DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 91, 121, 125, and 135

[Docket No. FAA–2006–25334; Amendment Nos. 91–292; 121–326; 125–51; and 135–106]

RIN 2120–AI76

Additional Types of Child Restraint Systems That May Be Furnished and Used on Aircraft

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Disposition of comments on final rule.

SUMMARY: On July 14, 2006, the Federal Aviation Administration (FAA) amended certain operating regulations to allow passengers or aircraft operators to furnish and use more types of Child Restraint Systems (CRS) on aircraft. The rule allowed the use of CRSs that the FAA approves under the aviation standards of Technical Standard Order C–100b, Child Restraint Systems. In addition, the rule allowed the use of CRSs approved by the FAA under its certification regulations regarding the approval of materials, parts, processes, and appliances. The intended effect of the rule was to increase the number of CRS options that are available for use on aircraft, while maintaining safe standards for certification and approval. This action is a summary and disposition of comments received on the July 14, 2006 final rule.

ADDRESSES: The complete docket for the final rule on Additional Types of Child Restraint Systems that May be Furnished and Used on Aircraft may be examined at the Dockets Office on the plaza level of the NASSIF Building at the U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You may review the public docket containing comments to these regulations in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. Also, you may review public dockets on the Internet at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Nancy Lauck Claussen, Federal Aviation Administration, Flight Standards Service, Air Transportation Division (AFS–200), 800 Independence Avenue, SW., Washington, DC 20591; Telephone 202–267–8166, E-mail *nancy.l.claussen@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

August 26, 2005 Final Rule

On August 26, 2005, the FAA published a final rule that amended its operating regulations to allow the use of CRSs that are approved by the FAA through Type Certificate (TC), Supplemental Type Certificate (STC), or Technical Standard Order (TSO) (70 FR 50902). The August 26, 2005 final rule allowed an operator to provide these CRSs. It did not allow passengers to furnish and use a CRS approved through TC, STC, or TSO. This is in contrast to CRSs that meet Federal Motor Vehicle Safety Standard (FMVSS) No. 213 or the standards of the United Nations, or are approved by a foreign government, which passengers may furnish and use on aircraft. The FAA received 16 comments on the August 26, 2005, final rule. The overwhelming majority of commenters requested that the FAA amend the August 26, 2005 Final Rule to allow passengers, in addition to aircraft operators, to furnish and use CRSs approved by the FAA.

July 14, 2006 Final Rule

After reviewing the comments to the August 26, 2005 final rule, the FAA decided to amend its operating rules to allow both passengers and aircraft operators to furnish and use CRSs that the FAA has approved under 14 CFR 21.305(d) and TSO C–100b. We published another final rule on July 14, 2006 (71 FR 40003). The July 14, 2006 final rule amendments were similar to provisions in the current rules that allow passengers and aircraft operators to furnish and use CRSs that meet FMVSS No. 213 or the standards of the United Nations, or are approved by a foreign government.

Discussion of Comments

The FAA received 16 comments on the July 14, 2006 final rule. Fifteen comments were from individuals and one was from the Air Transport Association (ATA)/United Airlines. All of the comments were positive. Many of the commenters noted and appreciated the FAA's attempt to be responsive to comments previously submitted on the August 26, 2005 final rule. Many of the commenters also noted positively that the final rule would allow passengers to furnish and use the AMSAFE CAReS CRS, which the FAA referenced in the July 14, 2006 final rule as an example of one CRS that the FAA may approve through the § 21.305(d) approval process. Some commenters also noted that the final rule would serve to encourage innovative technology in the area of child restraint and was in the best interests of safety, economy, children, parents, the traveling public, and air carriers. In addition, ATA noted it would ''be beneficial for the carriers and the passengers to be able to see the list and images of the TSO C–100b approved CRS.'' The FAA maintains a list of all authorized TSO Holders on its public Web site (*http://www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgTSO.nsf/MainFrame?OpenFrameSet*). Information regarding any TSO holders will be posted on our Web site.

Conclusion

After consideration of the comments submitted in response to the final rule, the FAA has determined that no further rulemaking action is necessary. Amendment Nos. 91–292, 121–326, 125–51, and 135–106 remain in effect as adopted.

Issued in Washington, DC, on November 7, 2006.

James J. Ballough,

Director, Flight Standards Service.

[FR Doc. E6–19412 Filed 11–16–06; 8:45 am]

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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2006–0101]

RIN 0960–AE93

Exemption of Work Activity as a Basis for a Continuing Disability Review

AGENCY: Social Security Administration (SSA).

ACTION: Final rules.

SUMMARY: We are publishing these final rules to amend our regulations to carry out section 221(m) of the Social Security Act (the Act). Section 221(m) affects our rules for when we will conduct a continuing disability review if you work and receive benefits under title II of the Act based on disability. (We interpret this section to include you if you receive both title II disability benefits and title XVI (Supplemental Security Income (SSI)) payments based on disability.) It also affects our rules on how we evaluate work activity when we decide if you have engaged in substantial gainful activity for purposes of determining whether your disability has ended. In addition, section 221(m) of the Act affects certain other standards we use when we determine whether your disability continues or ends. We are also amending our regulations concerning how we determine whether your disability continues or ends. These

revisions will codify our existing operating instructions for how we consider certain work at the last two steps of our continuing disability review process. We are also revising our disability regulations to incorporate some rules which are contained in another part of our regulations and which apply if you are using a ticket under the Ticket to Work and Self-Sufficiency program (the Ticket to Work program). In addition, we are amending our regulations to eliminate the secondary substantial gainful activity amount that we currently use to evaluate work you did as an employee before January 2001.

DATES: These rules are effective December 18, 2006.

FOR FURTHER INFORMATION CONTACT: Kristine Erwin-Tribbitt, Policy Analyst, Office of Program Development and Research, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401. Call (410) 965–3353 or TTY (410) 966–5609 for information about these final rules. For information on eligibility or filing for benefits, call our national toll-free number 1–(800) 772–1213 or TTY 1–(800) 325–0778. You may also contact Social Security Online at *http://www.socialsecurity.gov/*.

SUPPLEMENTARY INFORMATION:

Electronic Version Access

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html.*

What is the purpose of these final rules?

We are revising our disability regulations to carry out section 221(m) of the Act. The changes will apply to you if you are a working beneficiary who is entitled to Social Security disability benefits under title II of the Act and you have received such benefits for at least 24 months. If you are a person who meets these requirements, we are revising our rules on when we will start a continuing disability review (specifically, a medical continuing disability review or a ''medical review'') to decide whether you are still disabled. In addition, we are amending our rules to provide that, under the medical improvement review standard sequential evaluation process, we will not consider the activities you perform in your work if they support a finding that you are no longer disabled. We are revising our regulations to provide that we will not use the activities you perform in work to support a finding that you are no longer disabled when deciding if the work you do shows that you are able to perform substantial gainful activity. Specifically we will not compare your work activity to that of unimpaired persons in your community who are doing the same or similar work as their means of livelihood. Also, if your earnings are less than the substantial gainful activity limit, we will not make a determination that your work is worth more than the substantial gainful activity amount.

We are also making certain changes to our regulations that may apply to you even if you are not affected by section 221(m) of the Act. We are clarifying how we consider work activity at the last two steps of the medical improvement review standard sequential evaluation process when we determine if you are still disabled. The rules will codify the interpretations of our standards for determining whether disability continues under title II and title XVI that we have been using in operating instructions for some time. These rules also provide that these interpretations apply when we determine whether you are entitled to expedited reinstatement of benefits under section 223(i) of the Act or eligible for expedited reinstatement of benefits under section 1631(p) of the Act. The changes affect you if you are entitled to Social Security benefits based on disability under title II or you are an adult who is eligible for SSI payments based on disability under title XVI and you work during your current period of entitlement or eligibility based on disability. Also, the rules affect you if you request reinstatement of benefits.

We are also incorporating into our disability regulations some rules which are contained in another part of our regulations and which apply to you if you are using a ticket under the Ticket to Work program. In addition, we are revising our rules for evaluating work activity you performed as an employee prior to January 2001 to eliminate the use of the secondary substantial gainful activity amount. We are also making some minor clarifications and corrections of other rules.

Ticket to Work and Work Incentives Advisory Panel

During the preparation of these rules, we consulted with the Ticket to Work and Work Incentives Advisory Panel.

What do we mean by ''final rules'' and ''existing rules''?

For clarity, we use the term ''final rules'' in this preamble to refer to the changes we are making to our regulations in this publication. We also use the term ''new'' or ''amended'' rules to refer to these changes. We use the term ''existing rules'' to refer to the rules that will be changed by these final rules.

When will we start to use these final rules?

We will start to use these final rules on their effective date. We will continue to use our existing rules until the effective date of these final rules.

As is our usual practice when we make changes to our regulations, we will apply these final rules in determinations or decisions that we make on or after the effective date of these final rules. When these final rules become effective, we will apply them to cases that are pending in our administrative review process, including cases on remand from a Federal court.

What are continuing disability reviews and when do we start them under existing rules?

After we find that you are disabled, we are required by the Act and our regulations to periodically reevaluate whether you continue to meet the disability requirements of the Act. (See sections 221(i), 1631(d)(1) and 1633 of the Act, and §§ 404.1589 and 416.989 of our regulations.) We call this evaluation a continuing disability review. There are two main types of continuing disability review: (1) Work continuing disability reviews (sometimes referred to as a ''work reviews'') in which we mainly examine your earnings, and (2) medical continuing disability reviews (sometimes referred to as ''medical reviews'') in which we examine your medical improvement and ability to function. In §§ 404.1590 and 416.990 of our regulations, we explain that, if you are entitled to or eligible for disability benefits, you must undergo regularly scheduled continuing disability reviews. We also explain that in some circumstances, we may start a continuing disability review before the time of your regularly scheduled continuing disability review.

In §§ 404.1590(b) and 416.990(b) of our regulations, we list circumstances in which we will start a continuing disability review. In most cases, we start a continuing disability review because, under the Act and our regulations, we must evaluate your impairment(s) from time to time to determine if you are still entitled to Social Security disability benefits or eligible for SSI payments based on disability or blindness. If you are entitled to or eligible for such benefits, you are subject to regularly scheduled continuing disability reviews at intervals ranging from 6 months to 7 years depending on whether, and the

degree to which, we expect your impairment(s) to improve.

We may also start a continuing disability review because you returned to work, and at other times when we receive information that raises questions about whether you are still under a disability, such as when you complete vocational rehabilitation services. For more information about how we decide the frequency of continuing disability reviews and when we may start a continuing disability review at other than scheduled times, see §§ 404.1590 and 416.990 of our existing regulations.

Under existing rules, how do we determine whether your disability continues or ends?

When we do a continuing disability review to determine whether your disability continues or ends, we use the rules in § 404.1594 if you are a Social Security disability beneficiary and the rules in § 416.994 if you are an adult who is eligible for SSI payments based on disability. In general, these rules provide that we must determine if there has been any medical improvement in your impairment(s) and, if so, whether this medical improvement is related to your ability to work. The rules in these sections also provide some exceptions to this medical improvement review standard.

In § 404.1594(f), we provide an eight-step sequential evaluation process that we use when we determine whether you are still disabled under title II of the Act. We generally follow the steps in order. However, we may also find that your disability has ended because of one of several exceptions to the medical improvement review standard described in §§ 404.1594(d) and (e). (Since the exceptions are in the statute and are not affected by section 221(m) or the provisions of these final rules, we do not summarize them below.) The eight steps are as follows:

1. Are you engaging in substantial gainful activity? If you are (and any applicable trial work period has been completed), we will find that your disability ended.

2. If you are not, do you have an impairment or combination of impairments that meets or equals the severity of an impairment in our Listing of Impairments? If you do, we will generally find that your disability continues.

3. If you do not, has there been medical improvement? If there has been medical improvement as shown by a decrease in the medical severity of your impairment(s), we go on to step 4. If there is no medical improvement in your impairment(s), we skip to step 5.

4. If there has been medical improvement, we must determine whether it is related to your ability to do work. If medical improvement is not related to your ability to do work, we go on to step 5. If medical improvement is related to your ability to do work, we skip to step 6.

5. If we found at step 3 that there has been no medical improvement, or if we found at step 4 that the medical improvement is not related to your ability to work, we consider whether one of the exceptions to medical improvement applies in your case. If none of the exceptions to medical improvement applies, we find that your disability continues. However, if one of the exceptions applies, we will find either that your disability has ended or that we need to go on to step 6, depending on the exception that applies in your case.

6. If medical improvement is related to your ability to do work, or if any one of certain exceptions to medical improvement applies, we will determine whether all of your current impairments in combination are ''severe'' (see § 404.1521 of our regulations). If you do not have a ''severe'' impairment(s), we will find that your disability has ended.

7. If your impairment(s) is ''severe,'' we will assess your residual functional capacity based on all your current impairments and consider whether you can still do work you have done in the past. If you can do such work, we will find that your disability has ended.

8. If you are not able to do work you have done in the past, we will consider one final step. Given the residual functional capacity assessment and considering your age, education, and past work experience, can you do other work? If you can, disability will be found to have ended. If you cannot, disability will be found to continue.

We also use this medical improvement review standard to review your continuing eligibility if you are an adult who receives SSI payments based on disability. The sequential evaluation process is in § 416.994(b)(5) of our regulations, but it has only seven steps instead of eight. The seven steps are the same as the second through eighth steps of § 404.1594(f). We do not have a step for you if you are engaging in substantial gainful activity because of an SSI work incentive provision in section 1619 of the Act.

What is substantial gainful activity?

The term ''substantial gainful activity'' means work activity that involves significant physical or mental activities and that is done for pay or profit. Work activity is gainful if it is the kind of work usually performed for pay or profit, whether or not a profit is realized.

