No. 02-763

In the Supreme Court of the United States

JOANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,
PETITIONER

v.

PAULINE THOMAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY A. LAMKEN
Assistant to the Solicitor General

WILLIAM KANTER
WENDY M. KEATS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3506

PAULINE THOMAS, APPELLANT

v.

COMMISSIONER OF SOCIAL SECURITY

Argued: March 12, 2001
Argued En Banc: Feb. 13, 2002
Filed: June 21, 2002

Before: ALITO, RENDELL, Circuit Judges, and SCHWARZER,[*] Senior District Judge.

Before: BECKER, Chief Judge, SLOVITER, MANSMANN,[**] SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, AMBRO, and FUENTES, Circuit Judges.

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[*] The Honorable William W. Schwarzer, Senior District Judge for the Northern District of California, sitting by designation.

[**] The Honorable Carol Los Mansmann participated in the argument and conference of the en banc court in this appeal, but she died before the filing of the opinion.

OPINION OF THE COURT

ALITO, Circuit Judge.

Pauline Thomas worked as an elevator operator until her position was eliminated. Claiming a heart condition and related medical problems, she applied for Supplemental Security Income and Disability Insurance Benefits. The Commissioner of Social Security ("Commissioner") denied her application, and an Administrative Law Judge ("ALJ") also determined that Thomas was not eligible for benefits. The United States District Court for the District of New Jersey affirmed the ALJ's ruling and held that Thomas was not disabled under the five-step sequential process for determining eligibility for disability benefits because it found that she could continue to perform her previous work as an elevator operator. The District Court's interpretation of the Social Security Act, however, is inconsistent with both a careful reading of the particular provision at issue and the obvious statutory scheme. According to the Commissioner and the District Court, even if Thomas is unable to perform any job that exists in substantial numbers in the national economy and meets all of the other requirements for disability and supplemental security benefits, she may not obtain benefits because she could perform a job—serving as an elevator operator—that, as far as this record reflects, has now entirely vanished. We disagree and therefore reverse the order of the District Court and remand the case for further proceedings.

I.

Pauline Thomas worked as a housekeeper until 1988, when she had a heart attack. She then worked as an

elevator operator until she was laid off on August 25, 1995, because her position was eliminated. She applied for Disability Insurance Benefits and Supplemental Security Income Benefits on June 11, 1996, claiming disability related to cardiac problems. She testified that she suffers from irregular heartbeats, high blood pressure, dizziness, and fatigue. Thomas also claimed that she suffers from lower back problems caused by lumbar radiculopathy and asserts that she fractured her right ankle on July 8, 1996. Thomas was 54 years old at the time she applied for benefits.

Thomas's application for Social Security benefits was denied by the Commissioner initially and on reconsideration. A hearing was then held before an ALJ, who determined that Thomas was not entitled to benefits. The ALJ found that Thomas has hypertension, cardiac arrhythmia, cervical and lumbar strain/sprain, and a transient ischemic attack, but does not have an impairment listed in the list of impairments presumed to be severe enough to preclude any gainful work. Decision of ALJ at 5. The ALJ then found that Thomas has the residual functional capacity to perform at least light work and, therefore, that she could perform her past relevant work as an elevator operator. The ALJ considered Thomas's argument that her past relevant work as an elevator operator no longer exists in the national economy. *Id.* at 4-5. Nevertheless, the ALJ decided that the regulations and Social Security Ruling 82-40 exclude from Step Four of the sequential process for determining disability any inquiry into whether the past work actually exists. *Id.* at 5. The ALJ held that Step Four considers only whether a claimant can perform her previous job. As a result, the ALJ ruled that Thomas was not under a "disability"

and ended the evaluation without proceeding to Step Five. *Id.*

The Appeals Council denied Thomas's request for review, establishing the ALJ's decision as the final decision of the Secretary. Thomas then challenged the ALJ's ruling in the United States District Court for the District of New Jersey, but the District Court held that the ALJ properly applied the sequential process and affirmed his ruling. Thomas appeals from this judgment.

II.

Title II of the Social Security Act, as amended, provides Social Security Disability Insurance benefits for individuals who are "under a disability" and meet the other eligibility requirements. 42 U.S.C. § 423(a). Title XVI of the Act likewise provides Supplemental Security Income benefits for "disabled" indigent persons. 42 U.S.C. § 1382. With respect to individuals who are not blind, the term "disability" is defined as follows:

> (1) The term "disability" means—
>
> (A) 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 or can be expected to last for a continuous period of not less than 12 months . . .
>
> . . .

> (2) For purposes of paragraph (1)(A)—
>
> (A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is *not only unable to do his previous work but cannot*, considering his age, education, and work experience, *engage in any other kind of substantial gainful work which exists in the national economy*, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. § 423(d) (emphasis added); *see also* 42 U.S.C. § 1382c(a)(3) (providing the same definitions for Supplemental Security Income benefits).

Social Security regulations provide for a sequential evaluation process for determining whether a claimant is under a disability. 20 C.F.R. §§ 404.1520, 416.920; *see also Plummer v. Apfel*, 186 F.3d 422, 428 (3d Cir. 1999). At Step One, the Commissioner must determine whether the claimant is currently engaging in a "substantial gainful activity." 20 C.F.R. §§ 404.1520(b), 416.920(b). If so, she is not eligible. 20 C.F.R. §§ 404.1520(b), 416.920(b). At Step Two, the Commissioner must determine whether the claimant has a "severe impairment." 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does not have a severe impairment, then

she is not eligible. 20 C.F.R. §§ 404.1520(c), 416.920(c). At Step Three, if a claimant does not suffer from an impairment on the list of impairments presumed to be severe enough to preclude gainful work, the Commissioner moves to Step Four. 20 C.F.R. §§ 404.1520(d), 416.920(d). Step Four requires the Commissioner to decide whether the claimant retains the residual functional capacity to perform her past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e). The claimant bears the burden of demonstrating an inability to return to her past relevant work. *Plummer*, 186 F.3d at 428. If the claimant is unable to resume her former occupation, the evaluation moves to Step Five. *Id.* At Step Five, the Commissioner has the burden of demonstrating that the claimant is capable of performing other jobs existing in significant numbers in the national economy. 20 C.F.R. §§ 404.1520(f), 416.920(f). At Step Five, the Commissioner is to consider the claimant's vocational factors. 20 C.F.R. §§ 404.1520(f), 416.920(f). [1]

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[1] The regulations describe Steps Four and Five as follows:

> (e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.
>
> (f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled . . . .

