



Social Security: When the Injured Worker Qualifies

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RESIDUAL FUNCTIONAL CAPACITY

Impairments, and any related symptoms, such as pain, may cause physical and mental limitations that affect what one can do in a work setting. All impairments, severe and non-severe, must be considered in assessing residual functional capacity. When assessing physical abilities we first assess the nature and extent of physical **limitations** and then determine residual functional capacity for work on a regular and continuing basis.

Work on a regular and continuing basis is defined as eight hours a day, five days a week or equivalent schedule **SSR 96-8P**. This ruling sets forth guidelines on establishing residual functional capacity. When there is no allegation of physical or mental limitations of a specific functional capacity and no information in the case record that there is such a limitation or restriction, the adjudicator must consider the individual to have no limitation or restriction with respect to functional capacity.

The RFC assessment must first identify the individual's functional limitations and assess his or her work related abilities on a **function by function** basis. Medical impairments and symptoms, including pain, are not intrinsically exertional or non-exertional. Functional limitations or restrictions caused by medical impairments and their related symptoms are categorized as exertional and non-exertional. Non-exertional considers all work related limitations that do not depend on an individual's physical strength. Work related mental activities generally required by competitive, remunerative work includes the ability to: understand, carry out, and remember instructions; use judgment in making work related decisions; respond appropriately to supervision, coworkers and work situations; and deal with changes (stress) in a routine work setting. (SSR 85-16 and SSR 83-15 provide guidance with mental impairments).

Non-exertional limitations would be activities such as postural (e.g., stooping, climbing, balancing, kneeling, crouching and crawling), manipulative functions (e.g., reaching, handling, fingering, and feeling), visual (seeing), communicative (hearing and speaking). Exertional limitations are lifting, carrying, standing, walking, sitting, and pushing and pulling. The RFC assessment must include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts and nonmedical evidence.

Residual functional capacity assessment is predicated on medical evidence, activities of daily living, recorded observations, medical source statements, the effects of symptoms, evidence from work attempts, lay evidence and work evaluations. **SSR 96-8p** articulates factors to consider in assessing RFC. The factors to be considered are: 1. Medical history 2. Medical signs and laboratory findings 3. The effects of treatment, including limitations or restrictions imposed by the mechanics of treatment (frequency of treatment, duration, disruption to routine, side effects of medications) 4. Activities of daily living 5. Lay evidence 6. Recorded observations 7. Treating physicians reports 8. Medical source statements 9. Consultative examination reports 10. DDS physician/psychologist opinions and 11. Medical experts.

SSR 2000-4P.

Limitations must be quantified in the assessment of residual functional capacity. 2000-4p requires that terms used to quantify limitation are based on underlying assumptions or definitions that are consistent with regulatory policy and definitions. Terms such as extreme, slight, marked, more likely than not, are not consistent with terms defined by the Social Security Administration or found in the dictionary of occupational titles. Such terms as never, occasional, frequent and continuous are defined not only by the Social Security Administration but in the Dictionary of Occupational Titles. In order for a vocational expert to offer relevant evidence within his or her expertise or knowledge concerning the physical and mental demands of past relevant work or other work which exist in the national economy the frequency of the limitation must be quantified so the vocational expert understands the precise functional limitations. The terms used must be in functional limitations and quantified. Using functional terms and defined frequencies we will be assured the Administrative Law Judge, Appeals Council and United States District Court all have the same precise understanding of the RFC. **Social Security Ruling 85-16**, likewise, requires the assessment of the presence, frequency and intensity of mental symptoms. **Occasional** means occurring from very little up to one third of the time, or two hours in an eight-hour day **SSR 83-10** and **SSR 96-8p**. **Frequently** means occurring from one third to two thirds of the time, or six hours in an eight-hour day **SSR 83-10** and **SSR 96-8p**.

SSR83-5a

With respect to the rules in appendix 2, the preamble to the vocational factors regulations, as published in the Federal Register state in part-“ these rules are not presumptive, but are conclusive where the necessary findings with regard to each individual establishes that a particular rule is met.” “Where the finding of fact with respect to a particular individual's vocational factors and residual functional exactly Coincides with all of the criteria of a particular rule, the rules directs a conclusion as to whether the individual is or is not disabled. However, each of these findings of fact is subject to rebuttal and the individual may present evidence to refute such findings.”