Under existing rules, how do we evaluate your work as an employee to determine if you are engaging in substantial gainful activity?

If you work as an employee, we generally use earnings guidelines to evaluate your work activity to decide whether the work you do is substantial gainful activity. If your average monthly earnings are more than the primary substantial gainful activity amount (*i.e.*, $860 per month for non-blind individuals in 2006), we ordinarily consider that you have engaged in substantial gainful activity. If your average monthly earnings from your work activity are equal to or less than the primary substantial gainful activity amount for the year(s) in which you work, the way we evaluate your work activity under our existing rules generally depends on whether the work occurred in or after January 2001 or before January 2001.

For work occurring between January 1, 1990 and January 1, 2001, if your average monthly earnings from your work activity were less than $300, we generally consider that your earnings show that you have not engaged in substantial gainful activity. With certain exceptions, we generally do not consider other information beyond your earnings. We refer to this $300 earnings guideline as the secondary substantial gainful activity amount to distinguish it from the primary substantial gainful activity amount. If your earnings were between the primary ($700 per month for work occurring between July 1, 1999 and January 1, 2001) and secondary substantial gainful activity levels, our rules provide that such earnings are neither high nor low enough to show whether you have engaged in substantial gainful activity. In these circumstances, we use separate criteria to evaluate your work as an employee to determine if you engaged in substantial gainful activity. If you worked in a sheltered workshop or comparable facility before January 1, 2001, earnings not greater than the primary substantial gainful activity amount ordinarily establish that the work was not substantial gainful activity.

Beginning with January 2001, if your average monthly earnings are equal to or less than the primary substantial gainful activity amount, we generally consider that your earnings show that you have not engaged in substantial gainful activity. Except in certain circumstances, we generally do not

consider other information in addition to your earnings.

Example: You worked from July 2000 through June 2001, with earnings of $600 per month. We use different criteria for evaluating your work activity from January 2001 through June 2001 and from July 2000 through December 2000 to determine if you engaged in substantial gainful activity. For work activity from January 2001 through June 2001, your average monthly earnings are less than the primary substantial gainful activity amount ($740 per month for work occurring between January 1, 2001 and January 1, 2002). We will generally consider that your earnings show that you have not engaged in substantial gainful activity. For work activity from July 2000 through December 2000, your earnings are between the primary ($700 per month for work occurring between July 1, 1999 and January 1, 2001) and secondary ($300 per month for work occurring between January 1, 1990 and January 1, 2001) substantial gainful activity levels. We consider that your earnings are neither high nor low enough to show whether you have engaged in substantial gainful activity. We will use separate criteria, such as the work you did, the hours you worked, and the amount of assistance you received, to evaluate your work to determine if you engaged in substantial gainful activity.

Under existing rules, are earnings guidelines the only factor used to determine if your work as an employee is substantial gainful activity?

As we have indicated above, in some instances, earnings guidelines are not the only factor we used to determine if the work you are performing is substantial gainful activity. In some cases we will consider other information if there is evidence which shows that you may have engaged in substantial gainful activity. In these instances, we evaluate your work activity under the criteria described below to determine if you have engaged in substantial gainful activity. We may determine that you have engaged in substantial gainful activity if your work activity satisfies either of the following set of criteria:

- Your work is comparable to that of unimpaired people in your community who are doing the same or similar occupations as their means of livelihood, taking into account the time, energy, skill, and responsibility involved in the work; or
- Your work, although significantly less than that done by unimpaired people, is clearly worth more than the substantial gainful activity amount, according to pay scales in your community.

Under existing rules, what factors are used to determine if your work as a self-employed person is substantial gainful activity?

We consider your activities and their value to your business to decide whether you have engaged in substantial gainful activity. To determine whether you have engaged in substantial gainful activity, we apply three tests. If you have not engaged in substantial gainful activity under test one, then we will consider tests two and three. The tests are as follows:

(1) *Test One:* You have engaged in substantial gainful activity if you render services that are significant to the operation of the business and receive a substantial income from the business. (See § 404.1575(b) and (c) for an explanation of what we mean by significant services and substantial income for purposes of this test.)

(2) *Test Two:* You have engaged in substantial gainful activity if your work activity, in terms of factors such as hours, skills, energy output, efficiency, duties, and responsibilities, is comparable to that of unimpaired individuals in your community who are in the same or similar businesses as their means of livelihood.

(3) *Test Three:* You have engaged in substantial gainful activity if your work activity, although not comparable to that of unimpaired individuals, is clearly worth more than the substantial gainful activity amount when considered in terms of its value to the business, or when compared to the salary that an owner would pay to an employee to do the work you are doing.

Under existing rules, when will your performance of substantial gainful activity affect whether you continue to be disabled?

If you are entitled to Social Security benefits based on disability and you are working, the work you do may show that you are able to do substantial gainful activity and are, therefore, no longer disabled. If you are engaging in substantial gainful activity, before we determine whether you are no longer disabled because of your work activity, we will consider whether you are entitled to a trial work period under § 404.1592. We will find that your disability has ceased in the month in which you demonstrated your ability to engage in substantial gainful activity following completion of any applicable trial work period. See § 404.1594(d)(5) and (f)(1) of our regulations. Our determination that your disability has ceased because you demonstrated the ability to engage in substantial gainful activity is not a determination of whether you continue to have a disabling impairment (see § 404.1511) for purposes of eligibility for a reentitlement period (see § 404.1592a) following completion of a trial work period. If you work during your reentitlement period and we determine that your disability has ceased because your work is substantial gainful activity, we will stop your benefits. If you later stop engaging in substantial gainful activity and you are still within your reentitlement period, we will start paying your benefits again. In determining whether you do substantial gainful activity in a month for purposes of stopping or starting benefits during the reentitlement period, we will consider your work in, or earnings for, that month (see § 404.1592a(a)(2)(i)).

If you are receiving SSI benefits based on disability, your performance of substantial gainful activity does not affect your disability status for purposes of eligibility for SSI benefits. This is because of an SSI work incentive provision in section 1619 of the Act.

What does section 221(m) of the Act provide?

Above, we described what typically happens during a continuing disability review. However, section 221(m) of the Act provides for special exceptions for specified individuals under specific circumstances.

Section 221(m) contains two paragraphs. Paragraph (1) provides that, if you are entitled to disability insurance benefits under section 223 of the Act or to other monthly insurance benefits based on disability under section 202 of the Act,[1] and you have received such benefits for at least 24 months:

- We may not schedule a continuing disability review for you solely as a result of your work activity (section 221(m)(1)(A));
- We may not use your work activity as evidence that you are no longer disabled (section 221(m)(1)(B)); and
- If you stop working, we may not presume that you are unable to work just because you stopped working (section 221(m)(1)(C)).

[1] The other monthly insurance benefits based on disability under section 202 of the Act are:

- Child's insurance benefits based on disability under section 202(d);
- Widow's insurance benefits based on disblity under section 202(c); and
- Widower's insurance benefits based on disability under section 202(f).

Paragraph (2) explains that, if you are an individual described in paragraph (1):

- You are still subject to regularly scheduled continuing disability reviews that are not triggered by work (section 221(m)(2)(A)); and
- We may still terminate your benefits if you have earnings that exceed the level of earnings that represent substantial gainful activity (section 221(m)(2)(B)).

What revisions are we making, and why?

As a result of section 221(m) of the Act, we are revising several of our rules in subparts J and P of part 404 and subparts I and N of part 416 of our regulations:

- To explain that we will not start a continuing disability review based solely on your work activity if you are covered by section 221(m) of the Act;
- To explain how we consider activities from work in continuing disability reviews if you are covered by section 221(m); and
- To explain how we evaluate your work when we decide whether you have engaged in substantial gainful activity for purposes of determining whether your disability has ceased, if you are covered by section 221(m).

In addition, we are also revising several of our rules in subparts J and P of part 404 and subparts I and N of part 416 of our regulations:

- To incorporate rules about not starting a continuing disability review that are contained in another part of our regulations and apply to you if you are using a ticket under the Ticket to Work program;
- To clarify how we determine continuing disability at the last two steps of the medical improvement review standard sequential evaluation process;
- To explain that our action to start or to discontinue a continuing disability review is not an initial determination; and
- To eliminate the use of the secondary substantial gainful activity amount for evaluating work done by an employee before January 2001.

Although section 221(m) applies only if you receive disability benefits under title II of the Act, we are making changes to our title XVI regulations that will apply to you if:

- You are entitled to Social Security disability benefits under title II of the Act;
- You are subject to the provisions of section 221(m) because you have received the Social Security disability benefits for at least 24 months; and
- You are also eligible for SSI benefits based on disability or blindness under title XVI of the Act.

If you meet these criteria, we will use the same rules for starting continuing disability reviews under title XVI as we will use under title II. Also, when we do conduct a continuing disability review, we will use the same rules on how we consider the activities from your work in a continuing disability review under title XVI as we will use in a continuing disability review under title II. If we did not make these changes to the title XVI regulations, we would have rules under which we could start a continuing disability review based solely on your work activity to determine whether your disability continues or ends under title XVI even though we could not start a continuing disability review on that basis to determine whether your disability continues or ends under title II. Also, when we do conduct continuing disability reviews for both title II and title XVI purposes, we would have different rules on how we consider the activities from your work for title II and title XVI purposes. As a result, we could determine that your disability continues under title II but that your disability has ended under title XVI. For these reasons, we are making the aforementioned changes to the title XVI regulations that will apply to you if you are a recipient of SSI benefits based on disability or blindness and also are a Social Security disability beneficiary who is covered by section 221(m) of the Act. We concluded that this is a reasonable interpretation of the statute and the most logical, equitable, and administratively efficient way to implement section 221(m) if you receive both types of benefits.

We do not interpret section 221(m) of the Act to apply to you if you are a recipient of SSI benefits only. Section 221(m) provides that, for you to be covered by that section, you must be entitled to and have received Social Security disability benefits under title II. Therefore, these final rules do not extend the provisions of section 221(m) to you if you receive only SSI disability or blindness payments.

We are also revising our disability regulations to include rules that are already in subpart C of part 411 of our regulations and that apply to you if you are in the Ticket to Work program and using your ticket. These rules provide that we will not start a continuing disability review for you during the period in which you are using a ticket. However, they also explain that we can still do a review to determine if your disability has ended under title II because you have demonstrated your ability to engage in substantial gainful activity, as defined in §§ 404.1571–404.1576 of our regulations.

We are also clarifying in these final rules that if you are entitled to Social Security disability benefits under title II or eligible for SSI disability payments under title XVI, we will not consider the work that you are doing or have done during your current period of entitlement or eligibility based on disability to be past relevant work or past work experience at the last two steps of the applicable medical improvement review standard sequential evaluation process. We are also amending our rules to provide a comparable rule if you are requesting expedited reinstatement of benefits under section 223(i) or 1631(p) of the Act. The rule will apply at the last two steps to work you do during or after your previous period of entitlement or eligibility which terminated and which is the basis for your request for expedited reinstatement.

The following is an explanation of the specific changes we are making and our reasons for making these changes.

Sections 404.903 and 416.1403 Administrative Actions That Are Not Initial Determinations

We are adding a new paragraph (x) to § 404.903 and a new paragraph (a)(22) to § 416.1403 to explain that the action of starting or discontinuing a continuing disability review is not an initial determination. As explained in existing §§ 404.903 and 416.1403(a), administrative actions that are not initial determinations may be reviewed by us, but they are not subject to the administrative review process provided by subpart J of part 404 or subpart N of part 416 of our regulations, and they are not subject to judicial review. If we start a continuing disability review based solely on your work activity, we will provide an opportunity for you to request that we review that action if you believe that you are protected by the section 221(m)(1)(A) provision and that the medical review should not have been started. We will inform you of this opportunity when we send you a letter telling you that we are starting a medical continuing disability review. If we review the action and conclude that the initiation of the continuing disability review was in error because section 221(m)(1)(A) of the Act applies, we will discontinue processing the continuing disability review. In addition, as we explain later in this preamble, if we process the continuing disability review to completion and make a medical cessation determination, we are amending our

rules in §§ 404.1590 and 416.990 to provide a procedure under which we will vacate the medical cessation determination if, within a prescribed time period, we receive evidence from you that establishes that the start of your continuing disability review was in error because of section 221(m)(1)(A) of the Act.

Sections 404.1574 and 416.974 Evaluation Guides if You Are an Employee

We are revising §§ 404.1574(b) and 416.974(b) to remove the rules relating to the use of the secondary substantial gainful activity amount for evaluating work activity you performed as an employee prior to January 2001. This change will eliminate the difference that exists between the way we evaluate work you performed as an employee before January 2001 and the way we evaluate work you performed as an employee in months beginning with January 2001 in cases in which your average monthly earnings from your work are equal to or less than the applicable primary substantial gainful activity amount.

On December 29, 2000, we published final rules in the **Federal Register** (65 FR 82905) to discontinue the use of a secondary substantial gainful activity amount effective for work activity in months beginning with January 2001. We made this change because, as we explained in the preamble to those final rules, ''our experience suggests that the secondary substantial gainful activity amount has not been as useful a tool as we would have liked'' (65 FR 82906). We indicated that our experience suggests that few applicants and beneficiaries would be affected by the change because few employees have been found to have performed substantial gainful activity on the basis of the secondary rules except in those circumstances that would otherwise warrant development of other information beyond earnings. We also explained that ''[d]iscontinuing these complex secondary guidelines will help simplify our rules and facilitate public understanding of the Social Security disability program as well as improve our work efficiency'' (65 FR 82906). For these same reasons, and to provide consistent rules for considering earnings from your work as an employee, without regard to whether the work was performed before January 2001 or in or after January 2001, we are discontinuing the use of the secondary guidelines altogether.

