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4191-02U

## SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404, 411, and 416

[Docket No. SSA-2014-0016]

RIN 0960-AH66

### Unsuccessful Work Attempts and Expedited Reinstatement Eligibility

AGENCY: Social Security Administration.

ACTION: Notice of Proposed Rulemaking.

**SUMMARY:** We propose to remove some of the requirements for evaluation of an unsuccessful work attempt (UWA) that lasts between 3 and 6 months. We also propose to allow previously entitled beneficiaries to apply for expedited reinstatement (EXR) in the same month they stop performing substantial gainful activity (SGA). Provisional benefits will begin the month after the request for EXR if the beneficiary stops performing SGA in the month of the EXR request. These changes would simplify our policies and make them easier for the public to understand.

**DATES:** To ensure that your comments are considered, we must receive them no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by any one of three methods—Internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA-2014-0016 so that we may associate your comments with the correct regulation.

**CAUTION:** You should be careful to include in your comments only information

that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. Internet: We strongly recommend that you submit your comments via the Internet. Please visit the Federal eRulemaking portal at <http://www.regulations.gov>. Use the Search function to find docket number SSA-2014-0016. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each comment manually. It may take up to a week for your comment to be viewable.

2. Fax: Fax comments to (410) 966–2830.

3. Mail: Mail your comments to the Office of Regulations and Reports Clearance, Social Security Administration, 3100 West High Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Comments are available for public viewing on the Federal eRulemaking portal at <http://www.regulations.gov> or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Kristine Erwin-Tribbitt, Office of Retirement and Disability Policy, Office of Research, Demonstration, and Employment Support, Social Security Administration, 6401 Security Boulevard, Robert Ball Building 3-A-26, Baltimore, MD 21235-6401, (410) 965-3353. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

## SUPPLEMENTARY INFORMATION:

### SGA and UWA

To be eligible for disability benefits, an individual must be unable to engage in any SGA.<sup>1</sup> SGA is work activity that is both substantial and gainful.<sup>2</sup> Work activity is substantial if it involves the performance of significant physical or mental activities.<sup>3</sup> "Gainful work activity" is work done for pay or profit, or if it is the kind of work usually done for pay or profit, whether or not a profit is realized.<sup>4</sup> We will not determine that an individual is disabled or continues to be disabled if he or she is able to perform SGA.

We use several rules to decide whether an individual has performed SGA. Generally, our first consideration in evaluating work activity will be the earnings derived from the work activity.<sup>5</sup> We use earnings guidelines to evaluate whether work activity is SGA.<sup>6</sup> We ordinarily consider an individual who is earning more than a certain monthly amount to be engaged in SGA.<sup>7</sup> For the self-employed, we consider income or the value of the individual's activities to the business when determining whether he or she engaged in SGA.<sup>8</sup>

Disability evaluation is generally concerned with the ability to work over an extended period rather than in short, isolated periods. Disability claimants and beneficiaries may attempt to return to work and engage in SGA following a break in the continuity of their work. For SGA determination purposes, we may disregard work in

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<sup>1</sup> 42 U.S.C. 223(d)(1), 42 U.S.C. 1382c(a)(3)(A).

<sup>2</sup> 20 CFR 404.1572 and 416.972.

<sup>3</sup> 20 CFR 404.1572(a) and 416.972(a).

<sup>4</sup> 20 CFR 404.1572(b) and 416.972(b).

<sup>5</sup> 20 CFR 404.1574(a)(1) and 416.974(a)(1).

<sup>6</sup> Id.; see also 20 CFR 404.1574(b) and 416.974(b).

<sup>7</sup> 20 CFR 404.1574(b)(2) and 416.974(b)(2).

<sup>8</sup> 20 CFR 404.1575(a)(2) and 416.975(a).

employment or self-employment if a claimant or beneficiary, after working for a period of 6 months or less, stops working or reduces the amount of work so that the earnings fall below the SGA level because of the original impairment or the removal of special conditions that were essential to the performance of his or her work, and if there was a significant break in the continuity of work before this work attempt.<sup>9</sup> We call this a UWA. Earnings from a UWA will not show that a claimant or beneficiary is able to do SGA.<sup>10</sup> For purposes of the Social Security disability program under title II of the Act, we apply UWA policies when we determine initial entitlement to benefits as well as after approval for benefits. For purposes of the Supplemental Security Income (SSI) program under title XVI of the Act, we apply UWA only when determining initial entitlement to benefits.

Under our current rules, we evaluate the success of a work attempt by its duration. We look at work attempts lasting less than 3 months and those lasting between 3 and 6 months. We consider work of 3 months or less to be a UWA if the claimant or beneficiary stopped working or reduced the work and earnings below the SGA earnings level because of the claimant or beneficiary's impairment, or because of the removal of special conditions which took into account the claimant or beneficiary's impairment and permitted the claimant or beneficiary to work. In contrast, to qualify as a UWA, we require the work attempt to last between 3 and 6 months to meet the same conditions for work attempts lasting 3 months or less and to also meet several additional conditions. The claimant or beneficiary must also have: (1) been frequently absent from work because of his or her impairment, (2) performed the work unsatisfactorily because of his or her

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<sup>9</sup> 20 CFR 404.1574(c) and 416.974(c).

