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Establishing Disability For Young Adults

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Introduction

Young adults face unique challenges in meeting the new disability definition used for the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs. In many ways, for purposes of determining disability, young adults more closely resemble children than adults. However, young adults are measured under the adult disability standard, and Social Security Administration (SSA) decision makers often fail to identify evidence that shows functional limitations in young adults, such as evidence from school-based settings. In addition, SSA fails to look at factors that may mask the true impact of a young adult's functional limitations. In many cases, the childhood disability regulations provide better guidance for assessing the limitations of a young adult than do the adult disability regulations. We discuss these factors below.

First, we review the historical context of the childhood disability standard. Second, we explore how the childhood disability standard's focus on functioning in different areas can be used to show limitations that would satisfy the adult disability standard. Finally, we review relevant work rules for young adults.

SSI Childhood Disability Program Background

SSI, or Title XVI, is a federally financed program that provides benefits to low-income persons who have severe disabilities.¹

Administered by SSA, it provides a national income level benefit (\$552 per month in 2003).² That payment level is adjusted yearly to reflect changes in the cost of living. The federal SSI benefit is supplemented in many states with additional cash assistance to certain classes of SSI recipients.³

When the SSI Childhood Disability program was created in 1972, childhood disability was defined in relation to the definition of disability for adults. Children were eligible for SSI benefits if their disability was of "comparable severity" to an equivalent disability that would prevent an adult from working. However, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Act) provided a new statutory definition of disability for children claiming SSI benefits, and directed SSA to make changes in the way it evaluates childhood disability claims.⁴ Under the new law, a child's impairment must cause more serious limitations than under the old law. Specifically, the Welfare Act created a definition of disability for children separate from that of adults. The "comparable severity" test was replaced with a definition that says a child is disabled if s/he has a medically determinable physical or mental impairment, which results in marked and severe functional limitations.⁵ To implement the Welfare Act's changes to the child-

² The SSA promulgates several types of regulations and rulings that govern entitlement to SSI benefits. The first are federal regulations, which are promulgated pursuant to notice and comment provisions of the Administrative Procedure Act (See 20 C.F.R. Parts 404 and 416). The second are Social Security Rulings and Acquiescence Rulings. The third are the POMS (Program Operations Manual System) and the HALLEX (rules that apply to the Offices of Hearings and Appeals).

³ For example, SSI provides up to \$650 per month in cash benefits, access to healthcare through Medi-Cal and access to other services such as In-Home Supportive Services to eligible disabled children in California.

⁴ Pub. Law No. 104-193 enacted August 22, 1996.

⁵ 42 U.S.C. § 1382c(a)(3)(C)(i), as amended by Pub. L. No. 104-193, § 211(a).

¹ SSI governing statutes appear at 42 USC § 1382 et seq.

by Linda Landry &
Thomas Yates

hood disability standard, SSA issued final interim rules on Feb. 11, 1997.⁶

SSA issued final regulations on the childhood SSI disability standard on Sept. 11, 2000.⁷ The final regulations did two major things. First, they reinforced general guidelines that apply to all childhood disability determinations, chief among them being that, in assessing disability, a child with functional limitations from medical impairments must be compared to children without such limitations to assess the degree of limitation. Second, they reworked the functional equivalence process by completely separating it from the Listings of Impairments (the Listings), and defining six new domains in which all children's functional limitations are assessed. The final regulations did not, however, change the standard for showing disability. SSA continued to define the statutory standard of "marked and severe functional limitations" to mean marked limitations in two areas or "domains" of functioning, or an extreme limitation in one domain.⁸

Factoring Childhood Functional Measures into the Adult Disability Standard

Generally speaking, young adults aged 18 to 25 who receive or are seeking SSI benefits fall into three categories:



Marilyn Nolt

- Eighteen-year-olds who are receiving SSI childhood disability benefits. At age 18 they must have their eligibility for SSI reassessed. When SSA conducts this reassessment, it applies its adult disability rules;
- Young adults who apply for SSI disability benefits for the first time at age 18. Because of Social Security rules that count parents' income until a child turns age 18, many children cannot qualify for SSI before they turn age 18. At age 18, however, SSA no longer counts parents' income, even if the young adult is still living with the parents;
- Young adults seeking Social Security Disability Insurance (SSDI) benefits on the earnings record of their parent, if that parent is retired, disabled, or deceased. To qualify, young adults must show that they have a disabling condition that began prior to turning age 22.

A young adult must show that s/he is disabled using the adult SSI standard. The

adult standard, which covers persons from age 18 until they turn 65, is hard to meet; an individual age 18 or older must show that s/he is unable, due to a medical impairment or combination of medical impairments that have lasted, or are expected to last twelve months or result in death, to perform any jobs that exist in substantial numbers in the national or local economy. At a minimum, young adults must show the following to be found disabled under the adult disability standard:

- An inability to meet the basic demands of at least sedentary work on a sustained basis;
- An inability to meet the basic mental demands of simple, unskilled work.

Showing that, however, can be difficult because many young

adults do not have a work history that can be used in assessing disability. Moreover, young adults are literally just kids – the standards to which they have been held are those of children.

SSA recognizes the difference between children and adults in its disability evaluation models; children are evaluated on a model that looks at functioning in a number of different areas, while adults are assessed on performance of work-related activities.