Under this change, if your average monthly earnings from work you performed as an employee before January 2001 are equal to or less than the applicable primary substantial gainful activity amount, we will consider your earnings in the same way we consider earnings from work performed by an employee in or after January 2001 that do not average more than the applicable primary substantial gainful activity amount. That is, we will generally consider that your earnings from your work will show that you have not engaged in substantial gainful activity without considering other information beyond your earnings. We will perform additional development beyond looking at earnings only when circumstances indicate that you may have been engaging in substantial gainful activity or might have been in a position to control when earnings are paid to you or the amount of wages paid to you (for example, if you work for a small corporation run by a relative).

Using the facts from the ''Example'' set out earlier, the following illustrates how we will evaluate your work activity under these final rules, which eliminate the use of the secondary substantial gainful activity guidelines altogether. As in the ''Example'' above, you worked from July 2000 through June 2001, with earnings of $600 per month. For the entire period you worked, your average monthly earnings are less than the applicable primary substantial gainful activity amounts ($740 per month for work occurring between January 1, 2001 and January 1, 2002 and $700 per month for work occurring between July 1, 1999 and January 1, 2001). Therefore, we will generally consider that your earnings show that you have not engaged in substantial gainful activity.

To make this change, we are eliminating the rules in existing §§ 404.1574(b) and 416.974(b) relating to the use of the secondary substantial gainful activity amount and the distinction between work performed before January 2001 and work performed in or after January 2001. We are replacing existing paragraphs (b)(3) through (b)(6) of §§ 404.1574 and 416.974 with a new paragraph (b)(3), Earnings that will ordinarily show that you have not engaged in substantial gainful activity. In new paragraph (b)(3), we are consolidating our existing rules that apply in cases in which average monthly earnings from work performed by an employee (including work performed in a sheltered workshop or comparable facility) in or after January 2001 are equal to or less than the applicable primary substantial gainful activity amount, and are extending the scope of these rules to cover work performed before January 2001 as well as work performed in or after January 2001.

In a new paragraph (b)(3)(i), General, we state the general rule. We explain that if your average monthly earnings are equal to or less than the amount(s) determined under paragraph (b)(2) of § 404.1574 or § 416.974 for the year(s) in which you work, we will generally consider that the earnings from your work activity as an employee (including earnings from work in a sheltered workshop or comparable facility) will show that you have not engaged in substantial gainful activity. We explain that we will generally not consider other information in addition to your earnings except in the circumstances described in new paragraph (b)(3)(ii) of §§ 404.1574 and 416.974.

In new paragraph (b)(3)(ii), When we will consider other information in addition to your earnings, we describe those circumstances in which we will ordinarily consider other information beyond your earnings. We explain that we will generally consider other information in addition to your earnings if there is evidence indicating that you may be engaging in substantial gainful activity or that you are in a position to control when earnings are paid to you or the amount of wages paid to you (for example, if you are working for a small corporation owned by a relative).

We also include provisions in new paragraph (b)(3)(ii) that provide examples of other information we may consider. These latter provisions incorporate the provisions of existing paragraph (b)(6)(iii) of §§ 404.1574 and 416.974. In new paragraphs (b)(3)(ii)(A) and (B), we explain that other information we may consider includes, for example, whether (A) Your work is comparable to that of unimpaired people in your community who are doing the same or similar occupations as their means of livelihood, taking into account the time, energy, skill, and responsibility involved in the work; and (B) your work, although significantly less than that done by unimpaired people, is clearly worth the amounts shown in paragraph (b)(2) of § 404.1574 or § 416.974, according to pay scales in your community.

The provisions of new §§ 404.1574(b)(3)(i) and (ii) and 416.974(b)(3)(i) and (ii) are based on the rules that are stated in the first sentence of existing paragraph (b)(3), the last sentence of existing paragraph (b)(4), existing paragraph (b)(5), and existing paragraphs (b)(6)(ii) and (iii) of §§ 404.1574 and 416.974.

In new § 404.1574(b)(3)(iii), we explain that, even if the circumstances described in new § 404.1574(b)(3)(ii) are

present, we will not consider other information in addition to your earnings in evaluating the work you are doing or have done if: (A) At the time you do the work, you are entitled to Social Security disability benefits and you have received such benefits for at least 24 months; and (B) we are evaluating that work to consider whether you have engaged in substantial gainful activity or demonstrated the ability to engage in substantial gainful activity for the purpose of determining whether your disability has ceased because of your work activity. We include cross-references to the sections of our regulations that concern making substantial gainful activity determinations for purposes of determining whether your disability has ceased.

Since new paragraphs (b)(3)(ii)(A) and (B) require us to consider your work activities, we decided that we could no longer use (b)(3)(ii)(A) and (B)—based on section 221(m)(1)(B) of the Act—to decide that the work you do after you have received Social Security disability benefits for at least 24 months shows that you are able to engage in substantial gainful activity and are, therefore, no longer disabled. Therefore, in § 404.1574(b)(3), we have included a paragraph (b)(3)(iii), Special rule for considering earnings alone when evaluating the work you do after you have received social security disability benefits for at least 24 months, which provides an exception to the rule in § 404.1574(b)(3)(ii), discussed above. The exception will apply when we are evaluating the work that you perform while you are entitled to Social Security disability benefits and after you have received such benefits for at least 24 months and will apply to you only if you are covered by section 221(m) of the Act. The exception would apply only if we are evaluating that work to decide whether the work shows that you are able to engage in substantial gainful activity for the purpose of determining whether your disability has ceased because of your work activity. In this case, even if the circumstances described in new § 404.1574(b)(3)(ii) are present, we will not consider other information in addition to your earnings. Instead, we will apply the general rule described in new § 404.1574(b)(3)(i). That is, in the case described above, if your average monthly earnings from that work are equal to or less than the amount(s) determined under § 404.1574(b)(2) for the year(s) in which that work occurs, we will find that your earnings from that work will show that you have not engaged in substantial gainful activity.

If you are entitled to Social Security disability benefits and you perform work as an employee after you have received such benefits for at least 24 months, section 221(m)(1)(B) of the Act provides that we may not consider information about the activities you perform in that work (such as the information described in new § 404.1574(b)(3)(ii)(A) and (B)) to determine that the work shows that you are able to engage in substantial gainful activity and are, therefore, no longer disabled, *i.e.*, that your disability has ceased. We may still consider your earnings from that work under the earnings guidelines to decide whether your earnings show that you have engaged in substantial gainful activity for the purpose of determining whether your disability has ceased. Also, we may still consider other information in addition to your earnings in the circumstances described in new § 404.1574(b)(3)(ii) to decide whether that work is substantial gainful activity for purposes other than the purpose of determining whether your disability has ceased. Therefore, after we have determined that your disability has ceased during the reentitlement period because you performed substantial gainful activity, we will continue to make substantial gainful activity determinations to decide whether benefits should be started or stopped for a subsequent month(s) during the reentitlement period and to decide when your entitlement to benefits terminates (see § 404.1592a(a)(2) and (3)). We may use the tests in § 404.1574(b)(3)(ii) that involve looking at your work activities in making these substantial gainful activity determinations because these determinations do not involve deciding that you are no longer disabled.

Also, in new § 404.1574(b)(3), we include a paragraph (b)(3)(iv), When we consider you to have received social security disability benefits for at least 24 months. The provisions of paragraph (b)(3)(iv) apply for purposes of new paragraph (b)(3)(iii) of § 404.1574. In new § 404.1574(b)(3)(iv), we provide a definition of Social Security disability benefits and explain when we will consider you to have received such benefits for at least 24 months.

In response to public comments we received on the proposed rules, we have modified the criteria relating to the 24-month requirement in these final rules. We have modified the criteria in § 404.1574(b)(3)(iv) of the final rules to provide that, if you are otherwise due a social security disability benefit for a month, but we withhold your benefit for that month to recover an overpayment, we will count that month toward the 24-month requirement. We provide that, in this situation, we will consider you to have constructively received a social security disability benefit for the month for purposes of the 24-month requirement. We are making similar changes in final §§ 404.1575(e)(2), 404.1590(i)(2)(i), and 416.990(i)(2)(i), which are described later in this preamble.

In final § 404.1574(b)(3)(iv), we explain that we consider you to have received social security disability benefits for at least 24 months beginning with the first day of the first month following the 24th month for which you actually received Social Security disability benefits that you were due or constructively received such benefits. We state that the 24 months do not have to be consecutive. We explain that we do not count months for which you were entitled to benefits but for which you did not actually or constructively receive benefit payments. In addition, we explain that if you also receive SSI payments, months for which you received only SSI payments will not count for the 24-month requirement.

We are including new paragraphs (b)(3)(iii) and (iv) only in our revision of § 404.1574(b). We are not including similar provisions in our revision of § 416.974(b) because the performance of substantial gainful activity is not a basis for determining that disability has ceased under the SSI program.

As we explain above, new paragraph (b)(3) of §§ 404.1574 and 416.974 will replace existing paragraphs (b)(3) through (b)(6) of these sections. As a consequence, we have made certain conforming changes to existing paragraphs (b)(1) and (2) of §§ 404.1574 and 416.974. We are amending existing paragraph (b)(1) of §§ 404.1574 and 416.974 to remove references to paragraphs (b)(4), (5), and (6). We are revising the parenthetical phrase in the introductory text of existing paragraph (b)(2) of §§ 404.1574 and 416.974 to read, ''(including earnings from work in a sheltered workshop or a comparable facility especially set up for severely impaired persons),'' to incorporate the description of sheltered work contained in existing paragraph (b)(4) of these sections.

Section 404.1575 Evaluation Guides if You Are Self-Employed

If you are covered by section 221(m) of the Act and you are self-employed, we are revising our rules in existing § 404.1575 to explain how we will evaluate your work activity when

deciding whether you have engaged in substantial gainful activity following the completion of a trial work period for purposes of determining if your disability has ceased. (We are not amending our rules in § 416.975 because your performance of substantial gainful activity does not affect your disability status for purposes of your continuing eligibility for SSI payments.) As we explained earlier, if you are self-employed, we consider three tests to determine if you have engaged in substantial gainful activity. Since the three tests require us to consider your activities at work and their value to your business, we decided that we could not use these tests to decide that the work you do after you have received Social Security disability benefits for at least 24 months shows that you are able to engage in substantial gainful activity and are, therefore, no longer disabled. Based on section 221(m)(1)(B) of the Act, we concluded that we needed to provide a different test for considering whether that work is substantial gainful activity for purposes of determining whether your disability has ceased. Therefore, we will use a new evaluation test for that purpose. We refer to this new test as the countable income test.

To explain this new evaluation test and when we will apply it, we are revising existing paragraphs (a) and (c) of § 404.1575 and adding a new paragraph (e). We are retaining all of the provisions of existing paragraph (a). However, we are restructuring the paragraph. We made the first two sentences of existing paragraph (a) the introductory text of paragraph (a) of final § 404.1575. (We revised the first sentence of the paragraph to include a reference to new paragraph (e).) We included the remaining provisions of existing paragraph (a) in a new paragraph (a)(2), General rules for evaluating your work activity if you are self-employed. Because of this change, we redesignated existing paragraphs (a)(1), (2), and (3) of § 404.1575 as paragraphs (a)(2)(i), (ii), and (iii), respectively, of final § 404.1575.

Following the first two sentences (the introductory text) of paragraph (a) of final § 404.1575, we added a new paragraph (a)(1), How we evaluate the work you do after you have become entitled to disability benefits. In new § 404.1575(a)(1), we explain which rules we will use to evaluate your work activity if you are self-employed and you perform the work activity while you are entitled to Social Security disability benefits. (We explain that Social Security disability benefits means disability insurance benefits for a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability.) We explain that the way we will evaluate your work activity will depend on whether the work occurs before or after you have received Social Security disability benefits for at least 24 months and on the purpose of the evaluation. We explain in new § 404.1575(a)(1) that we will use the guides in new paragraph (e), which provide for the use of the countable income test, to evaluate the work activity you do after you have received such benefits for at least 24 months to determine whether you have engaged in substantial gainful activity for the purpose of determining whether your disability has ceased. In all other cases in which we evaluate your work activity as a self-employed person to make a substantial gainful activity determination, we will apply the guides in § 404.1575(a)(2) of these final rules. Section 404.1575(a)(2) of the final rules sets out the three tests we currently use to evaluate the work of a self-employed person.

We explain in new § 404.1575(a)(1) that we will use the three tests described in § 404.1575(a)(2) to evaluate the work activity you do before you have received Social Security disability benefits for 24 months to determine if you have engaged in substantial gainful activity, regardless of the purpose of the evaluation. We also explain that, after we have determined that your disability has ceased during the reentitlement period because you performed substantial gainful activity, we will use the three tests to determine whether you are doing substantial gainful activity in subsequent months in or after your reentitlement period, whether your work activity occurs before or after you have received Social Security disability benefits for at least 24 months. After we have determined that your disability has ceased due to the performance of substantial gainful activity during the reentitlement period, we make substantial gainful activity determinations to decide whether benefits should be started or stopped for a subsequent month(s) during the reentitlement period and to decide when your entitlement to benefits terminates (see § 404.1592a(a)(2) and (3)). We may use the three tests that involve looking at work activity in making these substantial gainful activity determinations because these determinations do not involve deciding that you are no longer disabled.

We are revising existing § 404.1575(c). In amended § 404.1575(c)(1), Determining countable income, we explain what deductions are applied to your net income to decide the amount of your income we use to determine if you have done substantial gainful activity. We explain that we refer to this amount as your countable income. In amended § 404.1575(c)(2), we explain when we consider your countable income to be substantial.