<sup>10</sup> 20 CFR 404.1574(a)(1) and 416.974(a)(1).

impairment, (3) worked during a period of temporary remission of his or her impairment, or (4) worked under special conditions essential to his or her performance and those conditions were removed.<sup>11</sup>

We propose to revise 20 CFR 404.1574(c), 404.1575(d), 416.974(c), and 416.975(d) to remove the additional conditions that we use when evaluating a work attempt in employment or self-employment that lasts between 3 and 6 months. We propose to use the current 3-month standards for all work attempts that are 6 months or less. This change would apply to Social Security Disability Insurance (SSDI) and SSI claimants and beneficiaries.<sup>12</sup>

Under the current rule, when an individual works between 3 and 6 months, we are required to perform additional development to determine if any of the additional conditions are met. This additional step delays case processing, in part, because we must contact the individual's employer and physician for information to support the individual's claim. Our proposed changes would result in simplified case processing and faster and better determinations and decisions.

#### EXR Eligibility and Provisional Benefits

Previously entitled individuals may request EXR within 60 months of their prior termination of benefits if their medical condition no longer permits them to perform SGA. To qualify for EXR, a previously entitled individual must be unable to perform SGA due to an impairment that is the same as or related to an impairment that was the basis for the previous entitlement.<sup>13</sup> The standard for evaluating disability on an EXR claim may be more advantageous to the claimant than the standard for evaluating

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<sup>11</sup> 20 CFR 404.1574(c)(4) and 416.974(c)(4).

<sup>12</sup> 20 CFR 404.1574 (c)(3)and 416.974 (c)(3).

<sup>13</sup> 20 CFR 404.1592c and 416.999a.

disability on a completely new claim for benefits.<sup>14</sup> EXR applies to both SSDI and SSI programs.

Currently, our regulations state that individuals are not eligible for EXR if they perform SGA during the month in which they apply for EXR.<sup>15</sup> In many cases, a previously entitled individual will request EXR in the same month that he or she stopped working. However, since earnings already exceeded SGA for that month, the individual is not eligible to file for EXR until the following month. In such cases, we are required to deny the EXR request, and the individual can request EXR in the following month.

We propose to revise 20 CFR 404.1592c and 416.999a to allow previously entitled individuals to request EXR in the same month they stop performing SGA. This change would apply to SSDI and SSI claimants and beneficiaries. This change would make requesting EXR easier as we will be able to accept the request at first contact. It would also allow us to forward the individual's file immediately for a medical determination, reducing wait time and the possibility of a gap in benefit payments.

For a beneficiary who has requested EXR, provisional benefits are available for a period of up to 6 months while we make a reinstatement determination.<sup>16</sup> We stop paying provisional benefits when we send a notice of our determination on reinstatement, when the individual performs SGA, when the individual attains full retirement age, or when we have paid 6 months of provisional benefits. We also propose to revise 20 CFR 404.1592e(a)(1) to clarify that provisional benefits will begin the month after the individual files a request for EXR if the individual stops performing SGA in the month of request.

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<sup>14</sup> 20 CFR 404.1592b and 416.999.

<sup>15</sup> 20 CFR 404.1592c and 416.999a.

<sup>16</sup> 20 CFR 404.1592e.

### Clarity of This Rule

Executive Order 12866 requires each agency to write all rules in plain language.

In addition to your substantive comments on this proposed rule, we invite your comments on how to make rules easier to understand.

For example:

- Would more, but shorter, sections be better?
- Are the requirements in the rule clearly stated?
- Have we organized the material to suit your needs?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?
- Does the rule contain technical language or jargon that is not clear?
- Would a different format make the rule easier to understand, e.g. grouping

and order of sections, use of headings, paragraphing?

### Regulatory Procedures

#### Executive Order 12866

We consulted with the Office of Management and Budget (OMB) and determined that this proposed rule meets the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563, and was subject to OMB review.

#### Regulatory Flexibility Act

We certify that this proposed rule will not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as

amended.

Paperwork Reduction Act

This rule does not create any new or affect any existing collections and, therefore, it does not require Office of Management and Budget approval under the Paperwork Reduction Act.

(Catalog of Federal Domestic Assistance Program Nos. 9601, Social Security – Disability Insurance; 96.006, Supplemental Security Income; 96.008, Social Security – Work Incentives Planning and Assistance Program.)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Reporting and recordkeeping requirements, Social security, Vocational rehabilitation.

20 CFR Part 416

Administrative practice and procedure, Medicaid, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Vocational rehabilitation.

Dated: March 14, 2016.

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Carolyn W. Colvin,  
Acting Commissioner of Social Security.