The Childhood Disability Standard: The Three-Step Sequential Evaluation for Children

SSA now uses a three-step sequential evaluation to determine childhood disability. 20 C.F.R. § 416.924. It is set forth below:

Step 1: Is the child working? (The SSA rules on substantial gainful activity are set forth at 20 C.F.R. §§ 416.971-76). If yes, deny the claim. If no, go to Step 2.

⁶ 62 Fed. Reg. 6408 (Feb. 11, 1997).

⁷ 65 Fed. Reg. 54747-54790 (Sept. 11, 2000).

⁸ 20 C.F.R. § 416.926a(a).

Step 2: Does the child have a medically determinable impairment or combination of impairments that is severe? 20 C.F.R. § 416.924(c). If no, deny the claim. If yes, go to Step 3.

Step 3: Does the child's impairment meet any of the following:

- a) Meet the requirements of a listed impairment in the Listing of Impairments in 20 C.F.R. Part 404, Subpt. P, App. 1; or
- b) Medically equal the requirements of a listed impairment in the Listing of Impairments in 20 C.F.R. Part 404, Subpt. P, App. 1; or
- c) Display functional limitations that are equivalent to the disabling limitations of any listing.

If yes, the child is disabled. If no, the child is not disabled.

Evaluating Functional Capacity: Functional Domains

In determining functional equivalence, SSA looks at six different functional domains, defined below. A child is considered disabled if s/he has marked limitations in two domains or an extreme limitation in one domain. The six domains are:

- **Acquiring and Using Information.** How well a child acquires or learns information, and how well the child uses the information the child has learned. 20 C.F.R. § 416.926a(g);
- **Attending and Completing Tasks.** How well a child is able to focus and maintain attention, and how well the child begins, carries through, and finishes activities, including the pace at which the child performs activities and the ease with which the child changes them. 20 C.F.R. § 416.926a(h);
- **Interacting and Relating With Others.** How well a child initiates and sustains emotional connections with others, develops and uses the language of the child's community, cooperates with oth-

ers, complies with rules, responds to criticism, and respects and takes care of the possessions of others. 20 C.F.R. § 416.926a(i);

- **Moving About and Manipulating Objects.** How a child moves his or her body from one place to another and how the child moves and manipulates things. Put another way, this domain assesses gross and fine motor skills. 20 C.F.R. § 416.926a(j);
- **Caring For Yourself.** How well a child maintains a healthy emotional and physical state, including how well the child gets physical and emotional wants and needs met in appropriate ways; how the child copes with stress and changes in environment; and whether the child takes care of his or her own health, possessions, and living area. 20 C.F.R. § 416.926a(k);
- **Health and Physical Well-Being:** This domain is defined as the cumulative physical effects of physical or mental impairments and their associated treatments or therapies on the child's functioning that SSA did not consider in the domain of Moving About and Manipulating Objects. 20 C.F.R. § 416.926a(l).

Evaluating Functional Capacity: What Evidence Is Considered

The same general evidence rules that apply in adult cases also apply in children's cases. See 20 C.F.R. §§ 404.1527, 416.927. An acceptable medical source is needed to establish a medically determinable impairment. 20 C.F.R. §§ 404.1513, 416.913. Important to cases for both children and young adults, is the addition of the of the following sources: licensed or certified school psychologists for mental retardation, learning disabilities, and borderline intellectual functioning; and qualified speech and language pathologists for speech and language impairments. See *id.* Evidence of the functional severity of medical impairments is not limited to that from acceptable medical

sources. It also can come from other medical sources, such as nurse practitioners and therapists, as well as professional sources such as counselors, teachers, and lay sources. 20 C.F.R. §§ 404.1513, 416.913.

SSA regulations provide that school evidence should be requested and evaluated. 20 C.F.R. § 416.924a(a)(2)(iii). In addition, the regulations provide guidance on how to weigh evidence that a child is in a special education program or receives accommodations, 20 C.F.R. § 416.924a(b)(7)(iv); and a child has medical impairments that limit attendance and participation in school activities. 20 C.F.R. § 416.924a(b)(7)(v).

Evaluating Functional Capacity: How Evidence Is Considered

There is a key difference between disability standards for children and those for adults. With children, SSA must consider whether there are factors present which mask a child's functional limitations. Also, SSA must consider whether these factors cause or exacerbate the limitations themselves.

In assessing the severity of children's functional limitations, SSA must consider the amount of help a child requires, and the impact of structured settings. In so doing, SSA is to consider the following:

- The range of activities a child does;
- The child's ability to do them independently, including any prompting the child requires to begin, carry through, and complete those activities;
- The pace at which the child does those activities;
- How much effort the child needs to do those activities;
- How long the child is able to sustain such activities. 20 C.F.R. § 416.924a(b)(5).

