§119 Summary and Exceptions

As you can see, determining disability involves a multi-step reasoning process. The one-step "he can't work" sort of argument won't get you very far. Common sense can be applied only where there isn't a regulation or Social Security Ruling to the contrary.

Two Main Routes to Disability Finding

The sequential evaluation process provides two main routes for a finding of disability. One route involves a purely medical determination that the claimant's impairment meets or medically equals an impairment described in the Listing of Impairments. The other route to a disability finding involves assessing a combination of medical and vocational factors that culminates at step 5 of the sequential evaluation process and, to one degree or another, uses the Medical-Vocational Guidelines.

Three Special Medical-Vocational Profiles

In addition, there are three other ways to be found disabled without completing the standard five-step sequential evaluation process. If a claimant fits one of three special medical-vocational profiles, the claimant is found disabled without proceeding to step five and without consulting the Medical-Vocational Guidelines. Indeed, for one of the three profiles, it is not even necessary to assess residual functional capacity. A claimant who fits this profile is found disabled by simply showing that he or she has a severe impairment. This profile, which is described at 20 C.F.R. § 404.1562(b), provides that a claimant is disabled who:

- Has a severe, medically determinable impairment;
- Is age 55 or older;
- Has an 11th grade education or less; and
- Has no past relevant work experience.

Another profile, known as the "worn-out worker," describes a claimant who:

- Has no more than a sixth grade education;
- Worked 35 years at arduous unskilled labor; and
- Is unable to do the arduous unskilled labor done in the past.

20 C.F.R. §§ 404.1520(g)(2) and 404.1562(a). *See also* SSR 82-63 and *Walston v. Sullivan*, 956 F.2d 768 (8th Cir. 1992). In effect, the worn-out worker is found disabled at step four with proof that he or she is incapable of performing past relevant work. An article by ALJ Peter J. Lemoine, "The Worn-Out Worker Rule Revisited," 49 West's Social Security Reporting Service 883, presents a well-reasoned analysis that demonstrates that the worn-out worker rule may be more useful than it may appear at first glance.

A claimant may have more formal education than sixth grade and still be considered to have marginal education if he or she functions at the marginal educational level. 20 C.F.R. § 404.1564(b). Even light work "if it demands a great deal of stamina or activity such as repetitive bending and lifting at a very fast pace" (SSR 82-63), may qualify as arduous. The 35 years of qualified work activity need not be continuous and may be interspersed with work activity that does not satisfy the "arduous unskilled labor" requirement. Not all prior work need be unskilled if work at higher skill level is isolated, brief, or remote, or if skills are not transferable. ALJ Lemoine points out that as long as there are 35 years of qualified employment that the claimant can no longer perform, the existence of an unskilled job in the past which the claimant retains the capacity to perform will not make the worn-out worker rule inapplicable.

The third medical-vocational profile, known as the "lifetime commitment" profile, does not appear in 20 C.F.R. § 404.1562. Instead, it appears only in the POMS (along with the other two profiles discussed above), but it is consistent with the principles stated in SSRs 82-63 and 85-15. Like the worn-out worker, this claimant is found disabled at step four with proof of inability to do past relevant work. POMS DI 25010.001B.3 provides:

> A finding of "disabled" will be made for persons who:
> - Are not working at SGA level, and
> - Have a lifetime commitment (30 years or more) to a field of work that is unskilled, or is skilled or semi-skilled but with no transferable skills, and

- Can no longer perform this past work because of a severe impairment(s), and
- Are closely approaching retirement age (age 60 or older), and
- Have no more than a limited education.

(*See* DI 25001.001 for the definitions of "limited education" and DI 24505.000 for a discussion of severe impairment.)

NOTE: To satisfy the requirement for this profile, the 30 years of lifetime commitment work does not have to be at one job or for one employer but rather work in one field of a very similar nature. If the person has a history of working 30 years or more in one field of work, the use of this profile will not be precluded by the fact that the person also has work experience in other fields, so long as that work experience in other fields is not past relevant work which the person is still able to perform.

Six Ways to Be Found Not Disabled

The regulations provide six possibilities for a finding of not disabled. A claimant is not disabled who:

- Is working at the SGA level;
- Has no medically determinable impairment;
- Has an impairment that does not significantly limit the physical or mental ability to do basic work activities;
- Fails to meet the duration requirement;
- Is capable of past relevant work;
- Is capable of other work.

Two Ways to Be Found Disabled But Not Eligible

There are two ways for a claimant to be found *not* disabled *after* the sequential disability evaluation process has been completed and SSA has concluded that the claimant is, in fact, disabled. This can happen when a claimant fails to follow prescribed treatment or when alcoholism or other drug abuse is a contributing factor material to the determination of disability. Although SSA itself never refers to these issues precisely this way, where they apply, you can view these issues as involving additional steps in the sequential evaluation process.

The regulations provide that SSA will not find a claimant disabled if the claimant, without good reason, does not follow prescribed treatment. 20 C.F.R. § 404.1530. Although the regulation doesn't say so, SSR 82-59 makes it clear that a determination finding a claimant not disabled on this basis is made only after SSA finds that the claimant is otherwise disabled. The treatment must be prescribed by the claimant's own physician and, according to SSR 82-59, this treatment must be "clearly expected to restore" the claimant's ability to work. *See* §278 of this book for additional information.

