§100 "Disabled" — A Term of Art

You cannot always rely on common sense to tell you who is and who is not disabled under Social Security law. Here are some examples:

Example: Lawyer
- He is 35 years old with 10 years of trial experience.
  - He is not working, but he is looking for a job.
  - He lost his left foot in a car accident a year ago.
  - Because of stump complications, he is unable to use a prosthesis to walk one block at a reasonable pace, though he uses it to walk shorter distances, e.g., around an office or around his apartment. When he goes longer distances, he rides a motorized scooter.
  - He is disabled. See C.F.R. Part 404, Subpart P, Appendix 1, §1.05B.

Example: Bookkeeper
- He has a college education.
- He is a quadriplegic with only limited use of his right hand and arm and no use whatsoever of his legs and left arm.
- He uses an arm brace to write.
- He works a few hours per day as a bookkeeper and earns, after deductions for expenses related to his impairment, about $1,050 per month on average.
- Because of his earnings he is not disabled. See 20 C.F.R. §§404.1520(b) and 404.1574(b)(2).

Example: Construction worker
- He is 48 years old.
- He has done heavy unskilled construction work since age 16.
- He has a fourth grade education and is capable of reading only rudimentary things like inventory lists and simple instructions.
- He has a "low normal" I.Q.
- He is limited to sedentary work because of a heart condition.
- He is not disabled unless he has some additional limitations. See 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 201.18.

Example: Machine operator
- He is 38 years old.
- He has done medium exertion level unskilled factory work, operating a machine since he graduated from high school.
- A cardiovascular impairment limits him to sedentary work, and a permanent injury of the right hand limits him to such work not requiring bimanual dexterity.
- He is probably disabled. See Social Security Rulings 83-10 and 96-9p.

Example: Truck driver
- He is 61 years old.
- He worked as a truck driver all his life except that 10 years ago during a downturn in the trucking industry, he worked for 1-1/2 years at a sedentary office job which he got with the help of his brother-in-law.
- He is limited to sedentary work because of a pulmonary impairment.
- He is not disabled because he is still capable of doing the office job. See 20 C.F.R. §§404.1520(f) and 404.1560(b).

Example: Packer
- He is 50 years old.
- He has a high school education.
- He has done unskilled light exertion factory work as a packer for the past 30 years.
- He had a heart attack on January 1 and, after being off work for eight months, he recovered after an angioplasty. His cardiologist gave him a clean bill of health and was ready to send him back to work when he broke his leg in a fall unrelated to his heart condition. In a cast and unable to stand and walk as required by his job, he could not return to work until February. He was off work a total of 13 months.
- He is not disabled for the time he was off work. 20 C.F.R. §404.1522(a) provides that unrelated impairments may not be combined to meet the requirement that a claimant be unable to work for 12 months.

Example: Housewife
- She is 55 years old.
- She has an eleventh grade education.
- She has not worked in the past 15 years. Before that she was a secretary.
- She has a back problem diagnosed as status post laminectomy.
- She is limited to maximum lifting of 50 lbs. with frequent lifting of 25 lbs., is capable of frequent
bending, stooping, etc., and has no limitation for standing or walking.

She is disabled for the SSI program as long as she meets the income and asset limitations for that program. See 20 C.F.R. Part 404, Subpart P, Appendix 2, Rule 203.10. See also 20 C.F.R. § 404.1562(b). (She is not eligible for Social Security disability benefits because she has not worked for so long.)

§101 Regulations and Rulings

These examples are based on the Social Security regulations. A current copy of these regulations is essential to representing disability claimants. Although we will discuss some of the regulations, this book is not a substitute for having your own copy. You can purchase a copy of 20 C.F.R. Parts 400 to 499 from the Government Printing Office. For ordering information and where to find the regulations on the Internet, see Appendix 2.

This chapter will give you an overview of the regulations that describe how to determine if someone is disabled. (For the Social Security disability program, these appear at 20 C.F.R. §§ 404.1501 to 404.1599, plus two appendices located just after 20 C.F.R. § 404.1599.) It will provide enough information about these disability regulations and some of the nondisability and procedural matters covered in other parts of 20 C.F.R. Parts 400 to 499 for you to be able to conduct a reasonably thorough interview of most claimants. But each claimant’s situation is unique. You may run into unusual issues for which it will be necessary to study the regulations themselves or other parts of this book.

Outside of the regulations, the most important body of law for determining disability is found in Social Security Rulings. These are published in the Federal Register by the Social Security Administration and are binding on all components of SSA. 20 C.F.R. § 402.35(b)(1). This book will give you citations to Social Security Rulings that elaborate on the meaning of the regulations. Because there are hundreds of rulings of varying usefulness and because these rulings are poorly indexed, Appendix I provides a list of the most important Social Security Rulings pertaining to determining disability. It is essential in representing Social Security disability claimants to have access to the rulings listed in Appendix I. Rulings are available at SSA’s website, www.ssa.gov. See also Appendix 2 for more information about obtaining copies of rulings.

Practice Tip

The Appendix 1 Guide to Important Social Security Rulings and Acquiescence Rulings is on the Internet at http://www.tebush.com/teb/SSRs_files/SSRs.htm with links to individual rulings on SSA’s website. The best way to search rulings is to use the search engine at www.google.com and limit your search to rulings on the SSA website. For example, if you want to search for references to widow’s benefits, enter your Google search this way: site:www.ssa.gov/OP_Home/rulings widow. Or if you want to include regulations, the statute and everything else on SSA’s website, enter your Google search this way: site:www.ssa.gov widow.

