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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Regulations Nos. 4 and 16]

RIN 0960–AE 96

Federal Old-Age, Survivors and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Determining Disability and Blindness; Clarification of ''Age'' as a Vocational Factor

AGENCY: Social Security Administration.

ACTION: Final rules.

SUMMARY: We are revising the Social Security and Supplemental Security Income (SSI) disability regulations to clarify our consideration of ''age'' as a vocational factor at the last step of our sequential evaluation process for determining whether an individual is disabled under title II or title XVI of the Social Security Act (the Act). We are also amending our rules to better explain how we consider transferability of skills for individuals who are of ''advanced age'' (age 55 or older) in deciding whether such individuals can make an adjustment to other work.

DATES: These rules will be effective May 8, 2000.

FOR FURTHER INFORMATION CONTACT: Georgia E. Myers, Regulations Officer, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, 1–410–965–3632 or TTY 1–800–966–5609 for information about these rules. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778.

SUPPLEMENTARY INFORMATION: The Act provides, in title II, for the payment of disability benefits to persons insured under the Act. Title II also provides for the payment of child's insurance benefits for persons who become disabled before age 22, and for the payment of widow's and widower's insurance benefits for disabled widows, widowers, and surviving divorced spouses of insured persons. In addition, the Act provides, in title XVI, for SSI payments to persons who are aged, blind, or disabled and who have limited income and resources.

For adults (including persons claiming child's insurance benefits based on disability under title II), ''disability'' is defined in the Act under both title II and title XVI as the ''inability to engage in any substantial gainful activity by reason of any 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.'' Sections 223(d) and 1614(a) of the Act also state that an individual ''shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.''

To implement the process for determining whether an individual is disabled based upon this statutory definition, our regulations at §§ 404.1520 and 416.920 provide for a five-step sequential evaluation process as follows:

1. Is the individual engaging in substantial gainful activity? If the individual is working and the work is substantial gainful activity (SGA), we find that he or she is not disabled. Otherwise, we proceed to step 2 of the sequence.

2. Does the individual have an impairment or combination of impairments that is severe? If the individual does not have an impairment or combination of impairments that is severe, we find that he or she is not disabled. If the individual has an impairment or combination of impairments that is severe, we proceed to step 3 of the sequence.

3. Does the individual's impairment(s) meet or equal the severity of an impairment listed in appendix 1 of subpart P of part 404 of our regulations? If so, and the duration requirement is met, we find that he or she is disabled. If not, we proceed to step 4 of the sequence.

4. Does the individual's impairment(s) prevent him or her from doing his or her past relevant work, considering his or her residual functional capacity (RFC)? If not, we find that he or she is not disabled. If so, we proceed to step 5 of the sequence.

5. Does the individual's impairment(s) prevent him or her from performing other work that exists in the national economy, considering his or her RFC together with the ''vocational factors'' of age, education, and work experience? If so, and if the duration requirement is met, we find that the individual is disabled. If not, we find that he or she is not disabled.

As discussed in §§ 404.1569 and 416.969, at step 5 of the sequential evaluation process we use the medical-vocational rules that are set out in appendix 2 of subpart P of part 404. (By reference, § 416.969 provides that appendix 2 is also applicable to adults claiming SSI payments based on disability.) In general, the rules in appendix 2 take administrative notice of the existence of numerous, unskilled occupations at exertional levels defined in the regulations, such as ''sedentary,'' ''light,'' and ''medium.'' Based upon a consideration of an individual's RFC, age, education, and work experience, the rules either direct a conclusion as to whether an individual is disabled at step 5 of the sequential evaluation process or provide a framework for making a decision at this step. Some rules in appendix 2 also direct a conclusion when an individual has ''skills'' acquired from previous skilled or semiskilled work that are ''transferable'' to other skilled or semiskilled work.

Our rules regarding age and skills are set out in §§ 404.1563, 404.1568, 416.963, and 416.968. The rules and explanatory text of appendix 2 of subpart P of part 404 also provide guidance for considering the vocational factors of age, education, and work experience that supplement the information on consideration of these vocational factors in §§ 404.1560–404.1569a and 416.960–416.969a.

Our revisions clarify a number of our rules on the consideration of one of the vocational factors, ''age,'' in §§ 404.1563 and 416.963. They also clarify in final §§ 404.1568(d)(4) and 416.968(d)(4) how we determine whether individuals who are of ''advanced age'' (*i.e.,* age 55 or older), including individuals in a subcategory of advanced age called ''closely approaching retirement age'' (*i.e.,* age 60–64), have skills that are transferable to other work.

Explanation of Revisions

For clarity, we refer to the changes in this notice as ''final'' rules and to the rules that will be changed by these final rules as the ''current'' rules. However, it must be remembered that these final rules do not go into effect until 30 days after the date of this publication. Therefore, the ''current'' rules will still be in effect for another 30 days.

Sections 404.1563 and 416.963 Your Age as a Vocational Factor

We are revising the first sentence of paragraph (a) of §§ 404.1563 and

416.963, ''General,'' to state more clearly that ''age'' means chronological age. We are doing this because there has been some misunderstanding about how we consider the vocational factor of ''age'' at step 5 of the sequential evaluation process. In current paragraph (a) we state, in part, that ''*Age* refers to how old you are (your chronological age) * * *.'' We use an individual's chronological age when we use the medical-vocational guidelines in appendix 2 to decide whether the individual can do other work. We do this because we built consideration of chronological age and its impact on an individual's ability to make an adjustment to other work into the medical-vocational guidelines in appendix 2. These guidelines also consider the person's education and work experience, as well as the person's physical and mental functioning (*i.e.,* RFC).