If drug addiction or alcoholism is "a contributing factor material to the determination of disability," a claimant will be found not disabled. 42 U.S.C. §§ 423(d)(2)(C) and 1382c(a)(3)(J). This issue is addressed only after it is determined that the claimant is disabled when considering all impairments, including any impairments involving drug addiction or alcoholism. 20 C.F.R. § 404.1535(a). Then SSA looks at the claimant's impairments again to consider whether the claimant would still be disabled if the claimant stopped using drugs or alcohol. 20 C.F.R. § 404.1535(b)(1). *See* §249 of this book for additional discussion. (Note that SSA has not amended its regulations after Congress provided that a claimant was not disabled if drug addiction or alcoholism is a contributing factor material to the determination of disability. Thus, regulations that deal with treatment requirements for claimants with drug addiction or alcoholism, 20 C.F.R. §§ 404.1536 to 404.1541, are not applicable.)

Non-Disability Requirements

As we shall see, there are other requirements, which have nothing to do with whether a claimant is disabled—SSA calls these "non-disability requirements"—that may be used by SSA to deny benefits. These issues, "insured status" for Social Security disability claims, and alien status and income/asset limitations for SSI claims, are supposed to be evaluated before SSA looks at medical issues (and they usually are), but sometimes a problem is caught when SSA is getting ready to pay benefits after SSA has already concluded that a claimant meets the disability requirements. *See* §§131, 132, and 136.

§120 Medical-Vocational Guidelines

In determining whether a claimant is capable of performing other work that exists in significant numbers, SSA decision makers are faced with the difficult task of weighing the relative importance of the factors for consideration identified by the Social Security Act: the claimant's remaining work capacity, known as residual functional capacity or RFC; age; education; and work experience, including whether or not the claimant has developed work skills transferable to other work within his or her RFC. Before 1979 SSA relied on vocational expert (VE) testimony to analyze these factors and determine how many jobs existed in the economy for a particular claimant. It was then up to the ALJ to determine whether the number of jobs identified by the vocational expert was "significant." As one might imagine, this procedure yielded disparate results, varying from VE to VE and ALJ to ALJ.

To achieve more consistency in decision-making, SSA promulgated regulations, effective in 1979, known as the Medical-Vocational Guidelines. These appear as Appendix 2 to the Social Security disability regulations cited as 20 C.F.R. Part 404, Subpart P, Appendix 2. The Medical-Vocational Guidelines contain three charts, called grids, which answer the question whether a claimant is or is not disabled for different combinations of maximum physical residual functional capacity, age, education and work experience. If a claimant's profile matches one of the rules in the Medical-Vocational Guidelines, the rules, which are binding on decision-makers, direct the outcome of the case. *See* §121.1 for a chart that shows the maximum residual functional capacity a claimant can have and still be found disabled. You may use this chart to determine to what degree your client must be exertionally limited if he or she is to be found disabled. But do not neglect a careful analysis of age, education and work experience. Your analysis might make a different rule applicable.

If a claimant's profile differs from that described in the grids, the rules do not directly answer the question of whether the claimant is or is not disabled—but they must be used as a "framework" for decision-making. This happens where a claimant's exertional limitations fall between those described by the three grids for sedentary, light and medium work; where a claimant cannot do a full range of sedentary work; and where there are nonexertional limitations such as in cases involving mental, sensory or skin impairments, postural or manipulative limitations or environmental limitations. As a rule, ALJs call vocational experts to testify when the Medical-Vocational Guidelines must be used as a framework.

§121 Maximum Residual Functional Capacity

The following chart is a composite of information from the three grids in the Medical-Vocational Guidelines. The chart focuses on those rules that result in a claimant being found disabled. It shows different combinations of age, education and work experience with the maximum exertional residual functional capacity that a claimant may have and still be found disabled. Thus, the chart shows what you have to prove when, for example, a 55-year-old high school graduate with an unskilled work background comes to your office to discuss a heart impairment: the claimant must have an RFC for light work or less in order to win the case.

(Text continued on page 1-22.)

§121.1 Chart: Maximum RFC Possible for Disability Finding

Age	Education	Previous work experience	Max. RFC	Rule
60-64	6th grade or less	Unskilled	Medium	203.01
	7th to 11th grade	Unskilled	Light	202.01
	11th grade or less	None	Medium	203.02
	11th grade or less	Skilled or semiskilled—skills not transferable	Light	202.02
	High school graduate or more—does not provide for direct entry into skilled work	Unskilled or none	Light	202.04
	High school graduate or more—does not provide for direct entry into skilled work	Skilled or semiskilled—skills not transferable	Light	202.06
55-59	11th grade or less	None	Medium	203.10
	11th grade or less	Unskilled	Light	202.01
	11th grade or less	Skilled or semiskilled—skills not transferable	Light	202.02
	High school graduate or more—does not provide for direct entry into skilled work	Unskilled or none	Light	202.04
	High school graduate or more—does not provide for direct entry into skilled work	Skilled or semiskilled—skills not transferable	Light	202.06
50-54	Illiterate or unable to communicate in English	Unskilled or none	Light	202.09
	11th grade or less—at least literate and able to communicate in English	Unskilled or none	Sedentary	201.09
	High school graduate or more—does not provide for direct entry into skilled work	Unskilled or none	Sedentary	201.12
	High school graduate or more—does not provide for direct entry into skilled work	Skilled or semiskilled—skills not transferable	Sedentary	201.14
45-49	Illiterate or unable to communicate in English	Unskilled or none	Sedentary	201.17
	All educational levels—at least literate and able to communicate in English	Unskilled, none, or skilled or semiskilled—skills not transferable	Sedentary occupational base must be significantly compromised	201.00(h)
18-44	All educational levels including illiterate or unable to communicate in English	Unskilled, none, or skilled or semiskilled—skills not transferable	Sedentary occupational base must be significantly compromised	201.00(h)

§122 Age

Age is second only to residual functional capacity as a determinant of whether or not someone is found disabled by the Medical-Vocational Guidelines. The regulations provide that in determining whether a claimant is disabled, SSA will consider the claimant's chronological age in combination with the claimant's residual functional capacity, education, and work experience. SSA will not consider a claimant's ability to adjust to other work on the basis of the claimant's age alone. "In determining the extent to which age affects a person's ability to adjust to other work, we consider advancing age to be an increasingly limiting factor in the person's ability to make such an adjustment." 20 C.F.R. § 404.1563(a).