20 C.F.R. §§ 404.1520(e) and (f); 20 C.F.R. §§ 416.920(e) and (f); *see also* 20 C.F.R. § 404.1560; 20 C.F.R. § 416.960.

III.

Thomas argues that because her position as an elevator operator was eliminated and does not appear in significant numbers in the national economy, the ALJ should have proceeded to Step Five of the sequential process. We agree that at Step Four, Thomas should have been permitted to show that her previous work as an elevator operator no longer exists in substantial numbers in the national economy.

At Step Four of the sequential process, the Commissioner must determine whether the claimant can perform her past relevant work. Based on the language of the relevant provisions of the Social Security Act and the broader statutory scheme, we hold that, for the purposes of Step Four of the evaluation process, a claimant's previous work must be substantial gainful work which exists in the national economy. Thus, a claimant may proceed to Step Five by showing either that she cannot perform her past relevant work or that the previous work is not substantial gainful work that exists in the national economy.

The statute defines disability as follows: "An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is *not only unable to do his previous work but cannot*, considering his age, education, and work experience, *engage in any other kind of substantial gainful work which exists in the national economy*. . . ." 42 U.S.C. § 423(d) (emphasis added). Thus, an individual is disabled only if "he is not only unable to do his previous work but cannot . . . engage in **any other** kind of substantial gainful work which exists in the national economy," i.e., any "work

which exists in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 423(d)(2)(A) (emphasis added). The phrase "any other" in this provision is important for present purposes. The use of this phrase makes clear that an individual's "previous work" was regarded as a type of "substantial gainful work which exists in the national economy." When a sentence sets out one or more specific items followed by "any other" and a description, the specific items must fall within the description. For example, it makes sense to say: "I have not seen a tiger or any other large cat" or "I have not read *Oliver Twist* or any other novel which Charles Dickens wrote." But it would make no sense to say, "I have not seen a tiger or any other bird" or "I have not read *Oliver Twist* or any other novel which Leo Tolstoy wrote." Therefore, if we presume that the statutory provisions at issue here are written in accordance with correct usage, a claimant's ability to perform "previous work" is not disqualifying if that work no longer "exists in the national economy."[2] This feature of the statutory language is unambiguous.

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[2] We are aware that the Ninth and Sixth Circuits have opined that subsection (d)(2) is ambiguous. In *Quang Van Han v. Bowen*, 882 F.2d 1453 (9th Cir. 1989), the Court wrote that the interpretation that we have just set out "is a reasonable interpretation of the statute, but not the only one. It is also reasonable to construe 'previous work' and 'other' work as separate categories, neither a subset of the other." *Id.* at 1457 (emphasis in original); *see also Garcia v. Secretary of Health and Human Services*, 46 F.3d 552, 558 (6th Cir. 1995) (same). In response, we can say only that for the reasons we have attempted to explain, we do not believe that this conclusion is consistent with standard usage. The language of subparagraph (d)(2) is not ambiguous.

Moreover, even if the statutory language were ambiguous, our interpretation would not change. Other things being equal, a statute should be read to avoid absurd results. *In re First Merchants Acceptance Corporation v. J.C. Bradford & Co.*, 198 F.3d 394, 402 (3d Cir. 1999). Here, there is no plausible reason why Congress might have wanted to deny benefits to an otherwise qualified person simply because that person, although unable to perform any job that actually exists in the national economy, could perform a previous job that no longer exists.

It is true that a literal interpretation of the Social Security regulations setting out the five-step evaluation process seems to lead to this result. The regulation describing Step Four states:

> Your impairment(s) must prevent you from doing past relevant work. . . . If you can still do this kind of work, we will find that you are not disabled.

20 C.F.R. § 404.1520(e); *see also* 20 C.F.R. § 416.920(e). Only if a claimant can get by Step Four do the regulations call for an inquiry into whether the claimant can perform any job that actually exists. *See* 20 C.F.R. § 404.1520(f); 20 C.F.R. § 416.920(f).

Mechanically following the regulations, the ALJ in this case found that Thomas retained the residual functional capacity to perform her previous job as an elevator operator. Without giving Thomas an opportunity to present evidence concerning the existence of elevator operator positions, the ALJ ended the evaluation at Step Four.[3] He rejected Thomas's argument

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[3] The Commissioner asserted in his brief that the position of "elevator operator" is listed in the most recent edition of the

that, because the position of elevator operator is now obsolete, she should be permitted to proceed to Step Five.