In new § 404.1575(e), Special rules for evaluating the work you do after you have received social security disability benefits for at least 24 months, we explain the countable income test and when it applies. We explain that we will apply this test to evaluate the work you are doing or have done if, at the time you perform the work, you are entitled to Social Security disability benefits and you have received such benefits for at least 24 months. We explain that we will apply the test only when we are evaluating that work to consider whether you have engaged in substantial gainful activity or demonstrated the ability to engage in substantial gainful activity for the purpose of determining whether your disability has ceased because of your work activity. We explain that, under the countable income test, we will not consider the services you perform in that work to determine that the work you are doing shows that you are able to engage in substantial gainful activity and are, therefore, no longer disabled. However, we may consider the services you perform to determine that you are not doing substantial gainful activity.

In new paragraph (e)(2), The 24-month requirement, we explain that we consider you to have received Social Security disability benefits for at least 24 months beginning with the first day of the first month following the 24th month for which you actually received Social Security disability benefits that you were due or constructively received such benefits. We explain that we will consider you to have constructively received a benefit for a month for purposes of the 24-month requirement if you were otherwise due a social security disability benefit for that month and your monthly benefit was withheld to recover an overpayment.

We explain the new evaluation test in new paragraph (e)(3), The countable income test. Under the countable income test, we will compare your countable income to the substantial gainful activity earnings guidelines in § 404.1574(b)(2) to determine if you have engaged in substantial gainful activity. We will consider that you have engaged in substantial gainful activity if your monthly countable income averages more than the amounts in § 404.1574(b)(2) unless the evidence shows that you did not render

significant services in the month(s). If your average monthly countable income is equal to or less than the amounts in § 404.1574(b)(2), or if the evidence shows that you did not render significant services, we will consider that your work as a self-employed person shows that you have not engaged in substantial gainful activity.

Sections 404.1590 and 416.990 When and How Often We Will Conduct a Continuing Disability Review

We added two new paragraphs to existing §§ 404.1590 and 416.990 to explain when we will and will not start continuing disability reviews if you are in the Ticket to Work program and your ticket is in use (new paragraph (h)), and if you are covered by the provisions of section 221(m) of the Act (new paragraph (i)).

In new §§ 404.1590(h) and 416.990(h), If you are participating in the Ticket to Work program, we restate our rules already set out in §§ 411.160 and 411.165 that we will not start a continuing disability review for you during the period in which you are using a ticket under the Ticket to Work program. This amendment to existing §§ 404.1590 and 416.990 is not a change in policy, but incorporates rules already set out in §§ 411.160 and 411.165. In addition, we provide in new § 404.1590(h) that this provision does not apply to the reviews we do under title II using the rules in §§ 404.1571–404.1576 to determine whether the work you have done shows that you are able to do substantial gainful activity (see § 411.160(b)). (As we have already noted, your performance of substantial gainful activity does not affect your SSI eligibility because of the work incentive provisions of section 1619 of the Act.)

In new §§ 404.1590(i) and 416.990(i), If you are working and have received social security disability benefits for at least 24 months, we provide rules for you if you are covered by section 221(m) of the Act. In new paragraph (i)(1), General, we explain that we will not start a continuing disability review based solely on your work activity if you are currently entitled to benefits based on disability under title II of the Act and you have received such benefits for at least 24 months. We also list the types of title II disability benefits that qualify.

Although section 221(m)(1)(A) says that a continuing disability review may not be ''scheduled'' based solely on your work activity, we use the word ''start'' in this provision and the remainder of new paragraph (i) of §§ 404.1590 and 416.990 to avoid any confusion about what we will do, and to use consistent language throughout these sections of our rules. Existing provisions in §§ 404.1590 and 416.990 use both words. We use the word ''start'' in the opening sentence of existing §§ 404.1590(b) and 416.990(b) to explain when we will do a continuing disability review. We then use the word ''scheduled'' in existing paragraphs (b)(1), (b)(2) and (b)(10) to explain when we will start a continuing disability review that we have scheduled in advance; that is, based on a diary for ''medical improvement expected,'' ''medical improvement possible,'' or ''medical improvement not expected,'' or on a ''vocational reexamination diary.'' In existing paragraph (b)(11) of § 416.990, we specify a timeframe within which we must review the cases of certain children (i.e., by the first birthday of the child) unless certain conditions are met. In existing paragraph (b)(11)(ii) of § 416.990, which discusses one of the conditions, we use the word ''schedule'' to describe a situation in which we set a time in advance for conducting a continuing disability review. The remaining provisions in existing paragraphs (b)(3)–(b)(9) of §§ 404.1590 and 416.990 describe situations in which we do not schedule continuing disability reviews in advance but may start them sooner than the regularly scheduled reviews.

In new §§ 404.1590(i)(2) and 416.990(i)(2), The 24-month requirement, we provide rules for determining whether the 24-month requirement in new §§ 404.1590(i)(1) and 416.990(i)(1) is met. In new paragraph (i)(2)(i), we explain that months for which you have actually received Social Security disability benefits under title II that you were due, or for which you have constructively received such benefits, will be counted for the 24-month requirement. The 24 months do not have to be consecutive. We explain that we will consider you to have constructively received a benefit for a month for purposes of the 24-month requirement if you were otherwise due a social security disability benefit for that month and your monthly benefit was withheld to recover an overpayment. We also explain that we do not count months for which you were technically ''entitled'' but did not actually or constructively receive benefit payments. In addition, we clarify that months for which you received only SSI payments and months for which you received continued benefits pending the appeal of a medical cessation determination, do not count toward the 24-month requirement.

In new §§ 404.1590(i)(2)(ii) and 416.990(i)(2)(ii), we explain that you will not meet the 24-month requirement for purposes of new § 404.1590(i)(1) or § 416.990(i)(1) if you have not received Social Security disability benefits for at least 24 months as of the date on which we start a continuing disability review. We explain that the date on which we start a continuing disability review is the date on the notice we send you that tells you that we are beginning the review.

In new §§ 404.1590(i)(3) and 416.990(i)(3), When we may start a continuing disability review even if you have received social security disability benefits for at least 24 months, we include a reminder that, even if you meet the requirements of new paragraph (i)(1) of § 404.1590 or § 416.990, we may still start a continuing disability review if we have another reason to do so; that is, when the fact that you are working is not the sole reason for the continuing disability review. We include two examples, including a reminder that we must still schedule you for regularly scheduled continuing disability reviews, as provided under section 221(m)(2)(A) of the Act.

In § 404.1590, we include a new paragraph (i)(4), Reviews to determine whether the work you have done shows that you are able to do substantial gainful activity, to clarify that the exemption from continuing disability reviews in new paragraph (i)(1) of that section does not apply to certain reviews we conduct under title II of the Act. We explain that paragraph (i)(1) does not apply to the reviews we conduct using the rules in §§ 404.1571–404.1576 to determine whether the work you have done shows that you are able to do substantial gainful activity and are, therefore, no longer disabled. In other words, if section 221(m) of the Act applies to you, we may not be able to start a medical continuing disability review, but we can still start a work continuing disability review to determine if you are doing substantial gainful activity. We do not conduct similar reviews under title XVI because of the work incentive provisions in section 1619 of the Act. Therefore, we do not include a similar provision in the amendments to § 416.990.

As we explain earlier in this preamble, if we start a continuing disability review based on your work activity, we will provide an opportunity for you to request that we review that action if you believe that you are protected by section 221(m)(1)(A) of the Act and that the action of starting the continuing disability review was in error. If we review the action and conclude that the initiation of the medical continuing disability review

was in error, we will discontinue the processing of the continuing disability review. If the continuing disability review proceeds to completion and we make a medical cessation determination, we provide a procedure in new §§ 404.1590(i)(5) and 416.990(i)(4) under which we will vacate the medical cessation determination if the action of starting the continuing disability review is shown to have been in error because you were protected by section 221(m)(1)(A). You must provide evidence to us that establishes that you met the requirements of new § 404.1590(i)(1) or § 416.990(i)(1) as of the date of the start of your continuing disability review and that the start of the review was erroneous. In addition, we must receive the evidence within 12 months of the date of the notice of the initial determination of medical cessation.

We also amended existing paragraph (a) of §§ 404.1590 and 416.990 to include references to new paragraphs (h) and (i) of these sections.

Section 404.1592a The Reentitlement Period

We amended existing paragraph (a) of § 404.1592a to explain when the special rules in amended §§ 404.1574(b)(3)(iii) and 404.1575(e) may apply, and when they will not apply, in making substantial gainful activity determinations. We also revised existing paragraph (a)(3) of § 404.1592a to separate the provisions into two lower level paragraphs. We designated the second, third, and fourth sentences of existing paragraph (a)(3) as new paragraph (a)(3)(i). We designated the fifth, sixth, and seventh sentences of existing paragraph (a)(3) as new paragraph (a)(3)(ii).

We amended existing paragraph (a)(1) of § 404.1592a to include a reference to the special rules for evaluating the work you do after you have received Social Security disability benefits for at least 24 months. We are including this reference in the list of examples of the relevant rules we will apply when deciding whether the work you do following completion of a trial work period is substantial gainful activity for purposes of determining whether your disability has ceased. We are also making a similar change in newly designated paragraph (a)(3)(ii).

We revised the last sentence of existing paragraph (a)(2)(i), and added in newly designated paragraph (a)(3)(i), of this section to clarify that, if we have decided that your disability ceased because you performed substantial gainful activity, we will not apply the special rules in amended §§ 404.1574(b)(3)(iii) and 404.1575(e) in making substantial gainful activity determinations for purposes of determining whether benefits should be paid for any subsequent months of the reentitlement period or whether your entitlement to benefits has terminated. The special rules in amended §§ 404.1574(b)(3)(iii) and 404.1575(e) do not apply in making these substantial gainful activity determinations because these determinations do not involve deciding whether your disability has ceased.

Section 404.1594 How We Will Determine Whether Your Disability Continues or Ends

Section 416.994 How We Will Determine Whether Your Disability Continues or Ends, Disabled Adults

We are adding new § 404.1594(i), If you work during your current period of entitlement based on disability or during certain other periods, and new § 416.994(b)(8), If you work during your current period of eligibility based on disability or during certain other periods, to:

- Incorporate a longstanding instruction that interprets our regulations on how we consider your work at the last two steps of the medical improvement review standard sequential evaluation process when determining whether your disability continues or ends;
- Provide a comparable rule on how we consider your work at the last two steps of the process when determining whether you are entitled to expedited reinstatement of benefits under section 221(i) or eligible for expedited reinstatement of benefits under section 1631(p) of the Act;
- Explain how we will consider the activities you do in your work when determining whether your disability continues or ends if you are covered by section 221(m) of the Act; and
- Explain how we will consider the activities you do in your work when determining whether your disability continues or ends if you are not covered by section 221(m) of the Act.

In new §§ 404.1594(i)(1) and 416.994(b)(8)(i), we clarify our rules about the last two steps of the medical improvement review standard sequential evaluation process for determining whether disability continues or ends to reflect an interpretation contained in an operating instruction we have been using for a number of years. The provisions clarify that we will not consider work you are doing now, or work that you did, during your current period of entitlement based on disability under title II (new § 404.1594(i)(1)), or during your current period of eligibility based on disability under title XVI (new § 416.994(b)(8)(i)), to be past relevant work for purposes of the second to last step of the sequential evaluation processes described in §§ 404.1594(f) and 416.994(b)(5). The provisions also explain that we will not consider such work to be ''past work experience'' when we decide whether you can do other work at the last step of those processes. In these provisions of the final rules, we also provide that we will not consider certain work to be past relevant work or past work experience for purposes of the last two steps of the medical improvement review standard sequential evaluation process when we decide whether you qualify for expedited reinstatement of benefits under section 223(i) or 1631(p) of the Act. For purposes of deciding whether you qualify for expedited reinstatement of benefits, the rules would apply to work you are doing or have done during or after your previous period of entitlement or eligibility which terminated and which is the basis for your request for expedited reinstatement.

In new §§ 404.1594(i)(2) and 416.994(b)(8)(ii), we provide rules for you if you are covered by section 221(m) of the Act. Section 221(m)(1)(B) of the Act explains that if you are covered by this section, ''no work activity engaged in by the individual may be used as evidence that the individual is no longer disabled.'' Based on this statutory language, we provide in these final rules that we will not consider the activities you do in your work if they support a finding that you are no longer disabled. We may still find that you are no longer disabled, but only if that finding is based on other evidence.

We also provide that we may consider the activities you do in your work if they provide evidence that you are still disabled or if they do not conflict with a finding that you are still disabled. Your functioning on the job may help us to establish that you are still disabled. We concluded that we are required to include this provision because the language of section 221(m)(1)(B) speaks only about the use of work activity as evidence that an individual is ''no longer disabled.''

We also include in new §§ 404.1594(i)(2) and 416.994(b)(8)(ii) a statement that we will not presume that you are still disabled if you stop working. This would incorporate the statutory requirement of section 221(m)(1)(C) into our regulations.

In new §§ 404.1594(i)(3) and 416.994(b)(8)(iii), we explain how we consider activities from work in all other continuing disability reviews, that is, if you receive disability benefits under title II but are not covered by section 221(m) or if you are eligible only for SSI benefits. The rules would only incorporate into our regulations an interpretation we already use. Even though we may not consider the work that you do during your current period of entitlement or eligibility based on disability to be past relevant work or past work experience, we do consider the physical and mental activities you do in your work when we need to assess your functioning (for example, when we assess your residual functional capacity) in deciding whether your disability continues or ends. We consider the activities regardless of whether they support a finding that your disability continues or support a finding that your disability has ended. (It is only when you are covered by section 221(m) that we would not consider the activities if they support a finding that your disability has ended, as explained in §§ 404.1594(i)(2) and 416.994(b)(8)(ii), discussed above.) In new §§ 404.1594(i)(3) and 416.994(b)(8)(iii), therefore, we are only codifying in our regulations our current practice when you are not covered by section 221(m).