Among the factors specifically considered are the following:

(continued on p.4)

by Linda Landry &
Thomas Yates

Establishing Disability For Young Adults

- **Extra Help.** SSA is required to consider any extra help that a child requires to do age-appropriate activities. 20 C.F.R. § 416.924a(b)(5)(i). In making the disability determination or decision, the decision makers must assess how a child would function without the extra help. Extra help is more help than a child of the same age without an impairment would be expected to need. 20 C.F.R. § 416.924a(b)(5)(ii);
- **Structured or Supportive Settings.** Children with serious impairments may spend some or all of their time in a structured setting, which is beyond what children without such impairments normally require. SSA must consider how that child would function outside of the structured setting because that may minimize symptoms of the child's impairment and help to improve functioning while in attendance there, even though the child's impairment might worsen outside this setting. 20 C.F.R. § 416.924a(b)(5)(iv);
- **Unusual Settings.** SSA recognizes that children may behave differently in unusual settings and that behavior alone should not be relied upon in determining the severity of functional limitations. The final regulations state:
Children may function differently in unfamiliar or one-to-one settings than they do in their usual settings at home, at school, in childcare or in the community. You may appear more or less impaired on a single examination (such as a consultative examination) than indicated by the information covering a longer period... We will not draw inferences about your functioning in

other situations based only on how you function in a one-to-one, new, or unusual situation. 20 C.F.R. § 416.924a(b)(6);

- **Effects of Medications.** In determining disability, SSA decision makers must consider how a child functions with prescription medications. 20 C.F.R. § 416.924a(b)(9). The regulations state that if a child's symptoms are reduced by medications, SSA still must consider, among other things, whether the medications create side effects that cause or contribute to the child's functional limitations.
20 C.F.R. § 416.924a(b)(9)(i)(A)-(E);
- **Treatment Effects.** The effects of treatment also must be considered in determining disability. 20 C.F.R. § 416.924a(b)(9)(ii). Treatment includes occupational, physical, speech, and language therapy, along with psychotherapy and psychosocial counseling. The regulations provide that frequent therapy also may interfere with a child's functioning. Therefore, SSA must consider the frequency of therapy; how long the child has received therapy or will need it; whether the therapy interferes with the child's participation in activities typical of children of that age without impairments; and the length and frequency of hospitalizations.
20 C.F.R. § 416.924a(b)(9)(ii).

The Adult Disability Standard: The Five Step Sequential Evaluation for Adults

For adults age 18 and older, SSA defines disability as the inability to engage in any substantial gainful activity by reason of medically determinable physical or mental impairment, which can be expected to last for at least 12 months or result in death. 20 C.F.R. §§ 404.1505, 416.905. SSA uses a five-step sequential analysis to determine disability. See 20 C.F.R. §§ 404.1520, 416.920.

Step 1: Is the applicant engaging in Substantial Gainful Activity (SGA)? If yes, the application is denied. If no, the application proceeds to Step 2.

Step 2: Does the applicant have a severe impairment or combination of impairments that are severe? If no, the application is denied. If yes, the application proceeds to Step 3.

Step 3: Does the applicant have an impairment which meets or equals the severity of a listed impairment? If yes, the application is approved. If no, the application proceeds to Step 4.

Step 4: Does the applicant have the residual functional capacity (RFC) to perform past relevant work (work performed in the last 15 years)? If yes, the application is denied. If no, the application proceeds to Step 5.

Step 5: Does the claimant have the RFC to perform any other work that exists in significant numbers in the national economy? SSA considers factors such as the applicant's age, education, work history, and ability to communicate in English, in determining if there is other work the claimant can perform. If no, the application is approved. If yes, the application is denied.

Finding Common Ground Between Childhood and Adult Disability Standards: Relevant, Non-Medical Evidence

The regulations provide, at 20 C.F.R. § 416.913(e), that information from non-medical sources is important in determining how a medical impairment affects a claimant's ability to work. Relevant sources are:

- Public and private social welfare agencies and social workers;
- Observations by people who know you (for example, spouses, parents and other

caregivers, siblings, other relatives, friends or neighbors, clergy);

- Other medical practitioners, such as nurse practitioners, physician assistants, naturopaths, and chiropractors;
- Therapists, such as physical, occupational, or speech and language therapists;
- Educational agencies and personnel, such as teachers, school psychologists, and school counselors.

Finding Common Ground Between Childhood and Adult Disability Standards: Evaluating Function at Step Three

As described above, an adult is disabled if s/he meets a listing in the Listing of Impairments. Most of the listings do not incorporate function. However, SSA has been making some effort, as it updates the listings for physical impairments, to incorporate functional measures.

Each listing in the Listing of Impairments is broken down into three criteria. The “A” criteria fulfill the statutory requirement that a person have a medically determinable impairment to be found disabled. The “B” criteria consider the impact of the impairment on activities of daily life. If the “B” criteria are not met, SSA looks at additional functional “C” criteria to assess the severity of functional limitations. The “C” criteria do the same thing as the other factors discussed above for children.

The mental impairment listings incorporate functional measures in the “B” and “C” criteria. The “B” and “C” of the adult mental impairment listings should be advocates’ main focus. The “B” and “C” criteria describe impairment-related functional limitations that are incompatible with the ability to work . . . The criteria included in paragraphs B and C of the listings for mental disorders have been chosen because they represent functional areas deemed essential to work. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.A.

The “B” Criteria and “C” Criteria

The “B” criteria examine a broad range of social functioning.

Activities of Daily Living are as follows:

- Cleaning;
- Shopping;
- Cooking;
- Taking public transportation;
- Paying bills;
- Maintaining a residence;
- Caring appropriately for one’s grooming and hygiene;
- Using telephones and directories;
- Using a post office.

20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.C.1.

In the context of the individual’s overall situation, the quality of these daily activities is judged by their independence, appropriateness and effectiveness. It is necessary to define the extent to which the individual is capable of initiating and participating in these activities without supervision. Additionally, advocates should evaluate a young adult’s daily activities in light of social functioning, concentration, persistence, or pace, and the occurrence of episodes of decompensation.

