



New York **Makes Work Pay**

Developing a path to employment for New Yorkers with disabilities

www.NYMakesWorkPay.org

Policy to Practice Brief #3

Social Security Disability Insurance, Medicare And Work

A Review of the SSDI and Medicare Rules Related to Work Activity. Guidelines for Proactively Using the SSDI and Medicare Work Incentives to Help Individuals with Disabilities Maximize Independence Through Work.

James R. Sheldon, Jr., J.D.
Neighborhood Legal Services

Edwin J. Lopez-Soto, J.D.
Employment and Disability Institute

About Policy-to-Practice Briefs

This document is one of a series of policy-to-practice briefs published as part of the New York Makes Work Pay Project, a Comprehensive Employment Services Medicaid Infrastructure Grant funded by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) to the New York State Office of Mental Health (OMH) and its management partners the Blatt Institute at Syracuse University and the Employment and Disability Institute (EDI) at Cornell University. The New York Makes Work Pay Initiative is currently funded for calendar years 2009 and 2010 and will provide an array of services to individuals with disabilities and the agencies and advocates that serve them, helping to remove obstacles to work and pave the way to self-supporting employment.¹

This brief is based, in part, on a similar document last updated by the authors in 2003 and originally published by the Work Incentives Support Center in the Employment and Disability Institute at Cornell. Materials were reviewed for accuracy by the Social Security Administration (SSA), Office of Employment Support Programs. However, the thoughts and opinions expressed in these materials are those of the authors and do not necessarily reflect the viewpoints or official policy positions of the SSA, CMS, or OMH. The information, materials and technical assistance are intended solely as information guidance and are neither a determination of legal rights or responsibilities, nor binding on any agency implementation and/or administrative responsibilities.

This publication is based on federal Social Security and Supplemental Security Income (SSI) laws, regulations and policy. However, unlike earlier versions, the current version is specifically targeted to New Yorkers with disabilities and, as such, will use New York's SSI rates in all its examples. Also, as relevant, we will specifically mention New York agencies by name and reference any New York-specific supports which may be able to assist New Yorkers with disabilities achieve their work goals when used in combination with SSI's Plan for Achieving Self Support. Notwithstanding this focus on New York, this publication will include extensive references to SSI policy and will be a valuable reference throughout the nation.

¹ A detailed description of the New York Makes Work Pay Project and its services can be found at <http://www.NYMakesWorkPay.org>

Contents

I.	Introduction	5
II.	Background on Social Security and Medicare	6
III.	Two Historical Work Disincentives: the Substantial Gainful Activity Rule and the Continuing Disability Review	7
	A. The Substantial Gainful Activity Rule	8
	B. Continuing Disability Reviews and the Medical Improvement Standard	9
	1. Work-Triggered CDR Eliminated in 2002	10
	2. No CDR While Using a "Ticket"	10
	3. Section 301: Continuation of Benefits for Persons in Vocational Rehabilitation Programs	10
IV.	Work Incentives and SSDI.....	12
	A. "Rebuttable Presumption" of SGA When Earnings Exceed \$1,000	13
	B. Income Averaging	13
	1. Not Applicable During SSDI's Trial Work Period.....	14
	2. Applicable During the Extended Period of Eligibility to Determine the Benefit Cessation Month.....	14
	3. Not Applicable After the Extended Period of Eligibility.....	14
	4. Unsuccessful Work Attempt.....	15
	C. Establishing That "Countable Wages" Are Equal to or Less Than SGA Amount of \$1,000	15
	1. Paid Time Off is Deducted from Gross Wages	15
	2. Subsidies Deducted from Gross Wages	16
	3. Business-Related Expenses Deducted	18
	4. Impairment-Related Work Expenses Deducted	18
	D. The Trial Work Period.....	19
	E. The Extended Period of Eligibility.....	23
	F. Illustrations of Trial Work Period and Extended Period of Eligibility	23

- G. Expedited Reinstatement of SSDI 24
 - 1. Provisional Benefits Pending Expedited Reinstatement Decision 25
 - 2. Effective Month of SSDI Reinstatement 26
 - 3. New Trial Work Period and Extended Period of Eligibility 26
 - 4. Application of Expedited Reinstatement with Second Trial Work Period and Extended Period of Eligibility 27
- H. Continuing Medicare Eligibility While Individual is Working 27
- V. Conclusion 28
- Notes 29

I. Introduction

Many individuals with severe disabilities depend on either Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) as their primary or sole source of income. To obtain either benefit, an individual has to meet a strict disability standard. In some cases, an initial application may be denied and significant time lapse before an individual is finally awarded benefits through an appeal.

Individuals who are considering going to work or returning to work will typically need answers to several important questions:

- Will my condition allow me to work?

Will I need special supports (e.g., job coaching, on-the-job training, a modified computer, or specialized equipment) to perform a new job?

- Will I lose my cash benefits or health insurance (Medicare or Medicaid) because I am working?
- Can I take advantage of any special work incentives if I go to work?
- How can I build assets to increase my economic self-sufficiency?
- Who can I go to for answers to these questions?

As many readers know, the answers to many of these questions will vary greatly depending on whether the individual receives SSDI or SSI (or a combination of both benefits).

This policy-to-practice brief will focus on issues related to benefits and work for the SSDI beneficiary. After first explaining what SSDI is and the differences between SSDI and SSI, we will explain two historical work disincentives: the substantial gainful activity (SGA) rule and the continuing disability review (CDR). We will then explore a number of work incentives or special rules that seek to encourage work by either allowing benefits to continue for limited periods while working (trial work period (TWP), extended period of eligibility (EPE)), or allow individuals to quickly return to benefits status when a work effort stops or wage levels dip below the SGA level (expedited reinstatement). We will also explain special rules for either ignoring some short-term employment efforts (unsuccessful work attempts) or reducing countable monthly wages to be measured against the SGA amount for the year in question (impairment related work expenses, subsidies, paid time off).

Throughout this policy-to-practice brief we will provide examples to reinforce how the rules will operate. We will also point out the proactive steps that the beneficiary and his or her benefits adviser can take to maximize the use of work incentives as the beneficiary moves toward a long-range work goal and maximum levels of financial independence.

The authors realize that many SSDI beneficiaries will also receive SSI benefits and Medicaid. Many SSDI beneficiaries will also receive or qualify for other needs-based benefits, including food stamps and subsidized housing. This brief will not address SSI, Medicaid, or other needs-based benefits; nor will it address any special tax considerations, including

eligibility for the federal earned income tax credit.² Instead, this brief will address only SSDI and its companion health care benefit, Medicare. Future policy-to-practice briefs will address how individual beneficiaries negotiate multiple benefit systems in the context of pursuing work goals.

II. Background on Social Security and Medicare

The Social Security Administration (SSA) administers separate Social Security Disability benefit programs for wage earners (SSDI), widows or widowers of wage earners, and adult disabled children of wage earners (Child's Insurance Benefits, most commonly referred to by SSA as Childhood Disability Benefits (CDB) or Disabled Adult Child (DAC)) benefits. Since the work rules and work incentives, discussed below, are in nearly all cases identical for each of these benefit programs, we will use the designation SSDI to refer to all of them.