The primary purpose of this book is to help you represent your clients in administrative proceedings. We are not going to spend much time talking about the Social Security Act itself because the regulations, along with the Social Security Rulings, constitute the official interpretation of the Act. Nearly everything in the Act appears in the regulations, though there are a few notable exceptions (e.g., attorney fees authorized under the fee agreement process, see Chapter 7) where SSA has not yet promulgated regulations.

While you may wish to compare the regulations with the Act in certain unusual circumstances, you will never get a decision in your favor from any level of SSA based on a conflict between the Act and the regulations. If you want to challenge the regulations, you will have to make that challenge in federal court after making your record on the issue when the case is before the agency.

The regulations provide a lot of room to maneuver—a lot of possibilities for winning your client’s case at the administrative hearing or maybe even at an earlier stage—so we are going to concentrate on these. But first, let us take a brief look at the definition of “disabled” in the Social Security Act.

§102 Statutory Definition

Congress has defined the term “disability” for both the regular Social Security disability program (which appears in Title II of the Social Security Act)
and the SSI disability program (which appears in Title XVI of the Act) as an 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." 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A).

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. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.


The Act defines "physical or mental impairment" as "an impairment that results from anatomical, physiological or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. §§ 423(d)(3) and 1382c(a)(3)(D). The definition of disability in the Act specifically provides that an individual is not "disabled" if drug addiction or alcoholism would "be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. §§ 423(d)(2)(C) and 1382c(a)(3)(J).

The Act leaves it to the Commissioner of Social Security to prescribe regulations to determine when services performed or earnings demonstrate ability to engage in substantial gainful activity. 42 U.S.C. §§ 423(d)(4) and 1382c(a)(3)(E).

The Act provides somewhat different definitions of disability for those who are blind and, until 1991, for widow(er)s (including surviving divorced spouses), subjects which we will not address in detail in this book. See §§142 and 143. The part of the Act dealing with SSI provides a significantly different definition of disability for children requiring "marked and severe functional limitations." 42 U.S.C. § 1382c(a)(3)(C)(i). See §145.

For regular Social Security disability and SSI, the Act is much less specific than the regulations and rulings promulgated by the Commissioner. For example, although the Act requires consideration of age, education and work experience, it provides no guidance for weighing these factors to determine capacity for other work.

The Act sets a hypothetical tone for disability determination by excluding consideration of availability of work in the area where the claimant lives, job vacancies and whether the individual claimant would be hired. The Act does not define jobs existing "in significant numbers."

The regulations and rulings provide the official, formal interpretation of the Social Security Act, answering many questions raised by the text of the Act and, as we shall see, leaving many questions unanswered. But this is the stuff of which good lawyering is made.

§103 Role of SSA's Informal Policy Statements

The regulations and rulings that interpret the Social Security Act are in turn interpreted and supplemented by two huge agency manuals and memoranda from various components of SSA. These official but informal statements of SSA policy and procedures are useful tools for understanding the regulations and rulings and for understanding how SSA is supposed to handle various issues.

However, when SSA doesn't follow procedures set forth in one of its manuals, courts are not fast to force SSA to follow the stated procedure. In Schweiker v. Hansen, 450 U.S. 785, 789 (1981), the U.S. Supreme Court stated that SSA's former claims manual was "not a regulation. It has no legal force, and it does not bind the SSA." Nevertheless, a clear statement of SSA policy is likely to be followed at all levels of the Social Security Administration and an SSA interpretation of the Social Security Act or regulations is likely to be extremely influential in a federal court proceeding. See Washington State Department of Social and Health Services et al. v. Guardianship Estate of Keffeler et al., 537 U.S. 371,
We will make reference to the POMS to describe SSA policy. You may also have some occasion to cite the POMS to an ALJ for its educational value. However, the POMS is binding only at administrative proceedings below the ALJ hearing level. It is not binding on ALJs.

At the ALJ hearing level, the manual used by ALJs and their staffs, the HALLEX (Hearings, Appeals and Litigation Law Manual), is much smaller than the POMS. The HALLEX is useful in understanding hearing office procedures, many of which have due process implications, and includes discussion of a number of substantive issues; however, unlike the POMS, the HALLEX has very little discussion of medical disability issues.

In addition to the HALLEX, substantive and procedural issues are also addressed in memoranda from various components of SSA, some of which end up as part of the HALLEX, often starting out as “temporary instructions” in HALLEX Volume I, Division 5, which tend to retain temporary status for years. Current temporary instructions deal with oral bench decisions, HALLEX I-5-1-16, hearings held by video teleconferencing, HALLEX I-5-1-17, and instruction for processing a subsequent claim while an earlier claim is pending at the Appeals Council, HALLEX I-5-3-17. A classic example of a substantive memorandum deals with fibromyalgia and chronic fatigue syndrome, which is reprinted at §231.5 (Deputy Commissioner for Disability and Income Security Programs, Susan M. Daniels). Although they never announce a new policy, periodic reminders from the Chief ALJ, which are designed to get ALJs to follow SSA policy, often provide useful summaries of SSA’s position on various issues. As a rule, SSA forbids ALJs to cite memoranda, even though the ALJs are supposed to follow the policies or interpretations of the regulations contained in them.

Thus, there exists a hidden but very influential body of law interpreting SSA’s regulations and rulings. A claimant’s lawyer may not always be able to get an administrative law judge to follow a favorable interpretation contained in a memorandum; and the fact that the memorandum constitutes the SSA position on the subject is not always persuasive on further administrative appeal or in an appeal to federal court.