Social functioning refers to the capacity to interact independently, appropriately, effectively, and on a sustained basis with other individuals. Social functioning includes the ability to get along with others, such as family members, friends, neighbors, grocery clerks, landlords, or bus drivers. An individual may demonstrate impaired social functioning by, for example, a history of altercations, evictions, firings, by fear of strangers, avoidance of interpersonal relationships, or social isolation. An individual may exhibit strength in social functioning by such things as your ability to initiate social contacts with others, communicate

clearly with others, or interact and actively participate in group activities. Also considered are cooperative behaviors, consideration for others, awareness of others’ feelings, and social maturity. Social functioning in work situations may involve interactions with the public, responding appropriately to persons in authority (e.g., supervisors), or cooperative behaviors involving co-workers. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.C.2.

Concentration, persistence, or pace refers to the ability to sustain focused attention and concentration to permit completion of tasks commonly found in work settings. Limitations in concentration, persistence, or pace are best observed in work settings, but also may be reflected by limitations in other settings. In addition, major limitations in this area often can be assessed through clinical examination or psychological testing. Whenever possible, however, a mental status examination or psychological test data should be supplemented by other evidence. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.C.3.

On mental status examinations, concentration is assessed by tasks such as having an individual subtract serial sevens or serial threes from 100. In psychological tests of intelligence or memory, concentration is assessed through tasks requiring short-term memory, or through tasks that must be completed within established time limits.

These work evaluations test an individual’s ability to sustain work using appropriate production standards, in either real or simulated work tasks (e.g., filing index cards, locating telephone numbers, or disassembling and reassembling objects). Concentration and attention can be discussed in terms of an individual’s ability to work at a consistent pace for acceptable periods of time and until a task is completed, and his or her ability to repeat sequences of action to achieve a goal.

(continued on p.6)

by Linda Landry &
Thomas Yates

Establishing Disability For Young Adults

Episodes of decompensation are exacerbations or temporary increases in symptoms, accompanied by a loss of adaptive functioning. These episodes manifest themselves via difficulties in performing activities of daily living, maintaining social relationships, or maintaining concentration, persistence, or pace. Episodes of decompensation may be demonstrated by an exacerbation in symptoms or signs that would ordinarily require increased treatment, a less stressful situation, or both. Episodes of decompensation



Marilyn Nolt

may be inferred from medical records showing significant alteration in medication, documentation of the need for a more structured support system (e.g., hospitalizations, placement in a halfway house, or a highly structured household), or other relevant information. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.C.4.

The phrase “repeated episodes of decompensation, each of extended duration” in these listings means three episodes within one year, or an average of once every four months, each lasting for at least two weeks. If an individual has experienced more frequent episodes of shorter duration or less frequent episodes of longer duration, SSA must determine if the episodes are of equal severity, and may use this information to

substitute for the listed finding in a determination of equivalence.

Special Factors in Weighing Evidence in Adult Claims

As set forth above, the childhood regulations provide specific guidance in assessing the severity of functional limitations, the amount of help a child requires, and the impact of structured settings. The adult mental impairment listings make the same points. However, they are not as clearly set out.

These factors are discussed below.

Effects of Structured Settings. SSA recognizes

that overt symptomatology may be controlled or attenuated by psychosocial factors, such as placement in a structured support system, such as a hospital, halfway house, board and care facility, or other environment (including one’s home). Such settings may greatly reduce the mental demands placed on a person. With lowered mental demands, overt symptoms of the mental disorder may be minimized. At the same time, however, the person’s ability to function outside a structured setting may not have changed. If someone’s symptomatology is controlled or attenuated by psychosocial factors, SSA must consider that person’s ability to function outside of these structured settings. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.F. See also SSR 85-15 (discussing stress and mental illness).

Effects of Medication. SSA recognizes that medication affects a person’s symptoms and ability to function. While drugs may control certain primary manifestations of a mental disorder, such as hallucinations, impaired attention, restlessness, or hyperactivity, such treatment may not affect all functional limitations imposed by the mental disorder. In cases where overt symptomatology is attenuated by the use of such drugs, particular attention must be focused on the functional limitations that may persist.

The introductory language to the Listings recognizes that drugs used in the treatment of some mental illnesses may cause side effects. Those symptoms must be considered in evaluating the overall severity of someone’s impairment. Where adverse effects of medications contribute to an impairment’s severity, and the impairment meets no listing but is nonetheless severe, SSA considers such adverse effects in the RFC assessment. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.G.

Effects of Treatment. With adequate treatment, some individuals with chronic mental disorders not only have their symptoms ameliorated, but they also return to a level of

function close to the level they had before they developed symptoms of their mental disorders. Treatment may assist in the achievement of a level of adaptation adequate to perform sustained SGA. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.H.

Unusual Settings. Unlike the childhood disability regulations, the adult mental impairment standard does not specifically recognize unusual settings. In the childhood context, the unusual settings language cautions decision makers against reliance solely on evidence generated from one-on-one encounters, because many children do not exhibit symptoms in such settings. Similar language is contained in the adult mental impairment listings, although it is not separately set forth.

In discussing the “B” criteria of concentration, persistence, or pace, the listings state:

We must exercise great care in reaching conclusions about your ability or inability to complete tasks under the stresses of employment during a normal workday or work week based on a time-limited mental status examination or psychological testing by a clinician, or based on your ability to complete tasks in other settings that are less demanding, highly structured, or more supportive. We must assess your ability to complete tasks by evaluating all the evidence, with an emphasis on how independently, appropriately, and effectively you are able to complete tasks on a sustained basis.