SSDI is an insurance program. To qualify, one must meet an "insured status" test, i.e., a wage earner must have paid sufficient amounts into the Social Security trust fund.³ Both the wage earner and his or her dependents may be eligible for benefits.⁴ Current earnings will not affect the SSDI check amount, but may affect whether the person is considered disabled.⁵

Medicare⁶ is most frequently associated with Social Security. Adults with disabilities can establish eligibility in four ways: 1) after 24 months of SSDI eligibility; 2) after 24 months of eligibility for Railroad Retirement disability benefits; 3) if diagnosed with kidney disease and not receiving SSDI, upon entering end stage renal disease or developing an impairment that requires regular dialysis or kidney transplantation to maintain life⁷; or 4) as a Medicare-Qualified Government Employee.⁸

A Medicare beneficiary qualifies automatically for Medicare Part A, known as hospital insurance benefits. It covers such things as inpatient care and skilled nursing facility care.⁹ Part B, supplemental medical insurance, is optional and requires payment of a monthly premium (\$96.40 per month in 2010 for most individuals). It covers community-based services, including physician services, durable medical equipment, prosthetic devices, and home health services.¹⁰ Medicare Part D, the prescription drug benefit, is also optional and,

² For a detailed explanation of the earned income tax credit, see *The Federal Earned Income Tax Credit: A Work Incentive That Puts More Money in a Paycheck and Saves on Taxes*, available at http://www.ilr.cornell.edu/edi/publications/PPBriefs/PP_21.pdf.

³ 42 U.S.C. § 423(c).

⁴ See, e.g., 42 U.S.C. § 402(d) (Child's Insurance Benefits).

⁵ See part III.A, below.

⁶ 42 U.S.C. §§ 1395 *et seq.*

⁷ 42 U.S.C. §§ 426(b), 426-1, 1395c, 1395rr.

⁸ Social Security Program Operations Manual Systems (POMS) HI 00801.440 B.

⁹ 42 U.S.C. § 1395d.

¹⁰ 42 U.S.C. §§ 1395j, 1395k.

depending on the individual, could require substantial out-of-pocket expenses for monthly premiums, co-payments, and deductibles.¹¹

SSI is for individuals with limited income and resources. It can be a person's only source of income or, as its name suggests, supplement other income, such as SSDI. Because SSI is needs-based, income is always relevant in determining the amount of the monthly check. However, once approved for SSI, the amount of earnings will not affect the determination of whether a person continues to be disabled.

Medicaid,¹² like SSI, is needs-based (means-tested). In 39 states, the District of Columbia, and the Northern Mariana Islands, a person who receives SSI automatically qualifies for Medicaid.¹³ In the 11 section 209(b) states, eligibility is not automatic for SSI beneficiaries. These states use their own Medicaid eligibility criteria, which differs from SSI criteria.¹⁴ States which exercise the 209(b) option include: Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, and Virginia.¹⁵ There will be no further discussion of SSI or Medicaid in this publication, except some general references to give context to the SSDI and Medicare discussion.

III. Two Historical Work Disincentives: the Substantial Gainful Activity Rule and the Continuing Disability Review

SSDI beneficiaries, their advocates, and other professionals who work with them often approach the subject of competitive employment with great fear. They fear loss of cash benefits, loss of health insurance coverage, and — should a work attempt fail — the time-consuming reapplication process. For those heavily dependent on Medicare and/ or Medicaid to fund a range of services, including prescription drugs, home health care services, or expensive medical equipment, like power wheelchairs, the loss of health care coverage could keep them from maintaining a work effort.

There is no foolproof way to allay every fear. But numerous SSDI and Medicare work incentives, discussed below, allow the SSDI beneficiary relief from the fears, either temporarily or, in some cases, permanently. First, however, we will review two historical disincentives that cause some of these fears.

¹¹ POMS HI 03001.000 *et seq.*

¹² 42 U.S.C. §§ 1396 *et seq.*

¹³ 42 U.S.C. § 1396a(a)(10)(A)(i).

¹⁴ 42 U.S.C. § 1396a(f).

¹⁵ POMS SI 01715.020.

A. The Substantial Gainful Activity Rule

The general rule, for persons who are not legally blind, is that earnings of more than \$1,000 per month amount to substantial gainful activity (SGA) in 2010.¹⁶ Absent application of the rules discussed in section IV, below, a person earning more than \$1,000 per month would be denied SSDI as an applicant or SSDI would be terminated if already receiving benefits. If monthly earnings are equal to or less than the SGA amount for the year in question, SSA will generally not consider information other than a person's earnings to determine if he or she is performing SGA.¹⁷

For the SSDI applicant or beneficiary who is legally blind, monthly earnings of more than \$1,640 are considered to be SGA in 2010.¹⁸ The U.S. Court of Appeals for the Tenth Circuit has held that SSA's statutes and regulations, allowing persons who are blind a higher SGA threshold than allowed for other disabilities, do not violate the U.S. Constitution's equal protection clause.¹⁹

In evaluating the earnings of individuals who are considered to be legally blind, SSA distinguishes between individuals under age 55 and those age 55 or older. For those under 55, SSA will apply the SGA rules as it does for all other SSDI beneficiaries. If, following a TWP, the individual has monthly earnings above the SGA level for the year in question (\$1,640 in 2010), SSA will ordinarily cease their benefits (subject to the rules discussed in part IV, below).²⁰

SSA will apply a different standard to individuals who are legally blind and age 55 or older:

"If you are age 55 or older, we will evaluate your work using the guides in paragraph (d) of this section to determine whether or not your work shows that you are doing substantial gainful activity. If you have not shown this ability, we will pay you cash benefits. If you have shown an ability to do substantial gainful activity, we will evaluate your work activity to find out how your work compares with the work you did before. If the skills and abilities of your new work are about the same as those you used in the work you did before, we will not pay you cash benefits. However, if your new work requires skills and abilities which are less than or different than those you used in the work you did before, we will pay you cash benefits, but not for any month in which you actually perform substantial gainful activity."²¹

¹⁶ 20 C.F.R. §§ 404.1574, 416.974; POMS DI 10501.000 et seq. For self-employed persons, see 20 C.F.R. §§ 404.1575, 416.975; POMS DI 10510.001 et

¹⁷ 20 C.F.R. §§ 404.1574(b)(3)(i), 416.974(b)(3)(i). See 20 C.F.R. §§ 404.1574(b)(3)(ii) and 416.974(b)(3)(ii) for the very limited circumstances under which SSA will look to information other than a person's earnings to make an SGA determination.¹⁸ 03

¹⁸ 20 C.F.R. § 404.1584(d); POMS DI 10501.015 C. SSA's regulations and policy use the term "statutorily blind" to describe these individuals.

¹⁹ *Spragens v. Shalala*, 36 F.3d 947 (10th Cir. 1994), *cert den.* 514 U.S. 1035 (1995).

²⁰ 20 C.F.R. § 404.1584(b).

²¹ 20 C.F.R. § 404.1584(c).

What does the quoted language mean? Blind individuals age 55 or older, who are using skills and abilities that are “less than or different from” those used in prior work, will be able to move in and out of benefits status, each month, depending on whether their countable wages are more than the SGA level for the year in question. This, in effect, treats their wages the same way they would be treated under the 36-month EPE (discussed in part IV.E, below).

SSA annually adjusts the SGA amounts, for the beneficiary population generally and for those who are legally blind, based on the National Wage Index. The SGA amount will increase if the previous year’s index has increased. If the index stays the same or goes down, the SGA amount for the previous year will continue unchanged.²² The SGA amount, for individuals who are legally blind, that normally increases with the national wage index, will only increase if there is also a cost of living adjustment (COLA). This explains why the 2010 SGA amount went up by \$20 for the beneficiary population, generally, but remained the same for those who are legally blind.

B. Continuing Disability Reviews and the Medical Improvement Standard

Many fear that work increases the likelihood of a continuing disability review (CDR) and a resulting termination of benefits. Indeed, many advocates and rehabilitation professionals have discouraged work for this reason. Rather than discouraging work activity, advocates should ensure that the beneficiary understands the potential impact of work on benefits so that he or she can make informed choices about work and use of the work incentives. They must also ensure that beneficiaries are aware of special provisions that will eliminate CDRs in some circumstances, or allow for a time-limited benefits continuation after a finding of medical improvement.