In addition to defining ''age'' as how old you are (your chronological age), the first sentence of paragraph (a) of current §§ 404.1563 and 416.963 explains that ''age'' refers to the extent to which age affects an individual's ability to adapt to a new work situation and ''to do work in competition with others.'' We are incorporating the principle intended in this statement into a new third sentence that clarifies our intent, as explained below.

The second sentence of paragraph (a) of final §§ 404.1563 and 416.963 combines the second and third sentences of current paragraph (a). It clarifies our intent that, when we decide whether a person is disabled, we will not consider the person's age alone, but will consider his or her RFC, education, and work experience together with age.

The third sentence of paragraph (a) of final §§ 404.1563 and 416.963 explains that, when we consider the vocational factor of ''age'' in determining an individual's ability to adjust to other work, we consider advancing age to be an increasingly limiting factor in the ability to make such an adjustment.

The third sentence of paragraph (a) of final §§ 404.1563 and 416.963, incorporates the rule we intended in the first sentence of current §§ 404.1563(a) and 416.963(a), indicating that we consider the effects of age on an individual's ability ''to do work in competition with others.'' Some United States Courts of Appeals have interpreted this provision of the current rules, together with a provision regarding skills that are ''highly marketable'' in current §§ 404.1563(d) and 416.963(d) that we are replacing, to support holdings that our regulations provide for consideration of an individual's employability. This is contrary to our intent. The circuit courts in these cases did not hold that their conclusions were required by the Act, which prohibits consideration of whether an individual would be hired if he or she applied for work. *See* sections 223(d)(2) and 1614(a)(3)(B) of the Act. Rather, the courts relied on the language in the provisions of our regulations in current §§ 404.1563(a) and (d) and 416.963(a) and (d). The changes to the regulations provided in these final rules are, therefore, necessary to clarify our intent in this area.

In the fourth sentence of §§ 404.1563(a) and 416.963(a) of the proposed rules, we had proposed replacing the current rules' reference to the ability to ''do a significant number of jobs which exist in the national economy'' with a reference to ''the ability to do substantial gainful activity.'' We proposed this change to better reflect the definition of disability in the Act. In response to a comment we received on the proposed rules in which the commenter expressed the view that our proposed fourth sentence of paragraph (a) seemed inconsistent with the intent of our revisions to §§ 404.1563 and 416.963, we are revising that sentence in the final rules to read: ''If you are unemployed, but you still have the ability to adjust to other work, we will find that you are not disabled.''

The fifth sentence of final §§ 404.1563(a) and 416.963(a) is similar to the fifth sentence of current §§ 404.1563(a) and 416.963(a).

We are moving the last sentence of paragraph (a) of §§ 404.1563 and 416.963 of the current rules to final §§ 404.1563(b) and 416.963(b). This sentence explains that we will not apply the age categories mechanically in a borderline situation. We believe the sentence fits more logically with the provisions in new paragraph (b) of the final rules, which explains more fully how we apply the age categories.

We are adding a new paragraph (b), entitled ''How we apply the age categories,'' to §§ 404.1563 and 416.963. The new paragraph explains that, if a person's age category changes during the period for which we are adjudicating a disability claim, we will use each of the age categories that is applicable to the person during the period for which we are deciding if the person is disabled. We also explain that in borderline age situations, we will not apply the age categories mechanically. We explain that a ''borderline'' situation means that the individual is ''within a few days to a few months'' of reaching a higher age category. This is consistent with our current policy interpretation in Social Security Ruling 83–10, ''Titles II and XVI: Determining Capability To Do Other Work—The Medical-Vocational Rules of Appendix 2,'' Social Security Rulings (C.E. 1983, p. 174). As we explain in that Social Security Ruling, we are unable to provide ''fixed'' guidelines since such guidelines themselves would reflect a mechanical approach. (*See* Social Security Ruling 83–10, ibid., p. 182.)

In response to commenters' requests to clarify the provisions of the proposed rules concerning borderline age, we are changing the last sentence of paragraph (b) in final §§ 404.1563 and 416.963 to explain that ''If you are within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.''

Because we are including a new paragraph (b) in final §§ 404.1563 and 416.963, we are redesignating the remaining paragraphs, *i.e.*, paragraphs (b) through (e) of the current rules, as paragraphs (c) through (f) in the final rules.

Paragraph (c) of final § § 404.1563 and 416.963, ''Younger person,'' incorporates the rules for individuals who have not yet attained age 50 that are in current §§ 404.1563(b) and 416.963(b). The second sentence of current §§ 404.1563(b) and 416.963(b) explains that in some circumstances ''we consider age 45 a handicap in adapting to a new work setting.'' The reference to ''age 45'' in this provision of the current rules is actually a reference to individuals who are age 45 through 49, because the category ''younger person'' ends upon attainment of age 50. We state this meaning plainly in the final rules by changing ''age 45'' to ''age 45–49.'' We are also revising the second sentence to remove the word ''handicap,'' to make the language of paragraphs (c), (d), and (e) of the final rules consistent and to clarify our intent; *i.e.*, to discuss the effects of age on the ability to make an adjustment to other work.