SSA groups claimants who are under age 45, those ages 45 through 49, 50 through 54, 55 through 59, and 60 through 64. Those within each age category are treated alike. Thus, a 50-year-old claimant will be treated the same as a 54-year-old claimant. However, according to the regulations, these age categories will not be applied "mechanically in a borderline situation." 20 C.F.R. § 404.1563(b) and SSR 86-8. Therefore, a claimant who is within a few months of a birthday that puts him or her into a disabled category in the Medical-Vocational Guidelines is supposed to get the benefit of the doubt.

Normally where a rule directs a conclusion that a claimant is disabled because of reaching a specified age, SSA will find the claimant disabled as of the day before his or her birthday. POMS DI 25015.005 A.1. and GN 00302.400. But where the alleged onset date is a few months prior to an age at which a rule directs a finding of disabled, the Appeals Council has stated that it will take a "sliding scale" approach by looking at whether a claimant has additional vocational adversities that support use of the higher age category. HALLEX II-5-3-2.

For example, where poor education or limited work experience operates against a claimant, one may argue that the age category ought to be stretched. According to POMS DI 25015.005A.1, the borderline age rule applies only when a claimant is within "a few days or a few months" of the next higher age category. "Determining how much time can separate an individual's actual age from the next higher age category is a matter for adjudicative judgment. Such judgments must be supported by the evidence in file and be carefully explained. However, finding a borderline situation as much as one year before the next higher age is difficult to justify and, therefore, will be rare." POMS DI 25015.005A.

According to POMS DI 25015.005B.1:

> Once it has been decided that a borderline age situation exists ..., the adjudicator then considers whether the specific facts of the individual case support the use of the next higher age category. If they do not, the individual's chronological age is used in adjudication—even when he or she is only a few days from attaining a critical age.
>
> - The medical-vocational rules fully consider the relative adversities of a claimant's exertional capabilities, age, education and work experience (including skill level).
> - Therefore, additional vocational adversities in residual functional capacity (RFC), education, or work experience (beyond those already considered in the rules) are needed to support a determination to use the next higher age.
> - Additional vocational adversity is found when some adjudicative factor(s) is relatively more adverse when considered in terms of that factor's stated criteria, or when there is an additional element(s) which has adverse vocational implications.
> - The longer the period of time between an individual's actual age and attainment of the next higher age category, the progressively greater the additional adversity that must be present to support the use of the next higher age.
> - Conversely, the shorter the period between an individual's actual age and the next higher age category, the less adversity and justification that are needed.
> - If there are no additional vocational adversities justifying use of the higher age category, the adjudicator will use the claimant's chronological age.

The examples given in POMS DI 25015.005B.2 of additional vocational adversities are quite generous:

- "The presence of an additional impairment(s) which infringes upon—without substantially narrowing—a claimant's remaining occupational base (*e.g.*, a nonse-

vere allergy to printing ink or other unique substance used in an isolated industry)";

- "A limitation that does not significantly erode an individual's remaining unskilled occupational base (*e.g.*, a limitation to no overhead reaching or to no frequent stooping for an individual with a sedentary exertional level, or any mental limitation that at least permits the performance of unskilled work)";
- "A claimant who may be barely literate in English or have only a marginal ability to communicate in English";
- "A history of work experience in an unskilled job(s) in one isolated industry or work setting (*e.g.*, a family business or oyster bed worker or forest worker)."

Thus, it appears that virtually any vocational adversity may justify use of a higher age category in a borderline age situation.

How age affects a claimant's ability to work is not explained anywhere in the regulations. Instead, it appears in the commentary that was published when the Medical-Vocational Guidelines were first promulgated. "[W]here age is critical to a decision, recognition is taken of increasing physiological deterioration in the senses, joints, eye-hand coordination, reflexes, thinking processes, *etc.*, which diminish a severely impaired person's aptitude for new learning and adaptation to new jobs." 43 Fed. Reg. 55,359 (1978). At another point this commentary refers to age "in terms of how the progressive deteriorative changes which occur as individuals get older affect their vocational capacities to perform jobs." 43 Fed. Reg. 55,353 (1978).

§123 Education

As a rule, SSA uses the highest grade completed in school in evaluating educational level. However, the regulation itself recognizes that a person's actual educational abilities may be higher or lower. SSA will accept evidence that a claimant's actual educational level is lower than the numerical grade completed in school. 20 C.F.R. § 404.1564(b). Achievement testing, such as with the Wide Range Achievement Test (WRAT), may show a low educational level.

§124 Work Experience

SSA classifies work as unskilled, semiskilled and skilled. Unskilled work is work that may be learned in 30 days or less. 20 C.F.R. § 404.1568(a). Everything else is either semiskilled or skilled. For the purposes of the Medical-Vocational Guidelines, semiskilled and skilled work is treated as one category. This treatment has spawned the issue of transferability of work skills. *See*, §349 *et seq.*

§125 Full or Wide Range of Work

Under certain circumstances, a claimant can somewhat exceed the maximum residual functional capacity stated in the Medical-Vocational Guidelines (see chart at §121.1) and still be found disabled under the rule for the lower RFC. To give an example: a claimant's doctor says the claimant may not lift more than 50 pounds but fails to explain that the claimant may not engage in repetitive lifting of weights of more than about 10 pounds and may not bend or stoop frequently. Based on the 50-pound lifting limitation, SSA may leap to the conclusion that the grid for medium work should be applied and issue a denial decision.