A medical CDR will occur, periodically, for all SSDI beneficiaries to determine whether they still meet the medical criteria of the program. A medical CDR will occur whether or not the person is working, based on three classifications:

1. Medical Improvement Not Expected: Reviewed every five to seven years.
2. Medical Improvement Possible: Reviewed every three years.
3. Medical Improvement Expected: Reviewed six to 18 months after initial entitlement.²³

Generally, benefits will be terminated, following a CDR, only if medical improvement enables the person to engage in SGA.

²² 20 C.F.R. §§ 404.1574(b)(2)(ii), 404.1584(d)(3), 416.974(b)(2)(ii).

²³ 42 U.S.C. § 421(i); 20 C.F.R. §§ 404.1590(d), 416.990(d). For a more detailed discussion on CDRs, see *Medical Continuing Disability Reviews and Related Concepts: A Discussion of Medical CDRs and the Age 18 Redetermination*, available at http://www.ilr.cornell.edu/edi/publications/PPBriefs/PP_11.pdf.

If a beneficiary works, will improvement be implied? Historically, this was a justified concern as evidence of recent work activity could trigger a CDR. Since 2002, however, most SSDI beneficiaries will no longer face a work-triggered CDR and, for them, work activity can no longer be viewed as evidence of medical improvement.

1. Work-Triggered CDR Eliminated in 2002

Prior law and regulations authorized a CDR, in all cases, after an SSDI beneficiary completed nine trial work months or when substantial earnings were reported to the individual's wage record.²⁴ This work-triggered CDR was eliminated effective January 1, 2002 for persons who have been entitled to SSDI for at least 24 months. For them, no CDR will be scheduled solely as a result of work activity. Work activity may not be used as evidence that a person is no longer disabled and cessation of work may not give rise to a presumption that a person is unable to work. Persons affected by this section are still subject to regularly scheduled CDRs that are not triggered by work and will be subject to termination of benefits if they perform SGA.²⁵

2. No CDR While Using a "Ticket"

In most cases, during the period in which an SSDI or SSI beneficiary is using a "ticket," or voucher for rehabilitation services under the Ticket to Work and Self-Sufficiency Program, SSA may not initiate a CDR to determine if the individual is no longer disabled.²⁶ The original ticket regulations became effective on January 28, 2002. Revised ticket regulations were published in May 2008 and became effective on July 21, 2008.²⁷ A separate policy-to-practice brief describes the ticket program and the criteria for the moratorium on CDRs when an individual is using a ticket and making timely progress.²⁸

3. Section 301: Continuation of Benefits for Persons in Vocational Rehabilitation Programs

A special rule protects persons who medically improve after beginning a vocational rehabilitation program approved by SSA.²⁹ This is often referred to as "section 301" because it was enacted as section 301 of the Social Security Amendments of 1980.³⁰ It protects persons who participate in any vocational rehabilitation program which SSA approves, not just those developed by a state vocational rehabilitation agency.³¹

²⁴ See former 20 C.F.R. § 404.1590(b)(4). The trial work period is discussed in part IV.D, below.

²⁵ 42 U.S.C. § 421(m)(1); 20 C.F.R. § 404.1590(i).

²⁶ 20 C.F.R. § 404.1590(h).

²⁷ See 20 C.F.R. Part 411.

²⁸ See *The "New" Ticket to Work and Self-Sufficiency Program: Enhancing Economic Self-Sufficiency of Beneficiaries Through Work Opportunities and Public / Private Partnership*, will be available at <http://www.ilr.cornell.edu/edi/nymakesworkpay/m-research.cfm>.

²⁹ U.S.C. §§ 425(b), 1383(a)(6); 20 C.F.R. §§ 404.316(c), 416.1338; POMS DI 14505.001 et seq.

³⁰ Social Security Amendments of 1980, Pub. L. No. 96-265, § 301(b), 94 Stat. 441

³¹ 42 U.S.C. §§ 425(b)(1), 1383(a)(6)(A).

Historically, these provisions applied to persons who medically improve while attending a college or other training program. Over the past 10 years, the section 301 protection was expanded and now applies to individuals participating in the Ticket to Work program³² or SSI's Plan for Achieving Self Support³³; and to individuals who, at the time medical improvement is determined, are attending a special education program pursuant to an individualized educational plan.³⁴

In most cases, the law provides two requirements for continued SSDI or SSI eligibility: (1) participation must be in the Ticket to Work program or another SSA-approved vocational rehabilitation program, and (2) participation must increase the likelihood of permanent removal from the disability rolls. SSA's regulations add the requirement that the program must have started before the disability ceased.³⁵ In the case of an individual participating in the ticket program and making "timely progress" as defined in the ticket regulations, there is no need to separately satisfy the second criterion. In the case of an individual participating in the PASS program, there is no need to separately satisfy the second criterion as an approved PASS requires a viable work goal that is expected to lead to elimination of or reduced dependence on benefits.

Effective 2005, the 301 protections were expanded to apply to certain SSDI beneficiaries, between the ages of 18 and 21, who have been found to have medically improved. If the youth is attending a special education program pursuant to an individualized educational program in accordance with the federal Individuals with Disabilities Education Act, at the time medical improvement is found, benefits will continue so long as attendance in the special education program continues. Under this provision, there is no requirement that the special education student be enrolled in a vocational program, nor is there any requirement that the student meet the usual two-part test under section 301.³⁶ Similarly, if the young person is receiving "transition services" after having completed an individualized educational program, SSA will determine that the transition services will increase the likelihood that the individual will not return to the disability rolls, thereby meeting part two of the usual two-part test.³⁷

³² 20 C.F.R. § 404.327(a)(1).

³³ POMS DI 14505.010 B. For more detailed information on the PASS, see *Plan for Achieving Self-Support: An SSI Work Incentive and Approach to Self-Directing Vocational Rehabilitation to Support a Range of Work Goals*, available at http://www.ilr.cornell.edu/edi/nymakesworkpay/docs/MIG_PP_PASS.pdf.

³⁴ 20 C.F.R. §§ 404.327(a)(4), 404.328; POMS DI 14505.010 C.

³⁵ 20 C.F.R. §§ 404.316(c), 416.1338.

³⁶ 20 CFR § 404.328(b).

³⁷ 20 C.F.R. § 404.328(c).

IV. Work Incentives and SSDI

Since the work incentives vary greatly between SSDI and SSI, the two programs should always be discussed separately. This publication will only discuss the SSDI work incentives. The SSI work incentives will be discussed in a subsequent policy-to-practice brief.

With SSDI, the substantial gainful activity (SGA) rule applies to both applicants and beneficiaries. When it applies, it results in a denial, suspension, or termination of benefits. Under the sequential process for evaluating SSDI eligibility, a person who is performing SGA is not considered disabled.³⁸ All examples in this section use the 2010 monthly SGA amount of \$1,000 for persons who are not legally blind. If an individual is legally blind, the higher \$1,640 SGA amount would apply. Unless otherwise noted, all of the rules discussed below will apply equally to individuals who are blind.

There are six ways to avoid or limit the application of the SGA rule during the short-term or long-term process of moving toward self-supporting employment :

- First, wages of more than \$1,000 create a presumption of SGA which may be rebutted by evidence concerning how well the person performs the work.
- Second, the rule does not apply, in many instances, when the average monthly wage is \$1,000 or less.
- Third, the rule does not apply if the person is not earning more than \$1,000 per month in "countable wages."
Fourth, earnings of more than \$1,000 can be disregarded for a limited time under TWP rules.
- Fifth, a person who loses SSDI by performing SGA after a TWP can return to benefits status during the EPE when countable wages for a month are at or below the SGA level.
- Sixth, the expedited reinstatement provisions allow SSDI to be reinstated in many cases, after the EPE, if countable earnings are reduced below the SGA level.