Paragraph (d) of final §§ 404.1563 and 416.963, ''Person closely approaching advanced age,'' incorporates the rules for individuals age 50 through 54 that are in current §§ 404.1563(c) and 416.963(c). We are adding the word ''closely'' to the heading of this paragraph for consistency with the text of the paragraph. We are replacing the phrase at the end of the sentence in the current rule, ''a significant number of jobs in the national economy,'' with the

phrase, ''other work,'' for consistency of language in the provisions of paragraphs (c), (d), and (e) of final §§ 404.1563 and 416.963. This is not intended to be a change in the standard, only a change for consistency among these provisions of the regulations.

Paragraph (e) of final §§ 404.1563 and 416.963, ''Person of advanced age,'' incorporates the rules for individuals age 55 or older that are in the first sentence of current §§ 404.1563(d) and 416.963(d). As in the preceding paragraphs, we are replacing the phrase, ''ability to do substantial gainful activity,'' in the first sentence of the current rules with the phrase ''ability to adjust to other work,'' so that paragraphs (c), (d), and (e) of §§ 404.1563 and 416.963 will contain consistent language.

The first sentence of paragraph (e) of final §§ 404.1563 and 416.963 reflects a change from the proposed rules. In the final rules, we use the term ''age'' instead of ''chronological age'' which was used in paragraph (e) of the proposed rules. Paragraph (a) of final §§ 404.1563 and 416.963 states that, '' 'Age' means your chronological age.'' It is unnecessary, therefore, to specify ''chronological age'' in the provisions of paragraph (e). This change from the proposed rules also will make the references to ''age'' in paragraphs (c), (d), and (e) consistent.

We are revising the second and third sentences of current §§ 404.1563(d) and 416.963(d) and moving these provisions to final §§ 404.1568(d)(4) and 416.968(d)(4). We explain these changes below, under the explanation of §§ 404.1568(d)(4) and 416.968(d)(4). We are including in §§ 404.1563(e) and 416.963(e) an appropriate cross-reference to § 404.1568(d)(4) or § 416.968(d)(4) to make it easier to find the provisions in their new location.

Sections 404.1568 and 416.968 Skill Requirements

We are adding new §§ 404.1568(d)(4) and 416.968(d)(4), ''Transferability of skills for individuals of advanced age,'' to our final regulations addressing skills and their transferability. This paragraph incorporates and clarifies the provisions in the second and third sentences of current §§ 404.1563(d) and 416.963(d). In the current regulations, these sentences provide rules regarding skills and their transferability for individuals of ''advanced age'' (*i.e.*, age 55 or older) who have the RFC for no more than ''sedentary'' work, and for individuals who are ''closely approaching retirement age'' (*i.e.*, age 60–64) who have the RFC for no more than ''light'' work. We believe that these provisions more logically belong in the sections of our regulations that discuss our rules regarding skills and their transferability; *i.e.*, §§ 404.1568 and 416.968. We are revising these provisions to clarify our intent, to make their language consistent with current provisions in our regulations, and to be consistent with other provisions in these final rules.

The second sentence of current §§ 404.1563(d) and 416.963(d) states that if a person of advanced age has a severe impairment(s) and cannot do medium work (*i.e.*, the person is limited to light or sedentary work), the person may not be able to work unless he or she has transferable skills. We are incorporating this provision in the first sentence of final §§ 404.1568(d)(4) and 416.968(d)(4).

The first sentence of final §§ 404.1568(d)(4) and 416.968(d)(4) describes a standard that applies to a person who is of advanced age (age 55 or older) and has a severe impairment(s) that limits him or her to sedentary or light work. For such a person, we state that, ''we will find that you cannot make an adjustment to other work unless you have skills that you can transfer to other skilled or semiskilled work (or you have recently completed education which provides for direct entry into skilled work) that you can do despite your impairment(s).'' This provision of the final rules differs from the provision of the proposed rules which stated that, for such a person, ''we will find that you cannot make an adjustment to other work unless you have skills that you can use in (transfer to) other skilled or semiskilled work that you can do despite your impairment(s).'' While the standard described in the proposed rules would apply in most circumstances, it is not a completely accurate statement of our rules concerning when we will find that a person who is of advanced age and limited to sedentary or light work is unable to make an adjustment to other work; *i.e.,* is disabled. Our rules in appendix 2 to subpart P of part 404 of our regulations, the medical-vocational guidelines, provide that if such a person does not have transferable skills, a finding of disability is warranted unless the person has recently completed education which provides for direct entry into skilled work within his or her RFC. *See* § 201.00(d) and rules 201.05, 201.08, 202.05 and 202.08 of appendix 2. Accordingly, we are modifying the first sentence of §§ 404.1568 (d)(4) and 416.968 (d)(4) in these final rules to reflect our rules in appendix 2.

We are incorporating in final §§ 404.1568(d)(4) and 416.968(d)(4) provisions from §§ 201.00(f) and 202.00(f) of appendix 2 to subpart P of part 404 of our regulations. This will clarify our original intent regarding the last sentence of current §§ 404.1563(d) and 416.963(d) and will provide consistency in our rules. The revisions explain that, for an individual of advanced age (*i.e.*, age 55 or older) whose RFC permits him or her to do no more than sedentary work, we will find that such individual's skills are transferable to skilled or semiskilled sedentary work only if the sedentary work is so similar to the individual's previous work that the individual would need to make ''very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry.'' In addition, we are including in final §§ 404.1568(d)(4) and 416.968(d)(4) a provision to clarify how we consider the transferability of skills for a person who is of advanced age but has not attained age 60 (*i.e.*, a person age 55–59) and who has a severe impairment(s) that limits him or her to no more than light work. We explain that for such a person we will apply the rules in paragraphs (d)(1) through (d)(3) of current §§ 404.1568 and 416.968 to determine if the person has skills that are transferable to skilled or semiskilled light work. The revisions also explain that, for an individual of advanced age who is ''closely approaching retirement age'' (*i.e.*, age 60–64) and whose RFC permits him or her to do no more than *light* work, we will find that such individual's skills are transferable to skilled or semiskilled light work only if the light work is so similar to the individual's previous work that the individual would need to make ''very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry.''