20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.C.3.

In addition, the mental impairment listings stress the need for longitudinal evidence, recognizing that a person’s level of functioning may vary considerably over time. Proper evaluation of impairment must take into account any variations in the level of an individual’s functioning in arriving at a determination of severity over time. Thus, it is vital to obtain evidence from relevant sources over a sufficiently long period prior to the date of adjudication to establish impairment

severity. 20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.D.2.

Evaluating Function at Step Four and Step Five: Residual Functional Capacity (RFC)

At steps four and five in the adult sequential evaluation, SSA assesses how an adult functions in determining disability. The adult assessment is residual functional capacity (RFC), which is what the person can still do despite the functional limitations imposed by all of his or her impairments. See 20 C.F.R. §§ 404.1545, 416.945. Put another way, RFC is:

A multidimensional description of the work-related activities [that a person] retain[s] in spite of ... medical impairments. An assessment of . . . RFC complements the functional evaluation necessary for the paragraphs B and C of the listings by requiring consideration of an expanded list of work-related capacities that may be affected by mental disorders . . .

20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00.A.

RFC includes both exertional and non-exertional functional capacities. Exertional functional capacity includes the ability to walk, stand, sit, lift, push, pull, reach, carry, and handle items. Non-exertional functional capacity includes the ability to see, hear, and speak; and to tolerate fumes, dust, heat, and cold. It also includes the ability to understand, carry out, and remember simple instructions; to use judgment, respond appropriately to supervision, co-workers, and usual work situations; and deal with changes in a routine work setting.

When SSA considers the individual functional limitations of claimants with mental impairments at steps four and five of the sequential analysis, it is not unusual to see SSA find claimants with severe mental impairments capable of unskilled work. This is especially true for younger claimants. See Social Security Ruling 85 -15 and 85-16.

The introductory materials (20 C.F.R. Part 404, Subpt. P, App. 1, § 12.00) to the mental impairment listings, as discussed earlier, contain language that is useful to the evaluation of mental impairments throughout the sequential analysis. See 20 C.F.R. §§ 404.1520a(c), 416.920a(c).

Evaluating the Impact of Stress and the Need for Structured Settings

Social Security Ruling 85-15 contains helpful language on the impact of stress on persons with mental impairments. Since mental illness is characterized by maladaptive behavior, it is not unusual that the mentally impaired have difficulty accommodating to the demands of work and work-like settings. Determining whether these individuals will be able to adapt to the demands of the workplace is often extremely difficult. This section is not intended to set out any presumptive limitations for disorders, but to emphasize the importance of thoroughness in evaluation.

Individuals with mental disorders often adopt highly restricted or inflexible lifestyles, within which they appear to function well. Good mental health services may enable them to function adequately in the community. The reaction to the stress of work is highly individualized, and mental illness is characterized by adverse responses to seemingly trivial circumstances. The mentally impaired may cease to function effectively when facing such demands as getting to work regularly, having their performance supervised, or remaining in the workplace for a full day. A person may become panicked and develop palpitations while riding in an elevator; another may experience terror and begin to hallucinate when approached by a stranger asking a question. Thus, the mentally impaired may have difficulty meeting the requirement of even low-stress jobs.

(continued on p.8)

by **Linda Landry &
Thomas Yates**

Establishing Disability For Young Adults

Because responses to the demands of work differ among individuals, the skill level of a position is not necessarily an indicator of the difficulty an individual will have in performing the job. A claimant's condition may make performance of an unskilled job as difficult as an objectively more demanding job. For example, a busboy need only clear dishes from tables. But an individual with a severe mental disorder may find unmanageable the demand of making sure that he or she removes all the dishes, does not drop them, and gets the table cleared promptly for the waiter or waitress. Similarly, an individual who cannot tolerate being supervised may be not able to work even in the absence of close supervision. The knowledge that one's work is being judged and evaluated, even when the supervision is remote or indirect, can be intolerable for some mentally impaired persons. Any impairment-related limitations created by an individual's response to demands of work, however, must be reflected in the RFC assessment.

Incorporating School Evidence Into the RFC Determination

Often, SSA fails to focus on evidence that shows the inability to do simple, unskilled work on a sustained basis. Among other things, Social Security Ruling 85-16 provides that the following types of evidence should be considered in determining RFC:

- Reports of the individual's activities of daily living and work activity, as well as testimony of third parties about the individual's performance and behavior;
- Reports from workshops, group homes, or similar assistive entities.

In analyzing the evidence, it is necessary to draw reasonable conclusions about the individual's strengths and weaknesses. Consideration should be given to factors such as:

- Quality of daily activities, both in occupational and social spheres (see Listing 12.00, Introduction), as well as of the individual's actions with respect to a medical examination;
- Ability to sustain activities, interests, and relate to others over a period of time. The frequency, appropriateness, and independence of the activities must also be considered;
- Level of intellectual functioning;
- Ability to function in a work-like situation.