All of the work incentives, with the exception of section 301,³⁹ assume the beneficiary continues to be disabled. If a person medically improves and regains the capacity for SGA, benefits can be terminated even if countable earnings are equal to or less than the SGA amount.

³⁸ 20 C.F.R. §§ 404.1520(a), (b), 416.920(a), (b).

³⁹ See part III.B.3, above.

A. “Rebuttable Presumption” of SGA When Earnings Exceed \$1,000

The SSDI regulations state that earnings above \$1,000 per month “will ordinarily show that [the individual has] engaged in substantial gainful activity.”⁴⁰ In addition to looking at wages, SSA must look at the nature of work performed, the adequacy of performance, any special employment conditions, and the amount of time spent working.⁴¹ Several courts have held that wages above \$1,000 SGA level create only a rebuttable presumption of SGA.⁴²

B. Income Averaging

The income averaging rules will apply during the initial application for SSDI benefits and during the EPE (see below) to determine the first month of SGA following the TWP.

If earnings are not constant, an SSDI applicant must sustain earnings averaging more than \$1,000 before earnings are equated with SGA. If work is steady and continuous, wages are averaged over the entire work period; if seasonal or sporadic, only the work months are counted in determining the average.⁴³ When wages being averaged span a period during which the SGA levels change, SSA will average separately for each period in which a different level applies.⁴⁴

Two examples illustrate these rules.

Example. *Bill applies for SSDI in November 2010. He claims he became disabled in January 2010, the month he reduced his work hours because of his disability. When he applies, Bill’s earnings for the 10-month period, January through October 2010, averaged \$950 (i.e., below the 2010 SGA amount of \$1,000). He is not performing SGA and his application will not be denied on that basis. He can establish disability as of January 2010 if he was medically disabled in January.*

Now let’s assume Bill applies in June 2010 and has wages for the 10-month period, August 2009 through May 2010, as follows:

8/09 - \$930	1/10 - \$1,070
9/09 - \$1,050	2/10 - \$910
10/09 - \$990	3/10 - \$1,050

⁴⁰ 20 C.F.R. § 404.1574(b)(2).

⁴¹ 20 C.F.R. § 404.1573

⁴² See, e.g., *Boyes v. Secretary of HHS*, 46 F.3d 510, 512 (6th Cir. 1994); *Corrao v. Shalala*, 20 F.3d 943, 948 (9th Cir. 1994); *Payne v. Sullivan*, 946 F.2d 1081, 1083 (4th Cir. 1991); *Thompson v. Sullivan*, 928 F.2d 276, 277 (8th Cir. 1991); *White v. Heckler*, 740 F.2d 390, 394 (5th Cir. 1984); *Nazarro v. Callahan*, 978 F.Supp. 452 (W.D.N.Y. 1997); *Case v. Sullivan*, 810 F. Supp. 52, 56-57 (W.D.N.Y. 1992); *Goldstein v. Harris*, 517 F. Supp. 1314, 1317 (S.D.N.Y. 1981).

⁴³ 20 C.F.R. § 404.1574a(a), (c); POMS DI 10505.015.

⁴⁴ 20 C.F.R. §§ 404.1574a(b), 404.974a(b).

11/09 - \$1,010	4/10 - \$990
12/09- \$970	5/10 - \$930

Average earnings through December 2009 were \$990 (i.e., more than the 2009 SGA level of \$980). Average earnings for January through May 2010 were \$990 (i.e., less than the 2010 SGA level of \$1,000). Based on these facts, Bill's application will likely be denied for the period through December 2009, as he was performing SGA. For the period beginning January 2010, since average earnings were below the SGA level, Bill's application for that period will not be denied on the basis of SGA. Readers should keep in mind that Bill's "countable wages" could be reduced through impairment related work expenses, subsidies, or paid time off, bringing his monthly average below the SGA level.⁴⁵

1. Not Applicable During SSDI's Trial Work Period

During the nine-month TWP, income averaging will not apply. The SSDI beneficiary is entitled to keep the benefit check each month no matter how high earnings are.⁴⁶

2. Applicable During the Extended Period of Eligibility to Determine the Benefit Cessation Month.

The EPE is the 36-month period immediately following the TWP. During the EPE, the person will be entitled to an SSDI check for each month that wages are at or below the SGA level.⁴⁷ Averaging rules will apply only to determine the first time SGA occurs within the EPE.⁴⁸ The first month during the EPE that gross earnings are above the SGA level will be considered the "cessation month." The person will receive benefits for that month and the following two months (i.e., during a three-month "grace period"). Thereafter, the person qualifies for a check only if countable earnings are at or below the SGA amount.

3. Not Applicable After the Extended Period of Eligibility

SSA will only average earnings in deciding an application and during the EPE to determine the benefit cessation month. Following the EPE, one month of countable earnings above the SGA level will be enough to terminate benefits.⁴⁹

NOTE: If an individual goes through the entire 36-month EPE without performing SGA, the averaging rules will apply to determine the first month of SGA after the EPE. If SSA determines that the individual did perform SGA, the individual will be eligible for SSDI benefits for the first month of SGA and the following two months (i.e., the three-month grace period).

⁴⁵ See part IV.C, below.

⁴⁶ See part IV.D, below.

⁴⁷ See part IV.E., below.

⁴⁸ 20 C.F.R. § 404.1592a(a); POMS DI 13010.210 D.

⁴⁹ 20 C.F.R. § 404.1574a(d).

4. Unsuccessful Work Attempt

Even if average earnings are above the SGA level, this may be considered an unsuccessful work attempt if work is discontinued or reduced to the non-SGA level after less than six months.⁵⁰ Unsuccessful work attempt criteria differ depending on whether the work effort was for three months or less or for three to six months. The work is considered to be an unsuccessful work attempt if it ended or was reduced to the non-SGA level within three months due to the impairment or to the removal of special conditions related to the impairment that are essential for the further performance of work. If the work lasted between three and six months, SSA also requires one or more of the following: frequent absences due to the impairment; unsatisfactory work due to the impairment; performance of work during a period of temporary remission; or performance of work under special conditions.⁵¹

C. Establishing That “Countable Wages” Are Equal to or Less Than SGA Amount of \$1,000

To calculate countable wages, paid time off, impairment related work expenses, and subsidies are deducted from a person’s gross wages. If a person is engaged in self employment, business related expenses may also be deducted.

1. Paid Time Off is Deducted from Gross Wages

Paid time off includes vacation time, personal time, holidays, and sick time. When measuring wages against the SGA level for the year in question, it is always best to look at paid time off first as a way of reducing gross wages to determine “countable wages.” If part of an individual’s monthly pay can be attributed to paid time off, that amount will be subtracted from gross pay to determine countable wages.⁵²

Example. *Roger earns \$1,100 gross per month at his job (or \$50 gross per work day). In January 2010, Roger receives \$50 in holiday pay for January first and also receives \$100 in vacation pay for a Thursday and Friday he takes off during the month. To determine Roger’s countable wages for the month, we must deduct the combined holiday and vacation pay from his gross wages (\$1,100 – 150 = \$950). Since \$950 is less than the \$1,000 SGA level for 2010, Roger did not perform SGA during January.*

Moving from Policy to Practice. A practitioner may need to review monthly wage stubs to determine whether an individual’s gross wages include any of the four categories of paid time off. In some cases the individual may even need a statement from the employer’s payroll department to verify this information.

⁵⁰ 20 C.F.R. §§ 404.1574(c), 416.974(c); POMS DI 11010.145.