However, to apply a rule from one of the grids in the Medical-Vocational Guidelines to the facts of a particular claimant's case, that claimant must be capable of doing a "full or wide range" of work at the exertional level applicable to that grid. That is, the claimant must be capable of substantially all of the activities at that exertional level. SSRs 83-10 and 83-11.

Medium work requires frequent lifting of 25 pounds and frequent bending or stooping, both of which are beyond the capacity of our hypothetical claimant. Thus, our claimant has the RFC for only slightly more than light work. Therefore, the light grid may be applied, which may require a decision that this claimant is disabled. For more information about how to evaluate an RFC that falls between ranges of work, *see* Social Security Ruling 83-12.

As you can see, understanding the definitions of the exertional levels that appear in 20 C.F.R. § 404.1567 is extremely important to application of the proper grid to your client's case. Social Security Ruling 83-10 provides the most detailed explanation of medium, light and sedentary work. These explanations are set forth below.

§125.1 Definition of Medium Work From SSR 83-10

"The regulations define medium work as lifting no more than 50 pounds at a time with frequent lift-

ing or carrying of objects weighing up to 25 pounds. A full range of medium work requires standing or walking, off and on, for a total of approximately 6 hours in an 8-hour workday in order to meet the requirements of frequent lifting or carrying objects weighing up to 25 pounds. As in light work, sitting may occur intermittently during the remaining time. Use of the arms and hands is necessary to grasp, hold, and turn objects, as opposed to the finer activities in much sedentary work, which require precision use of the fingers as well as use of the hands and arms.

"The considerable lifting required for the full range of medium work usually requires frequent bending-stooping. (Stooping is a type of bending in which a person bends his body downward and forward by bending the spine at the waist.) Flexibility of the knees as well as the torso is important for this activity. (Crouching is bending both the legs and spine in order to bend the body downward and forward.) However, there are relatively few occupations in the national economy which require exertion in terms of weights that must be lifted at times (or involve equivalent exertion in pushing or pulling), but are performed primarily in a sitting position, *e.g.*, taxi driver, bus driver, and tank-truck driver (semiskilled jobs). In most medium jobs, being on one's feet for most of the workday is critical. Being able to do frequent lifting or carrying of objects weighing up to 25 pounds is often more critical than being able to lift up to 50 pounds at a time."

§125.2 Definition of Light Work From SSR 83-10

"The regulations define light work as lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted in a particular light job may be very little, a job is in this category when it requires a good deal of walking or standing—the primary difference between sedentary and most light jobs. A job also is in this category when it involves sitting most of the time but with some pushing and pulling of arm-hand or leg-foot controls, which require greater exertion than in sedentary work; *e.g.*, mattress sewing machine operator, motor-grader operator, and road-roller operator (skilled and semiskilled jobs in these particular instances). Relatively few unskilled light jobs are performed in a seated position.

"'Frequent' means occurring from one-third to two-thirds of the time. Since frequent lifting or carrying requires being on one's feet up to two-thirds of a workday, the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday. Sitting may occur intermittently during the remaining time. The lifting requirement for the majority of light jobs can be accomplished with occasional, rather than frequent, stooping. Many unskilled light jobs are performed primarily in one location, with the ability to stand being more critical than the ability to walk. They require use of arms and hands to grasp and to hold and turn objects, and they generally do not require use of the fingers for fine activities to the extent required in much sedentary work."

§125.3 Definition of Sedentary Work From SSR 83-10

"The regulations define sedentary work as involving lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers and small tools. Although sitting is involved, a certain amount of walking and standing often is necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. By its very nature, work performed primarily in a seated position entails no significant stooping. Most unskilled sedentary jobs require good use of the hands and fingers for repetitive hand-finger actions.

"'Occasionally' means occurring from very little up to one-third of the time. Since being on one's feet is required 'occasionally' at the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday. Work processes in specific jobs will dictate how often and how long a person will need to be on his or her feet to obtain or return small articles."

§126 RFC for Less Than Full Range of Sedentary Work

Go back and look at the chart, §121.1, for the age categories under 50. At first glance, proof of disability for almost everyone under age 50 looks like an impossible task. Disability for such individuals

requires proof that they can do much less than a full or wide range of sedentary work, described by SSR 83-12 as a "significance compromise" of the sedentary occupational base. This means, according to SSR 96-9p, that jobs for them do not exist in significant numbers. Although this is frequently difficult, it is not impossible.

For example, our hypothetical machine operator in §100 has an RFC for much less than a wide range of sedentary work. He may be found disabled despite his young age and high school education because of a limitation to sedentary work *plus* an impairment that affects bimanual dexterity. This result is based on SSRs 83-10 and 96-9p, which point out that "most sedentary jobs require good use of both hands." However, a note of caution is appropriate here. SSA's position, in effect, is that although a person limited to sedentary work with limited bimanual dexterity will *usually* be found disabled, this conclusion can be rebutted by vocational expert testimony in an individual case.

For most claimants under age 50, as a preliminary matter, it is necessary to show that they can do neither a wide range of sedentary work nor a wide range of light work. It is essential, then, to have a thorough understanding of SSA's definitions of sedentary and light work. *See* §§125.2 and 125.3, from Social Security Ruling 83-10.

In order to prove that the sedentary occupational base is significantly compromised, you will usually look for a combination of exertional and nonexertional impairments. Each additional impairment whittles away the range of sedentary work that a claimant is capable of doing to arrive at the point where jobs do not exist in significant numbers. *See* §§260 *et seq.*, on designing a case for a claimant under age 50. *See* §348.8, on dealing with vocational experts regarding whether significant numbers of jobs exist within the claimant's RFC.