Although we acknowledge that the literal language of the regulation governing Step Four appears to support the ALJ's decision to terminate the inquiry at Step Four, this regulation should be read, if possible, so as not to conflict with the statute it implements, *see*, *e.g.*, *Joy Technologies*, *Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), and if there is such a conflict, the regulation must yield.[4] *See United States v. Mead*

Department of Labor's *Dictionary of Occupation Titles* (rev. 4th ed. 1991). The job titles of "elevator operator" (Code 388.663-010) and "elevator starter" (Code 388.367-010) do indeed appear in the *Dictionary of Occupation Titles*, but these occupations were last studied and updated in 1977. The Commissioner further claimed that the Occupational Information Network (O*Net), which is being developed by the Department of Labor as an electronic replacement for the *Dictionary of Occupation Titles*, also lists the job of elevator operator. Our own search of O*Net, however, at <http://online.onetcenter.org/main.html> turned up no occupations entitled "elevator operator" or "elevator starter." Nor were there cross-references to those positions as listed in the *Dictionary of Occupation Titles*. The 2000-2001 edition of the Bureau of Labor Statistics's *Occupational Outlook Handbook* also does not contain positions resembling an elevator operator or starter. The ALJ refused to consider Thomas's arguments regarding the status of elevator operator as an occupation, so we do not have any findings as to whether or not that occupation remains in existence.

[4] We are not certain that the regulation concerning Step Four is irreconcilable with the language of the statute. The situation arguably presented here—where the only job that a claimant may be able to perform is a past job that is now obsolete—is undoubtedly rare, and it is likely that this situation was not in the minds of those who drafted and promulgated the regulation. *See Kolman v. Sullivan*, 925 F.2d 212, 213 (7th Cir. 1991) ("The failure of the regulation to require that the job constituting the applicant's

Corp., 533 U.S. 218, 226, 121 S. Ct. 2164, 150 L.Ed.2d 292 (2001) (even when an agency is expressly delegated authority to elucidate a specific provision of a statute by regulation, a court should not follow a regulation that is "manifestly contrary to the statute"); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984); *see also Mead Corp.*, 533 U.S. at 226, 121 S. Ct. 2164; *Heckler v. Campbell*, 461 U.S. 458, 466, 103 S. Ct. 1952, 76 L.Ed.2d 66 (1983). The problem with a literal reading of the regulation regarding Step Four is that it sets up an artificial roadblock to an accurate determination of whether Thomas can "engage in any . . . kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2). If Thomas can show that elevator operator positions really are obsolete, the fact that she still possesses the physical or mental capability to perform the duties of an elevator operator does not mean that she can engage in any substantial gainful activity that actually exists. Accordingly, the ALJ should have allowed Thomas to present evidence on whether elevator operator positions are obsolete. If Thomas had made such a showing, the ALJ then should have proceeded to Step Five of the sequential evaluation to ascertain whether Thomas's medical

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past work exist in significant numbers probably just reflects an assumption that jobs that existed five or ten or even fifteen years ago still exist."). As noted, a regulation should be read if possible in a way that does not conflict with the statute it implements and in a way that avoids absurd results. If, however, the regulation must be interpreted as the Commissioner insists, we would hold that the regulation and any Social Security rulings embodying that interpretation conflict with the statute and are, to the extent of the conflict, invalid.

impairments prevent her from engaging in any work that actually exists.

Step Four was designed to facilitate the determination of whether a claimant has the capacity to work, because it is easier to evaluate a claimant's capacity to return to a former job than to decide whether any jobs exist for a person with the claimant's impairments and vocational background. Nevertheless, we cannot lose sight of the fact that the touchstone of "disability" is the inability to engage in any substantial gainful activity that exists in the national economy. 42 U.S.C. § 423(d)(2). Because a rigid application of Step Four in this case could defeat Congress's unambiguous intent, we must reject such an approach. *See Mead Corp.*, 533 U.S. at 226, 121 S. Ct. 2164.

The Commissioner argues that permitting a claimant to proceed to Step Five if she can show that her past job does not exist in significant numbers in the national economy would convert disability benefits into unemployment benefits. We find this argument unconvincing. Awarding disability benefits to a claimant who, as a result of a qualifying impairment, cannot perform any job that actually exists is hardly the equivalent of providing unemployment compensation.[5] By

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[5] A claimant cannot even reach Step Four unless she makes a threshold showing of a medically severe physical or mental impairment. At Step Two, if a claimant does not have "any impairment or combination of impairments which significantly limits [her] physical or mental ability to do basic work activities," she does not have a severe impairment and is therefore not disabled. 20 C.F.R. § 404.1520(c); 20 C.F.R. § 416.920(c). In addition, a claimant's burden of proving that her previous work no longer exists is hardly insubstantial. Finally, in the vast majority of cases, a claimant who is found to have the capacity to perform her past

contrast, denying benefits because a claimant could perform a type of job that does not exist seems nonsensical.

In our view, the most perceptive precedent addressing the question at hand is *Kolman v. Sullivan*, 925 F.2d 212 (7th Cir. 1991). The holding in that case—that the ALJ should have continued to Step Five because the claimant's past job was a temporary training position—is inapplicable here, but the *Kolman* Court did mention in dicta that, even if a claimant's past job was a permanent position, an ALJ would be required to move to Step Five if that past job had disappeared. As the *Kolman* Court noted, the fact that a claimant could perform a past job that no longer exists would not be "a rational ground for denying benefits." *Kolman*, 925 F.2d at 213. The Court observed:

> The failure of the regulations to require that the job constituting the applicant's past work exist in significant numbers probably just reflects an assumption that jobs that existed five or ten or even fifteen years ago still exist. But if the assumption is dramatically falsified in a particular case, the administrative law judge is required to move on to the next stage and inquire whether some other job that the applicant can perform exists in significant numbers today somewhere in the national economy.

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work also will have the capacity to perform other types of work. To remain faithful to the statutory scheme, however, the ALJ should move to Step Five and dispose of the case at that stage rather than cutting off the evaluation simply because the claimant has the capacity to perform a job that may not exist.