⁵¹ 20 C.F.R. §§ 404.1574(c)(3) & (4), 416.974(c)(3) & (4); POMS DI 11010.145 E.

⁵² POMS DI 10505.010 C.

2. Subsidies Deducted from Gross Wages

Any part of wages that can be attributed to a subsidy will not count when measuring wages against the SGA rule. SSA will only count that part of wages that can be fairly attributed to a worker's productivity.⁵³ Always consider a subsidy possible if the person is working in a sheltered, supported, or special environment.⁵⁴ In competitive employment, a wage may contain a hidden subsidy, as the employer may pay more than productivity would justify. This may be a reward for a long-term employee who is now disabled; the employee may be a friend; or this may be an act of charity.⁵⁵ Whatever the motive, it is crucial to establish the real worth of the person's labors.

Many government-sponsored training and job placement programs exist for persons with disabilities. If part of a wage is paid by a government agency, and is not related to productivity, there is a strong argument that the worker has not earned that part of the wage. For example, a person placed in a job may be paid \$9 per hour, but a state rehabilitation agency may be paying \$4.50 per hour toward the wage. Under these circumstances, it may be possible to establish that only the amount paid by the employer, i.e., \$4.50 per hour, will count as earnings under the SGA rule.

Supported employment is a work option in which the person usually works a traditional job, but receives special assistance, often from a job coach. The job coach is typically provided by an agency other than the employer. SSA has recognized that while "special conditions on the job," like job coaching, "are not technically 'subsidies,'" the job coach's services should be factored in when SSA determines how much earnings are based on the person's own productivity.⁵⁶ In effect, SSA's policy authorizes a subsidy calculation.

SSA requires that "special conditions" on the job, like job coaching, must be considered to determine if the individual's pay is based on his or her own productivity. In the relevant POMS provision, SSA explains that "[e]xamples of special conditions include on-the-job coaching and substitution during which the job coach performs part or all of the individual's duties, or close and continuous supervision."⁵⁷

SSA's POMS states that certain of the job coach's hours should be multiplied by the hourly rate of the person with a disability to determine the subsidy. The policy specifically cautions not to consider the job coach's salary to determine countable earnings. Although the POMS makes it clear that "special conditions" include both "on-the-job coaching" and "close and continuous supervision," the examples used in the policy both involve a job coach who actually performs part of the person's work. The examples count only the

⁵³ 20 C.F.R. §§ 404.1574(a)(2), 416.974(a)(2); POMS DI 10505.010 A.

⁵⁴ 20 C.F.R. §§ 404.1574(a)(3), 416.974(a)(3).

⁵⁵ See, e.g., *Scott v. Commissioner of Social Security*, 899 F. Supp. 275, 279 (S.D. W.Va. 1995) (where job was created by family members and only job requirement was to answer the telephone for 12 hours per week).

⁵⁶ POMS DI 10505.010 A.

⁵⁷ POMS DI 10505.010 A.4

job coach hours spent doing the person's work as relevant to the subsidy calculation, with hours spent observing and verifying quality of work not counted – somewhat at odds with the language quoted immediately above. The policy and examples do not address whether job coach services or any other support services performed away from the job or during breaks are to be used in determining the subsidy.

The authors caution that the examples in the POMS can be misleading. Those examples fail to point out that a concept sometimes called “modeling” (doing the job while the person with a disability observes) is just one method of providing job coach services. A job coach may provide a myriad of special services, on site and off site, which will help the person move toward greater vocational independence. Arguably, as long as the person could not perform the job without those extra services, all job coach hours should be relevant to the subsidy calculation.

Example (using job coach hours, individual's pay rate): *Consider Gerald, who is mentally retarded, works as a dishwasher making \$9 per hour, and earns \$1,080 monthly. Agency X provides him with 20 hours of job coach services each month. During the 20 hours of service, the job coach is involved in modeling the job, observing and coaching, and providing close and continuous supervision.*

If we use SSA's approved method for calculating the subsidy (and count all job coach hours), Gerald's countable wages will be \$900 per month [$\$1,080 - 180$ (20 job coach hours multiplied by Gerald's \$9 hourly wage)], reducing his wages below the \$1,000 SGA level.

Some advocates have suggested that SSA's approved method for calculating a subsidy is flawed. They suggest that the real measure of a job coaching subsidy should be based on the actual cost of providing the job coaching services to the individual. In fact, several advocates have reported winning administrative law judge (ALJ) hearings, with the ALJ approving this alternative approach for calculating the subsidy. As a practical matter, however, beneficiaries are best served by practitioners/practitioner who advise them to calculate the value of a job coach subsidy based on SSA's approved formula. In most cases, it is not realistic for a beneficiary to plan his or her future on an interpretation that might only succeed a year or more later when the issue is addressed by an ALJ.

An employer may designate a specific amount as a subsidy. If the employer does so and provides an “adequate explanation as to how a specific subsidy was calculated,” this will “normally suffice” to establish the subsidy.⁵⁸

Example of subsidy designated by employer. *Marilyn works in a warehouse for employer JK and makes \$1,200 gross per month. Although Marilyn does not have a job coach, the employer does provide her with more supervision than other employees, tolerates more frequent breaks, and tolerates a*

⁵⁸ POMS DI 10505.010 A.2 & 3.

slower pace of work. The employer explains this in a letter and concludes that Marilyn's pay is subsidized by 25 percent or by \$300 monthly. SSA can be expected in this case to accept the employer's conclusion and determine that Marilyn's countable wages are \$900 per month, less than the 2010 SGA level of \$1,000.

Moving from Policy to Practice. Sometimes it is obvious to a practitioner that an individual with a disability could not perform the duties of a job without employer subsidies. A practitioner may need to get permission from the individual to contact the employer, ask about employer subsidies and then get a letter from the employer delineating the subsidies provided.

Some employers may provide accommodations to employees under the mandates of the Americans with Disabilities Act,⁵⁹ or section 504 of the Federal Rehabilitation Act.⁶⁰ For example, an office worker who is blind may be entitled to services from a reader to allow him or her to perform a job.⁶¹ A paralegal who is blind may be provided with specialized computer equipment to allow him or her to work. To the extent that one can attach an extra cost to these accommodations, compared to what is provided to sighted employees, can these extra costs be considered subsidies to reduce countable monthly wages to \$1,640 (i.e., the 2010 SGA amount for the legally blind) or less? Current policy does not specifically address this issue. However, it would appear that the same rationale for finding a subsidy with job coach services, or rebutting the presumption of SGA based on special circumstances, would apply here.

3. Business-Related Expenses Deducted

A person who is self-employed can deduct reasonable business expenses such as rent, utilities, car expenses, supplies, or a telephone bill. SSA will also deduct the reasonable value of any unpaid help furnished by a spouse, children or others; and unincurred business expenses paid by another individual or agency. If the business is run out of the home, consider allocating a portion of household expenses to the business. If the person has filed a tax return, SSA should ordinarily look at annual net income, after business-related deductions, and divide by 12 to determine what amount of monthly income is measured against the SGA rule.⁶²

4. Impairment-Related Work Expenses Deducted

Impairment-related work expenses (IRWEs) are the reasonable cost of items and services that, because of an impairment, one needs and uses in order to work.⁶³ This includes items

⁵⁹ Americans with Disabilities Act, 42 U.S.C. §§ 12112 *et seq.*

⁶⁰ Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

⁶¹ See *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd without opinion*, 732 F.2d 146 (3rd Cir. 1984), *cert denied*, 469 U.S. 1188 (1985).

⁶² 20 C.F.R. §§ 404.1575(c), 416.975(c).

⁶³ 20 C.F.R. §§ 404.1576, 416.976; POMS DI 10520.001 *et seq.*, SI 00820.540.

such as attendant care, medical or prosthetic devices, drugs, medical services, residential modifications, and special transportation.