There is, in fact, a tension between SSA and many ALJs who take the position that although they are bound to follow SSA policy (and certainly will do so when there is a regulation or ruling on point),
it is often necessary to interpret what SSA policy is and whether that policy applies to the facts of an individual claimant’s case. These ALJs find neither the POMS nor SSA memoranda to be dispositive. After all, they argue, the POMS and certain SSA memoranda may reflect only what one element within SSA thinks is the policy. Until that policy appears in a regulation or ruling, it may not be the final word. This position gives a claimant’s attorney considerable leeway to present an interpretation of an issue that is favorable to a claimant’s case, even when at first blush the interpretation may appear to contradict SSA policy.

The Social Security administrative system is not one built on precedent. Only limited attention is paid to court precedent (see §104), and ALJ decisions have no precedential value at all. Even an Appeals Council decision has no precedential value unless, as occasionally occurs, it is adopted as a Social Security ruling. In this system, one tends to fight the same battles over and over.

ALJs usually know and follow official interpretations such as those stated in the POMS, even though they are not technically bound to do so. For this reason, it is usually more important to know how SSA interprets the regulations and rulings than it is to know the position of the federal courts on an issue. Knowing SSA’s position gives a fairly reliable basis for predicting how an issue will be decided at the administrative level.

§104 Role of Federal Court Decisions

Most lawyers, when dealing with any new federal legal issue, reflexively look first to the Federal Reporter to see how circuit courts have dealt with the matter. But lawyers and administrative law judges within the Social Security Administration tend to look at circuit court case law last, if at all.

Although there used to be an official short list of circuit court cases, which were decided in SSA’s favor, that were sometimes cited by ALJs (and even today a few ALJs have favorite circuit court cases that they cite in decisions), it is the rule within SSA that no significant decision-making weight is accorded a decision of a circuit court of appeals unless that decision has been adopted as an acquiescence ruling. See SSR 96-1p. Discussion of a circuit court opinion generally appears in an ALJ decision only in response to a citation by a claimant’s attorney. An ALJ will follow circuit court precedent only if it suits the ALJ’s purpose in the case.

At the same time, ALJs have been instructed not to cite federal district court opinions in their decisions except to distinguish them from the facts of the claimant’s case. The decisions of the local United States District Court are thus accorded no precedential value whatsoever by SSA. SSR 96-1p.

When SSA finds a court decision to be an accurate statement of SSA policy, SSA may issue that decision as a Social Security Ruling, which will be identified with the suffix “c.” But such rulings are rarely cited by ALJs.

SSA does apply precedential value to decisions of the United States Supreme Court. These also are published as Social Security rulings with the suffix “c.” However, whenever a Supreme Court decision is cited, even within SSA, it is invariably cited in the usual manner and not as a Social Security ruling.

For the most part, SSA simply ignores circuit court decisions with which it disagrees, except for those few cases in which SSA issues “acquiescence rulings” by which it agrees to follow that appellate court decision in the circuit where it was decided. See §105. In the past, SSA issued “rulings of nonacquiescence” concerning such circuit court decisions.

SSA says that it must administer a national program. The agency argues that it cannot apply different rules in every federal district in the country, and, less convincingly, that it cannot apply different rules from circuit to circuit. See SSR 96-1p. SSA takes interpretation of the Social Security Act to be its mandate, and, essentially, considers federal courts as not sufficiently deferential to agency interpretation.

Needless to say, the low regard with which SSA holds federal court decisions has caused tension between the federal courts and SSA. Federal district judges complain that they decide the same issues over and over. Frustrated by SSA’s flagrant practice of ignoring appellate court decisions, a judge once threatened the official in charge of the agency with contempt proceedings “both in her official and individual capacities.” Hillhouse v. Harris, 715 F.2d 428, 430 (8th Cir. 1983) (McMillan, J., concurring).

If you are new to the practice of representing Social Security disability claimants, you may initially find SSA’s treatment of federal court precedent to...
be bizarre and possibly illegal; but once you get used to it, you will find that it opens myriad possibilities for representing your clients. For one thing, if good, on-point claimant-oriented case law is ignored in the administrative phase of your client’s case, you obviously have a great case for federal court review.

It often comes as a revelation to lawyers practicing Social Security disability law that at the administrative level you may treat unfavorable appellate court case law the same way SSA does: ignore it. This is especially true for those cases that are both anti-claimant and contrary to SSA policy. Although, in court, SSA lawyers often use arguments based on case law contrary to SSA policy, it is unlikely that you will ever see such arguments made in administrative proceedings.

**§105 Acquiescence Rulings**

In addition to regular Social Security rulings, SSA has developed a species of rulings dealing with federal court decisions—"acquiescence rulings." In the 1980s, SSA was faced with more and more class action lawsuits attempting to enforce appellate court precedent. In response, SSA developed a procedure for issuing "acquiescence rulings" to deal with court of appeals decisions that were contrary to SSA policy but which SSA agreed to follow in the circuit from which the decision was issued. SSA policy on acquiescence rulings, including the circumstances under which SSA will re litigate an issue, appears at 20 C.F.R. § 404.985.

We have included acquiescence rulings pertaining to disability determination in our index of important Social Security rulings, Appendix 1. Acquiescence rulings are published in the Federal Register, as are regular Social Security Rulings; and they appear at SSA's website, www.ssa.gov. Acquiescence rulings are identified AR, are numbered consecutively in the year of issuance, and contain a number in parentheses that indicates the circuit in which the acquiescence ruling is applicable. For example, AR 03-1(7) indicates that this is the first acquiescence ruling issued in 2003 and is applicable in the seventh circuit.