SSR 96-4P

Once the existence of a medically determinable physical or mental impairment that could reasonably be expected to produce the pain or other symptoms alleged has been established on the basis of medical signs and laboratory findings, allegations about the intensity and persistence of the symptoms must be considered. Limitations or restrictions are divided into three classifications: exertional, non-exertional, and combined exertional and non-exertional limitations. Exertional limitations are sitting, standing, walking, lifting, carrying, pushing, and pulling. Non-exertional limitations affect an individual's ability to meet the non-strength demands of a job.

Mickles v. Shalala 29 F3d 918; (4th Cir. 1994) once objective medical evidence establishes a condition which could reasonably be expected to cause pain of the severity a claimant alleges, those allegations may not be discredited simply because they are not confirmed by objective evidence of the severity of the pain, such as heat, swelling, redness, and effusion

Albright v. Commissioner 174F.3d 473 (4th Cir. 1999). Prior Administrative Law Judge establishes residual functional capacity. Claimant exhausts appellate review with the determination of the Commissioner being upheld. Claimant files a subsequent application the first Judges residual functional capacity can be binding on the subsequent claim absent change in medical conditions. Treatment of later filed applications must consider the prior RFC and given appropriate weight in light of all relevant facts and circumstances when adjudicating the subsequent disability claim.

SEVERE IMPAIRMENTS

Severe impairment requires two elements to coalesce. First there must be a medically determinable impairment or combination of impairments that has more than a minimal affect on the ability to do basic physical or mental work activities. **Impairment** means the result of anatomical, physiologic or psychological abnormalities established by acceptable clinical or laboratory diagnostic techniques **404.1508, 1528, 1529 and SSR 96-4P**. **Severe** means an impairment or combination of impairments that significantly limits the physical or mental abilities to do basic work-related activities. All symptoms must be considered in determining if the impairment is severe.

We will find that you are not disabled if the medical and other evidence in your case establishes that your impairments or combination of impairments are not severe. Your impairments are not severe if it does not significantly limit your physical or mental ability to do basic work activities, such as: sitting, standing, walking, lifting, carrying, handling, reaching, pushing, pulling, climbing, stooping, crouching, seeing, hearing, speaking, understanding, carrying out, and remembering simple instructions; using judgment; responding appropriately to supervisors, coworkers, and usual work situations; and dealing with changes in a routine work setting **404.1521**. A “symptom” is not a “medically determinable physical or mental impairment” and no symptom by itself can establish the existence of such impairment. In the absence of any showing that there is a “medically determinable physical or mental impairment,” an individual must be found not disabled at step two of the sequential evaluation process **SSR 96-4p**.

SSR 96-3p

In determining the severity of an impairment, evidence about the functionally limiting effects of an individual's impairment must be evaluated in order to assess the effect of the impairment on the individual's ability to do basic work activities. If the adjudicator finds that such symptoms cause a limitation or restriction having more than a minimal effect on an individual's ability to do basic work activities, the adjudicator must find that the impairment is severe. If after considering all of the evidence, the adjudicator is unable to determine clearly the effect of an impairment on the individual's ability to do basic work activities, the adjudicator must assume the impairment is severe.

404.1520

If you do not have any impairment or combination of impairments which would significantly limit your physical or mental ability to do basic work activities we will find that you do not have a severe impairment.

404.1523 SSR 85-28

Although an impairment is not severe, the possibility of several such impairments combining to produce a severe impairment must be considered. The adjudicator must assess the impact of the combination of those impairments on the person's ability to function, rather than assess separately the contribution of each impairment existing alone.

404.1522

Two or more unrelated severe impairments cannot be combined to meet the 12 month durational test. If you have a severe impairment and then develop another unrelated

severe impairment but neither one is expected to last for 12 months you cannot be found disabled, despite the two impairments in combination lasted for 12 months **SSR 86-8p. SSR 82-52**

Severe impairments lasting less than 12 months cannot be combined with successive, unrelated impairments to meet the durational requirement. Disability is defined as the inability to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment expected to result in death or which has lasted or can be expected to last for continuous period of not less than 12 months **SSR 82-53.**

Social security rulings on specific impairments

SSR 82-57 Organic Loss of Speech

SSR 93-2p Human Immunodeficiency Virus

SSR 99-2P Chronic Fatigue Syndrome

SSR 02-1p Obesity

SSR 02-2p Interstitial Cystitis

SSR 03-1p Post Polio Sequelae

SSR 03-2p Reflex Sympathetic Dystrophy Syndrome, Complex Regional Pain Syndrome

SSR 03-3p blindness in initial claims for individuals aged 65 or older

SUBSTANTIAL GAINFUL ACTIVITY

Substantial gainful activity is work activity that is both **substantial** and **gainful** 404.1572. Substantial work activity involves doing significant **physical or mental** activity with reasonable regularity. Gainful work activity is done for pay or profit. Pay includes in-kind payments. Illegal activity can constitute substantial gainful activity **SSR 94-1c**. Work at certain levels of earnings at applicable times, establishes the claimant is not disabled.