Often, you will find individuals who, for one reason or another, cannot sit for the six hours out of an eight-hour day required to do sedentary work, nor can they stand for six hours out of an eight-hour day required to do light work. A common residual functional capacity describes claimants who must alternate between sitting and standing. Although Social Security Ruling 83-12 analyzes this RFC, this RFC does present several challenges to lawyers representing claimants, a subject dealt with in detail at §§348.4 and 348.9. The SSR 83-12 statement on the subject is reproduced below.

§126.1 Alternate Sitting and Standing From SSRs 83-12 and 96-9p

SSR 83-12 provides:

> In some disability claims, the medical facts lead to an assessment of RFC which is compatible with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing. The individual may be able to sit for a time, but must then get up and stand or walk for a while before returning to sitting. Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work. (Persons who can adjust sitting and standing by doing so at breaks, lunch periods, etc., would still be able to perform a defined range of work.)
>
> There are some jobs in the national economy—typically professional and managerial ones—in which a person can sit or stand with a degree of choice. If an individual had such a job and is still capable of performing it, or is capable of transferring work skills to such jobs, he or she would not be found disabled. However, most jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a V[ocational] S[pecialist] should be consulted to clarify the implications for the occupational base.

SSR 96-9p added the following to the discussion of alternate sitting and standing jobs:

"**Alternate sitting and standing**: An individual may need to alternate the required sitting of sedentary work by standing (and, possibly, walking) periodically. Where this need cannot be accommodated by scheduled breaks and a lunch period, the occupational base for a full range of unskilled sedentary work will be eroded. The extent of the erosion will

depend on the facts in the case record, such as the frequency of the need to alternate sitting and standing and the length of time needed to stand. The RFC assessment must be specific as to the frequency of the individual's need to alternate sitting and standing. It may be especially useful in these situations to consult a vocational resource in order to determine whether the individual is able to make an adjustment to other work."

§127 Nonexertional Limitations

Exertional abilities involve sitting, standing, walking, lifting, carrying, pushing and pulling. 20 C.F.R. § 404.1569a. A limitation of any other work-related ability is a nonexertional limitation. A list of categories and examples follows:

Category	Example
Postural:	**Need to alternate sitting and standing; Need to elevate leg; Difficulty turning head; Balance problems; Difficulty bending, stooping or squatting.**
Manipulative:	**Difficulties with reaching, grasping, handling, fingering.**
Environmental:	**Difficulties working around fumes, dust, etc.; Difficulties tolerating noise, heights, humidity or temperature extremes; Inability to be around dangerous machinery.**
Mental:	**Difficulties relating with others; Difficulty understanding, remembering or carrying out simple instructions; Inability to maintain attention or concentration; Poor stress tolerance.**
Sensory:	**Difficulties speaking, hearing, feeling or seeing.**

This list is by no means exhaustive. Note that a nonexertional *impairment* may impose more than one type of nonexertional *limitation*. For example, a skin impairment may impose both environmental and manipulative limitations and may affect work in other ways, also. Some impairments, such as certain gastro-intestinal impairments, impose nonexertional limitations by forcing a worker to be absent from the work area to lie down or go to the restroom, *etc.*

Many impairments have both exertional and nonexertional implications. For example, amputation of an arm will limit the weight a claimant can lift, an exertional impairment, and will limit bimanual dexterity, a nonexertional manipulative impairment.

Nonexertional impairments need to be carefully examined. They are discussed in Social Security Rulings 83-12, 83-14, 85-15, 96-4p, 96-8p and 96-9p. You may need to consult your own vocational expert for help evaluating the impact of such limitations on your client's ability to work.

§128 Transferable Work Skills

You also may need a vocational expert to help you manage the complex problem of transferability of work skills. If you examine the three grids from the Medical-Vocational Guidelines, you will discover that a claimant is never disabled if the claimant has skills transferable to jobs within his or her RFC that exist in significant numbers. On the other hand a finding of no transferable work skills may lead to a finding of disability in certain cases. But note that in only two age categories does the issue of transferability of skills determine the outcome of the case. If a claimant is age 50 or older and is limited to sedentary work, the claimant wins or loses the case based upon whether or not the claimant has skills transferable to sedentary work. If a claimant is age 55 or older, this rule extends to light work—a claimant wins or loses based on whether or not the claimant has skills transferable to a significant range of semiskilled or skilled light work.

Since an unskilled work background produces no transferable skills, the rules about transferability apply only to claimants with histories of semiskilled or skilled work.

The standards for determining transferability differ for age categories beginning with ages 50, 55 and 60, making it easier as a claimant gets older to

show that skills are not transferable to a significant range of work within the claimant's RFC. At age 50, garden-variety transferability of skills to sedentary work is all that is required to turn down a case based on the presence of transferable skills. To find that skills of a 55-year-old claimant are transferable to sedentary work, SSA must meet a higher burden. It must show that there is "very little, if any, vocational adjustment required in terms of tools, work settings, or the industry." Rule 201.00(f) of the Medical-Vocational Guidelines. A 55-year-old claimant limited to light work needs only garden-variety transferable work skills in order to be turned down. But at age 60 for claimants limited to light work, SSA must meet a higher burden—the same higher burden that applies to 55-year-olds limited to sedentary work. *See* Rules 202.00(c) and (e) of the Medical-Vocational Guidelines. *See* §349.6 for a chart showing the transferability standards for different ages; *and see* §349 for an extensive discussion of the transferability issue.

In that rare situation where recently completed education provides for direct entry into skilled work, the Guidelines always require a finding of not disabled. *See* Rules 201.05, 201.08, 201.13, 201.16, 202.05, 202.08, 203.09, 203.17 and 203.24.