Id. at 213-14. [6]

We acknowledge that the Commissioner's position is supported by *Rater v. Chater*, 73 F.3d 796 (8th Cir. 1996), and *Pass v. Chater*, 65 F.3d 1200 (4th Cir. 1995), but neither opinion is persuasive. Both decisions rely primarily on the Social Security regulations and on Social Security rulings. *See Rater*, 73 F.3d at 798-99 (relying on Social Security Ruling 82-61); *Pass*, 65 F.3d at 1204-05 (relying on Social Security Rulings 82-61 and 82-40). Neither opinion, in our judgment, devotes sufficient attention to the language of the statute or the statutory scheme.

IV.

The dissent argues that our reasoning in this case is "flawed in six ways," but the dissent's arguments are unpersuasive. The dissent asserts that the statutory language supports its position, accusing us of "rewriting the statute," "contort[ing] the statutory language," "reject[ing] its literal meaning," and "engraft[ing]" upon it an "additional component." Dissent at [17a, 19a]. In the words of the dissent, the statutory language is "perfectly clear," it "permits no other conclusion," it "clearly mandates" the result reached by the dissent, and its

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[6] In subsequent cases, the Seventh Circuit has neither implemented nor disavowed this dicta. To be sure, in *Knight v. Chater*, 55 F.3d 309 (7th Cir. 1995), the Court affirmed the denial of benefits sought by a claimant who argued that she should have been permitted to bypass Step Four because her previous position as a keypunch operator had become obsolete with the advent of computers. The Court stated, however, that some of the claimant's other previous jobs also qualified as past relevant work that the claimant still had the capacity to perform, and consequently the Court was not required to reach the claimant's argument about her now-extinct previous job. *Id.* at 316.

meaning is "plain." *Id.* Notably absent from the dissent, however, is any attempt to provide reasoned support for these charges. In particular, the dissent makes no effort to respond to our argument that the statutory language, when read in accordance with standard rules of usage, prescribes that the claimant's "previous work" must still "exist[] in the national economy." *See supra* at [7a-8a].

Three of the dissent's arguments are beside the point because they are based not on the statute, but on the regulations. The dissent contends that "Step Four requires the Commissioner to decide whether the claimant retains the residual functional capacity to perform her past relevant work"; that "it is not until Step Five that vocational factors (i.e., ability to access other gainful work) are considered"; and that "Steps Four and Five are quite clear." Dissent at [18a, 20a]. Our decision, however, is based not on the regulations but on the statute. To the extent that the regulations are inconsistent with the statute, they are invalid. Thus, the dissent's reliance on the regulations does not respond to the rationale of our decision.

The dissent argues that the Seventh Circuit's decision in *Kolman* is the "linchpin" of our decision and that it can be "distinguished" from the present case. Dissent at [20a]. This argument is puzzling because our opinion plainly acknowledges that "[t]he holding [in *Kolman*] is inapplicable here." *Supra* at [13a]. Instead of basing our decision on *Kolman*, we simply quoted what we recognized as "dicta" in that opinion. *Id.*

The dissent warns that our interpretation of the statute "would wreak havoc with the evidentiary aspects of the administrative process" by making "voca-

tional concerns" (i.e., whether elevator operator jobs still exist) a part of Step Four. Dissent at [18a]. This is, to put the point mildly, hyperbole. Cases like the present one are rare, and inquiring whether a job such as that of an elevator operator still exists in the national economy is not complex. We have no doubt that the Social Security system will be able to cope with this decision.

Finally, the dissent attempts to provide a plausible reason why Congress might have wanted to deny benefits to a claimant on the ground that the claimant can perform a previous job that no longer exists. According to the dissent, "[p]revious work essentially serves as a proxy for the ability to perform work." Dissent at [19a]. Apparently, this means that Congress might have reasoned that if a claimant is able to perform previous work that no longer exists, it is likely that the claimant is also able to perform other work that does exist. Undoubtedly this is true in most cases—but it may not always be true, and it may not be true in this case. The dissent thus provides no answer to the question why Congress might have wanted to preclude benefits for a claimant who is able to perform previous work that no longer exists but is unable to perform any work that does exist.

V.

For the foregoing reasons, we reverse the order of the District Court and remand for further proceedings.

RENDELL, Circuit Judge, dissenting, with whom Judges SLOVITER and ROTH join.

As the majority notes, the Administrative Law Judge ("ALJ") determined that Pauline Thomas had the "residual functional capacity to perform at least light work and, therefore, she could perform her past relevant work as an elevator operator." Maj. Op. at [3a]. Under the statutory framework, that finding dictated a determination that Thomas was not disabled. I respectfully dissent from the majority's view to the contrary and believe its reasoning to be flawed in six ways.

First, the statutory language permits no other conclusion than that Thomas was disabled. It requires that disability be based on an initial finding that an individual is "unable to do his previous work." 42 U.S.C. § 423(d)(2)(A). If that condition is met, then the ALJ is to look into the ability to engage in "any other kind of substantial gainful work which exists in the national economy." *Id.* The majority concludes that the second condition's reference to gainful employment existing in the national economy must be engrafted upon the perfectly clear first requirement, thus re-writing the statute. The majority's holding so states: "We hold that, for the purposes of Step Four of the evaluation process, a claimant's previous work must be substantial gainful work which exists in the national economy." Maj. Op. at [9a]. However, the statutory scheme clearly mandates that since Pauline Thomas is able to perform an elevator operator's work, found to be light work, she is not disabled as a matter of law.

Second, by the majority's own admission, Step Four requires the Commissioner to decide whether the

claimant retains the residual functional capacity to perform her past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e) (Maj. Op. at [6a]). Step Four is not an inquiry into employability or employment opportunity, but, rather, it is an inquiry into *physical capacity*. *See Pass v. Chater*, 65 F.3d 1200, 1204 (4th Cir. 1995) ("Past relevant work in the regulatory scheme is a gauge by which to measure the physical and mental capabilities of an individual and the activities that he or she is able to perform."); *see also* Social Security Ruling 82-61 (explaining that past relevant work is considered for the purpose of determining whether the claimant has the "capacity [] to perform the physical and mental demands of the kind of work he or she has done in the past"). Pauline Thomas has been found to have the physical capacity to perform the job of elevator operator, concededly her past relevant work. That determination ends the inquiry.