Earnings in excess of \$980 per month for 2009 establishes a presumption the claimant is engaging in substantial gainful activity. The presumptive amount in 2008 was \$940 and in 2007 \$900. Generally, earnings are averaged over the entire period of work requiring evaluation to determine if you have done substantial gainful activity 404.1574a. If an individual's pattern of work was continuous without significant change in work patterns or earnings, and there was no change of SGA earnings level during the period involved, earnings are to be averaged over the entire period of work requiring evaluation **SSR 83-35**.

404.1574 (a) (1) earnings may show you have done substantial gainful activity. Primary consideration will be the earnings you derive from work activity; unless we have information from you, your employer, or others that shows that we should not count all of your earnings. Your earnings from an unsuccessful work attempt will not show that you are able to do substantial gainful activity. (c) Work you are doing will not show you are able to do substantial gainful activity if after working for a period of six months or less your impairment forced you to stop working or reduce the amount of work you do. There must be a significant break in the continuity of your work before we will consider that you began a work attempt that later proved unsuccessful we will consider your prior work to be discontinued if you were out of work at least 30 consecutive days.

SSR 82-62 Past Relevant Work.

The term work experience means skills and abilities acquired through work previously performed. It must be done within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful activity. The 15 years runs from the time of adjudication of the claim. In Title II cases in which the claimant's disability insured status was last met prior to adjudication, the work performed for the 15 year period preceding the date the title II disability insured status requirement was last met would generally be considered relevant.

SSR 83-33 Substantial Gainful Activity

Work may be substantial even if it is performed on a part-time basis, or even if the individual does less, is paid less or has less responsibility than in previous work. Work activity... is gainful if it is the kind of work usually done for pay, whether in cash or in kind. Activities such as self-care, household tasks, unpaid training, hobbies, therapy, school attendance,... are not generally considered to be SGA. **Subsidized earnings** may be deducted from gross earnings in order to ascertain countable earnings. The amount of the subsidy can be ascertained by comparing the time, energy, skills, and responsibility

involved in the individual services with the same elements involved in the performance of the same or similar work by unimpaired individuals in the community and estimating their proportionate value of the individual services according to the prevailing pay scale for such work. **Impairment -- related work expenses** are deductible in determining countable earnings only to the extent that they exceed what would have been work -- related expenses if the person were not impaired. The cost of certain attendant care services, medical devices, equipment, prosthesis, and similar items and services are deductible from earnings. The cost of routine drugs and medical services are not deductible.

SSR 05-02 Unsuccessful Work Attempt

Earnings from an unsuccessful work attempt will not show that you are able to do substantial gainful activity. The unsuccessful work attempt is to be used in initial disability cases. It is also to be used in continuing disability cases in determining whether, because of work activity, your disability continues or ceases. We will consider your work to be discontinued if you were out of work for at least 30 consecutive days or were forced to change to another type of work or another employer. Work efforts of three months or less must have ended or have been reduced to the non-SGA level within three months due to your impairment or to the removal of special conditions related to your impairment that are essential to your further performance of work. Work efforts between three and six months must have ended or have been reduced to the non-SGA level within six months due to your impairments or to the removal of special conditions related to your impairment that are essential to your further performance of work **and:** 1. You must have had frequent absences from your work due to your impairments; or 2. Your work must have been unsatisfactory due to your impairments; or 3. Your work must have been done during a period of temporary remission of your impairments; or 4. Your work must have been done under special conditions.

Disability means inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted work can be expected to last for a continuous period of not less than 12 months. The United States Supreme Court on March 27, 2002 issued the decision of *Barnhart v. Walton*, 535 U.S. 212, 152 L. Ed.2d 330 that reversed the decision of the fourth circuit in *Walton v. Apfel*. The Supreme Court ruled that the durational requirement in the definition of disability entitled II and XVI of the act means that both the medical impairment and the inability to engage in substantial gainful activity must have lasted or be expected to last for a continuous period of not less than 12 months.