We concluded that we are required to do this in these cases, because of the general requirements of the Act and our regulations that we consider all of the relevant evidence in your case record whenever we make a determination about your disability. Section 221(m) provides an explicit exception to this rule, but only for people who are covered by that section.

We are aware that the provisions in final §§ 404.1594(i)(2) and 416.994(b)(8)(ii) may create a more complex process because we may, in some cases, be required to disregard information about your work that would otherwise be evidence about your physical and mental abilities. We may also be required to undertake additional development to obtain alternative evidence about your abilities, or to clarify evidence (such as medical opinion evidence) that may have been based on information about your activities at work. However, we concluded that there is no other permissible interpretation of the language of section 221(m)(1)(B).

We are also adding cross-references in several places in existing §§ 404.1594 and 416.994 as a reminder to consider the provisions in new §§ 404.1594(i) and 416.994(b)(8) whenever appropriate.

Other Changes

We are making a few minor editorial corrections and revisions to existing provisions. These changes are not substantive and we do not intend to change the meaning of existing rules in any way by them. For example, we provide paragraph designations for some of the clauses within §§ 404.1590(b) and 416.990(b) to make them easier to refer to. We are also deleting the reference to completion of a trial work period from existing § 416.990(b)(4). There are no trial work periods under title XVI because of other work incentive provisions in the Act. When we last revised our regulations to remove references to the trial work period from the SSI regulations, we inadvertently overlooked this provision. See 65 FR 42772, 42775 (July 11, 2000). In addition, we are replacing the word ''decide'' with the word ''determine'' in the heading of § 416.994 to conform to the language used in the headings of §§ 404.1594 and 416.994a.

Public Comments on the Notice of Proposed Rulemaking (NPRM)

When we published the NPRM in the **Federal Register** on October 11, 2005 (70 FR 58999), we provided interested parties 60 days to submit comments. We received comments from 13 commenters, including national, State and community based agencies and private organizations serving people with disabilities, beneficiaries, and other individuals. We carefully considered the comments we received on the proposed rules in publishing these final regulations. The comments we received and our responses to the comments are set forth below. Although we condensed, summarized, or paraphrased the comments, we believe that we have expressed the views accurately and have responded to all of the significant issues raised.

In addition, a few of the comments were about subjects that were outside the scope of this rulemaking. We have not summarized and responded to these comments below.

Comments and Responses

Comment: One commenter wanted us to clarify how the evaluation of subsidies and special conditions will be performed if work activity cannot be evaluated when making a substantial gainful activity determination for the purpose of determining whether disability has ceased.

Response: Generally, in evaluating the work activity of an employee for purposes of determining whether the work is substantial gainful activity, our primary consideration will be the earnings the individual derives from the work activity. When we evaluate earnings under the earnings guidelines for determining substantial gainful activity, we use the actual amount of earnings paid to the individual (subject to the deduction of impairment-related work expenses) unless we have information indicating that not all of the earnings are directly related to the individual's productivity (*i.e.*, the earnings are subsidized or the work is performed under special conditions). When the amount of earnings paid to an individual exceed the reasonable value of the work he or she performs, we consider only that part of the individual's pay which he or she actually earns. See § 404.1574(a)(2) of our regulations.

When we have evidence indicating that an individual with a serious medical impairment may not be earning all that he or she is paid, we will continue to evaluate the work activity performed by the individual to determine whether, and to what extent, the individual's earnings exceed the reasonable value of the services performed by the individual. We will evaluate the work activity to determine the reasonable value of the actual services the individual performs in order to determine the amount of earnings we will use when applying the earnings guidelines. If we did not do this before applying the earnings guidelines, we could find that an individual with a serious medical impairment has demonstrated the ability to engage in substantial gainful activity and, therefore, is no longer disabled, on the basis of earnings that are in excess of the reasonable value of the actual services he or she performs. Therefore, we will continue to evaluate the work activity of an individual in these instances for the purpose of determining the amount of earnings we will use when applying the earnings guidelines, even if the individual is covered by section 221(m) of the Act. We believe this is a reasonable interpretation of sections 221(m)(1)(B) and (2)(B) of the Act.

The changes which we proposed to make to § 404.1574(b), and which we are adopting in these final rules, do not affect this aspect of our existing rules in § 404.1574(a)(2) for evaluating whether the work performed by an employee is substantial gainful activity. Therefore, we do not believe that there is a need to make changes to clarify this aspect of our existing rules.

Comment: One commenter was concerned that individuals who are participating in the Ticket to Work

program do not understand that the continuing disability review protection for individuals who are using a ticket does not apply to the reviews we conduct using the rules in §§ 404.1571 through 404.1576.

Response: When we refer to the reviews we conduct using the rules in §§ 404.1571 through 404.1576, we are discussing the substantial gainful activity determinations we make under §§ 404.1592a(a)(1) and 404.1594(d)(5) and (f)(1) (see also § 404.1592a(a)(3)(ii) of these final rules). The latter sections require us to evaluate the work activity of a title II disability beneficiary to determine whether the work shows that the individual is able to engage in substantial gainful activity and, therefore, is no longer disabled. Our public information materials have clearly explained that even though a title II disability beneficiary is using a ticket under the Ticket to Work program, we will still evaluate his or her work activity to determine whether the work is substantial gainful activity. We explain in these materials that if the work shows that the individual is able to do substantial gainful activity, we will determine that the individual is no longer disabled (after applying any applicable trial work period). Also, § 411.160(b) of our regulations for the Ticket to Work program clearly explains that even though an individual who is using a ticket is protected from a medical continuing disability review, the individual will still be subject to a review to determine whether his or her disability has ended under § 404.1594(d)(5) because he or she has demonstrated the ability to engage in substantial gainful activity.

Comment: A number of commenters recommended that we allow the start of a continuing disability review to be an initial determination with appeal rights and/or eliminate the prescribed 12-month period within which an individual must submit evidence to show that the start of a continuing disability review was in error because it was precluded under section 221(m)(1)(A) of the Act.

Response: We did not adopt the recommendations. Because the action of starting or discontinuing a continuing disability review is not an adjudication of whether the individual's disability continues or ends, we do not consider that action to be an initial determination that is subject to the administrative review process under subpart J of part 404 or subpart N of part 416 of our regulations or to judicial review. We recognize that beneficiaries may not always know whether they qualify for the protection against the start of a continuing disability review based solely on work activity as provided under section 221(m)(1)(A) of the Act. Therefore, we have developed a screening tool to identify beneficiaries covered by section 221(m) to help prevent the starting of a continuing disability review based solely on their work activity. We recognize that the screening tool may not capture every case and that it is possible that we may start a continuing disability review solely as a result of a beneficiary's work activity even though the beneficiary may be protected by the section 221(m)(1)(A) provision. Should this happen, we will provide an opportunity for the beneficiary to request that we review the action of starting the continuing disability review. As we explain earlier in this preamble, we will inform the individual of this opportunity in the notice we send the individual which tells him or her that we are starting a medical continuing disability review. If we review the action and conclude that the initiation of the continuing disability review was in error because section 221(m)(1)(A) applies, we will discontinue processing the continuing disability review. In the event the continuing disability review is processed to completion and results in a medical cessation determination, we explain in §§ 404.1590(i)(5) and 416.990(i)(4) of these final rules that we will provide the beneficiary 12 months within which to submit evidence to show that the action of starting the medical continuing disability review was in error because the beneficiary was protected by section 221(m)(1)(A) of the Act. If we receive evidence within the prescribed time period that establishes that the start of the continuing disability review was in error because of section 221(m)(1)(A), we will vacate the medical cessation determination and reinstate the individual. This procedure will be available in addition to any appeal requests on the medical cessation determination. We believe that the 12-month period is adequate time to submit evidence that the medical continuing disability review should not have been started, considering the beneficiary will only have 60 days to appeal the medical cessation determination. Also, we believe that the situation in which a beneficiary may need to use this procedure will be rare with the use of the screening tool and the availability of the aforementioned protest procedure that will be explained in the notice that we send to the beneficiary telling the beneficiary that we are starting a continuing disability review.

Comment: Several of the commenters suggested that we make changes to the criteria relating to the requirement that a title II disability beneficiary must have received social security disability benefits for at least 24 months to receive the protections under section 221(m) of the Act. Specifically, the commenters requested that we allow months for which a beneficiary does not receive payment of social security disability benefits due to overpayment recovery or because of worker's compensation offset, as well as months for which a beneficiary receives only SSI payments, to be counted for the 24-month requirement.

Response: We agree with the commenters that our rules should allow months for which a beneficiary is otherwise due a social security disability benefit to count for the 24-month requirement if the monthly benefit is withheld to satisfy the beneficiary's obligation to reimburse us for an overpayment. Because the monthly benefit which is otherwise due the beneficiary is applied to reduce the beneficiary's overpayment debt, we believe that a beneficiary in this situation may be treated as having received a social security disability benefit for purposes of applying the 24-month requirement. This will allow a social security disability beneficiary whose monthly benefit is withheld to recover an overpayment to receive the same consideration for purposes of the 24-month requirement as a beneficiary who repays an overpayment by refunding the overpayment amount to us or whose monthly benefit is subject to partial withholding to recover an overpayment. We have modified §§ 404.1574(b)(3)(iv), 404.1575(e)(2), 404.1590(i)(2)(i), and 416.990(i)(2)(i) of the final rules to provide that, if a beneficiary is otherwise due a social security disability benefit for a month and the monthly benefit is withheld to recover an overpayment, we will consider the beneficiary to have constructively received a benefit for that month for purposes of the 24-month requirement. We also have made changes to these sections of the final rules to provide that months for which a beneficiary has actually received social security disability benefits that he or she was due, or for which the beneficiary has constructively received such benefits (as described above), will be counted for the 24-month requirement.

We cannot adopt the suggestion to allow months for which a beneficiary does not receive a benefit payment because of worker's compensation offset to count for the 24-month requirement.

Because the Act requires a reduction in title II benefits on account of receipt of worker's compensation or similar payments, we cannot regard a beneficiary as having received a benefit for purposes of the 24-month requirement if the application of the worker's compensation offset results in no monthly benefit being due the beneficiary. This is not like the situation where the monthly benefit which is otherwise due a beneficiary is withheld to reduce the beneficiary's overpayment debt and where the beneficiary would have actually received a benefit payment had he or she refunded the overpayment amount to us. In addition, we cannot adopt the suggestion that months for which the individual receives only SSI payments be counted for the 24-month requirement. The statute specifically requires receipt of title II disability benefits for at least 24 months. Therefore, if an individual is both entitled to title II disability benefits and eligible for SSI payments based on disability or blindness, we cannot count the months for which the individual received only SSI payments for the purpose of determining whether the 24-month requirement is met.

Comment: A few commenters requested that we reconsider our stance on the interpretation of section 221(m)(1)(c). The commenters were concerned that our interpretation creates a barrier or disincentive for a beneficiary to attempt working.

Response: We did not make any changes in the final rules as a result of the commenters' recommendation. We believe that the language of section 221(m)(1)(C) of the Act is clear and not susceptible of another interpretation. Moreover, we do not believe that this interpretation will create a disincentive for beneficiaries to return to work.

Section 221(m)(1)(c) of the Act states that ''no cessation of work activity by the individual may give rise to a presumption that the individual is unable to engage in work.'' In other words, we will not presume that a beneficiary is still disabled simply because he or she stops working. When an individual has a medical continuing disability review, we apply the medical improvement review standard to determine whether the individual's disability continues or ends. Section 221(m)(1)(c) clarifies that, when determining whether disability continues or ends under the medical improvement review standard, we may not presume that the individual continues to be disabled just because he or she stopped working. The facts associated with why the individual stopped work will still be evaluated under the medical improvement review standard if they support a determination that the individual is still disabled.

Comment: Several commenters believe the rules associated with the medical improvement review standard are complex and need to be simplified for beneficiaries to understand, especially with the addition of the new rules associated with section 221(m)(1)(B).

Response: We wrote the new rules in §§ 404.1594(i) and 416.994(b)(8) relating to the medical improvement review standard in plain language to make the rules as easy to read and understand as possible. With the addition of these new rules, we will revise our public information materials to make sure beneficiaries understand that activities they perform in work cannot be used to show they are no longer disabled if they meet the requirements of section 221(m)(1). Additionally, when we make a determination that an individual is no longer disabled, we are required to explain the determination in writing and in plain language. The notice of determination will also have to explain what evidence was used and, in an appropriate case, clarify that work activity was not used because the beneficiary was protected by section 221(m)(1)(B) of the Act.

Comment: A few commenters suggested that we clarify that if a medical cessation is overturned on appeal, the months for which social security disability benefits were continued pending the appeal will count, thereafter, toward the 24-month requirement.

Response: If we conduct a continuing disability review and determine that the disability of a social security disability beneficiary has medically ceased, the individual may request benefit continuation while the medical cessation is being appealed. Because the individual is being paid under a special provision, we clarify in §§ 404.1590(i)(2)(i) and 416.990(i)(2)(i) of these final rules that the months for which an individual is receiving benefit continuation pending reconsideration and/or a hearing before an administrative law judge on a medical cessation determination will not count toward the 24-month requirement for section 221(m)(1) purposes. If the medical cessation is overturned on appeal and our final decision is that the individual's disability continues, we reinstate the individual's entitlement to social security disability benefits for the months in the period during which the medical cessation was being appealed. Thereafter, these months would be months for which the individual was entitled to social security disability benefits for purposes of any future continuing disability reviews. We provide in final §§ 404.1590(i) and 416.990(i) that months for which the individual was entitled to social security disability benefits and received such benefits that he or she was due will count for the 24-month requirement. We believe these provisions of the final rules adequately address the situation that was of concern to the commenters. Because the final rules cover the situation, we do not believe further clarification is necessary.