Third, it is not until Step Five that vocational factors (i.e., ability to access other gainful work) are considered. 20 C.F.R. §§ 404.1520(f), 416.920(f). Again, the majority notes this. But the majority fails to note that its interpretation of the statute would make vocational concerns, and the need for experts, part of Step Four as well. It would, and will, wreak havoc with the evidentiary aspects of the administrative process.[1] This represents a radical change in the regulatory scheme.

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[1] The claimant carries the burden until Step Five. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5, 107 S. Ct. 2287, 96 L.Ed.2d 119 (1987). At Step Five "[t]he ALJ must show there are other jobs existing in significant numbers in the national economy which the claimant can perform, consistent with her medical impairments, age, education, past work experience, and residual functional capacity . . . . The ALJ will often seek the assistance of a

Fourth, the majority states that "there is no plausible reason why Congress might have wanted to deny benefits" to someone in Pauline Thomas's position—"an otherwise qualified person, although unable to perform any job that actually exi[s]ts in the national economy, could perform a previous job that no longer exist[s]." Maj. Op. at [11a]. I take issue with that assertion, thinking it quite plausible that Congress decided that if a claimant still retained the physical and mental capacity to do whatever work she previously did, the inquiry should end there with a finding that claimant is not disabled. Previous work essentially serves as a proxy for the ability to perform work, not as proof that the claimant can be employed in that particular job. Congress may not, in fact, have considered the problem of job obsolescence, but, contrary to what Judge Posner suggests in *Kolman v. Sullivan*, 925 F.2d 212 (7th Cir. 1991), it is not up to the courts to fill that alleged legislative void. Further, the absence of any particular vocation is not really a void at Step Four, given that the statutory scheme limits the inquiry into ability and does not permit consideration of matters other than the demands of the previous job.

Fifth, the statute, read according to its plain meaning, is quite consistent with the regulations as promulgated. Yet the majority, having contorted the statutory language and rejected its literal meaning, then

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vocational expert at this fifth step." *Plummer v. Apfel*, 186 F.3d 422, 428 (3d Cir. 1999) (citations omitted). The Supreme Court explained: "This allocation of burdens of proof is well within the Secretary's 'exceptionally broad authority' under the statute." *Bowen*, 482 U.S. at 146 n. 5, 107 S. Ct. 2287 (quoting *Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S. Ct. 2633, 69 L.Ed.2d 460 (1981)).

finds it must similarly reject a "mechanical" reading of the regulations. But in so doing it fails to state how the regulations can possibly be read any other way; Steps Four and Five are quite clear. In fact, the majority's decision to reject the regulatory scheme of Steps Four and Five as outlined in the regulations is unprecedented. Nor does the majority seek to justify its reasoning based on its unwillingness to defer to the Agency's authority to regulate. Indeed, that would be contrary to the Supreme Court's recent ruling in *Barnhart v. Walton*, —- U.S. ——, 122 S. Ct. 1265, 152 L.Ed.2d 330 (2002), which instructs, addressing specifically a Social Security Administration interpretation:

> [I]f the statute speaks clearly "to the precise question at issue," we "must give effect to the unambiguously expressed intent of Congress." If, however, the statute "is silent or ambiguous with respect to the specific issue, we must sustain the Agency's interpretation if it is 'based on a permissible construction'" of the Act.

Id. at 1269 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984)).

In *Walton*, the Supreme Court found that 42 U.S.C. § 423(d)(1)(A) was ambiguous and concluded that the Social Security Administration's interpretation of ambiguous provisions of the [s]tatute were reasonable, and therefore permissible. *Id.* at 1270-73. The Court explained: "The [Social Security Act's] complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience lead us to read the statute as delegating to the Agency considerable authority to fill in, through

interpretation, matters of detail related to its administration." *Id.* at 1273. Here, one can only conclude that if the majority's position is credited, the statute is at best ambiguous. Accordingly, the Agency's interpretation should be accorded great weight. And, here, not only has the Agency spoken in formal regulatory terms, it has also issued "Program Policy Statements" regarding this very issue. In addressing the issue of whether previous work in a foreign country should be considered past relevant work, the Agency warned that requiring the existence of similar jobs in the United States would improperly "elevate[] an element of the fifth step of the sequential evaluation process, availability of work in the national economy, to the fourth step which only deals with the claimant's ability to do his or her past work." Social Security Ruling 82-40. *See also* Social Security Ruling 82-61 (noting "the intent of Congress that there be a clear distinction between disability benefits and unemployment benefits"); Social Security Ruling 82-62 (explaining that past relevant work is considered in order to determine whether the claimant is able to perform "the functional activities required in [that] work"). Therefore, the majority has erred by failing to consider the Agency's view of the statutory language and scheme.