In making these revisions, we are replacing the statement in current §§ 404.1563(d) and 416.963(d), ''unless you have skills which are highly marketable,'' with the foregoing language taken from §§ 201.00(f) and 202.00(f) of appendix 2. This will clarify our original intent that the provisions of current §§ 404.1563(d) and 416.963(d) are consistent with, and must be read in the context of, the provisions of §§ 201.00(f) and 202.00(f) of appendix 2.

There is no reference to ''highly marketable'' skills in the Act, which prohibits consideration of whether an individual would be hired if he or she applied for work. (*See* sections 223(d)(2) and 1614(a)(3)(B) of the Act.) The phrase was one of the additions we made to the regulations under the ''common sense'' recodification in 1980. (*See* 45 FR 55566, August 20, 1980.) When we issued those regulations, we

did not intend to introduce the term as a statement of a new rule or as a change in existing rules. We intended only to contribute to public understanding of the provisions regarding transferability of skills for older workers in the medical-vocational guidelines in appendix 2. (The language in appendix 2 was not changed by the ''common sense'' recodification in 1980.) However, by using different language in current §§ 404.1563(d) and 416.963(d) from that in appendix 2, we have inadvertently given the mistaken impression that we meant to establish a separate criterion for these individuals beyond what we already provide in appendix 2. That was not our intent. (*See, e.g.,* Social Security Ruling 82–41,''Titles II and XVI: Work Skills and Their Transferability As Intended By the Expanded Vocational Factors Regulations Effective February 26, 1979,'' Social Security Rulings (C.E. 1982, pp. 196, 202); Final Rules for Adjudicating Disability Claims in Which Vocational Factors Must Be Considered, 43 FR 55349, 55353–55354 (November 28, 1978).)

Public Comments: We published these regulatory provisions in the **Federal Register** as a Notice of Proposed Rulemaking (NPRM) on August 4, 1999 (64 FR 42310). We provided the public a 60-day comment period. The comment period closed on October 4, 1999. We received 55 letters in response to the proposed rules. We received letters from disabled persons, attorneys, legal services organizations that represent the interests of disabled persons, and other interested parties. Four of the letters supported our proposed changes. The rest provided comments. A summary of the comments we received and our responses to the comments are set out below.

Because many comments were detailed, we have condensed, summarized, or paraphrased them. We have, however, tried to summarize each commenter's views accurately and to respond to all of the significant issues raised by commenters that are within the scope of the proposed rules.

Comment: Fifteen commenters believed that with increasing age, it becomes more difficult for individuals to adjust to other work. The commenters believed that a ''highly marketable'' skills standard is fair because it acknowledges that increased difficulty. One commenter stated that, ''An individual, age 60, may not be able to adapt to a new situation unless the individual has skills so specialized or unique as to offset the disadvantage of advancing age.'' One commenter noted that removal of the ''highly marketable'' provision would mean that individuals having a sedentary RFC would have no different standard at ages 55–59 than at ages 60–64.

Response: Consistent with the statutory definition of disability, our regulations reflect that advancing age is an increasingly limiting factor in an individual's ability to adjust to other work.

This concept is reflected in current §§ 404.1563 and 416.963, and in final §§ 404.1563, 404.1568(d)(4), 416.963 and 416.968(d)(4). The concept is built into the rules in the medical-vocational guidelines in appendix 2. The medical-vocational guidelines consider the impact of an individual's age, together with his or her RFC, education, and work experience, on his or her ability to make an adjustment to other work.

With advancing age, it becomes increasingly more difficult for an individual to make an adjustment to other work. Our regulations recognize this by providing, among other things, for a more restrictive standard for determining transferability of skills for individuals of advanced age (age 55 or older) who can do no more than sedentary work and for individuals closely approaching retirement age (age 60–64) who can do no more than light work. Thus, the medical-vocational guidelines, as well as § § 404.1568(d)(4) and 416.968(d)(4) of the final rules, provide that for skills to be transferable to sedentary work for individuals who are age 55–64 or to light work for individuals who are age 60–64 there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry.

This standard for determining transferability of skills for individuals of advanced age considers the combined effects of advancing age and a restrictive RFC on an individual's ability to adjust to other work. It provides that, with advancing age (even when combined with a progressively less restrictive RFC, *i.e.,* for individuals age 60–64), past relevant work skills must fit more closely with the skill requirements of the other work that is within the individual's RFC in order to find that the individual's skills are transferable to such work. For individuals with acquired work skills, we believe that this standard gives appropriate consideration to the effect of increasing age, in combination with an individual's RFC, on an individual's ability to make an adjustment to other work. We do not agree that, as an individual becomes older, there must be a greater degree of specialized or unique skills in order for an individual with past relevant work skills to be able to adjust to other work.