To be deductible, the expense must meet a three-part test:

1. It must be paid by the worker and not paid or reimbursed by another source;
2. It must relate to the individual's disability; and
3. Without it, the person must be unable to work.⁶⁴

A medical expense can be deducted as an IRWE even if it would be incurred in the absence of employment. The test is whether the person could work without paying the expense. For example, a person can deduct the cost of anticonvulsant medication as an IRWE, even though this medication would be required in any event to prevent seizures.⁶⁵

- Many assistive technology or specialized equipment expenses could qualify as IRWEs. These include:
 - transportation expenses for persons who are mobility impaired (e.g., hand controls or a hydraulic lift for a vehicle);
 - construction of ramps or lifts to allow a person to leave the home;
 - purchase of a telecommunication device for a person who is deaf to perform work in an office or from home; and
 - specialized or modified office equipment (e.g., desks, phones, or computers) to work in an office or from home.

Consider Sharon, an SSDI beneficiary who uses a wheelchair. She works part-time, earns \$1,150 per month, and must pay a driver \$300 per month to take her to and from work. This expense is deductible as an IRWE because it meets the three-part test: she pays the driver; the service is related to her disability; and she could not work if she did not pay this expense. Sharon's countable wages will be \$850 per month (\$1,150 - 300). Since her wages after IRWE deductions are less than \$1,000 monthly, she is not performing SGA.

D. The Trial Work Period

The TWP is any nine months, within a rolling 60-month period, during which SSDI beneficiaries may test their ability to work, without losing benefits.⁶⁶ During the TWP, the SGA rule will not apply. The beneficiary can keep both the paycheck and the disability check, no matter how high the paycheck is.

⁶⁴ 20 C.F.R. §§ 404.1576(b), 416.976(b). If the expense was paid by the employer or some third party, it may qualify as a subsidy in some circumstances. See part IV.C.2, above.

⁶⁵ 20 C.F.R. §§ 404.1576(c)(5), 416.976(c)(5).

⁶⁶ 42 U.S.C. § 422(c); 20 C.F.R. § 404.1592; POMS DI 13010.035 *et seq.* See 20 C.F.R. § 404.1585, concerning the trial work period for persons age 55 or older who are legally blind.

The work itself, when performed during the TWP, cannot be used to show medical improvement until the nine-month TWP is completed.⁶⁷ As noted earlier, effective January 1, 2002, the work activity of an SSDI beneficiary, who has received benefits for at least 24 months, cannot be used as evidence that the person is no longer disabled even if the work occurs after the TWP.⁶⁸

The nine months of the TWP need not be consecutive. Any month in which the person earns at least \$720 in 2010 will be a TWP “services” month. For the self-employed, a TWP month in 2010 is a month with either net earnings of more than \$720 or more than 80 work hours, regardless of the amount of earnings.⁶⁹ SSA will annually index the amount needed for a TWP month based on the National Wage Index. The amount will increase if the index for the previous year has increased. If the index stays the same or goes down, the TWP amount will continue unchanged.⁷⁰

The TWP will be computed under a 60-month rolling period.⁷¹ When a person works enough to be credited with nine TWP months, SSA will count back 60 months (including the present month) to determine whether the nine TWP months have been worked during that period. If not, SSA will wait until the next TWP month is worked to determine if nine TWP months were completed during the rolling 60-month period.

An SSDI beneficiary is allowed one TWP during a period of entitlement to cash benefits.⁷² The rules allow more than nine TWP months so long as the person does not have nine within any period of 60 months. However, once the person works nine TWP months within a 60-month period, the TWP is completed and a second TWP will not be allowed during that period of entitlement to cash benefits. As will be discussed later, effective January 1, 2002, the new expedited reinstatement rules allow for a new TWP after the person receives reinstated benefits for 24 months.⁷³

Example. This example illustrates how the TWP rules operate: *Mary began collecting SSDI benefits in 2001. She worked two TWP months in January and February 2003; worked four TWP months in April through July 2007; and worked three more in October through December 2008.*

Mary has not used up her TWP. As of July 2007, she had worked six TWP months. When she works again in October 2008, we look to see if she now has worked nine TWP months within a 60-month period — in this case covering November 2004 through October 2008. Since the only other months in that period are the four she worked in 2007, October 2008 is her fifth TWP month. After working in November and December 2008, Mary has used up seven TWP months and would have two months left.

⁶⁷ 42 U.S.C. § 404.1592(a).

⁶⁸ See part III.B.1, above.

⁶⁹ 20 C.F.R. § 404.1592(b).

⁷⁰ 20 C.F.R. § 404.1592(b)(1)(ii),(b)(2)(ii).

⁷¹ 42 U.S.C. § 422(4).

⁷² 20 C.F.R. § 404.1592(c).

⁷³ See part IV.G, below.

What if Mary doesn't work again until late 2009 and then works (and earns at least \$700) in November and December 2009? Now Mary has worked nine TWP months within a 60-month period and her TWP will be completed.

Table I illustrates Mary's TWP within the rolling 60-month period:

Year	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
2003	TWP Month	TWP Month	-----								
2004	----- No TWP Months During the Year -----										
2005	----- No TWP Months During the Year -----										
2006	----- No TWP Months During the Year -----										
2007	-----		TWP Month	TWP Month	TWP Month	TWP* Month	-----				
2008	-----								TWP Month	TWP Month	TWP** Month
2009	-----									TWP Month	TWP*** Month

Comments:

* Sixth TWP month within 60-month period ending 7/07 (i.e., 8/02-7/07). TWP continues.

** A 9th TWP month, but only 7th TWP month within 60-month period ending 12/08 (i.e., 1/04-12/08). TWP continues.

*** The 9th TWP month within 60-month period ending 12/09 (i.e., 1/05-12/09). TWP is completed.

Moving from Policy to Practice. Practitioners should use a tracking worksheet, like the one used for Mary, whenever working with an SSDI beneficiary who is employed. The tracking worksheet, which is available by calling the NY Makes Work Pay "Toll-free Work Incentives Hotline,"⁷⁴ allows the practitioner to track the use of trial work months and the EPE over time.

How long will benefits continue if Mary finishes her TWP in December 2009 and is earning more than the SGA amount in January 2010? In that case, entitlement ends three months after the ninth TWP month. The first time Mary performs SGA following the TWP, she will be eligible for three more months of benefits, i.e., the "cessation month" plus two additional months (i.e., the "three-month grace period"). In Mary's case, these happen to

⁷⁴ Readers call the Work Incentives Hotline, toll-free, at 1-888-224-3272.

be the first three months of the EPE. An SSDI beneficiary who goes to work for the first time and earns more than the monthly SGA amount can receive both an SSDI check and a paycheck for 12 consecutive months.⁷⁵

The TWP for individuals who are legally blind and under age 55 is the same as the TWP for non-blind individuals. If the blind individual age 55 or older became entitled to disability benefits while engaging in noncomparable SGA, he or she is entitled to a TWP only if the individual later returns to SGA that requires skills or abilities comparable to those required in the work he or she regularly did before he or she became blind or became 55 years old, whichever is later; or the individual's last previous work ended because of an impairment and the current work requires a significant vocational adjustment.⁷⁶

This example illustrates how the TWP and SGA rules operate when an individual is blind:

John was an accountant throughout his work life. John lost his vision when he was in his early 50's. John received SSDI for several years, until he was 57. At age 57, John returned to private practice as a self-employed accountant and used all of the skills he used prior to attaining age 55. John also made a significant net profit from his business (averaging \$2,500 net per month), even after considering all work incentives for self-employed individuals such as unpaid help, and unincurred business expenses. John continued to average \$2,500 or more, as net income from self employment, over the next five years. When John returned to work, SSA determined that he was engaging in comparable SGA. John's work was substantial, and utilized the skills he had used prior to attaining age 55 and blindness.