Sixth, I believe that other courts have distinguished the decision of the Court of Appeals for the Seventh Circuit in *Kolman*, on which the majority relies, and I submit that it should not be the linchpin here. Unlike the majority, I find the Court of Appeals for the Fourth Circuit's opinion in *Pass v. Chater*, 65 F.3d 1200 (4th Cir. 1995), to be well-reasoned and persuasive.[2] In

[2] The majority summarily disposes of the Court of Appeals for the Fourth Circuit's reasoning in *Pass*, as well as the Court of

Pass, the court concluded that although the applicant's previous job as a gate guard may not exist in the national economy it is still considered as past relevant work because the focus of Step Four is the claimant's physical and mental capabilities. *Id.* at 1207. Also, the Court of Appeals for the Seventh Circuit seems to have retreated from *Kolman* somewhat in *Knight v. Chater*, 55 F.3d 309 (7th Cir. 1995), where it distinguished the facts of the case before it on the grounds that the claimant's job as a keypunch operator-clerk was not "makeshift" or "temporary." *Id.* at 315.[3]

Admittedly, Pauline Thomas's situation has visceral appeal because of the perceived low level of exertion required to perform her former work and the obsoles-

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Appeals for the Eighth Circuit's reasoning in *Rater v. Chater*, 73 F.3d 796 (8th Cir. 1996), on the grounds that they "rely primarily on the Social Security regulations and on Social Security rulings." Maj. Op. at [16a]. While I disagree with this characterization, even if it is true, this is hardly an indictment. As the Supreme Court has explained: "[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking, *see* 5 U.S.C. § 553, does not automatically deprive that interpretation of the judicial deference otherwise its due." *Walton*, 122 S. Ct. at 1271. Therefore, the courts' consideration of regulations and rulings does not undermine the persuasiveness of their decisions.

[3] In support of its claim that the Court of Appeals for the Seventh Circuit "has neither implemented nor disavowed" its dicta in *Kolman*, the majority says that in *Knight* the court "did not reach the claimant's argument about her now-extinct previous job." Maj. Op. at [16a] n. 6. While it may not have conducted an in depth analysis of her argument, it did specifically rule out the applicability of its *Kolman* reasoning when it could have expanded its reach: "Ms. Knight's former job as a keypunch operator-clerk was neither a temporary nor training job. Therefore, *Kolman* does not apply here." *Knight*, 55 F.3d at 315.

cence of her former job. However, the point at Step Four is not that she can actually be employed in her past job, but that she is able to do a certain level of work. If Congress and the regulatory body charged with implementing the statutory scheme have determined that Pauline Thomas should not be considered "disabled" if she still has the ability, physically and mentally, to do what she had previously done, are we entitled to graft additional requirements on the statutory and regulatory scheme? While we might like to do so, or think it somehow makes sense to do so, we cannot provide a remedy where Congress and the Agency have not. It is for Congress to alter the statute, if indeed it believes that the statutory scheme, and specifically Step Four, should be altered in such a way as to deal with the issue of job obsolescence.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 99-2234 (WGB)

PAULINE THOMAS, PLAINTIFF

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

[Filed: Aug. 17, 2000]

O P I N I O N

* * * * *

BASSLER, District Judge:

Plaintiff, Pauline Thomas, ("Thomas"), age 57, brings this action pursuant to 42 U.S.C. 405(g) and 1383(c)(3) of the Social Security Act ("the Act"). Thomas requests that the Court reverse or remand the final decision of the Commissioner of Social Security ("Commissioner") denying Thomas's application for Disability Insurance Benefits ("SSI"). For the reasons set forth in this opinion, the Commissioner's decision is **affirmed**.

I. BACKGROUND

Pauline Thomas, a former elevator operator, filed an application for Disability Insurance and SSI benefits on June 11, 1996, alleging disability as of August 25, 1995.

(Tr. 65-67). Thomas was laid off from her job as an elevator operator on August 25, 1995, because her job was obsolete. (Tr. 12). Thomas then worked as a mail bag checker for two weeks, but the ALJ did not consider this relevant work because of its short duration. (Tr. 12).

Thomas initially claimed her disability was caused by lumber radiculopathy[4] and heart disease (Tr. 12). Additionally, she cited medical problems that occurred after her August 25, 1995 filing, but there was no medical evidence to support such claims. For instance, in January 1996, a slow moving vehicle brushed her elbow, causing her to fall to the ground, but her X-rays were normal. (Tr. 12). Also, Thomas claimed she fractured her right ankle on July 8, 1996, and her attorney amended the onset date of her disability to include this injury, but Thomas never produced medical records in support of this claim. (Tr. 4, 14). Finally, Thomas was hospitalized on July 31 to August 6, 1996 for transient ischemic attack,[5] but she suffered no long term problems. (Tr. 144-154).

The Commissioner denied Thomas's application on February 1, 1996, for the following reasons: an exercise test indicated that Thomas's heart could tolerate the level of exertion she needed to work, and that despite

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[4] Lumbar radiculopothy is nerve root disorder in the lower back. A patient usually does not need surgery to recover. *Merck Manual* 1489-1490.

[5] A transient ischemic attack ("TIA") has symptoms similar to a stroke, but is transient in nature. A TIA begins suddenly, usually lasts two to thirty minutes, but rarely more than one to two hours, then abates without persistent neurologic abnormalities. *The Merck Manual of Diagnosis and Therapy* 1420 (17th ed. 1999).

neck pain, she did not have severe muscle weakness or numbness in her limbs. (Tr. 43). The Commissioner also concluded that there was no evidence of any other condition that significantly limits her ability to work. *Ibid.* Therefore, the Commissioner decided that she had the physical ability to perform her past job as an elevator operator. *Ibid.*

On October 21, 1996, the Commissioner denied the request for reconsideration that Thomas filed on September 11, 1996. (Tr. 51). Thomas then requested a hearing before an Administrative Law Judge ("ALJ"). On January 16, 1998, ALJ Carl E. Stephan denied Thomas's appliction because he determined that Thomas could perform her past relevant work. (8-16). Specifically, he found that Thomas could perform work-related activities, except for "perhaps" medium and heaving lifting and extensive bending and stooping, and therefore she could operate an elevator. (Tr. 15-16). The ALJ's ruling became final on March 12, 1999 when the Appeals Council denied Thomas's request for review. (Tr. 2, 3).