We do not agree with the commenters that we must provide a distinction in our rules for individuals age 60–64 and individuals age 55–59 who are limited to sedentary exertion in the same way that we have for individuals who are able to do light exertion. We believe that our standard for transferability of skills, that is, that there be ''very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry,'' is an appropriately narrow rule for individuals in the age groups affected. The only rule that could be narrower would be one that requires no vocational adjustment in terms of tools, work processes, work settings, or the industry, but such a standard would have virtually no applicability. By extending our narrow standard for transferability of skills to an individual age 55–59 when the individual is limited to sedentary work, we are merely recognizing the very severe limitations and the serious impact on the ability to adjust to other work that an RFC limited to ''sedentary'' exertion imposes for all individuals of advanced age. Moreover, we could not use the standard of ''highly marketable'' skills as the commenters understand it for the reasons we have already given earlier in the preamble.

Comment: Eleven commenters indicated that the provision in the regulations that refers to highly marketable skills had been in effect for at least 20 years without controversy. The commenters believed that to remove the reference to ''highly marketable'' from the regulations now would be unfair and would have a severe negative impact on individuals over the age of 60 who apply for Social Security disability benefits. One commenter found it difficult to believe that regulations that have been in place for almost two decades have inadvertently created a ''highly marketable'' standard that we did not intend.

Response: We believe that having different interpretations of our regulations in a small number of circuits is unfair to individuals who file for disability benefits. It is not true that the terminology has not raised controversy in the past. Even though the issue of transferability of skills for individuals age 60–64 who can do no more than light work arises in only a small number of claims, there have been a number of court cases centering around the issue of the meaning of ''highly marketable'' skills, especially in recent years. This is why we decided that we needed to clarify the regulations to restore national

uniformity and to clarify what we have always meant by this rule.

We do not agree that removal of the language ''highly marketable'' skills will have a severe, negative impact on individuals over the age of 60 who apply for Social Security disability benefits. Our rules for determining disability take into account a reduced ability to adapt to other work as an individual ages. Our rules for individuals age 60–64 recognize that individuals in this age group may have greater difficulty in making an adjustment to other work than individuals under age 60. In order to find that an individual age 60–64 possesses skills that are transferable to either sedentary or light work, there must be very little, if any, adjustment required in terms of tools, work processes, work settings, or the industry. This is an appropriately narrow definition of transferability and requires that other work must be very similar to an individual's past work in order to find an ability to adjust to other work.

In response to the last comment, we first published the rules establishing the standards for transferability in 1978 (43 FR 55349, November 28, 1978). Those rules did not include the phrase ''highly marketable'' skills. When we published the ''Operation Common Sense'' revisions of our disability regulations in 1980, we indicated that our goals were primarily to rewrite the disability regulations to make them easier to read and understand. We also indicated that there were some standards that we were including in the regulations for the first time, and provided a list of those new provisions. For the new provisions in §§ 404.1563 and 416.963, we made no reference to the insertion of the language on highly marketable skills, a clear indication that the new language was not intended to be a change in our standard. Our intent is, and always has been, what we provided in § 202.00(f) of appendix 2 in 1978 and continue to provide in the same section.

Comment: Eight commenters stated that realities of employment in the United States economy are such that older workers cannot compete in the workforce. One commenter stated that at issue is not how competitive older workers are, but how valuable their skill set is to the job market. One commenter did not believe that older individuals could adapt to the technological changes in the marketplace. One commenter indicated that many individuals have been offered ''early out'' agreements with their companies beginning at age 50. The commenter viewed this as an indication that older workers cannot compete in the marketplace. A commenter observed that age-related health insurance costs to an employer discourage hiring of older workers. One commenter indicated that because some states have enacted early retirement programs for individuals over age 50, this is further proof that age makes it much more difficult to obtain employment. One commenter stated that employers discriminate against disabled individuals and older individuals. The commenter believed that disabled, older individuals are doubly discriminated against. One commenter stated that we must factor into our disability analysis that an older worker in a skilled trade cannot transfer to a lower paying job without violating union collective bargaining agreements.

Response: The Act precludes our consideration of such factors as the inability to get work, the condition of the job market, the hiring practices of employers, the existence of job vacancies, or the types of job openings. In applying the definition of disability under the Act at the last step of our sequential evaluation process, we consider whether an individual whose impairment(s) prevents the individual from performing his or her past relevant work, has the *ability* to do other work, considering his or her RFC, age, education and work experience. The Act requires that we consider the factors of age, education, and work experience, together with the severity of the individual's impairment(s) (RFC), in determining whether the individual is able to do ''any other kind of substantial gainful work which exists in the national economy,'' without regard to ''whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.'' Sections 223(d)(2) and 1614(a)(3)(B) of the Act. These sections of the Act state that work exists in the national economy if it ''exists in significant numbers either in the region where such individual lives or in several regions of the country.''

Consistent with the provisions of the Act, we consider the vocational factors of age, education, and work experience, together with an individual's RFC, in determining whether an individual has the ability to make an adjustment to other work. Thus, §§ 404.1566(c) and 416.966(c) provide:

> We will determine that you are not disabled if your residual functional capacity and vocational abilities make it possible for you to do work which exists in the national economy, but you remain unemployed because of—
>
> (1) Your inability to get work;
>
> (2) Lack of work in your local area;
>
> (3) The hiring practices of employers;
>
> (4) Technological changes in the industry in which you have worked;
>
> (5) Cyclical economic conditions;
>
> (6) No job openings for you;
>
> (7) You would not actually be hired to do work you could otherwise do; or
>
> (8) You do not wish to do a particular type of work.