Many young adults have school-based evidence, including evidence of academic work and school-based vocational program work, which addresses these issues. The regulations provide that evidence from teachers and school psychologists, or physical, occupational, or speech-language therapists shall be considered. 20 C.F.R. § 416.913(e). Relevant school evidence includes:

- Evidence from teachers about the child's performance in activities throughout the school day;
- Special education services including information in Individualized Education Program (IEP) plans;
- Special education or accommodations: SSA will consider the circumstances of a child's school attendance, such as the ability to function in a regular classroom or preschool setting with children of the same age who do not have impairments. Similarly, SSA will consider that good performance in a special education setting does not mean the child is functioning at the same level as other children of the same age who do not have impairments;
- Attendance and participation. SSA also will consider factors affecting a child's ability to participate in his or her education program. The child may be unable to participate on a regular basis because of the chronic or episodic nature of his or her impairment or the need for therapy or treatment.

20 C.F.R. § 416.924a(b)(7).



Marilyn Nolt

Advocates should look to school evidence for the following in determining whether young adults can work:

- The ability to understand, carry out, and remember simple instructions and work-like procedures in the classroom is evidence of ability to do these things in a job;
- The ability to communicate spontaneously, interactively, and age-appropriately in the classroom is evidence of ability to do these things in a job;
- The ability to maintain attention for extended periods of time and to sustain an ordinary daily routine without special supervision is evidence of ability to do these things in a job;
- The ability to work with authority figures and to follow direction in school, responding appropriately to correction or criticism, is evidence of ability to deal with supervision in a job;
- The ability to interact with peers in school, school-related activities, and other age-appropriate environments is evidence of ability to relate to co-workers in a job;
- The ability to regulate mood and behavior in various school settings is evidence of ability to deal with change in the work setting;
- The ability to engage in physical activities both in and out of school is evidence of ability to perform the physical demands of work;
- The skills derived from specific vocational education or part-time employment are evidence of ability to use those skills in a job.

How Work Affects SSI and SSDI Eligibility for Young Adults

Many young adults are working, or want to go to work. However, wages will affect income eligibility for SSI, and the ability to do some work may be used by SSA to show that a young adult is not disabled. SSA looks

primarily at the wages a young adult earns at work to decide whether that person is disabled. Generally speaking, SSA will consider a young adult to be not disabled if he or she is employed and earns more than \$780 per month (in 2002). However, there are exceptions.

Wages and SSI Income Eligibility

Virtually all wages earned by an SSI recipient are countable after certain deductions. The SSI earned income deduction is \$65 plus half of the remainder. 20 C.F.R. § 416.1112(c)(5) & (7). For example, \$565 in gross monthly wages results in \$250 in countable income for SSI purposes. In addition, the \$20 general income deduction can be used if it has not been used up against unearned income. 20 C.F.R. § 416.1112(c)(4). Impairment Related Work Expenses (IRWE) and wages set aside in a Plan to Achieve Self Support (PASS) are also excluded from countable income. 20 C.F.R. § 416.1112(c)(6) & (9). Finally, students under age 22 who are regularly attending school can exclude up to \$1,320 per month but not more than \$5,340 in calendar year 2002. 20 C.F.R. § 416.1112(c)(3), POMS SI 00820.510. This amount is indexed to the yearly cost of living adjustment (COLA).

Substantial Gainful Activity (SGA)

The definition of disability for both SSI and SSDI requires that the claimant be “unable to engage in any substantial gainful activity (SGA).” 20 C.F.R. §§ 404.1505, 416.905. SGA involves the performance of physical or mental duties that are productive in nature. It is not necessary that the work be full-time to be substantial; part-time work may be sufficient. Gainful activity is activity for profit, whether or not it’s realized. Work performed in self-care or one’s own household tasks, and non-remunerative work on hobbies, institutional therapy or training, school attendance, clubs, social programs, etc. does not constitute SGA. However, SSA may look to these to see if the claimant has the ability to do SGA.

SSA has developed a complex set of rules for evaluating when work activity should be considered SGA. See 20 C.F.R. § 404.1571 et seq., 20 C.F.R. § 416.971. The primary consideration for employees is the amount of gross monthly wages. For the self-employed, SSA considers not only wages but also the value of the activity to the business. In addition, there are several factors that may be applied to reduce earnings below the SGA level. These factors are seldom adequately developed, so it is important to be aware of them and investigate them where appropriate. See the SGA evaluation rules at 20 C.F.R. §§ 404.1571 et seq., 20 C.F.R. § 416.971.

Presumed SGA Wages

In general, for 2002, SSA will presume that any employee who earns more than \$780 a month in gross wages is engaging in SGA. The SGA amount has been indexed to the yearly COLA since 2001. Prior SGA amounts include the following: \$740 for 2001; \$700 for July 1999 through December 2000; and \$500 for January 1990 through June 1999.

The presumption of SGA can be rebutted though the exceptions to SGA, as follows:

- The earnings include a subsidy reducing the true earnings below the SGA level (20 C.F.R. § 416.974(a)(2), 65 Fed. Reg. 42789 (July 11, 2000));
- The work involves special circumstances such that it should not be considered SGA (20 C.F.R. § 416.973(c), 65 Fed. Reg. 42788 (July 11, 2000));
- The individual’s impairment forces him or her to quit working within three to six months, constituting what is called an unsuccessful work attempt (20 C.F.R. § 416.974 (c), Id.);
- The claimant has impairment related work expenses that reduce monthly wages below the SGA level (20 C.F.R. § 416.976).

(continued on p.10)

by Linda Landry &
Thomas Yates

Establishing Disability For Young Adults

Presumed Non-SGA Wages

A claimant earning less than \$300 a month in gross wages, in the absence of evidence to the contrary, will not be considered engaging in SGA. Exceptions to this rule would be individuals doing volunteer work or work with little remuneration, which nevertheless is comparable to those engaged in SGA.