II. STANDARD OF REVIEW

A Court may review the factual findings of the Commissioner in disability cases to determine whether "substantial evidence" supports the Commissioner's finding that there is no disability. 42 U.S.C. § 405(g); *see also Plummer v. Apfel*, 186 F.3d 422, 427 (3d Cir. 1999) (*citing Adorno v. Shalala*, 40 F.3d 43, 46 (3d Cir. 1994)). Substantial evidence is defined as "more than a mere scintilla" and "such relevant evidence as a reasonable mind might accept as adequate," *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also*

Plummer, 186 F.3d at 427. This substantial evidence "shall be conclusive" and must be upheld, even if the record contains information that could support a different conclusion. 42 U.S.C. § 405(g); *see also Williams v. Sullivan*, 970 F.2d 1178, 1182 (3d Cir. 1992), *cert. denied*, 507 U.S. 924 (1993); *Alexander v. Shalala*, 927 F. Supp. 785, 791 (D.N.J. 1995); *see also Brown v. Bowen*, 845 F.2d 1211, 1213 (3d Cir. 1988.) Accordingly, the record in this case must be analyzed to assess whether substantial evidence supports the Commissioner's finding that Thomas is not eligible for disability insurance.

The Commissioner applies a five-step sequential process to determine whether a person is eligible for Disability Insurance Benefits. 20 C.F.R. §§ 404.1520, 416.920. If a finding of disability or non-disability can be found at any point in the sequential process, the Commissioner will not review the claim further. 20 C.F.R. §§ 404.1520(a), 416.920(a). The Claimant bears the burden of proof and must provide medical and other evidence to the Commissioner in order to pass the first four steps of the sequential analysis, 42 U.S.C. § 423(d)(A), incorporated by 42 U.S.C. § 1382c(a)(3)(G); *See Adorno*, 40 F.3d at 46; *Ferguson v. Schweiker*, 765 F.2d 31, 36 (3d Cir. 1985); *Rossi* v. *Califano*, 602 F.2d 55, 57 (3d Cir. 1979). The burden of proof only shifts to the Commissioner if the analytical process succeeds to the fifth and final step. *See Ferguson*, 765 F.2d at 36; *Rossi*, 602 F.2d at 57.

The Commissioner starts the analysis by determining whether the claimant currently is employed in a "substantial gainful activity," 20 C.F.R. §§ 404.1520(b), 416.920(b). If not, the Commissioner proceeds to the second step to assess whether a "severe impairment"

significantly limits the claimant's ability to work. 20 C.F.R. §§ 404.1520(c), 416.920(c). If so, then the Commissioner proceeds to the third step to determine whether the claimant has medical evidence that meets the criteria listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 ("Listing of Impairments"). 20 C.F.R. §§ 404.1520(d), 416.920(d). If the claimant meets the Listing criteria, then the Commissioner must conclude that the claimant is disabled and entitled to benefits, and the review ends. *Ibid.* If the claimant's impairment is not in the Listing, the Commissioner proceeds to step four to consider whether the claimant has the residual functioning capacity to meet the demands of her past employment. 20 C.F.R. §§ 404.1520(e), 416.920(e). Finally, if the claimant cannot perform her past work, the Commissioner has the burden of proving that there is other substantial gainful employment that the claimant could perform. 20 C.F.R. §§ 404.1520(f), 416.920(f).

III. ANALYSIS

Thomas claims that because her past work as an elevator operator is obsolete, the ALJ erred during the fourth step of the sequential analysis when he concluded that Thomas could perform her past relevant work. There is no validity to Thomas's claim because the standard of review is whether the claimant still has the residual physical and mental capacity to perform her past job, 20 C.F.R. §§ 404.1520(e), 416.920(e). Disability insurance provides for people who physically are incapable of performing the type of job they did in the past, it does not provide for people who lost their job. The ALJ properly proceeded through the first four steps of the analytical process and found substantial

evidence to conclude that Thomas can perform her past "light work" as an elevator operator.

A. *The ALJ properly applied the sequential analysis.*

The ALJ concluded his analysis at the fourth sequential step because Thomas failed to provide medical evidence of any functional limitation on her ability to perform her past work. In making his decision, the ALJ determined that Thomas was capable of light work. A job that is mainly sedentary, and requires some pushing and pulling of arm or leg controls, is light work if the employee usually is not required to lift more than twenty pounds. 20 C.F.R. §§ 404.1567(b), 416.967(b). Thomas indicated that her job involved eight hours of sitting and no lifting over ten pounds. (Tr. 84). Therefore, her work as an elevator operator fell well within the category of light work.

To assess Thomas's heart problems, the ALJ used a report from Dr. Merle C. Cruz, M.D., Plaintiff's treating physician. (Tr. 139). Although Thomas claimed to have had a heart attack in 1988, Dr. Cruz found no evidence of organ damage. (Tr. 137). Despite a finding of elevated blood pressure, Dr. Cruz characterized Thomas's physical examination as "unremarkable." (Tr. 136). Dr. Cruz noted that Thomas did not have chest discomfort, and her only cardiovascular symptoms was an occasional palpitation and fatigue. (Tr. 138). Dr. Cruz said Thomas's prognosis was good and she could perform light work such as sitting, lifting, walking and handling objects. (Tr. 139). Therefore, there was no evidence to support Thomas's claim that heart problems prevented her from performing her work.