Comment: Two commenters suggested that, if we remove the ''highly marketable'' language in §§ 404.1563(d) and 416.963(d), we should change our explanation for transferable skills for individuals age 60–64 having an RFC for sedentary or light work. The commenters suggested that we change the standard to ''In order to find transferability of skills to skilled sedentary or light work for individuals close to retirement age (60–64), there must be no vocational adjustment required in terms of tools, work processes, work settings or the industry.''

Response: As we have already noted, we believe that our current language expresses an appropriate standard to account for the reduction in the ability of an individual age 60–64 to adjust to other sedentary or light work. ''Very little, if any, vocational adjustment'' is an appropriately narrow standard.

Comment: Four commenters had concerns that our proposed changes were inconsistent with the decisions of the courts and inconsistent with our decision to acquiesce in court of appeals' decisions in three circuits.

Response: As we noted in the preamble to the NPRM, ''the circuit courts in these cases did not hold that their conclusions were required by the Act, which prohibits consideration of whether an individual would be hired if he or she applied for work. * * * Rather, the courts relied on the language in [the current] provisions of our regulations.'' (64 FR 42312) Therefore, in all three of our acquiescence rulings, we stated our intent to clarify the regulations at issue through the rulemaking process and to rescind these acquiescence rulings once we revised the regulations. Accordingly, because these final rules revise the regulations that were the subject of the circuit courts' holdings, we are publishing a notice in this issue of the **Federal Register** rescinding the acquiescence rulings effective as of the date the revised regulations go into effect. *See* §§ 404.985(e)(4) and 416.1485(e)(4) of our regulations.

Comment: Three commenters requested that we clarify our concept and definition of borderline age in proposed §§ 404.1563(b) and 416.963(b).

These commenters believe that ''a few days to a few months'' is too vague an explanation of borderline age to provide much guidance to adjudicators on this issue.

Response: As we explain earlier in this preamble and in the preamble to the NPRM, the description of a ''borderline'' situation as one in which the individual is ''within a few days to a few months'' of reaching a higher age category is consistent with our current policy interpretation in Social Security Ruling 83–10. As we explain in that Social Security Ruling, we are unable to provide ''fixed'' guidelines since such guidelines themselves would reflect a mechanical approach to the application of the age categories. However, we are changing the final sentence of §§ 404.1563(b) and 416.963(b) to explain that we must consider all of the factors of each case before deciding whether to use an older age category for our decision. We are considering whether there is a need to provide additional guidance on how the factors of each case should be considered in determining whether to apply a higher age category and may issue guidance in the future.

Comment: Four commenters expressed concern about our proposal to use the term ''other work'' in place of the phrases ''a significant number of jobs which exist in the national economy,'' and ''jobs which exist in significant numbers in the national economy'' which are in the provisions of current paragraphs (b), (c), and (d), of §§ 404.1563 and 416.963. The commenters were concerned that the proposed change might result in a misunderstanding as to what is meant by ''other work.'' They believed that it is important to stress that ''other work'' refers to jobs that are at the SGA level and that exist in significant numbers in the national economy.

Response: In these final rules, we use the term ''other work'' in place of the various phrases that are used in the current rules to refer to work which exists in the national economy. We are making this change to ensure that the terminology we use to describe such work is consistent throughout these final regulations. The change is also consistent with the language of other sections of our regulations in which we use the term ''other work.'' *See, e.g.,* §§ 404.1505(a), 404.1520(f)(1), 404.1560(c), 404.1561, 416.905(a), 416.920(f)(1), 416.960(c) and 416.961.

We explain the meaning of ''other work'' in §§ 404.1560(c) and 416.960(c). These sections state that, ''[b]y other work we mean jobs that exist in significant numbers in the national economy.'' In addition, §§ 404.1505(a) and 416.905(a), which describe the basic definition of disability for adults (including persons claiming child's insurance benefits based on disability under title II), indicate that ''any other work'' refers to ''any other substantial gainful activity which exists in the national economy.''

Comment: One commenter suggested that the sentence ''If you are unemployed because of your age, but you still have the ability to do substantial gainful activity, we will find that you are not disabled'' (in proposed §§ 404.1563(a) and 416.963(a)) seemed inconsistent with the intent of the revisions, which was to clarify that ''employability and marketability'' are not considered in establishing disability. The commenter observed that the proposed rules provided no explanation of how we would determine if a person is unemployed because of his or her age. The commenter believed that the proposed provision is also inconsistent with the other sections that use the phrase ''ability to adjust to other work.'' The commenter suggested that we change the sentence to read, ''If you are unemployed but you still have the ability to adjust to other work, we will find that you are not disabled.''

Response: We adopted the comment.

Comment: One commenter believed that the legislative history leading up to the ''common sense'' recodification of our disability regulations in 1980 supported a more liberal definition of disability. The commenter stated that the ''highly marketable'' skills language is consistent with a more liberal definition of disability.

Response: The purpose of our ''common sense'' rewrite of the disability regulations in 1980 was to make our regulations easier to read and understand. There was no intent to liberalize or change the meaning of our regulations for determining whether an individual who is age 60–64, possesses work skills, and is limited to sedentary or light work, can make an adjustment to other work.

Comment: One commenter agreed with our proposed changes, but suggested that we include a dollar level amount for SGA.