§129 Medical-Vocational Guidelines as Framework for Decision-Making

The grids govern the outcome of cases where they exactly describe a claimant. But the characteristics of many claimants do not fall squarely within the Guidelines. For example, a claimant's residual functional capacity may fall between ranges of work, a claimant may have only nonexertional impairments, or a claimant may have a combination of exertional and nonexertional impairments. In these cases, the Medical-Vocational Guidelines, by their own terms, are to be used as "an overall structure for evaluation" and a "framework for consideration" of disability. *See* Rules 200.00(d) and (e).

The most important principle of the Medical-Vocational Guidelines may be stated as follows: the more adverse a claimant's vocational factors (age, education and work experience), the more remaining residual functional capacity the claimant may have and still be found disabled. Consider our hypothetical housewife in §100. She is age 55, has a limited education and no relevant work experience. The grids find her disabled despite her residual functional capacity for medium work, a capacity which means that she is physically capable of performing about 2,500 out of the approximately 3,100 unskilled occupations identified in the *Dictionary of Occupational Titles*.

This fundamental principle of the Guidelines is based on the concept of vocational adaptability. Younger, better-educated people with work experience are more adaptable to job changes despite a decline in RFC caused by a medical impairment. Such younger claimants must demonstrate a more restricted RFC in order to be found disabled. Indeed, according to the Medical-Vocational Guidelines, English-speaking claimants with exertional impairments who are under age 50 must have such restricted RFCs that they are limited to much less than a wide range of sedentary work—to the point that jobs do not exist in significant numbers, according to SSR 96-9p. Using the Guidelines as a framework, an English-speaking claimant under age 50 with nonexertional impairments must have a similarly restricted occupational base.

Using the Medical-Vocational Guidelines as a framework for analysis is a slippery concept that is not well understood by claimants' attorneys or even by ALJs. It is the subject of three Social Security Rulings, SSRs 83-12, 83-14 and 85-15. SSR 96-9p, with its emphasis on whether jobs exist in significant numbers, departs somewhat from the earlier rulings. *See* §348, for a detailed discussion.

§130 Social Security Disability and SSI: Nondisability Requirements and Other Differences

§131 Social Security Disability — Worker's Insured Status

The Social Security program for workers functions like an insurance plan. There are requirements that a claimant for disability insurance must have:

- Contributed to the program (paid Social Security taxes) over a sufficiently long period to be "fully insured" and
- Contributed to the program recently enough to have "disability insured status"

In short, a worker must have paid Social Security taxes in order to be "insured," just like paying the premiums for a private insurance policy. After stopping work (and stopping paying Social Security taxes), there will come a time when insured status will lapse, just like with a private insurance policy.

Contributions are counted in "quarters of coverage," abbreviated QC by SSA, with minimum earnings requirements that, since 1978, go up every year. Before 1978 a nonagricultural worker generally could earn only one QC if he or she worked in only one calendar quarter of the year, no matter how great the earnings. (A calendar quarter is one of the following three-month periods: January through March, April through June, July through September, or October through December.) Before 1978 a worker need earn only $50 in wages in a calendar quarter to count as a "quarter of coverage." Thus, to evaluate how many QCs a worker earned prior to 1978, you need to know how much a worker earned and during what months of the year the money was earned. 20 C.F.R. §§ 404.140 through 404.146.

Beginning in 1978, an individual with sufficient earnings in one calendar quarter could earn QCs for the entire year, up to a total of four QCs for a calendar year. Thus, beginning in 1978 you need only consider total annual earnings and compare to the minimum earnings for a quarter of coverage. To take an example, in 2000 minimum earnings for a QC was $780. Therefore, a claimant who earned $3120 or more in wages in 2000 was credited with four QCs, no matter when the money was earned during 2000. 20 C.F.R. §§ 404.143 through 404.146.

Occasionally, you will encounter a case where, in order to meet the insured status rules, a claimant needs those extra quarters of coverage credited during the year he or she stopped working. For example, let's say that a claimant who earned $3120 in 2000 actually stopped working because of disability on March 31, 2000. Because the worker needs all four quarters of coverage in order to meet the insured status rules, the worker does not become insured until October 1, 2000. This is the "date first insured." This worker cannot be found disabled for Social Security disability before this date. Note that a quarter of coverage is acquired on the first day of the quarter in which it is assigned. 20 C.F.R. §§ 404.110(e) and 404.145.

To be *fully insured*, as a rule, a claimant must have one QC for every calendar year after the year in which he or she turned 21, up to the calendar year before becoming disabled, though more than 40 QCs are never required. 20 C.F.R. §§ 404.110 and 404.132.

The rule for *disability insured status* for those over 31 years old is that they must have 20 quarters of coverage out of the 40 calendar quarters before they become disabled. 20 C.F.R. § 404.130. This is referred to as the 20/40 rule. Significant work in five years out of the last 10 years usually satisfies this requirement. For a claimant with a steady work record, insured status will lapse about five years after stopping work. To receive any Social Security disability benefits, such a claimant will have to prove that he or she was disabled before the "date last insured." Our hypothetical housewife described in §100 does not have current insured status because she has not worked for over 15 years. Thus, she is not eligible for Social Security disability benefits even though she is disabled for SSI purposes.

For those who become disabled before age 31 there is a reduced quarter of coverage requirement. Such a younger claimant must have earned QCs in one-half the calendar quarters beginning with the quarter after the quarter in which he or she attained age 21 and ending with the quarter in which he or she became disabled. If the number of elapsing calendar quarters is an odd number, the next lower even number is used. A minimum of 6 QCs is required. If a claimant becomes disabled before age 24, an alternative rule applies. He or she must simply have 6 QCs in the 12-quarter period ending with the quarter in which disability began. Under the alternative rule, there is no requirement that the QCs be earned after attaining age 21. 20 C.F.R. § 404.130(c). *See also* POMS RS 00301.140, which contains a good discussion filled with examples.