Changes From the Proposed Rules

In these final rules, we are making certain changes from the proposed rules. We are making these changes to provide consistency in wording in parallel provisions of the part 404 and part 416 rules, to clarify certain provisions contained in the proposed rules, and to correct certain inappropriate cross-references contained in the proposed rules.

In § 404.1574(b)(3)(ii) of the final rules, we are revising the first sentence of this section of the NPRM to parallel the language used in § 416.974(b)(3)(ii). In § 404.1574(b)(3)(ii) of the NPRM, we had stated, in part, that we would generally consider other information in addition to earnings if there was evidence indicating that the individual is in a position to defer or suppress earnings. However, our intent was to include in this section the same language we used in proposed § 416.974(b)(3)(ii). The latter section explained that we will generally consider other information in addition to earnings if there is evidence indicating that the individual may be engaging in substantial gainful activity or that the individual is in a position to control when earnings are paid or the amount of wages paid. In the final rules, we include this language in both §§ 404.1574(b)(3)(ii) and 416.974(b)(3)(ii).

In §§ 404.1590(i)(2)(i) and 416.990(i)(2)(i) of the final rules, we are switching the order of the last two sentences contained in these sections of the proposed rules. We are also revising what was the last sentence of these sections of the proposed rules (and is now the next-to-last sentence of these sections of the final rules) to clarify that months for which an individual has social security disability benefits continued under § 404.1597a pending reconsideration and/or a hearing before an administrative law judge on a medical cessation determination will not count toward the 24-month requirement. In making this revision in

final § 416.990(i)(2)(i), we changed the cross-reference to § 416.996 (relating to SSI benefit continuation pending appeal of a medical cessation) that was contained in proposed § 416.990(i)(2)(i). In final § 416.990(i)(2)(i), we substituted a reference to § 404.1597a, which is the appropriate section of our regulations that concerns an individual's election of continuation of social security disability benefits pending an appeal of a medical cessation determination.

In §§ 404.1594(i) and 416.994(b)(8) of these final rules, we have revised certain cross-references that were contained in these sections of the proposed rules. For example, in final § 416.994(b)(8)(iii), we have substituted a reference to ''paragraph (b)(5) of this section'' for the reference to ''paragraph (f) of this section'' that was contained in proposed § 416.994(b)(8)(iii). The evaluation steps for the medical improvement review standard for SSI adult disability cases are contained in paragraph (b)(5) of § 416.994.

Also, in these final rules, we have made a few, minor, nonsubstantive changes in punctuation and wording from the proposed rules to improve the clarity of these final regulations.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the criteria for a significant regulatory action under Executive Order 12866, as amended by Executive Order 13258. Thus, they were subject to OMB review.

Regulatory Flexibility Act

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

Paperwork Reduction Act

These final regulations impose no reporting or recordkeeping requirements that require OMB clearance.

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

List of Subjects

20 CFR Part 404

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

20 CFR Part 416

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

Dated: August 3, 2006.

Jo Anne B. Barnhart,

Commissioner of Social Security.

■ For the reasons set out in the preamble, we are amending subparts J and P of part 404 and subparts I and N of part 416 of chapter III of title 20 of the Code of Federal Regulations as set forth below.

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

Subpart J—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions [Amended]

■ 1. The authority citation for subpart J continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a), (b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a), (b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note).

■ 2. Section 404.903 is amended by removing the word ''and'' at the end of paragraph (x), replacing the period at the end of paragraph (y) with ''; '', and adding a new paragraph (z) to read as follows:

§ 404.903 Administrative actions that are not initial determinations.

* * * * *

(z) Starting or discontinuing a continuing disability review; and

Subpart P—Determining Disability and Blindness [Amended]

■ 3. The authority citation for subpart P is revised to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a), (i), and (m), 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 (m), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189.

■ 4. Section 404.1574 is amended by revising paragraph (b) to read as follows:

§ 404.1574 Evaluation guides if you are an employee.

* * * * *

(b) *Earnings guidelines.* (1) *General.* If you are an employee, we first consider the criteria in paragraph (a) of this section and § 404.1576, and then the guides in paragraphs (b)(2) and (3) of this section. When we review your earnings to determine if you have been performing substantial gainful activity, we will subtract the value of any subsidized earnings (see paragraph (a)(2) of this section) and the reasonable cost of any impairment-related work expenses from your gross earnings (see § 404.1576). The resulting amount is the amount we use to determine if you have done substantial gainful activity. We will generally average your earnings for comparison with the earnings guidelines in paragraphs (b)(2) and (3) of this section. See § 404.1574a for our rules on averaging earnings.

(2) *Earnings that will ordinarily show that you have engaged in substantial gainful activity.* We will consider that your earnings from your work activity as an employee (including earnings from work in a sheltered workshop or a comparable facility especially set up for severely impaired persons) show that you engaged in substantial gainful activity if:

(i) *Before January 1, 2001,* they averaged more than the amount(s) in Table 1 of this section for the time(s) in which you worked.

(ii) *Beginning January 1,* 2001, and each year thereafter, they average more than the larger of:

(A) The amount for the previous year, or

(B) An amount adjusted for national wage growth, calculated by multiplying $700 by the ratio of the national average wage index for the year 2 calendar years before the year for which the amount is being calculated to the national average wage index for the year 1998. We will then round the resulting amount to the next higher multiple of $10 where such amount is a multiple of $5 but not of $10 and to the nearest multiple of $10 in any other case.

TABLE 1

For months:	Your monthly earnings averaged more than:
In calendar years before 1976	$200
In calendar year 1976	230
In calendar year 1977	240
In calendar year 1978	260
In calendar year 1979	280
In calendar years 1980–1989	300

TABLE 1—Continued

For months:	Your monthly earnings averaged more than:
January 1990–June 1999	500
July 1999–December 2000 ..	700

(3) *Earnings that will ordinarily show that you have not engaged in substantial gainful activity.*

(i) *General.* If your average monthly earnings are equal to or less than the amount(s) determined under paragraph (b)(2) of this section for the year(s) in which you work, we will generally consider that the earnings from your work as an employee (including earnings from work in a sheltered workshop or comparable facility) will show that you have not engaged in substantial gainful activity. We will generally not consider other information in addition to your earnings except in the circumstances described in paragraph (b)(3)(ii) of this section.

(ii) *When we will consider other information in addition to your earnings.* We will generally consider other information in addition to your earnings if there is evidence indicating that you may be engaging in substantial gainful activity or that you are in a position to control when earnings are paid to you or the amount of wages paid to you (for example, if you are working for a small corporation owned by a relative). (See paragraph (b)(3)(iii) of this section for when we do not apply this rule.) Examples of other information we may consider include, whether—

(A) Your work is comparable to that of unimpaired people in your community who are doing the same or similar occupations as their means of livelihood, taking into account the time, energy, skill, and responsibility involved in the work; and

(B) Your work, although significantly less than that done by unimpaired people, is clearly worth the amounts shown in paragraph (b)(2) of this section, according to pay scales in your community.

(iii) *Special rule for considering earnings alone when evaluating the work you do after you have received social security disability benefits for at least 24 months.* Notwithstanding paragraph (b)(3)(ii) of this section, we will not consider other information in addition to your earnings to evaluate the work you are doing or have done if—

(A) At the time you do the work, you are entitled to social security disability benefits and you have received such benefits for at least 24 months (see paragraph (b)(3)(iv) of this section); and

(B) We are evaluating that work to consider whether you have engaged in substantial gainful activity or demonstrated the ability to engage in substantial gainful activity for the purpose of determining whether your disability has ceased because of your work activity (see §§ 404.1592a(a)(1) and (3)(ii) and 404.1594(d)(5) and (f)(1)).

(iv) *When we consider you to have received social security disability benefits for at least 24 months.* For purposes of paragraph (b)(3)(iii) of this section, social security disability benefits means disability insurance benefits for a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability. We consider you to have received such benefits for at least 24 months beginning with the first day of the first month following the 24th month for which you actually received social security disability benefits that you were due or constructively received such benefits. The 24 months do not have to be consecutive. We will consider you to have constructively received a benefit for a month for purposes of the 24-month requirement if you were otherwise due a social security disability benefit for that month and your monthly benefit was withheld to recover an overpayment. Any months for which you were entitled to benefits but for which you did not actually or constructively receive a benefit payment will not be counted for the 24-month requirement. If you also receive supplemental security income payments based on disability or blindness under title XVI of the Social Security Act, months for which you received only supplemental security income payments will not be counted for the 24-month requirement.

* * * * *

■ 5. Section 404.1575 is amended by revising paragraphs (a) and (c) and adding new paragraph (e) to read as follows:

§ 404.1575 Evaluation guides if you are self-employed.

(a) *If you are a self-employed person.* If you are working or have worked as a self-employed person, we will use the provisions in paragraphs (a) through (e) of this section that are relevant to your work activity. We will use these provisions whenever they are appropriate, whether in connection with your application for disability benefits (when we make an initial determination on your application and throughout any appeals you may request), after you have become entitled to a period of disability or to disability benefits, or both.

(1) *How we evaluate the work you do after you have become entitled to disability benefits.* If you are entitled to social security disability benefits and you work as a self-employed person, the way we will evaluate your work activity will depend on whether the work activity occurs before or after you have received such benefits for at least 24 months and on the purpose of the evaluation. For purposes of paragraphs (a) and (e) of this section, social security disability benefits means disability insurance benefits for a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability. We will use the rules in paragraph (e)(2) of this section to determine if you have received such benefits for at least 24 months.

(i) We will use the guides in paragraph (a)(2) of this section to evaluate any work activity you do before you have received social security disability benefits for at least 24 months to determine whether you have engaged in substantial gainful activity, regardless of the purpose of the evaluation.

(ii) We will use the guides in paragraph (e) of this section to evaluate any work activity you do after you have received social security disability benefits for at least 24 months to determine whether you have engaged in substantial gainful activity for the purpose of determining whether your disability has ceased because of your work activity.

(iii) If we have determined under § 404.1592a(a)(1) that your disability ceased in a month during the reentitlement period because you performed substantial gainful activity, and we need to decide under § 404.1592a(a)(2)(i) or (a)(3)(i) whether you are doing substantial gainful activity in a subsequent month in or after your reentitlement period, we will use the guides in paragraph (a)(2) of this section (subject to the limitations described in § 404.1592a(a)(2)(i) and (a)(3)(i)) to determine whether your work activity in that month is substantial gainful activity. We will use the guides in paragraph (a)(2) of this section for these purposes, regardless of whether your work activity in that month occurs before or after you have received social security disability benefits for at least 24 months.

(2) *General rules for evaluating your work activity if you are self-employed.* We will consider your activities and their value to your business to decide whether you have engaged in

substantial gainful activity if you are self-employed. We will not consider your income alone because the amount of income you actually receive may depend on a number of different factors, such as capital investment and profit-sharing agreements. We will generally consider work that you were forced to stop or reduce to below substantial gainful activity after 6 months or less because of your impairment as an unsuccessful work attempt. See paragraph (d) of this section. We will evaluate your work activity based on the value of your services to the business regardless of whether you receive an immediate income for your services. We determine whether you have engaged in substantial gainful activity by applying three tests. If you have not engaged in substantial gainful activity under test one, then we will consider tests two and three. The tests are as follows:

(i) *Test one:* You have engaged in substantial gainful activity if you render services that are significant to the operation of the business and receive a substantial income from the business. Paragraphs (b) and (c) of this section explain what we mean by significant services and substantial income for purposes of this test.

(ii) *Test Two:* You have engaged in substantial gainful activity if your work activity, in terms of factors such as hours, skills, energy output, efficiency, duties, and responsibilities, is comparable to that of unimpaired individuals in your community who are in the same or similar businesses as their means of livelihood.

(iii) *Test Three:* You have engaged in substantial gainful activity if your work activity, although not comparable to that of unimpaired individuals, is clearly worth the amount shown in § 404.1574(b)(2) when considered in terms of its value to the business, or when compared to the salary that an owner would pay to an employee to do the work you are doing.

* * * * *

(c) *What we mean by substantial income.* (1) *Determining countable income.* We deduct your normal business expenses from your gross income to determine net income. Once we determine your net income, we deduct the reasonable value of any significant amount of unpaid help furnished by your spouse, children, or others. Miscellaneous duties that ordinarily would not have commercial value would not be considered significant. We deduct impairment-related work expenses that have not already been deducted in determining your net income. Impairment-related work expenses are explained in § 404.1576. We deduct unincurred business expenses paid for you by another individual or agency. An unincurred business expense occurs when a sponsoring agency or another person incurs responsibility for the payment of certain business expenses, e.g., rent, utilities, or purchases and repair of equipment, or provides you with equipment, stock, or other material for the operation of your business. We deduct soil bank payments if they were included as farm income. That part of your income remaining after we have made all applicable deductions represents the actual value of work performed. The resulting amount is the amount we use to determine if you have done substantial gainful activity. For purposes of this section, we refer to this amount as your countable income. We will generally average your countable income for comparison with the earnings guidelines in § 404.1574(b)(2). See § 404.1574a for our rules on averaging of earnings.

(2) *When countable income is considered substantial.* We will consider your countable income to be substantial if—

(i) It averages more than the amounts described in § 404.1574(b)(2); or

(ii) It averages less than the amounts described in § 404.1574(b)(2) but it is either comparable to what it was before you became seriously impaired if we had not considered your earnings or is comparable to that of unimpaired self-employed persons in your community who are in the same or a similar business as their means of livelihood.