You will find that acquiescence rulings are useful even if they do not apply to your clients' circuits. If an acquiescence ruling addresses an issue present in your client's case in an administrative proceeding, it may provide fodder for an argument to be used later in federal court. Perhaps more important, acquiescence rulings always explain how a court decision differs from SSA policy. Many times, such statements operate to clarify just what SSA policy is.

**§106 A Nonadversarial Administrative System**

Practice before SSA is nonadversarial. 20 C.F.R. §§ 404.900(b) and 404.1740(a)(2). You will never deal with an attorney adversary representing SSA's interest at any level of administrative review. Only if your client loses and you appeal to federal court will a lawyer adversary representing the government become involved.

The ALJ is a neutral factfinder. Although you may find an occasional ALJ who acts as if he or she were personally responsible for maintaining a surplus in the Social Security trust fund, ALJs are usually fair. Be careful not to treat an ALJ as an adversary. Such treatment of an ALJ may become self-fulfilling and a counterproductive adversarial relationship may develop.

As a factfinding system, the Social Security system works well at the ALJ level. This nonadversarial system is probably better at determining who is and is not disabled than any alternative adversarial system. The judges develop expertise in dealing with complicated medical and vocational issues that generally yields good results and accurate decisions.

You will also find that the regulations themselves have a certain logic and symmetry that aid accurate, dispassionate decision-making.

Despite the frustration of claimants by the time delays involved in this system at all levels, properly represented claimants tend to find the ALJ hearing to be non-threatening. They like having the opportunity to tell their stories to a judge. They like not having to deal with a lawyer adversary representing the government.

Attorneys representing claimants could abuse this nonadversarial system, but by and large they do not. Attorneys recognize that they have a heightened duty to this system: The attorney must not mislead the ALJ or allow a client to do so on any material fact. See 20 C.F.R. § 404.1740(c)(3). Attorneys have an affirmative duty to submit evidence "with reasonable promptness . . . that the claimant wants to submit in support of his or her claim." 20 C.F.R. §
Representatives should not “unreasonably delay” the processing of a claim. 20 C.F.R. § 404.1740(c)(4).

Based on § 1129 of the Social Security Act, 42 U.S.C. § 1320a-8, Social Security regulations provide for civil monetary penalties against persons who “[m]ake or cause to be made false statements or representations or omissions or otherwise withhold disclosure of a material fact for use in determining any right to or amount of benefits under title II or benefits or payments under title VIII or title XVI of the Social Security Act.” 20 C.F.R. § 498.100(b)(1).

Attorneys schooled in the adversarial system do not like having to submit adverse evidence in their clients’ cases. Yet this appears to be what the Social Security Act and regulations require. Various arguments that attorneys have made based on state bar ethics rules do not prevent a lawyer from following the fundamental rule of this non-adversarial system: Do not mislead the ALJ about any material fact.

An article by Professor Robert E. Rains, “Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance With Federal Rules on Production of Adverse Evidence,” 92 Cornell Law Review 363 (2007), which is reprinted in Appendix 9, addresses the ethical issues presented by disability cases: Do you have to submit a medical report that says your client is not disabled? What is the role of your state bar’s ethics rules when you are dealing with SSA? This article is required reading for all Social Security disability practitioners.

§107 Informal Procedures

Despite a trend in recent years toward more formality in Social Security disability practice, a trend that is disturbing to many attorneys, the administrative system remains an informal one. Hearings before administrative law judges, held in small conference rooms, are much less formal than court proceedings. Some ALJs wear robes but other judicial trappings such as gavels, bailiffs, and court reporters are absent. The rules of evidence do not apply. Evidence may be submitted even though it would be “inadmissible under rules of evidence applicable to court proceedings.” 42 U.S.C. § 405(b)(1). Although witnesses at hearings testify under oath, one can submit an unsworn letter from a doctor as evidence. Medical records are not required to be certified.

There is no special form required for any submission to SSA. Most attorneys use letters for almost everything (briefs, motions, to submit evidence, to make requests, to give notice, etc.). Although not required, most attorneys use the official forms for appeals and to notify SSA of their involvement in a case. While the regulations allow appeal by sending a simple letter, it is best to use the official form. With a letter appeal, one runs the risk that an SSA employee will not recognize it for what it is. See the sample Request for Hearing, §178.2.2; and Request for Review of Hearing Decision, §512. The Appointment of Representative form, §178.2.1, is used by most attorneys so that SSA employees will note that there is attorney involvement in the case, despite the fact that the regulations require only that the claimant sign a statement appointing a representative. 20 C.F.R. § 404.1707(a).

§108 SSA: A Bureaucracy

For the most part, attorneys deal with SSA’s Office of Disability Adjudication and Review (ODAR), which includes about 150 hearing offices scattered around the country, and the next level of appeal, the Appeals Council, which is located in a suburb of Washington, D.C. (Those in the northeast deal with the Disability Review Board under the DSI program—see §150.1.) In all, ODAR has about 8,000 employees, including about 1,300 administrative law judges and 34 administrative appeals judges. Dealing with hearing offices is generally a pleasant experience. Although dealing with the Appeals Council can be frustrating for attorneys, it is nothing compared to dealing with SSA outside of ODAR.