As a rule those who have "disability insured status" are also "fully insured." But there are circumstances where this is not so. Evaluating denials based on insured status requires careful reading of the regulations and the claimant's earnings record. *See* 20 C.F.R. §§ 404.101 to 404.146 and §205.4 of this book.

§132 SSI

The Supplemental Security Income (SSI) program is a federal welfare program for the disabled, blind and those over 65. In contrast to Social Security disability, benefits are paid out of general revenues, not out of the Social Security trust fund. Many states supplement the federal SSI benefit. Thus, the SSI benefit amount varies from state to state.

To meet all the requirements to receive SSI a claimant must:

- Be "disabled" using the same definition as is used for the Social Security disability program
- Meet the income and asset requirements of the SSI program
- Be a U.S. citizen or fall into the group of limited exceptions to the citizenship rule (*see* §136); and
- File an application

There are both income and asset limitations for eligibility. *See* 20 C.F.R. §§ 416.1100 to 416.1266. The income limit is based upon the SSI benefit amount after several different kinds and amounts of unearned income are "disregarded"; and part of earned income is disregarded under a formula designed to encourage SSI recipients to work. There is also a formula for counting part of the income of parents of minors or spouses who live with the claimant. Application of this formula is called "deeming."

Claimants may receive both Social Security disability and SSI benefits if the Social Security disability benefits are low enough. When both kinds of benefits are received, the recipient's total income from the two programs equals the SSI benefit amount plus $20. However, even where high Social Security disability benefits disqualify a claimant from receiving SSI, he or she still may get SSI during the five-month waiting period when no Social Security disability benefits are paid, assuming assets and any other income are small enough.

The asset limitation beginning in 1989 is $2,000 for an individual and $3,000 for a couple. Several assets are excluded, the most significant of which are the home of any value and one car of any value if it is used for work or to obtain medical care. *See* 20 C.F.R. §§ 416.1210 *et seq.*

§133 Retroactivity of Applications and Waiting Period

During the history of the SSI program, SSI benefits have never been paid for any time before the date of the application; in other words, there is no retroactive effect of an SSI application. Social Security disability, on the other hand, may pay benefits for the 12 months preceding the date of application if all requirements are met. Claimants who are not currently eligible for Social Security disability benefits must be found entitled to at least one month of benefits during this 12-month period in order for a "period of disability" to be established. For example, if a claimant alleges a disability that ended more than about 14 months before the date of application, SSA will not even bother to investigate if the claimant really was disabled during this time because no benefits are payable.

An exception to this rule allows filing up to 36 months after the period of disability ended if a physical or mental condition prevented a claimant from applying. *See* 20 C.F.R. §§ 404.621(d) and 404.320(b)(3). Since it is hard to see how an impairment could be so severe as to prevent application for benefits but not severe enough to make the person unable to work, this exception must be applicable primarily to those whose disabilities begin just before full retirement age, after which there can be no period of disability. They would have until three years after full retirement age to apply under this exception.

There used to be no waiting period for SSI. For applications before August 22, 1996, SSI was paid from the date of application if all requirements were met. For SSI applications filed on or after August 22, 1996, there is an effective waiting period until the first of the next month after all requirements are met. 20 C.F.R. §§ 416.330 and 416.335. For Social Security disability there is a five-month waiting period after the "onset date," the date disability began, during which no Social Security disability benefits are payable. Because only *full* months are counted, the actual waiting period is nearly always more than five months. Only when a person becomes disabled on the first day of the month is the waiting period exactly five months.

§134 Other Differences

A significant procedural difference between the Social Security disability and SSI programs appears in the time limit for requesting reopening of earlier applications based on good cause, such as where there is new evidence or where the earlier decision was wrong on its face. For Social Security disability, that time limit is four years from the date of the notice of the initial determination. 20 C.F.R. § 404.988(b). For SSI, that time limit is two years. 20 C.F.R. § 416.1488(b). *See also* §§370 *et seq.*

Payment processing within the Social Security Administration differs for the two programs, knowledge of which is useful when you are trying to track down and correct a payment delay. SSI payment is processed at the local Social Security office. Social Security disability payment is processed in Baltimore for those under age 55. Payment for those over 55 is processed at regional payment centers. *See also* §§440 *et seq.*

Social Security disability benefits applicable to one month are paid during the next month. For example, a Social Security disability payment for January is paid in February. For SSI, the check received in January is for January.

There also are some differences in the way benefits are paid. These differences are helpful when you're talking to a recipient of disability benefits and trying to figure out whether he or she is receiving Social Security disability or SSI payments, a distinction that many recipients of benefits do not make. SSI benefits arrive in the mail or by direct deposit on the first of the month. An SSI check says SSI on it. A Social Security disability check is very similar to an SSI check but it includes the reference: SOC SEC FOR INS.

In a concurrent claim in which a beneficiary receives both Social Security disability and SSI payments, the Social Security disability portion is paid on the third of the month. If a beneficiary receives only Social Security disability benefits, those benefits are paid on the second, third or fourth Wednesday of the month depending on the beneficiary's birthday. Those born on the 1st through the 10th of the month are paid on the second Wednesday. Those born on the 11th through the 20th are paid on the third Wednesday. The rest are paid on the fourth Wednesday.

(Text continued on page 1-32.)