* * * * *

(e) *Special rules for evaluating the work you do after you have received social security disability benefits for at least 24 months.* (1) *General.* We will apply the provisions of this paragraph to evaluate the work you are doing or have done if, at the time you do the work, you are entitled to social security disability benefits and you have received such benefits for at least 24 months. We will apply the provisions of this paragraph only when we are evaluating that work to consider whether you have engaged in substantial gainful activity or demonstrated the ability to engage in substantial gainful activity for the purpose of determining whether your disability has ceased because of your work activity (see §§ 404.1592a(a)(1) and (3)(ii) and 404.1594(d)(5) and (f)(1)). We will use the countable income test described in paragraph (e)(3) of this section to determine whether the work you do after you have received such benefits for at least 24 months is substantial gainful activity or demonstrates the ability to do substantial gainful activity. We will not consider the services you perform in that work to determine that the work you are doing shows that you are able to engage in substantial gainful activity and are, therefore, no longer disabled. However, we may consider the services you perform to determine that you are not doing substantial gainful activity. We will generally consider work that you were forced to stop or reduce below substantial gainful activity after 6 months or less because of your impairment as an unsuccessful work attempt. See paragraph (d) of this section.

(2) *The 24-month requirement.* For purposes of paragraphs (a)(1) and (e) of this section, we consider you to have received social security disability benefits for at least 24 months beginning with the first day of the first month following the 24th month for which you actually received social security disability benefits that you were due or constructively received such benefits. The 24 months do not have to be consecutive. We will consider you to have constructively received a benefit for a month for purposes of the 24-month requirement if you were otherwise due a social security disability benefit for that month and your monthly benefit was withheld to recover an overpayment. Any months for which you were entitled to benefits but for which you did not actually or constructively receive a benefit payment will not be counted for the 24-month requirement. If you also receive supplemental security income payments based on disability or blindness under title XVI of the Social Security Act, months for which you received only supplemental security income payments will not be counted for the 24-month requirement.

(3) *Countable income test.* We will compare your countable income to the earnings guidelines in § 404.1574(b)(2) to determine if you have engaged in substantial gainful activity. See paragraph (c)(1) of this section for an explanation of countable income. We will consider that you have engaged in substantial gainful activity if your monthly countable income averages more than the amounts described in § 404.1574(b)(2) for the month(s) in which you work, unless the evidence shows that you did not render significant services in the month(s). See paragraph (b) of this section for what we mean by significant services. If your average monthly countable income is equal to or less than the amounts in

§ 404.1574(b)(2) for the month(s) in which you work, or if the evidence shows that you did not render significant services in the month(s), we will consider that your work as a self-employed person shows that you have not engaged in substantial gainful activity.

■ 6. Section 404.1590 is amended by adding three new sentences to the end of paragraph (a), revising paragraph (b) introductory text and paragraphs (b)(6), (b)(7)(i), and (b)(8), and adding new paragraphs (h) and (i) to read as follows:

§ 404.1590 When and how often we will conduct a continuing disability review.

(a) *General.* * * * In paragraphs (b) through (g) of this section, we explain when and how often we conduct continuing disability reviews for most individuals. In paragraph (h) of this section, we explain special rules for some individuals who are participating in the Ticket to Work program. In paragraph (i) of this section, we explain special rules for some individuals who work.

(b) *When we will conduct a continuing disability review.* Except as provided in paragraphs (h) and (i) of this section, we will start a continuing disability review if—

* * * * *

(6) You tell us that—

(i) You have recovered from your disability; or

(ii) You have returned to work;

(7) * * *

(i) The services have been completed; or

* * * * *

(8) Someone in a position to know of your physical or mental condition tells us any of the following, and it appears that the report could be substantially correct:

(i) You are not disabled; or

(ii) You are not following prescribed treatment; or

(iii) You have returned to work; or

(iv) You are failing to follow the provisions of the Social Security Act or these regulations;

* * * * *

(h) *If you are participating in the Ticket to Work program.* If you are participating in the Ticket to Work program, we will not start a continuing disability review during the period in which you are using a ticket. However, this provision does not apply to reviews we conduct using the rules in §§ 404.1571–404.1576 to determine whether the work you have done shows that you are able to do substantial gainful activity and are, therefore, no longer disabled. See subpart C of part 411 of this chapter.

(i) *If you are working and have received social security disability benefits for at least 24 months.*

(1) *General.* Notwithstanding the provisions in paragraphs (b)(4), (b)(5), (b)(6)(ii), (b)(7)(ii), and (b)(8)(iii) of this section, we will not start a continuing disability review based solely on your work activity if—

(i) You are currently entitled to disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability; and

(ii) You have received such benefits for at least 24 months (see paragraph (i)(2) of this section).

(2) *The 24-month requirement.*

(i) The months for which you have actually received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability that you were due, or for which you have constructively received such benefits, will count for the 24-month requirement under paragraph (i)(1)(ii) of this section, regardless of whether the months were consecutive. We will consider you to have constructively received a benefit for a month for purposes of the 24-month requirement if you were otherwise due a social security disability benefit for that month and your monthly benefit was withheld to recover an overpayment. Any month for which you were entitled to benefits but for which you did not actually or constructively receive a benefit payment will not be counted for the 24-month requirement. Months for which your social security disability benefits are continued under § 404.1597a pending reconsideration and/or a hearing before an administrative law judge on a medical cessation determination will not be counted for the 24-month requirement. If you also receive supplemental security income payments based on disability or blindness under title XVI of the Social Security Act, months for which you received only supplemental security income payments will not be counted for the 24-month requirement.

(ii) In determining whether paragraph (i)(1) of this section applies, we consider whether you have received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability for at least 24 months as of the date on which we start a continuing disability review. For purposes of this provision, the date on which we start a continuing disability review is the date on the notice we send you that tells you that we are beginning to review your disability case.

(3) *When we may start a continuing disability review even if you have received social security disability benefits for at least 24 months.* Even if you meet the requirements of paragraph (i)(1) of this section, we may still start a continuing disability review for a reason(s) other than your work activity. We may start a continuing disability review if we have scheduled you for a periodic review of your continuing disability, we need a current medical or other report to see if your disability continues, we receive evidence which raises a question as to whether your disability continues, or you fail to follow the provisions of the Social Security Act or these regulations. For example, we will start a continuing disability review when you have been scheduled for a medical improvement expected diary review, and we may start a continuing disability review if you failed to report your work to us.

(4) *Reviews to determine whether the work you have done shows that you are able to do substantial gainful activity.* Paragraph (i)(1) of this section does not apply to reviews we conduct using the rules in §§ 404.1571–404.1576 to determine whether the work you have done shows that you are able to do substantial gainful activity and are, therefore, no longer disabled.

(5) *Erroneous start of the continuing disability review.* If we start a continuing disability review based solely on your work activity that results in a medical cessation determination, we will vacate the medical cessation determination if—

(i) You provide us evidence that establishes that you met the requirements of paragraph (i)(1) of this section as of the date of the start of your continuing disability review and that the start of the review was erroneous; and

(ii) We receive the evidence within 12 months of the date of the notice of the initial determination of medical cessation.

■ 7. Section 404.1592a is amended by revising the second sentence of paragraph (a)(1), the sixth sentence of paragraph (a)(2)(i), and paragraph (a)(3) to read as follows:

§ 404.1592a The reentitlement period.

(a) * * *

(1) * * * When we decide whether this work is substantial gainful activity, we will apply all of the relevant provisions of §§ 404.1571–404.1576 including, but not limited to, the provisions for averaging earnings,

unsuccessful work attempts, and deducting impairment-related work expenses, as well as the special rules for evaluating the work you do after you have received disability benefits for at least 24 months. * * *

(2)(i) * * * Once we have determined that your disability has ceased during the reentitlement period because of the performance of substantial gainful activity as explained in paragraph (a)(1) of this section, we will not apply the provisions of §§ 404.1574(c) and 404.1575(d) regarding unsuccessful work attempts, the provisions of § 404.1574a regarding averaging of earnings, or the special rules in §§ 404.1574(b)(3)(iii) and 404.1575(e) for evaluating the work you do after you have received disability benefits for at least 24 months, to determine whether benefits should be paid for any particular month in the reentitlement period that occurs after the month your disability ceased.

* * * * *

(3) The way we will consider your work activity after your reentitlement period ends (see paragraph (b)(2) of this section) will depend on whether you worked during the reentitlement period and if you did substantial gainful activity.

(i) If you worked during the reentitlement period and we decided that your disability ceased during the reentitlement period because of your work under paragraph (a)(1) of this section, we will find that your entitlement to disability benefits terminates in the first month in which you engaged in substantial gainful activity after the end of the reentitlement period (see § 404.325). (See § 404.321 for when entitlement to a period of disability ends.) When we make this determination, we will consider only your work in, or earnings for, that month; we will not apply the provisions of §§ 404.1574(c) and 404.1575(d) regarding unsuccessful work attempts, the provisions of § 404.1574a regarding averaging of earnings, or the special rules in §§ 404.1574(b)(3)(iii) and 404.1575(e) for evaluating the work you do after you have received disability benefits for at least 24 months.

(ii) If we did not find that your disability ceased because of work activity during the reentitlement period, we will apply all of the relevant provisions of §§ 404.1571–404.1576 including, but not limited to, the provisions for averaging earnings, unsuccessful work attempts, and deducting impairment-related work expenses, as well as the special rules for evaluating the work you do after you have received disability benefits for at least 24 months, to determine whether your disability ceased because you performed substantial gainful activity after the reentitlement period. If we find that your disability ceased because you performed substantial gainful activity in a month after your reentitlement period ended, you will be paid benefits for the month in which your disability ceased and the two succeeding months. After those three months, your entitlement to a period of disability or to disability benefits terminates (see §§ 404.321 and 404.325).

* * * * *

■ 8. Section 404.1594 is amended by adding a new sentence to the end of paragraph (b) introductory text, adding a sentence to paragraph (c) introductory text immediately following the first sentence, revising the third sentence of paragraph (f) introductory text and adding a new fourth sentence, and adding a new paragraph (i) to read as follows:

§ 404.1594 How we will determine whether your disability continues or ends.

* * * * *

(b) *Terms and definitions.* * * * In addition, see paragraph (i) of this section if you work during your current period of entitlement based on disability or during certain other periods.

* * * * *

(c) *Determining medical improvement and its relationship to your abilities to do work.* * * * (In addition, see paragraph (i) of this section if you work during your current period of entitlement based on disability or during certain other periods.) * * *

* * * * *

(f) *Evaluation steps.* * * * The steps are as follows. (See paragraph (i) of this section if you work during your current period of entitlement based on disability or during certain other periods.)

* * * * *

(i) *If you work during your current period of entitlement based on disability or during certain other periods.* (1) We will not consider the work you are doing or have done during your current period of entitlement based on disability (or, when determining whether you are entitled to expedited reinstatement of benefits under section 223(i) of the Act, the work you are doing or have done during or after the previously terminated period of entitlement referred to in section 223(i)(1)(B) of the Act) to be past relevant work under paragraph (f)(7) of this section or past work experience under paragraph (f)(8) of this section. In addition, if you are currently entitled to disability benefits under title II of the Social Security Act, we may or may not consider the physical and mental activities that you perform in the work you are doing or have done during your current period of entitlement based on disability, as explained in paragraphs (i)(2) and (3) of this section.

(2) If you are currently entitled to disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability under title II of the Social Security Act, and at the time we are making a determination on your case you have received such benefits for at least 24 months, we will not consider the activities you perform in the work you are doing or have done during your current period of entitlement based on disability if they support a finding that your disability has ended. (We will use the rules in § 404.1590(i)(2) to determine whether the 24-month requirement is met.) However, we will consider the activities you do in that work if they support a finding that your disability continues or they do not conflict with a finding that your disability continues. We will not presume that you are still disabled if you stop working.

(3) If you are not a person described in paragraph (i)(2) of this section, we will consider the activities you perform in your work at any of the evaluation steps in paragraph (f) of this section at which we need to assess your ability to function.

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

Subpart I—Determining Disability and Blindness [Amended]

■ 9. The authority citation for subpart I of part 416 is revised 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, 1382h note).

■ 10. Section 416.974 is amended by revising paragraph (b) to read as follows:

§ 416.974 Evaluation guides if you are an employee.

* * * * *

(b) *Earnings guidelines.* (1) *General.* If you are an employee, we first consider the criteria in paragraph (a) of this section and § 416.976, and then the guides in paragraphs (b)(2) and (3) of

this section. When we review your earnings to determine if you have been performing substantial gainful activity, we will subtract the value of any subsidized earnings (see paragraph (a)(2) of this section) and the reasonable cost of any impairment-related work expenses from your gross earnings (see § 416.976). The resulting amount is the amount we use to determine if you have done substantial gainful activity. We will generally average your earnings for comparison with the earnings guidelines in paragraphs (b)(2) and (3) of this section. See § 416.974a for our rules on averaging earnings.

(2) *Earnings that will ordinarily show that you have engaged in substantial gainful activity.* We will consider that your earnings from your work activity as an employee (including earnings from work in a sheltered workshop or a comparable facility especially set up for severely impaired persons) show that you have engaged in substantial gainful activity if:

(i) *Before January 1, 2001,* they averaged more than the amount(s) in Table 1 of this section for the time(s) in which you worked.

(ii) *Beginning January 1, 2001,* and each year thereafter, they average more than the larger of:

(A) The amount for the previous year, or

(B) An amount adjusted for national wage growth, calculated by multiplying $700 by the ratio of the national average wage index for the year 2 calendar years before the year for which the amount is being calculated to the national average wage index for the year 1998. We will then round the resulting amount to the next higher multiple of $10 where such amount is a multiple of $5 but not of $10 and to the nearest multiple of $10 in any other case.