John was eligible for a TWP, since this was his first comparable work attempt after entitlement and attaining age 55. John had not used his TWP previously. Since John continued to work above the blind SGA level, after his nine-month TWP, using the skills he used prior to attainment of age 55, the first month of the EPE was his benefit cessation month. John was eligible for an SSDI check for that month and the next two months (i.e., the grace period). Thereafter, since John continued to perform SGA he was not entitled to benefits again during the remainder of his EPE.

Following the end of John's 36-month EPE, since John continued to perform SGA his benefits were terminated. If John again stops working, or reduces his work to below the SGA level prior to the time he attains full retirement age, he may use the expedited reinstatement provisions⁷⁷ to ensure reinstatement of his benefits without a new application.

⁷⁵ 20 C.F.R. §§ 404.1592(e), 404.1592a(a); POMS DI 13010.210.

⁷⁶ POMS DI 41001.025

⁷⁷ See part IV.G, above.

E. The Extended Period of Eligibility

The 36-month EPE, or reentitlement period, allows the person to reestablish SSDI eligibility without either a new application for benefits or an application for expedited reinstatement, if work activity ceases or is significantly diminished during the 36 months following the TWP.⁷⁸ The 36 months run consecutively, immediately following the ninth TWP month, whether or not the person is performing SGA at the time.

During the EPE, the person will be entitled to an SSDI check for each month that wages are at or below the SGA level.⁷⁹ Averaging rules will apply only to determine the first time SGA occurs within the EPE.⁸⁰ The first month of SGA during the EPE is called the “cessation month.” The person will be eligible for SSDI benefits for that month and the following two months. This is true whether the month of SGA is the first month of the EPE or some later month of that 36-month period. Thereafter, during the remainder of the EPE, the person will not receive benefits for any month in which he or she performs SGA. The person will receive benefits for any month in which he or she does not perform SGA (i.e., earns \$1,000 or less in 2010).

F. Illustrations of Trial Work Period and Extended Period of Eligibility

The following example illustrates the TWP and EPE rules when impairment related work expenses (IRWEs) are involved:

Jennifer, who has a spinal cord injury and uses a wheelchair, receives \$1,050 in monthly SSDI. It is September 2010 and she has worked the past eight months earning \$1,250 gross per month as a part-time paralegal, her first work as an SSDI beneficiary. She must pay a driver \$200 per month to take her to and from work. To allow her to safely leave the home for work without assistance, she has two doorways widened and a ramp constructed at her home at a cost of \$4,800 which she will pay in 24 monthly payments of \$200 starting in October 2010.

Jennifer has been able to keep SSDI the past eight months because she is still within her nine-month TWP. Will she be able to keep her SSDI checks as she moves into her EPE?

The answer is yes. Jennifer’s TWP will end in September 2010. Her EPE will start in October 2010 and run through September 2013. Since the home improvement and transportation payments will qualify as IRWEs, this combined \$400 expense will allow Jennifer to reduce her countable earnings from \$1,250 to \$850 effective the first month of her EPE.⁸¹

⁷⁸ 20 C.F.R. § 1592a; POMS DI 13010.210 *et seq.*

⁷⁹ See part IV.E., below.

⁸⁰ 20 C.F.R. § 404.1592a(a); POMS DI 13010.210 D.

⁸¹ Under IRWE policy, installment payments can be deducted each month during the term of the loan or installment contract. 20 C.F.R. § 404.1576(e)

Assuming her wages do not increase, her countable wages will remain well below the SGA level through September 2012.

Let us assume the SGA level stands at \$1,020 in 2011, \$1,040 in 2012, and \$1,070 in 2013, based on future indexing.⁸² After she finishes paying for the home improvements, Jennifer's IRWEs, effective October 2012, will be reduced to \$200 per month for transportation-related expenses and her countable earnings will be \$1,050 per month. At that point, Jennifer will perform her first month of SGA during the EPE (i.e., countable earnings would be more than the projected 2012 level of \$1,040). As her first month of SGA, Jennifer will be entitled to SSDI checks for that month (i.e., her "cessation month") and the two following months. Thus, she would be eligible for benefits during an October through December 2012 grace period.

If Jennifer's wages do not increase during 2013, and her IRWEs remain at \$200, she will continue to be eligible for SSDI throughout the year as her countable wages (\$1,050) will be at or below the new, 2013 SGA level of \$1,070. Through September 2013, she will be eligible under EPE rules, as her countable income would be below the SGA level. Since her countable earned income remains at or below the SGA level as her EPE ends, she remains eligible for SSDI at least through December 2013.

Moving from Policy to Practice. A practitioner needs to review a beneficiary's earnings record, known as the Benefits Planning Query Yearly (BPQY), to ensure that the information in it is correct, to ascertain whether the individual has used up his/her TWP and if so, ensure that the EPE rules have been properly applied.

G. Expedited Reinstatement of SSDI

Under pre-2001 law, a person who performed SGA after the EPE would lose SSDI benefits. If the person later lost a job or had wages reduced below the SGA level, he or she would have to reapply to re-establish eligibility. This prospect of a new application, with the uncertainty of whether a new decision maker would find the person disabled, made many beneficiaries pause at the notion of taking a chance at work that might not be successful in the long term. The new expedited reinstatement (EXR) program, which was effective January 2001, should make more beneficiaries willing to try working, knowing they may reestablish eligibility if their work is not sustained because of their disability.⁸³

These provisions protect a person who performs SGA after the EPE and later has wages reduced below the SGA level for any reason. The EXR provisions allow SSDI to be reinstated, without a new application, if the person:

- a) was eligible for SSDI;
- b) lost SSDI due to performance of SGA;

⁸² See 20 C.F.R. § 404.1574(b)(2)(ii).

⁸³ 20 C.F.R. §§ 404.1592b – 404.1592f.

- c) requests reinstatement within 60 months of the last month of entitlement, or, if the request is filed after 60 months, establishes good cause for missing the deadline;
- d) has a disability that is the same as (or related to) the physical or mental disability that was the basis for their original claim; and
- e) that disability renders him or her incapable of SGA based on application of the medical improvement standard.⁸⁴

If a person believes he or she meets these criteria, the person should contact SSA to request reinstatement. SSA has issued policy instructions, outlining the EXR criteria and procedures to be followed by local offices.⁸⁵ The instructions also include an EXR request form.⁸⁶

If the beneficiary satisfies the EXR criteria, both the beneficiary's benefits and the benefits of dependents can be reinstated. Dependent's benefits, including benefits for children and spouses, can be reinstated if a dependent satisfies all eligibility criteria as a dependent (this includes having a new medical determination if the dependent's entitlement is based on being disabled). Both previously entitled dependents and new dependents will have to file an application to qualify for reinstated benefits.⁸⁷

1. Provisional Benefits Pending Expedited Reinstatement Decision

While the EXR request is pending, a person is eligible for up to six consecutive months of provisional benefits, which are payable when EXR is requested.⁸⁸ The person may also be eligible for Medicare while receiving provisional benefits, if not already covered for such benefits. Performing SGA will terminate provisional benefits, but will not preclude approval of the EXR application.

What happens if SSA pays provisional benefits and later determines the person was not entitled to reinstatement? Must the person repay the provisional benefits? SSA's policy states that any resulting overpayment cannot be recovered unless SSA determines that the person knew or should have known he or she did not meet the EXR criteria.⁸⁹

⁸⁴ 42 U.S.C. § 423(i); 20 C.F.R. § 404.1592c. For a very extensive discussion of this topic, see *Expedited Reinstatement of Social Security or SSI Disability Benefits*, available at http://www.ilr.cornell.edu/edi/publications/PPBriefs/PP_28.pdf.