There is a rigidity of rule-following, whether or not application of the rule makes any sense, which characterizes the approach of low-level bureaucrats. This problem exists in all bureaucracies and is present at SSA, for the most part outside of ODAR. It is something that has been known to cause both claimants and lawyers to tear out their hair. To deal with this, you will find that it is best to be firm and persistent but never obnoxious.

A fundamental problem in dealing with SSA outside of ODAR is, of course, the sheer size of the agency, which has more than 57,000 employees in
addition to those employed by ODAR. Also, there are more than 14,000 state agency employees nationwide involved in making determinations of disability below the ALJ hearing level. It is difficult for a lawyer first to figure out whom to contact about a claimant’s particular problem and then to determine how to contact them, whether by phone, fax, mail or, in some limited circumstances, e-mail. Once you figure it out in a particular case, be sure to keep good notes for that particular case; and also start keeping a master list of telephone and fax numbers and addresses for use in future cases. You will discover that there are knowledgeable and helpful people at all levels of SSA. You will do well to cultivate a relationship with them. Treasure their phone numbers.

The problem of SSA’s size is compounded by the complexity of its programs, the most complicated of which are the two disability programs, Social Security disability and SSI. When there are program changes, it is a huge task to ensure that everyone within SSA who needs to know gets the information, and often they do not. Sometimes it will be up to you to tell SSA employees about policy changes.

To take just one example of problems created by complexity, consider the Social Security Administration’s nationwide toll-free telephone number, 1-800-772-1213 (which SSA likes to write as 1-800-SSA-1213). In theory, the toll-free number is staffed by knowledgeable SSA employees capable of answering a wide variety of questions, including questions about entitlement to disability benefits. However, this is not the reality. One test showed 25 percent wrong answers to questions involving SSI, by far the most complicated of SSA’s programs. The toll-free number, if you can get past the busy signals and the recorded messages, is most useful for information about the retirement program, not for questions that a lawyer might have about disability benefit entitlement.

SSA, like all bureaucracies, attempts to routinize complex decisions; however, the more complicated the decision, the less effective this is. It does not work well at all for disability determinations below the administrative law judge hearing level because the medical-vocational issues tend to be complicated and because state agencies are not equipped to assess the actual impact of a medical impairment on a particular claimant, which often involves a credibility determination. State agency disability determinations tend to be inadequate, and many people within SSA remain almost blissfully unaware of state agency decision shortcomings. For example, studies using SSA’s own peculiar methodology repeatedly conclude that state agency determinations are correct more than 93% of the time. Such studies are unable to explain why ALJs have always found disabled more than half the claimants who come before them. These studies have led many state agency employees to believe that ALJs issue mostly wrong decisions, and there is a component within SSA (outside of the Office of Disability Adjudication & Review) that thinks so, too.

It is a mistake to view SSA as being of one mind. For example, there are those within SSA who think that disability determination would be improved by getting rid of lawyers, administrative law judges, due process hearings, and appeals. Thus, there is a component of SSA that is opposed to the very existence of the Office of Disability Adjudication and Review. This tension between different components of SSA tends to produce turf wars and, whenever restructuring of SSA is going on as it has been for the past several years, a search for hidden agendas is made to see if this or that bureaucratic change will ultimately be a benefit or detriment to the future of a particular component of SSA.

§ 109  Citations

The primary focus of this book is on Social Security disability regulations, with an emphasis on the regulations for determining disability beginning at 20 C.F.R. § 404.1501. For the sake of simplicity, citations to the identical disability regulations for the SSI program will not be provided. The SSI regulations for determining disability begin at 20 C.F.R. § 416.901. It is easy to find the parallel SSI regulation. The formula is: 20 C.F.R. § 416.900 plus the last two digits of the Social Security disability regulation. For example, the parallel SSI regulation for the important Social Security disability regulation that describes the sequential evaluation process, 20 C.F.R. § 404.1520, appears at 20 C.F.R. § 416.920. The same sort of conversion works for the regulations dealing with the administrative review process appearing at 20 C.F.R. §§ 404.900 to 404.999 for the Social Security disability program. The parallel SSI regulations, which
contain some differences, begin at 20 C.F.R. § 416.1400.

To be technically correct according to the Bluebook system of citation, whenever one cites the Code of Federal Regulations, one is supposed to reference the year of the latest bound volume, e.g., 20 C.F.R. § 404.1520 (2000). If a new regulation was issued after the publication date of the latest bound volume, a Federal Register cite should be provided. We have included some important Federal Register citations; but we have chosen not to state the year of the latest C.F.R. because to do so would require annual changes in virtually every citation in this book and would significantly increase subscriber costs for supplements. When you are writing a federal court brief and you want to use correct citation form, be sure to determine the year of the latest C.F.R. and include this in your citation.

This book will cite the Social Security Act using the U.S. Code system, the system usually used by lawyers. The Social Security Administration, on the other hand, usually cites to a section number of the Social Security Act itself. It is easy to convert to the U.S. Code system references to the Social Security Act for Title II, the title pertaining to the Social Security retirement, survivors and disability programs. Simply add 200. For example, a reference to § 223 of the Social Security Act, the section that contains the definition of disability, is a reference to 42 U.S.C. § 423.

Converting references to Title XVI of the Social Security Act, that part of the Act dealing with SSI, to the U.S. Code System is more complicated. Title XVI appears in the Social Security Act at §§ 1601 through 1635; but these sections are crammed into the U.S. Code system from 42 U.S.C. §§ 1381 through 1383d. You may need to use a conversion table, such as one published by West’s Social Security Reporting Service, to find a reference to Title XVI in the U.S. Code system.