No Presumption Wages

For work performed since January 2001, SSA is not required to investigate whether these mid-level earnings should be considered SGA. Instead, SSA generally will not consider other evidence to determine whether mid-level wages show the ability to do SGA, unless there is evidence of SGA or evidence of wage suppression. See 20 C.F.R. § 416.974(6), 65 Fed. Reg. 82905, 82912 (Dec. 29, 2000). However, for work performed prior to January 2001, SSA is required to investigate whether earnings between \$300 and SGA-level earnings should be considered as engaging in SGA. See the considerations laid out in 20 C.F.R. § 416.974(6).

Factors That May Show Inability To Do SGA

The following factors may be used to rebut the presumption created by earnings at the SGA level.

Unsuccessful Work Attempts. This factor should be developed when the young adult has either stopped working or lost a job due to impairment-related reasons. Work that constitutes an Unsuccessful Work Attempt (UWA) is not SGA. A

UWA is a short, failed attempt to work. To be considered a UWA, the work attempt must be terminated because of an impairment-related inability to perform the work. As a general rule, SSA will consider a work attempt terminated in fewer than three months to be a UWA. Work attempts lasting between three and six months require more evidence showing disability-related problems and termination. A UWA should not result in a determination that the claimant is able to engage in SGA. SSA will not consider the work or wages of the UWA as evidence of ability to perform SGA. See 20 C.F.R. §§ 404.1574(a)(1), 416.974(a)(1), as published at 65 Fed. Reg. 42771 (July 11, 2000) and Social Security Ruling 84-25 for more information on UWA.

Subsidies and Special Conditions. Some young adults will have participated in work programs that may have had reduced expectations and production requirements. In these cases, the possibility that the work was subsidized or performed under special circumstances should be investigated. Subsidized work and work performed under special circumstances may show that the individual does not have the ability to perform SGA, even if the individual's wages are at or above the SGA level. See 20 C.F.R. §§ 404.1573, 404.1574, 416.973, 416.974, published at 65 Fed. Reg. 42771 (July 11, 2000). A subsidy exists when an employer pays an employee more than the reasonable value of his or her services. The amount of the subsidy is determined by comparing the time, energy, skill, and responsibility involved in the job, with the performance of similar work by individuals without impairments. For example, an employee who produces 50 percent of the job's production requirement and is paid the same as those expected to meet the production requirement receives a 50 percent subsidy. Evidence that a subsidy exists includes marked lack of productivity, necessity for an unusual amount of supervision and assistance, or marked slowness and inefficiency.

Work performed under special circumstances also may show that the individual

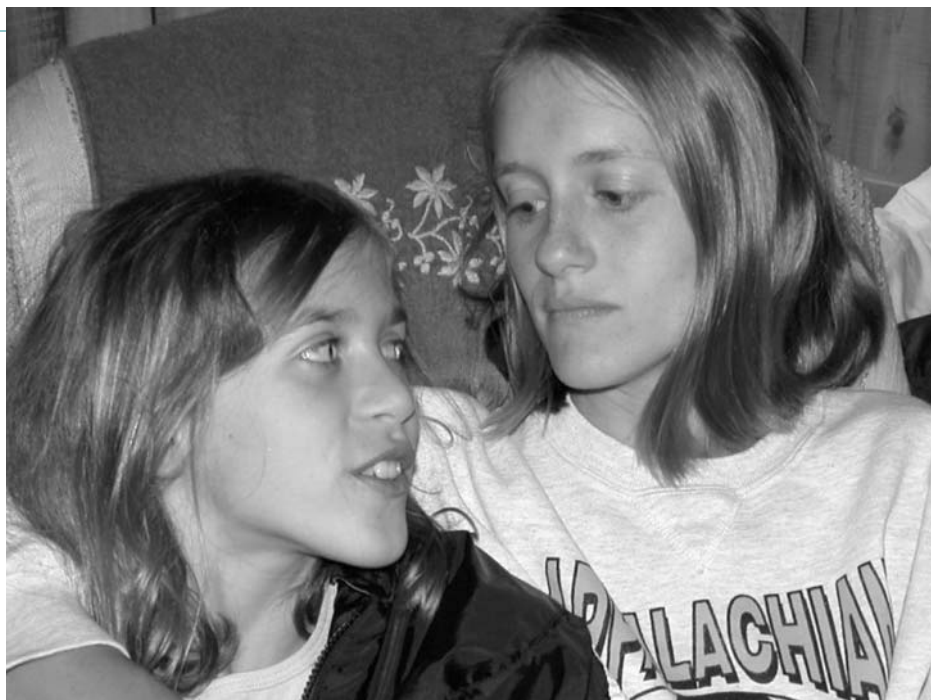
does not have the ability to do SGA. Special circumstances should be investigated whenever the employee:

- Receives special assistance from other employees;
- Works irregular hours or takes frequent rest periods;
- Works under specially arranged circumstances;
- Has lower standard of productivity or efficiency;
- Has a family relationship or past association with the employer.

See 20 C.F.R. §§ 404.1573(c), 416.973(c), as published at 65 Fed. Reg. 42771, 42783 (July 11, 2000). An example of work performed under special circumstances could include a young adult who earns SGA level wages, but who does so only with significant services from a job coach provided by a social service agency.