Response: These final rules, like the proposed rules, clarify our consideration of age as a vocational factor at the last step of the sequential evaluation process for determining disability. Our rules for determining when earnings demonstrate an ability to do SGA are in §§ 404.1574 and 416.974. Effective July 1, 1999, we increased the average monthly earnings guidelines for determining whether work done by an employee is SGA from $500 to $700 per month. *See* 64 FR 18566, April 15, 1999.

Comment: One commenter disagreed with the principle in our rules that age affects ability to adapt to other work. The commenter stated that many studies have shown that productivity does not decline with age, workers age 55 and over account for only 9.7 percent of workplace injuries, and that intelligence remains constant until age 70. The commenter stated that workers 50 and over tend to have better job attendance records, and greater job commitment than younger workers. The commenter believed that our wording bolsters the erroneous attitudes of many employers who see workers age 50 and over as unable to learn, adapt and be productive and might convince a certain segment of the population that as they age they can no longer learn new skills nor contribute to society in a meaningful, productive way.

Response: As we explain earlier in this preamble, the Act requires us to consider an individual's age, education, and work experience, together with the severity of his or her impairment(s), in determining whether the individual is disabled.

Comment: Two individuals pointed out that for some impairments, age is not the most critical factor in disability. They suggested that we incorporate language into the regulations to explain that younger individuals can become disabled and may qualify for disability benefits as a result.

Response: Our existing regulations include rules for deciding that an individual is disabled based on medical considerations alone. *See, e.g.,* § § 404.1525 and 416.925. The final regulations clarify our rules on the consideration of age as a vocational factor at the last step of the sequential evaluation process for determining disability. We consider the vocational factors of age, education, and work experience, together with an individual's RFC, only in cases in which a finding of disability cannot be made on the basis of medical considerations alone, and the individual is prevented from doing his or her previous work because of a severe impairment(s).

Comment: One commenter stated that if someone has worked at a physically demanding job all of his or her life and cannot do that job anymore, age should not make a difference.

Response: We have a special rule for determining disability for individuals who have a long work history of arduous, unskilled work and who can no longer do this work because of a severe impairment(s). This rule is

discussed in §§ 404.1520(f)(2), 404.1562, 416.920(f)(2) and 416.962.

Comment: Two commenters indicated that they believed that our NPRM is part of a trend to deny more individuals disability benefits.

Response: The purpose of our changes is to clarify the intent of our regulations and restore national uniformity to our procedures. The changes are not intended to tighten disability eligibility requirements.

Comment: One commenter indicated that SSA should provide a payment supplement to those individuals who experience reduced earning power as a result of the aging process.

Response: This is beyond the scope of our NPRM and the Act. We pay the benefits that the Act authorizes.

Comment: One commenter indicated that the disability appeals process takes far too long and believed that the disability rules should be applied uniformly from State to State.

Response: The length of the appeals process is outside the scope of the proposed rules and these final rules. We believe that the changes we are making will restore national uniformity in how age is applied as a vocational factor.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these rules do not meet the criteria for a significant regulatory action under Executive Order (E.O.) 12866. Thus, they were not subject to OMB review. We have also determined that these rules meet the plain language requirement of E.O. 12866 and the President's memorandum of June 1, 1998.

Regulatory Flexibility Act

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because they affect only individuals. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These regulations impose no additional reporting or recordkeeping requirements subject to OMB clearance.

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

List of Subjects

20 CFR Part 404

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

20 CFR Part 416

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

Dated: March 17, 2000.

Kenneth S. Apfel,

Commissioner of Social Security.

For the reasons set out in the preamble, subpart P of part 404 and subpart I of part 416 of 20 CFR chapter III are amended as set forth below:

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

Subpart P—[Amended]

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

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

2. Section 404.1563 is amended by:

A. Revising paragraph (a),

B. Redesignating paragraphs (b) through (e) as paragraphs (c) through (f),

C. Adding a new paragraph (b), and

D. Revising redesignated paragraphs (c), (d) and (e) to re ad as follows:

§ 404.1563 Your age as a vocational factor.

(a) *General.* ''Age'' means your chronological age. When we decide whether you are disabled under § 404.1520(f)(1), we will consider your chronological age in combination with your residual functional capacity, education, and work experience; we will not consider your ability to adjust to other work on the basis of your age alone. In determining the extent to which age affects a person's ability to adjust to other work, we consider advancing age to be an increasingly limiting factor in the person's ability to make such an adjustment, as we explain in paragraphs (c) through (e) of this section. If you are unemployed but you still have the ability to adjust to other work, we will find that you are not disabled. In paragraphs (b) through (e) of this section and in appendix 2 to this subpart, we explain in more detail how we consider your age as a vocational factor.

(b) *How we apply the age categories.* When we make a finding about your ability to do other work under § 404.1520(f)(1), we will use the age categories in paragraphs (c) through (e) of this section. We will use each of the age categories that applies to you during the period for which we must determine if you are disabled. We will not apply the age categories mechanically in a borderline situation. If you are within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.

(c) *Younger person.* If you are a younger person (under age 50), we generally do not consider that your age will seriously affect your ability to adjust to other work. However, in some circumstances, we consider that persons age 45–49 are more limited in their ability to adjust to other work than persons who have not attained age 45. See Rule 201.17 in appendix 2.

(d) *Person closely approaching advanced age.* If you are closely approaching advanced age (age 50–54), we will consider that your age along with a severe impairment(s) and limited work experience may seriously affect your ability to adjust to other work.