§110 Determining Disability
Under the Regulations
and Rulings

Social Security regulations provide a five-step sequential evaluation process for determining disability. In addition, the claimant’s impairment must be expected to result in death or have lasted or be expected to last at least 12 months. This is called the duration requirement. It is a requirement that, although not part of the sequential evaluation process, logically could be inserted into this process following step 2, the severity step. Thus, it is included in the following outline of the disability determination process.

(Text continued on page 1-14.)
§111 Diagram: Disability Decision and Sequential Evaluation Process

1. Gainfully employed?
   - Yes
   - No
     - Has a severe impairment?
       - Yes
         - Impairment will last 12 months or result in death?
           - Yes
             - Impairment meets or equals severity as defined in medical listing?
               - Yes
                 - Not disabled
               - No
             - No
               - Able to perform previous type of work?
                 - Yes
                   - Disabled according to vocational factors
                 - No
                   - Able to perform other generally available work?
                     - Yes
                       - Disabled according to medical listing
                     - No
                       - Not disabled

   - No
     - Has a severe impairment?
       - Yes
         - Impairment will last 12 months or result in death?
           - Yes
             - Impairment meets or equals severity as defined in medical listing?
               - Yes
                 - Not disabled
               - No
             - No
               - Able to perform previous type of work?
                 - Yes
                   - Disabled according to vocational factors
                 - No
                   - Able to perform other generally available work?
                     - Yes
                       - Disabled according to medical listing
                     - No
                       - Not disabled

No
§112 Sequential Evaluation Process — Overview

Under the five-step sequential disability evaluation process described in 20 C.F.R. § 404.1520 the following must be proved by a claimant in order to be found disabled:

1. The claimant is not engaging in “substantial gainful activity” (SGA); and
2. The claimant has a “severe” impairment; and
3. The impairment meets or “equals” one of the impairments described in the Social Security regulations known as the “Listing of Impairments”; or
4. Considering the claimant’s “residual functional capacity” (RFC), that is, what the claimant can still do even with his or her impairments, the claimant is unable to do “past relevant work” (PRW); and
5. Other work within the claimant’s RFC, considering age, education and work experience, does not exist in the national economy in significant numbers.

Watch out for the terms identified by quotation marks above and the initials that go with some of them. They have precise meanings in the regulations and rulings that are not necessarily the meanings one would expect. It will be necessary for you to learn these terms if you want to make sense out of Social Security regulations.

§113 Step 1: Substantial Gainful Activity

Because it is a sequential process, if the proof fails at any step other than step 3, the process is terminated and the claimant is found not disabled. Thus, if a claimant is working, that is, performing “substantial gainful activity” (SGA), no matter how impaired that claimant is, the claimant cannot be found disabled. This is the reason that our hypothetical bookkeeper in §100 is not disabled.

Work is evaluated “without regard to legality.” 20 C.F.R. § 404.1572. 42 U.S.C. §§ 423(d)(4)(B) and 1382c(a)(3)(E). Thus, illegal activity may be substantial gainful activity. See also SSR 94-1c, which adopted Dotson v. Shalala, 1 F.3d 571 (7th Cir. 1993), as a Social Security ruling.

Work, however, must be both “substantial” and “gainful.” “Substantial work activity . . . involves doing significant physical or mental activities.” 20 C.F.R. § 404.1572(a). Work may not be substantial when a claimant is unable “to do ordinary or simple tasks satisfactorily without more supervision or assistance than is usually given other people doing similar work” or when a claimant is doing work “that involves minimal duties that make little or no demands” on the claimant and that are of “little or no use” to the employer or to the operation of a self-employed business. 20 C.F.R. § 404.1573(b). But even sheltered work may be substantial. 20 C.F.R. § 404.1573(c).

SSA defines gainful activity broadly: “Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.” 20 C.F.R. § 404.1572(b). Nevertheless, when a claimant is an employee of someone else, whether work is “gainful” is usually determined by looking only at the claimant’s earnings. But, because SSA does not want to let employed claimants slip past this step if they are in a position to control the timing or amount of their income (e.g., when claimants are working for relatives), SSA will look at factors in addition to the amount of income to make sure such claimants are not cheating. 20 C.F.R. § 404.1574(b)(3)(ii).

This problem is always presented for self-employed claimants, who SSA views very suspiciously. SSA looks carefully at a self-employed person’s work activity and its value to the business, even if the person is working at a loss (as so many unimpaired self-employed people do from time to time). See 20 C.F.R. § 404.1575(a)(2) and SSR 83-34, which provide evaluation guides for the self-employed. See also §176.3 of this book.

Whether the claimant is employed by someone else or is self-employed, to arrive at countable income, SSA allows deduction from earnings for what it calls “impairment-related work expenses,” which are usually payments made by the claimant for drugs or medical treatment for the disabling impairment but may also include payments for some transportation costs, vehicle modification, attendant care services, residential modification, etc. SSA’s impairment-related work expense rules must be reviewed carefully before making a deduction because some expenses you wouldn’t expect are included (such as payment for treatment for the disabling impairment that the claimant has to pay whether the claimant works or not) and some expenses that you might expect to
qualify are excluded (such as payment for health insurance). See 20 C.F.R. § 404.1576, SSR 84-26, and §274 of this book.

In determining if work is substantial gainful activity, SSA averages income according to rules that consider the nature of the work, the period of time worked, and whether the SGA level changed during the time the claimant worked. See 20 C.F.R. §§ 404.1574a and SSR 83-35.