Impairment-Related Work Expenses. Some young adults may be earning SGA level wages but spending significant non-reimbursed amounts on Impairment Related Work Expenses (IRWE). The value of any such IRWE can be deducted from monthly earnings, and may reduce those earnings below the SGA level. An IRWE is a disability-related expense that helps the employee function at work. The cost of an IRWE must be paid by the recipient and must not be reimbursed by any source. 20 C.F.R. §§ 404.1576(b)(3), 416.976(b)(3). Verified IRWE costs must be deducted from monthly gross earnings before SSA makes an SGA determination. Significant IRWE costs can reduce gross earnings below the SGA level. Other IRWE deductions may include items or such as wheelchairs, assistive technology, counseling services, specially adapted vehicles, etc.

Plans for Achieving Self-Support. A Plan for Achieving Self-Support (PASS) allows claimants to set aside income or resources for



Marilyn Nolt

a specified time, for a vocationally achievable work goal. A young adult could set aside money to pay expenses for education, vocational training, adaptive equipment, job coaching, or starting a business. POMS SI 00870.000 et seq. SSA does not count PASS funds when computing the SSI payment amount. 20 C.F.R. § 416.1112(c)(9). Further, SSA does not PASS funds to determine resource eligibility for SSI. 20 C.F.R. § 416.1225. This means that PASS can help establish or maintain SSI eligibility and can increase the SSI payment amount.

An individual's PASS must:

- Be designed especially for the claimant;
- Be in writing (preferably on form SSA-545-BK);
- State a specific work goal the claimant is capable of performing;
- State a specific time frame for reaching the work goal;
- Show what money and other resources will be used to reach the goal;
- Show how the funds will be used to reach the goal;
- Include a detailed business plan if the goal is self-employment;
- Show how the set aside funds will be kept identifiable from other funds;
- Be approved by SSA;

- Be reviewed by SSA periodically to assure the plan is actually helping achieve progress.

20 C.F.R. §§ 416.1181, 416.1126, POMS SI 00870.006.

Work Incentives

Both the SSI and the SSDI programs include work incentives that permit claimants to test their abilities to work without immediate loss of benefits. These rules can help young adults with disabilities in their transition from school to work.

SSI Work Incentive Program

SSI recipients who work at the SGA level are eligible for the 1619 program. 20 C.F.R. § 416.260 -.267. Recipients who have earnings above the SGA level can continue to receive cash payments under the 1619(a) program (special SSI payments for people who work) as long they remain medical disabled and meet all other eligibility requirements. The recipient's eligibility and payments will be calculated in the same way as someone who is not working at the SGA level. Medicaid eligibility also continues with 1619(a) eligibility.

When earnings become too high to allow for a cash payment, the recipient may be eligible for 1619(b) (continued Medicaid eligibili-

ty). 20 C.F.R. §§ 416.268 - .269. In order to qualify, the recipient must:

- Have been eligible for an SSI cash payment for at least one month;
- Still meet the disability definition;
- Still meet other non-disability requirements;
- Need Medicaid in order to work;
- Have gross earned income insufficient to replace SSI and Medicaid.

POMS SI 02302.010.

Individuals who remain medically disabled can move between SSI, 1619(a) and 1619(b) without a new application, as their circumstances change.

SSDI Work Incentive Program

SSDI recipients are entitled to a nine-month trial work period during which benefits are not affected. 20 C.F.R. § 404.1592. A trial work month is one in which the recipient earns more than \$560 in gross wages (in 2002) that is not training or therapy. Recipients continue to receive their full SSDI benefits during the trial work months, no matter how much they earn. The nine months do not have to be consecutive. The trial work period is completed when the recipient has had nine trial work months in a sixty-month period. When the nine-month trial work period is complete, SSA will review the work to determine whether the recipient is performing SGA. SSA also should conduct a continuing disability review to see whether the recipient remains medically disabled. If the individual is no longer medically disabled, benefits will cease.

Recipients who remain medically disabled begin the Extended Period of Eligibility (EPE). 20 C.F.R. § 404.1592a. The EPE is a consecutive thirty-six-month period that begins the month following the end of the trial work period. During the EPE, recipients are not eligible for a cash benefit for months in which they work at the SGA level.

(continued on p.12)

by **Linda Landry &
Thomas Yates**

Establishing Disability For Young Adults

However, as long as the recipient remains medically disabled, benefits can be reinstated during the EPE without a new application for any month in which the person does not work at the SGA level. Medicare benefits continue during the EPE regardless of whether the recipient is eligible for a cash benefit. Eligibility will cease at the end of the thirty-six months if the recipient is performing work at the SGA level. If the recipient is not working at the SGA level, eligibility

will cease the first month the recipient does perform SGA.

Although SSA can look at any work to see if it shows the ability to perform SGA, SSA presumes that work resulting in gross wages at SGA levels constitutes SGA. The regulations at 20 C.F.R. § 404.1574, provide a useful chart which shows SGA levels applicable to various time periods. Any special circumstances, along with subsidies or IRWE costs, should be deducted from monthly gross wages before deciding whether the wages show SGA.

Conclusion

Advocates assisting young adults with disabilities should be aware of the unique chal-

lenges presented by the SSI application and re-determination processes for this age group. The childhood disability regulations provide a guide to assessing the functional limitations of a young adult. Find common ground between this childhood standard and the adult disability standard that your client must meet. Use this information to communicate to SSA the true impact of your young clients' functional limitations.

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