§135 Chart: Social Security Disability and SSI Compared

Issue	SS Disability	SSI
Disability standard:	Same for both programs.	
Source of payment:	Social Security trust fund.	General revenue.
Amount of payment:	Based on worker's earnings record.	Federal amount set by Congress plus state supplement, if any, set by state. State supplement amount may vary according to living arrangement.
Payment to children:	Yes, additional payment based on earnings record to children under age 18 or under age 19 and still in high school.	No increased federal payment for child; but some state SSI supplements add money for children. Otherwise, children may receive welfare, which is not counted as income; i.e., welfare does not reduce SSI benefit amount.
Payment to spouse:	Yes, if child in spouse's care is under age 16 or is disabled. There is an income limit for spouse's payment.	No increased federal payment but some state SSI supplements add money for spouse.
Earnings requirement:	Fully insured (1 QC for each year after age 21); and disability insured status (20/40 rule).	None.
Asset limitation:	None.	$2,000 individual; $3,000 couple.
Unearned income limit:	None.	A small amount is disregarded; the rest is deducted from SSI benefit.
Earned income limit:	Same for both programs for claimants; SGA results in step one denial.	After individual is receiving benefits, SSI has more liberal rules designed to encourage work.
Waiting period:	Five full months from date of onset of disability.	For applications on or after August 22, 1996, payment begins with first of month after all requirements are met. For earlier applications, payment begins with date of application if all requirements are met.
Retroactivity of application:	12 months if all requirements are met.	No retroactivity.

Time limit for reopening for good cause:	4 years.	2 years.
Payment processing office:	Baltimore or regional payment center.	Local office.
Payment applies to:	Previous month.	Current month.
Payment date:	Varies by birthday except concurrent cases paid on 3rd of month.	1st day of month.
Check says:	SOC SEC FOR INS.	SSI.
Attorney's fees:	25 percent of past due benefits withheld for direct payment.	25 percent of back benefits withheld for direct payment.
Medical coverage:	Medicare begins after receipt of 24 months of benefits.	Medicaid coverage in most states begins with entitlement to SSI (sometimes 3 months before).
Eligibility of legal aliens:	Eligible.	Aliens who were lawfully residing in the U.S. on August 22, 1996 are, for the most part, eligible for SSI disability benefits; but those who arrived later are ineligible with limited exceptions.

§136 Eligibility of Aliens

The welfare reform legislation signed into law on August 22, 1996, made legal aliens ineligible for SSI benefits with some limited (and complicated) exceptions. A year later, this law was amended to make most legal aliens who were residing in the United States on August 22, 1996 eligible for SSI disability benefits and to grandfather in those aliens who were eligible to receive benefits on August 22, 1996. Thus, the original law applies only to those aliens who arrive in the United States after August 22, 1996. Public Law 110-328, enacted October 1, 2008, granted a two or three year extension to certain categories of aliens. The result is an odd patchwork that requires careful analysis. A threshold issue is the definition of U.S. "resident" and the acceptable types of evidence for proving status as a U.S. citizen or national. These are provided in 20 C.F.R. §§ 416.1603 and 416.1610.

A good description of which aliens were eligible for SSI appeared in an attachment to a memorandum from the Chief Administrative Law Judge dated August 29, 1997. This is an updated and edited version of that document:

The following is a list of the only categories of people who may be eligible for SSI:

1. Citizens or nationals of the U.S.
2. Aliens who are lawfully admitted for permanent residence under the Immigration and Nationality ACT (INA) and who have worked long enough to have at least a total of 40 qualifying quarters of work. An alien may get the 40 quarters of work himself or herself. Also, work done by a spouse or parent may count toward the 40 quarters of work for getting SSI only. We cannot count any quarter of work acquired after December 31, 1996 if the alien or the worker received certain types of federally funded assistance during that quarter.
3. Certain aliens who are blind or disabled and were lawfully residing in the U.S. on August 22, 1996. Note that this provision creates a new category of claimants who attorneys may be asked to prove disabled: Aliens over age 65. See SSR 99-3p about proving disability for claimants over age 65.
4. Certain aliens who are lawfully residing in the U.S. and who were "receiving" SSI benefits on August 22, 1996. SSA has interpreted this provision to apply to those whose claims were filed before August 22, 1996 and who were eligible to receive benefits for periods prior to August 22, 1996 even if their claims were not finally adjudicated and they were not actually being paid prior to August 22, 1996.
5. American Indians born outside the U.S. who are under section 289 of the INA or who are members of federally recognized Indian tribes under section 4(e) of the Indian Self-Determination and Educational Assistance Act.
6. Aliens admitted as refugees under section 207 of the INA. SSI eligibility is limited to the first 7 years after being admitted as a refugee. The 7-year limit applies even if the alien's status changes to lawfully admitted for permanent residence. Public Law 110-328 granted a two-year extension to most refugees, three years if the refugee has shown good faith in pursuing U.S. citizenship as determined by the Department of Homeland Security. However, the time limit does not apply at all if the alien meets the requirements in category 2, 3, 4, or 11.
7. Aliens granted asylum under section 208 of the INA. SSI eligibility is limited to the first 7 years after asylum is granted. The 7-year limit applies even if the alien's status changes to lawfully admitted for permanent residence. However, this time limit was extended by two or three years by Public Law 110-328, the same as for refugees described in category 6 above. The time limit does not apply at all if the alien meets the requirements in category 2, 3, 4, or 11.
8. Aliens whose deportation has been withheld under section 243(h) of the INA as in effect prior to April 1, 1997, or whose removal has been withheld under section 241(b)(3) of the INA. SSI eligibility is limited to the first 7 years after deportation or removal is withheld. The 7-year limit applies even if the alien's status changes to lawfully admitted for permanent residence. However, no time limit applies if the alien meets the requirements in category 2, 3, 4, or 11. Public Law 110-328 also extended the time limit by two or three years for this