The SGA level, which was $300 per month during all of the 1980s and $500 per month from 1990 until July 1999, when it was raised to $700, is becoming considerably more generous than it used to be because of cost-of-living increases that have been applied beginning with the year 2001. 20 C.F.R. § 404.1574(b)(2)(ii). For example, for the year 2009, average countable earnings of more than $980 per month show that work was substantial gainful activity. 20 C.F.R. § 404.1574(b)(2).

You can find the SGA amount for the current year on the Internet at www.ssa.gov/cola/. Because the regulations contain SGA dollar amounts only for years through 2000 (and only a formula for years after that), Appendix 11 of this book provides the SGA amounts (and several other amounts that are based on annual cost-of-living increases) for years beginning with the year 2000. Historical SGA amounts can also be found at POMS DI 10501.015.

§114 Step 2: The Severity Step

At step two of the sequential evaluation process, it is necessary to determine if a claimant’s impairments are “severe,” a misleading word that encouraged erroneous decisions and spawned much litigation in the past. This step, which incorporates two different concepts, was intended to weed out frivolous cases involving either 1) no medically determinable impairments or 2) slight medically determinable impairments that impose only minor limitations on ability to work. Virtually any reduction in residual functional capacity (what the claimant can still do even with his or her impairments) satisfies the requirement that there be a severe medically determinable impairment. See 20 C.F.R. § 404.1520(c), § 404.1521, SSR 85-28 and SSR 96-3p. As such, medically determinable impairments are divided into two categories: (1) slight impairments that are referred to in SSA’s peculiar lingo as “nonsevere” impairments and

(2) all other impairments that are, therefore, “severe.”

As a practical matter, when you prove a reduction of the claimant’s residual functional capacity at step 4, you have effectively proven that the claimant has a severe medically determinable impairment. No separate proof is required to show a significant limitation of ability to do “basic work activities.” See 20 C.F.R. § 404.1521. SSA is supposed to consider the combined effect of all impairments, including multiple non-severe impairments, in determining if a claimant’s overall condition meets the requirement of being “severe.” 20 C.F.R. § 404.1523. Note that even subjective symptoms, as long as they arise from a medically determinable impairment, must be considered in assessing whether an impairment, or group of impairments, reduces a claimant’s ability to do basic work activity. SSR 96-3p. If an adjudicator is “unable to determine clearly” the effect of an impairment on a claimant’s ability to do basic work activities, the adjudicator is directed by SSR 96-3p to proceed with the next steps of the sequential evaluation process. Thus, close cases are to be decided in favor of finding an impairment to be severe.

On the other hand, “[n]o symptom or combination of symptoms can be the basis for a finding of disability, no matter how genuine the individual’s complaints may appear to be, unless there are medical signs and laboratory findings demonstrating the existence of a medically determinable physical or mental impairment.” SSR 96-4p. When there is no “medically determinable impairment,” an individual may be found not disabled at step 2 of the sequential evaluation process. Nevertheless, as a rule, if a doctor has enough information to make a legitimate diagnosis, a claimant has a medically determinable impairment. When there is a controversy over which diagnosis is correct, if medical signs or laboratory findings show any abnormality, the claimant has a medically determinable impairment even if the doctors do not agree on which diagnosis is best.

Step 2 denials are usually hogwash. Do not be intimidated by a step 2 denial if your own eyes tell you that the claimant is significantly impaired and you believe the claimant. Indeed, you should not be intimidated by step 2 denials even after a hearing in a non-frivolous case. Even though the U.S. Supreme Court upheld the facial validity of the step 2 regulation in Bowen v. Yackert, 482 U.S. 137 (1987), federal courts have not treated SSA kindly in step 2 cases.
Federal courts usually send step 2 cases back to SSA for completion of the sequential evaluation process. Indeed, after the Supreme Court upheld the facial validity of step 2 in Bowen v. Yuckert, it remanded the case to the Ninth Circuit which, in turn, remanded Yuckert v. Bowen, 841 F.2d 303 (9th Cir. 1988), refusing to affirm a step 2 denial in that case.

§115 Duration Requirement

Unless an impairment is expected to result in death, it must have lasted or be expected to last for a continuous period of 12 months. 20 C.F.R. § 404.1505(a). See also 20 C.F.R. § 404.1522(b).

The regulation implies that the impairment must be continuously “severe.” This interpretation is a concern for those impairments that wax and wane or have short periods of remission but have active periods sufficient to preclude engaging in substantial gainful activity on a sustained basis. The regulation, properly interpreted, does not require a denial of disability benefits for failure to meet the duration requirement under such circumstances. Cf. Moore v. Sullivan, 895 F.2d 1065, 1069 (5th Cir. 1990).

The regulation specifically prohibits tacking together unrelated severe impairments to meet the duration requirement. 20 C.F.R. § 404.1522(a). This is the reason that our hypothetical packer in §100 is not disabled. This regulation appears to be the unintended consequence of the wording of the definition of disability. 42 U.S.C. § 423(d)(2)(A). It is hard to find a public policy reason for this harsh result.

Denials based on the duration requirement usually occur in those cases where, at the time of the decision, the duration requirement is not met and the impairment is the sort that is likely to improve within 12 months. For those impairments that may or may not improve before the duration requirement is met, sometimes a state agency decision maker will delay a case just to see if the claimant continues to be disabled. Because of the slow progress of the administrative process, the 12 months usually have passed by the time a claimant actually attends a hearing, thus permitting an accurate retrospective evaluation.

Once the twelve-month duration requirement is met, you may ask for a finding of a closed period of disability in the situation where a claimant’s condition has improved to the degree that he or she is able to return to work.