(e) *Person of advanced age.* We consider that at advanced age (age 55 or older) age significantly affects a person's ability to adjust to other work. We have special rules for persons of advanced age and for persons in this category who are closely approaching retirement age (age 60–64). See § 404.1568(d)(4).

* * * * *

3. Section 404.1568 is amended by adding a new paragraph (d)(4) to read as follows:

§ 404.1568 Skill requirements.

* * * * *

(d) *Skills that can be used in other work (transferability).* * * *

(4) *Transferability of skills for individuals of advanced age.* If you are of advanced age (age 55 or older), and you have a severe impairment(s) that limits you to *sedentary* or *light work*, we will find that you cannot make an adjustment to other work unless you have skills that you can transfer to other skilled or semiskilled work (or you have recently completed education which provides for direct entry into skilled

work) that you can do despite your impairment(s). We will decide if you have transferable skills as follows. If you are of advanced age and you have a severe impairment(s) that limits you to no more than *sedentary* work, we will find that you have skills that are transferable to skilled or semiskilled sedentary work only if the sedentary work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry. (See § 404.1567(a) and § 201.00(f) of appendix 2.) If you are of advanced age but have not attained age 60, and you have a severe impairment(s) that limits you to no more than *light* work, we will apply the rules in paragraphs (d)(1) through (d)(3) of this section to decide if you have skills that are transferable to skilled or semiskilled light work (see § 404.1567(b)). If you are *closely approaching retirement age* (age 60–64) and you have a severe impairment(s) that limits you to no more than *light* work, we will find that you have skills that are transferable to skilled or semiskilled light work only if the light work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry. (See § 404.1567(b) and Rule 202.00(f) of appendix 2 to this subpart.)

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

Subpart I—[Amended]

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

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

5. Section 416.963 is amended by:

A. Revising paragraph (a),

B. Redesignating paragraphs (b) through (e) as paragraphs (c) through (f),

C. Adding a new paragraph (b), and

D. Revising redesignated paragraphs (c), (d) and (e) to read as follows:

§ 416.963 Your age as a vocational factor.

(a) *General.* ''Age'' means your chronological age. When we decide whether you are disabled under § 416.920(f)(1), we will consider your chronological age in combination with your residual functional capacity, education, and work experience; we will not consider your ability to adjust to other work on the basis of your age alone. In determining the extent to which age affects a person's ability to adjust to other work, we consider advancing age to be an increasingly limiting factor in the person's ability to make such an adjustment, as we explain in paragraphs (c) through (e) of this section. If you are unemployed but you still have the ability to adjust to other work, we will find that you are not disabled. In paragraphs (b) through (e) of this section and in appendix 2 of subpart P of part 404 of this chapter, we explain in more detail how we consider your age as a vocational factor.

(b) *How we apply the age categories.* When we make a finding about your ability to do other work under § 416.920(f)(1), we will use the age categories in paragraphs (c) through (e) of this section. We will use each of the age categories that applies to you during the period for which we must determine if you are disabled. We will not apply the age categories mechanically in a borderline situation. If you are within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.

(c) *Younger person.* If you are a younger person (under age 50), we generally do not consider that your age will seriously affect your ability to adjust to other work. However, in some circumstances, we consider that persons age 45–49 are more limited in their ability to adjust to other work than persons who have not attained age 45. See Rule 201.17 in appendix 2 of subpart P of part 404 of this chapter.

(d) *Person closely approaching advanced age.* If you are closely approaching advanced age (age 50–54), we will consider that your age along with a severe impairment(s) and limited work experience may seriously affect your ability to adjust to other work.

(e) *Person of advanced age.* We consider that at advanced age (age 55 or older) age significantly affects a person's ability to adjust to other work. We have special rules for persons of advanced age and for persons in this category who are closely approaching retirement age (age 60–64). See § 416.968(d)(4).

* * * * *

6. Section 416.968 is amended by adding a new paragraph (d)(4) to read as follows:

§ 416.968 Skill requirements.

* * * * *

(d) *Skills that can be used in other work (transferability).* * * *

(4) *Transferability of skills for individuals of advanced age.* If you are of *advanced age* (age 55 or older), and you have a severe impairment(s) that limits you to *sedentary* or *light* work, we will find that you cannot make an adjustment to other work unless you have skills that you can transfer to other skilled or semiskilled work (or you have recently completed education which provides for direct entry into skilled work) that you can do despite your impairment(s). We will decide if you have transferable skills as follows. If you are of advanced age and you have a severe impairment(s) that limits you to no more than *sedentary* work, we will find that you have skills that are transferable to skilled or semiskilled sedentary work only if the sedentary work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry. (See § 416.967(a) and Rule 201.00(f) of appendix 2 of subpart P of part 404 of this chapter.) If you are of advanced age but have not attained age 60, and you have a severe impairment(s) that limits you to no more than *light* work, we will apply the rules in paragraphs (d)(1) through (d)(3) of this section to decide if you have skills that are transferable to skilled or semiskilled light work (see § 416.967(b)). If you are *closely approaching retirement age* (age 60–64) and you have a severe impairment(s) that limits you to no more than *light* work, we will find that you have skills that are transferable to skilled or semiskilled light work only if the light work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry. (See § 416.967(b) and Rule 202.00(f) of appendix 2 of subpart P of part 404 of this chapter.)

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DEPARTMENT OF EDUCATION

34 CFR Part 674

Federal Perkins Loan Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the Federal Perkins Loan Program regulations. The regulations replace all references and forms of the term ''Direct Loan'' in the Federal Perkins Loan