For the reasons set out in the preamble, we propose to amend 20 CFR part 404 subpart P and 20 CFR part 416 subpart I as set forth below:

**PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE**

**Subpart P—Determining Disability and Blindness**

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

Authority: Secs. 202, 205(a)-(b) and (d)-(h), 216(i), 221(a), (i), and (j), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a)-(b) and (d)-(h), 416(i), 421(a), (i), and (j), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104-193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108-203, 118 Stat. 509 (42 U.S.C. 902 note).

2. Amend §404.1574 by revising the first sentence of paragraph (c)(1), revising paragraph (c)(3), removing paragraph (c)(4), and redesignating paragraph (c)(5) as (c)(4).  
The revisions read as follows:

§404.1574 Evaluation guides if you are an employee.

\* \* \* \* \*

(c) \* \* \*

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

\* \* \* \* \*

(3) If you worked 6 months or less. We will consider work of 6 months or less to be an unsuccessful work attempt if you stopped working or you reduced your work and earnings below the substantial gainful activity earnings level because of your impairment or because of the removal of special conditions that took into account your impairment and permitted you to work.

\* \* \* \* \*

3. Amend §404.1575 by revising the first sentence of paragraph(d)(1), revising paragraph (d)(3), removing paragraph (d)(4), and redesignating paragraph (d)(5) as (d)(4).

The revisions read as follows:

§404.1575 Evaluation guides if you are self-employed.

\* \* \* \* \*

(d) \* \* \*

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

\* \* \* \* \*

(3) If you worked 6 months or less. We will consider work of 6 months or less to be an unsuccessful work attempt if you stopped working or you reduced your work and earnings below the substantial gainful activity earnings level because of your impairment or because of the removal of special conditions that took into account your impairment

and permitted you to work.

\* \* \* \* \*

5. Amend §404.1592c by revising paragraph (a)(4)(i) and (c)(2) to read as follows:

§404.1592c Who is entitled to expedited reinstatement?

(a) \* \* \*

(4) \* \* \*

(i) You are not able or become unable to do substantial gainful activity because of your medical condition as determined under paragraph (c) of this section;

\* \* \* \* \*

(c) \* \* \*

(2) You are not able or become unable to do substantial gainful activity in the month you file your request for reinstatement; and

\* \* \* \* \*

6. Amend §404.1592e by revising paragraph (a)(1) to read as follows:

§404.1592e How do we determine provisional benefits?

(a) \* \* \*

(1) We will pay you provisional benefits, and reinstate your Medicare if you are not already entitled to Medicare, beginning with the month you file your request for reinstatement under § 404.1592c(a) if you do not perform substantial gainful activity in that month. We will pay you provisional benefits, and reinstate your Medicare if you are not already entitled to Medicare, beginning with the month after you file your request for reinstatement under § 404.1592c(a) if you perform substantial gainful activity in the

month in which you file your request for reinstatement.

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

### Subpart I—Determining Disability and Blindness

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

Authority: Secs. 221(m), 702(a)(5), 1611, 1614, 1619, 1631(a), (c), (d)(1), and (p), and 1633 of the Social Security Act (42 U.S.C. 421(m), 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), (d)(1), and (p), and 1383 (b); secs. 4(c) and 5, 6(c)-(e), 14(a), and 15, Pub. L. 98-460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, and 1382h note).

14. Amend §416.974 by revising paragraph (c)(3), removing paragraph (c)(4), and redesignating paragraph (c)(5) as (c)(4).

The revisions read as follows:

#### §416.974 Evaluation guides if you are an employee.

\* \* \* \* \*

(c) \* \* \*

(3) If you worked 6 months or less. We will consider work of 6 months or less to be an unsuccessful work attempt if you stopped working or you reduced your work and earnings below the substantial gainful activity earnings level because of your impairment or because of the removal of special conditions that took into account your impairment

and permitted you to work.

\* \* \* \* \*

15. Amend §416.975 by revising paragraph (d)(1) and (3), removing paragraph (d)(4), and redesignating paragraph (d)(5) as (d)(4).

The revisions read as follows:

§416.975 Evaluation guides if you are self-employed.

\* \* \* \* \*

(d) \* \* \*

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

\* \* \* \* \*

(3) If you worked 6 months or less. We will consider work of 6 months or less to be an unsuccessful work attempt if you stopped working or you reduced your work and earnings below the substantial gainful activity earnings level because of your impairment or because of the removal of special conditions that took into account your impairment and permitted you to work.

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16. Amend §416.999a by revising paragraph (a)(4)(i) and (c)(2) to read as follows:

§416.999a Who is eligible for expedited reinstatement?

(a) \* \* \*

(4) \* \* \*

(i) You are not able or become unable to do substantial gainful activity because of your medical condition as determined under paragraph (c) of this section.

\* \* \* \* \*

(c) \* \* \*

(2) You are not able or become unable to do substantial gainful activity in the month you file your request for reinstatement; and

\* \* \* \* \*

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