§116 Step 3: Listing of Impairments

In order to be found disabled at step 3 of the sequential evaluation process, a claimant’s medical signs, findings, and symptoms must meet or “medically equal” one of the set of medical signs, findings and symptoms found in the Listing of Impairments. The Listing of Impairments is a set of medical criteria for disability found at Appendix 1 of the Social Security disability regulations, officially cited as 20 C.F.R. Part 404, Subpart P, Appendix 1.

If a claimant can be found disabled at step 3, there is no inquiry into ability to do past work or other work. This is the reason that our hypothetical lawyer in §100 is disabled despite the fact that he retains the ability to practice law. His impairment meets § 1.05B of the Listings, which deals with amputation of one or both feet.

Although you should look at the issue in every case, you will want to take an especially hard look at the Listings when your client can still perform past relevant work. If your client’s impairment meets or equals one of the impairments in the Listings, the ability to perform past work is irrelevant.

It is possible to argue that your client’s impairments are medically equivalent to an impairment in the Listing of Impairments. 20 C.F.R. § 404.1526(a). This comes up in four situations: (1) your client does not have one of the essential findings stated in the Listings for your client’s particular impairment but your client has other findings; (2) your client has all the essential findings but one or more of the findings is not quite severe enough and your client has other findings; (3) your client’s impairment is not described in the Listings but it may be as severe as an analogous impairment that appears in the Listings; or (4) your client has a combination of impairments, none of which meet the Listings but the cumulative total of your client’s impairments could still equal the Listings. 20 C.F.R. § 404.1526(b). It is possible to compare medical findings, symptoms and limitations in functioning to see if one claimant, whose impairment does not appear in the Listings, is as disabled as another claimant whose impairment meets a particular Listing. See §336. However, before an ALJ or the Appeals Council can find that a claimant’s impairment medically equals a Listed Impairment, the decision maker must receive the opinion of a medical expert hired by SSA. See SSR 96-6p.
In regular Social Security disability and SSI cases involving adults, if a claimant cannot be found disabled at step 3, the inquiry proceeds to step 4. For a discussion of widow(er)’s disability under pre-1991 standards and disabled children’s eligibility for SSI, see §§142 and 145.

§117 Step 4: Past Relevant Work

In the usual case, attention will focus on steps 4 and 5 of the sequential evaluation process. At step 4 the claimant has the burden of proving that he or she is incapable of doing any “past relevant work.” To qualify as past relevant work:

1. The job must have been performed within:
   a. 15 years prior to adjudication; or
   b. if insured status has lapsed, 15 years prior to the date last insured. 20 C.F.R. § 404.1565(a). See §131 on insured status.

2. The job must have been “substantial gainful activity,” 20 C.F.R. § 404.1565(a). That is,
   a. the job must have involved doing significant physical or mental activities, 20 C.F.R. § 404.1572(a); and
   b. it must have been done at the SGA level. See 20 C.F.R. §§ 404.1574-1575.

3. The job must have lasted long enough for the claimant to develop the facility needed for average performance. See 20 C.F.R. § 404.1565(a) and SSR 82-62.

Note that a job qualifies as past relevant work even if the job was done only part-time, as long as it was substantial gainful activity. SSR 96-8p, footnote 2. Thus, you have to identify the claimant’s easiest full or part time past relevant job and then figure out why the claimant cannot still do it. If the claimant had an easy job in the past 15 years that he or she can still do, the claimant will be found not disabled like our hypothetical truck driver in §100, unless you can put together an argument that the impairments meet or medically equal one of the impairments in the Listing of Impairments.

You must prove that your client cannot do a past relevant job even if that job no longer exists in the economy, an SSA position that was upheld by the U.S. Supreme Court in *Barnhart v. Thomas*, 540 U.S. 20 (2003).

In addition, if a claimant retains the capacity to do a past relevant job as it is ordinarily done, the claimant will be found not disabled even though the claimant’s actual past job required greater exertion and the claimant is unable to do that particular job. The “job as it is ordinarily done” rule will not be applied to a claimant’s benefit, however. If a claimant’s own past work was easier than the way the job is ordinarily done, SSA will examine the actual job requirements as the claimant performed them in determining whether the claimant can perform past relevant work. See Social Security Ruling 82-61.

Determining whether a claimant can do past relevant work is accomplished by comparing the claimant’s current residual functional capacity with the physical and mental demands of past relevant work. 20 C.F.R. § 404.1520(f).

For more about past relevant work, see §347.

§118 Step 5: Other Work

Once you have proven that the claimant cannot perform past relevant work, you move on to the most complicated step—determining whether the claimant can make an adjustment to other work that exists in significant numbers in the national economy, considering the claimant’s remaining work capacity, age, education and work experience. SSA has provided an important tool for determining whether a claimant is or is not disabled because of medical impairments and vocational factors: the Medical-Vocational Guidelines, discussed in detail beginning at §120. The Medical-Vocational Guidelines, popularly known as the “grids,” provide that the older a claimant is, the easier it is to be found disabled. Thus, our hypothetical housewife in §100, is found disabled despite the remaining physical capacity to do most jobs in the economy (sedentary, light and medium work) because of the adversity of age (55), education (less than a high school graduate), and work experience (none in the past 15 years). See Rule 203.10 of the Medical-Vocational Guidelines. Indeed, this rule may still be applied if “the work activity performed within this 15-year period does not (on the basis of job content, recency, or duration) enhance present work capability.” SSR 82-63.