⁸⁵ POMS DI 13050.001 *et seq.*; DI 28057.001 *et seq.*

⁸⁶ POMS DI 13050.105; DI 28057.100 *et seq.*

⁸⁷ POMS DI 28057.001 B.4.

⁸⁸ 42 U.S.C. § 423(i)(7); 20 C.F.R. § 404.1592e; POMS DI 13050.025.

⁸⁹ 42 U.S.C. § 423(i)(7)(D); 20 C.F.R. § 404.1592e(h); POMS DI 13050.080 A.1.a.

2. Effective Month of SSDI Reinstatement

Many former SSDI beneficiaries will not immediately file an EXR request in the month they stop performing SGA. This may be because they expect to go right back to work or it may be because they are not aware of the EXR provisions. The good news is that expedited benefits may be awarded retroactively, up to 12 months prior to the date of the EXR request.⁹⁰

Example. *John was receiving SSDI benefits of \$900 per month. He completed his TWP in June 2006 and completed his EPE in June 2009. His SSDI benefits were terminated in July 2009 because he was performing SGA at that time. John performs SGA throughout the remainder of 2009, then continues performing SGA through June 2010.*

In July 2010, John's hours are reduced and his gross pay is reduced to \$600 per month. John continues earning at \$600 level throughout the remainder of 2010. John's disability continues to be the same or related to the disability that was the basis for his original claim, with that disability rendering him unable to perform SGA under the medical improvement review standard.

In January 2011, John is still working at the \$600 level when he attends a benefits seminar and learns about the EXR provisions. That same day he goes to his SSA office and files an EXR request. Provisional benefits are paid beginning with the month of January 2011. Since he meets the criteria, his EXR request is approved in late March 2011 (after John had received provisional benefits in January, February, and March 2011. Can SSA award reinstated benefits retroactively?

In John's case, SSA will award EXR benefits, retroactively, to the earliest month of the 12-month period immediately preceding his EXR request in which he met all the requirements for reinstated benefits. This means that John will have his benefits reinstated as of July 2010, the first month in the 12-month period prior to the EXR request that his earnings level was below SGA. The amount of past due payments will be offset by the provisional benefits John received for January, February and March 2011. Since his reinstated benefit amount will usually be paid at the same level as the last time he received an SSDI check, plus applicable cost of living increases, John can expect to receive a check for about \$5,400 (i.e., six months at \$900 per month).

3. New Trial Work Period and Extended Period of Eligibility

For years, SSDI beneficiaries were told they would get one TWP and one EPE, which could be exhausted at very low levels of earnings. In fact, the EPE could be exhausted whether the person was working or not. This has changed under the new EXR program.

⁹⁰ 20 C.F.R. § 404.1592f(a).

After being paid 24 months of reinstated benefits which need not be consecutive (including any months for which provisional and retroactive payments were actually received), the beneficiary gets: a new TWP; a new EPE; and another 60 month period in which to request EXR if benefits are terminated again due to SGA.⁹¹

4. Application of Expedited Reinstatement with Second Trial Work Period and Extended Period of Eligibility

Under the EXR program, a person may be reinstated well after exhausting the TWP and EPE, and even if the person has performed SGA for many months or even years. The following example illustrates this change:

Example. *Tom performed SGA throughout his TWP and EPE. He completed his TWP in December 2005 and completed his EPE in December 2008. He continues to perform SGA, earning \$1,100 monthly January through December 2009 and his SSDI benefits are terminated. He stops working in early January 2010 because his disability worsens. Tom's disability is the same or worse than at the time of his original claim for SSDI and renders him incapable of SGA under SSA's medical improvement criteria.*

Tom can apply for reinstatement as early as January 2010 or within 60 months of the last month he was entitled to benefits. While his expedited reinstatement application is pending, Tom is eligible for up to six months of "provisional benefits." Based on the facts presented, he would appear to be eligible for reinstatement effective January 2010.

Now let's assume that Tom is awarded reinstated benefits, retroactive to January 2010, and receives SSDI checks through the remainder of 2010 and 2011 (i.e., for at least 24 months). He returns to work in January 2012 and earns more than \$1,400 gross monthly throughout 2012, with no deductions for IRWEs or subsidies. We will assume this will be more than the SGA amount for 2012.

Under EXR rules, Tom will be entitled to a new TWP, starting January 2012, as he has received at least 24 months of reinstated benefits. This means Tom is entitled to both his paycheck and his SSDI check for the nine-month period, January through September 2012. His new EPE will start in October 2012 and run through September 2015. Tom will be entitled to SSDI checks during the first three months of the EPE, October through December 2012 (i.e., the benefit cessation month plus the next two months).

H. Continuing Medicare Eligibility While Individual is Working

If the SSDI beneficiary works despite a continuing disability, Medicare eligibility will continue throughout the nine-month TWP as the person continues to receive SSDI benefits. Medicare Part A eligibility will continue to be automatic; Part B will be optional and

⁹¹ 42 U.S.C. § 423(i)(6); 20 C.F.R. § 404.1592f(e); POMS DI 13050.035 C.4.

subject to the same premium payment; Part D will also be optional and subject to certain out-of-pocket expenses.

After the end of the TWP, if the person's disability continues, Medicare coverage can be extended for at least 93 months. Effective October 1, 2000, section 202 of Ticket to Work and Work Incentives Improvement Act of 1999 increased the duration of the Extended Period of Medicare Coverage from its previous duration of 39 months.⁹² During this extended period, Part A will continue to be automatic and Parts B and D will continue to be optional, subject to a premium payment and/or other out-of-pocket costs.⁹³

An individual who exhausts the TWP and Extended Period of Medicare Coverage may be able to continue Medicare eligibility through a "buy-in" program. He or she must continue to be disabled and the loss of SSDI must be due solely to earnings that exceed the SGA amount. Medicare eligibility can continue indefinitely so long as the individual continues to be disabled and pays the enrollment premiums.⁹⁴

V. Conclusion

This policy to practice brief has focused on Social Security Disability Insurance benefits, Medicare and the effect of work on those benefits. Readers are reminded that since 2001, with the changes to the criteria governing substantial gainful activity, the TWP, and the EPE, along with the introduction of the expedited reinstatement provisions, SSDI beneficiaries have had powerful incentives to consider work. Coupled with the elimination of the work-triggered continuing disability review in January 2002, these new and improved work incentives have reduced much of the risk and uncertainty that traditionally made individuals shy away from attempts to work. We hope this policy to practice brief will help practitioners assist SSDI recipients to take advantage of them.

⁹² 42 U.S.C § 426(b); POMS HI 00820.025. Because of the way that 42 U.S.C. § 426(b) is written, the extended Medicare period could continue far beyond the 93-month period following the trial work period.

⁹³ POMS DI 280055.001 B.

⁹⁴ 42 U.S.C. § 1395i-2a; 20 C.F.R. § 404.1574(b)(2).

Notes



Notes

Notes



www.NYMakesWorkPay.org

Contact Information

Employment and Disability Institute
ILR School / Cornell University
201 Dolgen Hall
Ithaca, New York 14853-3901
607.255.7727 (voice)
607.255.2891 (tty)
607.255.2763 (fax)
ilr_edi@cornell.edu
www.edi.cornell.edu

Partnering Organizations

New York State Office Of Mental Health
Employment and Disability Institute (Cornell University)
Burton Blatt Institute (Syracuse University)

Alternate Formats

This publication is available in alternate formats. To request an alternate format, please contact us using the information provided above. This series of briefs are also available online in both text and pdf formats. They are located at www.NYMakesWorkPay.org.