TABLE 1

For months:	Your monthly earnings averaged more than:
In calendar years before 1976	$200
In calendar year 1976	230
In calendar year 1977	240
In calendar year 1978	260
In calendar year 1979	280
In calendar years 1980–1989	300
January 1990–June 1999	500
July 1999–December 2000	700

(3) *Earnings that will ordinarily show that you have not engaged in substantial gainful activity.*

(i) *General.* If your average monthly earnings are equal to or less than the amount(s) determined under paragraph (b)(2) of this section for the year(s) in which you work, we will generally consider that the earnings from your work as an employee (including earnings from work in a sheltered workshop or comparable facility) will show that you have not engaged in substantial gainful activity. We will generally not consider other information in addition to your earnings except in the circumstances described in paragraph (b)(3)(ii) of this section.

(ii) *When we will consider other information in addition to your earnings.* Unless you meet the criteria set forth in section 416.990 (h) and (i), we will generally consider other information in addition to your earnings if there is evidence indicating that you may be engaging in substantial gainful activity or that you are in a position to control when earnings are paid to you or the amount of wages paid to you (for example, if you are working for a small corporation owned by a relative). Examples of other information we may consider include, whether—

(A) Your work is comparable to that of unimpaired people in your community who are doing the same or similar occupations as their means of livelihood, taking into account the time, energy, skill, and responsibility involved in the work; and

(B) Your work, although significantly less than that done by unimpaired people, is clearly worth the amounts shown in paragraph (b)(2) of this section, according to pay scales in your community.

* * * * *

■ 11. Section 416.990 is amended by adding three new sentences to the end of paragraph (a), revising paragraph (b) introductory text and paragraphs (b)(4), (b)(6), and (b)(8), and adding new paragraphs (h) and (i) to read as follows:

§ 416.990 When and how often we will conduct a continuing disability review.

(a) *General.* * * * In paragraphs (b) through (g) of this section, we explain when and how often we conduct continuing disability reviews for most individuals. In paragraph (h) of this section, we explain special rules for some individuals who are participating in the Ticket to Work program. In paragraph (i) of this section, we explain special rules for some individuals who work and have received social security benefits as well as supplemental security income payments.

(b) *When we will conduct a continuing disability review.* Except as provided in paragraphs (h) and (i) of this section, we will start a continuing disability review if—

* * * * *

(4) You return to work;

* * * * *

(6) You tell us that—

(i) You have recovered from your disability; or

(ii) You have returned to work;

* * * * *

(8) Someone in a position to know of your physical or mental condition tells us any of the following, and it appears that the report could be substantially correct:

(i) You are not disabled or blind; or

(ii) You are not following prescribed treatment; or

(iii) You have returned to work; or

(iv) You are failing to follow the provisions of the Social Security Act or these regulations;

* * * * *

(h) *If you are participating in the Ticket to Work program.* If you are participating in the Ticket to Work program, we will not start a continuing disability review during the period in which you are using a ticket. See subpart C of part 411 of this chapter.

(i) *If you are working and have received social security disability benefits for at least 24 months.*

(1) *General.* Notwithstanding the provisions in paragraphs (b)(4), (b)(5), (b)(6)(ii), (b)(7)(ii), and (b)(8)(iii) of this section, we will not start a continuing disability review based solely on your work activity if—

(i) You are currently entitled to disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability under title II of the Social Security Act (see subpart D of part 404 of this chapter); and

(ii) You have received such benefits for at least 24 months (see paragraph (i)(2) of this section).

(2) *The 24-month requirement.* (i) The months for which you have actually received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability that you were due under title II of the Social Security Act, or for which you have constructively received such benefits, will count for the 24-month requirement under paragraph (i)(1)(ii) of this section, regardless of whether the months were consecutive. We will consider you to have constructively received a benefit for a month for purposes of the 24-month requirement if you were otherwise due a social security disability benefit for

that month and your monthly benefit was withheld to recover an overpayment. Any month for which you were entitled to social security disability benefits but for which you did not actually or constructively receive a benefit payment will not be counted for the 24-month requirement. Months for which your social security disability benefits are continued under § 404.1597a pending reconsideration and/or a hearing before an administrative law judge on a medical cessation determination will not be counted for the 24-month requirement. Months for which you received only supplemental security income payments will not be counted for the 24-month requirement.

(ii) In determining whether paragraph (i)(1) of this section applies, we consider whether you have received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability under title II of the Social Security Act for at least 24 months as of the date on which we start a continuing disability review. For purposes of this provision, the date on which we start a continuing disability review is the date on the notice we send you that tells you that we are beginning to review your disability case.

(3) *When we may start a continuing disability review even if you have received social security disability benefits for at least 24 months.* Even if you meet the requirements of paragraph (i)(1) of this section, we may still start a continuing disability review for a reason(s) other than your work activity. We may start a continuing disability review if we have scheduled you for a periodic review of your continuing disability, we need a current medical or other report to see if your disability continues, we receive evidence which raises a question as to whether your disability or blindness continues, or you fail to follow the provisions of the Social Security Act or these regulations. For example, we will start a continuing disability review when you have been scheduled for a medical improvement expected diary review, and we may start a continuing disability review if you failed to report your work to us.

(4) *Erroneous start of the continuing disability review.* If we start a continuing disability review based solely on your work activity that results in a medical cessation determination, we will vacate the medical cessation determination if—

(i) You provide us evidence that establishes that you met the requirements of paragraph (i)(1) of this section as of the date of the start of your continuing disability review and that the start of the review was erroneous; and

(ii) We receive the evidence within 12 months of the date of the notice of the initial determination of medical cessation.

■ 12. Section 416.994 is amended by revising the section heading, adding a new sentence to the end of paragraph (b)(1) introductory text, adding a sentence to paragraph (b)(2) introductory text immediately following the first sentence, revising the third sentence of paragraph (b)(5) introductory text and adding a new sentence to the end of the paragraph, and adding a new paragraph (b)(8) to read as follows:

§ 416.994 How we will determine whether your disability continues or ends, disabled adults.

* * * * *

(b) *Disabled persons age 18 or over (adults).* * * *

(1) *Terms and definitions.* * * * In addition, see paragraph (b)(8) of this section if you work during your current period of eligibility based on disability or during certain other periods.

* * * * *

(2) *Determining medical improvement and its relationship to your abilities to do work.*

* * * (In addition, see paragraph (b)(8) of this section if you work during your current period of eligibility based on disability or during certain other periods.) * * *

* * * * *

(5) *Evaluation steps.* * * * The steps are as follows. (See paragraph (b)(8) of this section if you work during your current period of eligibility based on disability or during certain other periods.)

* * * * *

(8) *If you work during your current period of eligibility based on disability or during certain other periods.*

(i) We will not consider the work you are doing or have done during your current period of eligibility based on disability (or, when determining whether you are eligible for expedited reinstatement of benefits under section 1631(p) of the Act, the work you are doing or have done during or after the previously terminated period of eligibility referred to in section 1631(p)(1)(B) of the Act) to be past relevant work under paragraph (b)(5)(vi) of this section or past work experience under paragraph (b)(5)(vii) of this section. In addition, if you are currently entitled to disability benefits under title II of the Social Security Act, we may or may not consider the physical and mental activities that you perform in the work you are doing or have done during your current period of entitlement based on disability, as explained in paragraphs (b)(8)(ii) and (iii) of this section.

(ii) If you are currently entitled to disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability under title II of the Social Security Act, and at the time we are making a determination on your case you have received such benefits for at least 24 months, we will not consider the activities you perform in the work you are doing or have done during your current period of entitlement based on disability if they support a finding that your disability has ended. (We will use the rules in § 416.990(i)(2) to determine whether the 24-month requirement is met.) However, we will consider the activities you do in that work if they support a finding that your disability continues or they do not conflict with a finding that your disability continues. We will not presume that you are still disabled if you stop working.

(iii) If you are not a person described in paragraph (b)(8)(ii) of this section, we will consider the activities you perform in your work at any of the evaluation steps in paragraph (b)(5) of this section at which we need to assess your ability to function. However, we will not consider the work you are doing or have done during your current period of eligibility based on disability (or, when determining whether you are eligible for expedited reinstatement of benefits under section 1631(p) of the Act, the work you are doing or have done during or after the previously terminated period of eligibility referred to in section 1631(p)(1)(B) of the Act) to be past relevant work under paragraph (b)(5)(vi) of this section or past work experience under paragraph (b)(5)(vii) of this section.

* * * * *

Subpart N—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions [Amended]

■ 13. The authority citation for subpart N continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b).

■ 14. Section 416.1403 is amended by removing the word ''and'' at the end of paragraph (a)(22), replacing the period at the end of paragraph (a)(23) with '';

and'', and adding new paragraph (a)(24) to read as follows:

§ 416.1403 Administrative actions that are not initial determinations.

(a) * * *

(24) Starting or discontinuing a continuing disability review; and

* * * * *

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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2006–0099]

RIN 0960–AG10

Rules for the Issuance of Work Report Receipts, Payment of Benefits for Trial Work Period Service Months After a Fraud Conviction, Changes to the Student Earned Income Exclusion, and Expansion of the Reentitlement Period for Childhood Disability Benefits

AGENCY: Social Security Administration.

ACTION: Final rules.

SUMMARY: We are revising our rules to reflect and implement sections 202, 208, 420A, and 432 of the Social Security Protection Act of 2004 (the SSPA). Section 202 of the SSPA requires us to issue a receipt each time you or your representative report a change in your work activity or give us documentation of a change in your earnings if you receive benefits based on disability under title II or title XVI of the Social Security Act (the Act). Section 208 changes the way we pay benefits during the trial work period if you are convicted by a Federal court of fraudulently concealing your work activity. Section 420A changed the law to allow you to become reentitled to childhood disability benefits under title II at any time if your previous entitlement to childhood disability benefits was terminated because of the performance of substantial gainful activity. Section 432 changes the way we decide if you are eligible for the student earned income exclusion. We will also apply the student earned income exclusion when determining the countable income of an ineligible spouse or ineligible parent. We are also changing the SSI student policy to include home schooling as a form of regular school attendance.

DATES: These final rules are effective December 18, 2006.

FOR FURTHER INFORMATION CONTACT: Cindy Duzan, Policy Analyst, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–4203, or TTY (410) 966–5609 for information about these final rules. For information on eligibility or filing for benefits, call our national toll-free number 1 (800) 772–1213 or TTY 1 (800) 325–0778. You may also contact Social Security Online, at *http://www.socialsecurity.gov/.*

SUPPLEMENTARY INFORMATION: Electronic Version: The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html.*

We are amending our rules to reflect and implement sections 202, 208, 420A, and 432 of the SSPA. These changes apply to you if you engage in work activity while entitled to or eligible for benefits based on disability under title II or title XVI of the Act.

We are also changing the SSI student policy to include home schooling as a form of regular school attendance. This may allow more individuals to benefit from the student earned income exclusion. This change, which is separate from the changes being made to reflect and implement the SSPA, will make the title II and title XVI programs uniform with respect to home schooling. The title II program recognizes home schooling as a form of school attendance. We will also apply the student earned income exclusion when determining the countable income of an ineligible spouse or ineligible parent.

When Will We Start To Use These Rules?

The effective date of the provisions of the SSPA that are the subject of these final rules are set forth below and take effect on the dates mandated by statute. The changes regarding home schooling and the extension of the student earned income exclusion to ineligible individuals will take effect 30 days after publication of these rules in the **Federal Register**.

What Is the Purpose of Section 202?

Section 202 of the SSPA requires us to issue a receipt to you or your representative each time you or your representative report a change in your work activity or give us evidence of a change in your earnings, such as your pay stubs, if you receive benefits based on disability under title II or title XVI of the Act. The law provides that we are to issue a receipt each time you or your representative report to us until we establish a centralized computer file that will electronically record the information about the change in your work activity and the date that you make your report. After the centralized computer file is implemented, we will continue to issue receipts to you or your representative automatically for a trial period of at least 6 months during which we will assess the effectiveness of our centralized computer file.

Once we determine that the automatic issuance of work receipts is no longer necessary, we will continue to issue receipts to you or your representative upon request. Adequate notice will be provided when this procedural change is put in place.

In the past, the reports you gave to us about your work activity may not have been processed timely, resulting in processing delays. This might have caused us to pay benefits to you incorrectly, without considering the effect your work and earnings may have had on your benefits, causing you to become overpaid. We are implementing a new centralized computer system which will create an electronic record of the work information that you report to us. This will help us ensure that we fulfill our responsibility to process your earnings reports and pay benefits to you correctly. We currently expect this centralized computer system to be operational in the summer of 2006. Issuing a receipt to you when you report your work or earnings will provide you with proof that you properly fulfilled your responsibility to report your earnings to us.

Why Must You Report Your Work Activity?

If you receive benefits based on disability under title II of the Act or are eligible for benefits under title XVI, you are required to report changes in your work activity and earnings to us. (See §§ 404.1588 and 416.708.)

Your earnings can affect your eligibility for benefits or the amount of your benefits.

You can report your work to us:

- By phone to our toll free number;
- In person or by phone to your local office; or
- By mailing your pay stubs to your local office.

We are also making efforts to expand the ways you can report information to us.

What Is the Effective Date of Section 202?

The statutory change that requires us to issue receipts every time you or your representative report a change in your work activity or give us documentation of a change in your earnings is effective as soon as possible, but no later than March 2, 2005. We are currently issuing receipts to you or your representative and will continue to do so at least until