There also was no evidence to support Thomas's claim that lumbar radiculopothy, a nerve root disorder in her back, prevented her from performing her past work. This claim was ruled out by her chiropractor, Dr. John L. Ceif, D.C., who treated Thomas for two months. (Tr. 133). Instead of lumbar radiculopothy, Dr. Ceif diagnosed acute traumatic cervical strain/sprain with concomitant disc herniation. *Ibid.* He noted that "manipulation and electrical muscle stimulation" eased her discomfort by sixty percent. *Ibid.*

Thomas claims to have had other problems that were not originally listed as a source of disability, but the ALJ does not consider them to be signficant enough to cause disability. For instance, Thomas had a transient ischemic attack which caused her to be hospitalized from July 31 to August 6, 1996. (Tr. 144-154). Although a transient ischemic attack has symptoms similar to a stroke, it only lasts a brief duration, causing no persistent nuerologic abnormalities. *Merck Manual* 1420. The medical reports do not indicate that Thomas suffered any functional limitations or abnormalities from the attack. (Tr. 144-154). Moreover, Thomas's CAT-scan revealed that there were no abnormalities. (Tr. 151, repeated at 154). Upon discharge of the hospital, Thomas was alert and oriented. (Tr. 144). Based on this diagnosis, there is no indication that Thomas's transient ischemic attack prevents her from performing her past work.

Moreover, Thomas has not provided medical evidence to support her claim of musculoskeletal problems. For instance, after a slow moving vehicle brushed Thomas's arm on January 15, 1996, x-rays taken in an emergency room indicated that Thomas's humerus, elbow, radius, ulna, leg, and pelvis were normal. (Tr. 126-130). As to

her claims of a fractured right ankle, Thomas did not produce appropriate records of this impairment although she was given a 45-day time extension to produce evidence for the appeals court. (Tr. 4, 14). Despite her complaints, there is no evidence that Thomas suffers any injuries that would prevent her from performing her job as an elevator operator.

The ALJ was able to conclude in the fourth step of the sequential analysis that Thomas was ineligible for disability insurance benefits and SSI because he found substantial evidence that Thomas has the residual capacity to perform her past light work as an elevator operator. Therefore, the Commissioner was not required to proceed to the fifth step to determine whether, based on her age, education work experience and residual functioning capacity, Thomas could perform any other jobs. 20 C.F.R. §§ 404.1520(f), 416.920(f).

B. *It is irrelevant whether Thomas's job exists.*

Once the Commissioner is able to determine whether disability should be awarded, there is no need to progress to the next step of the analytical process. 20 C.F.R. §§ 404.1520(a), 416.920(a). Thomas, however, argues that the ALJ should proceed to the fifth step to consider whether Thomas could perform other work because she no longer has the option to work as an elevator operator. Yet, the ALJ does not need to progress to step five because Thomas failed to meet her burden of proof in step four. It is only after an individual proves that she is incapable of performing her past relevant work in step four, that the burden shifts to the Commissioner to establish that the individual can perform other work in the national

economy. *Williams*, 970 F. 2d at 1181 (*citing Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987)). Thomas did not meet her burden of proof in step four and the ALJ had substantial evidence to support his conclusion that Thomas physically could perform her past job as an elevator operator. Therefore, there was no need to assess what other jobs Thomas physically was capable of performing.

C. *ALJ is not bound by the primary physician's opinion.*

Thomas complains that ALJ ignored the treating physician's opinion of disability. The Commissioner or ALJ generally will afford controlling weight to a treating physician's opinion if the opinion is well supported by medically acceptable evidence and is consistent with other substantial evidence. 20 C.F.R. §§ 404.1527(d). Yet, a treating physician's opinion is not binding and may be rejected for lack of supporting evidence, or if there is contradicting medical evidence in the record. *Jones v. Sullivan*, 954 F. 125, 129 (3d Cir. 1991.) (unsupported diagnosis is not entitled to significant weight); *Kent v. Schweikwe*, 710 F.2d 110, 115 n.5 (3d Cir. 1983); *Benjamin v. Bowen*, 682 F. Supp. 264, 268 (D.N.J. 1988). Accordingly, Thomas's treating physician's opinion need not be afforded controlling weight.

Here, Thomas's treating physician, Dr. Magdy Elamir, did not provide any laboratory or clinical evidence to support the assertion that Thomas was disabled. (Tr. 142). In a two-sentence letter dated June 7, 1996, Dr. Elamir simply wrote that Thomas was currently under medical treatment and was unable to work. *Ibid.*

In contrast, other physicians found Thomas was able to work. Dr. Merle C. Cruz, M.D., stated in an internal medicine report dated July 2, 1996 that Thomas was not disabled and could sit, stand, walk, lift, and handle objects. (Tr. 139). Additionally there were no hospital records indicating that Thomas has any functional limitations. (Tr. 144-145). Further, plaintiff's chiropractor, Dr. John L. Ceif, D.C., reported that his treatment resulted in a sixty percent reduction of plaintiff's symptoms. (Tr. 133). Therefore, the ALJ rejected Dr. Elamir's finding of disability because there was no supporting medical findings, and there was substantial evidence to support the finding that Thomas was not disabled.

IV. CONCLUSION

For the reasons previously stated in this opinion, this Court **affirms** the Commissioner's decision to deny Plaintiff Disability Insurance Benefits and Supplement Security Income.

An appropriate Order accompanies this Opinion.

DATED: [August 17, 2000]

/s/ WILLIAM G. BASSLER
WILLIAM G. BASSLER, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 99-2234 (WGB)

PAULINE THOMAS, PLAINTIFF

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

[Filed: Nov. 6, 2002]

ORDER

This matter having come before the Court by way of Pauline Thomas's complaint for review of the final decision of the Commissioner of Social Security denying her Social Security Disability Insurance Benefits and Supplemental Security Income; and

This Court having considered the joint stipulation of facts, the administrative record below, and the pleadings and briefs of the parties;

For the reasons set forth in the Court's Opinion filed this day and for good cause shown;

It is on this 17th day of August, 2000, hereby

ORDERED that the decision of the Commissioner is **affirmed**.

/s/ WILLIAM G. BASSLER
William G. Bassler, U.S.D.J.

APPENDIX D

[Seal omitted]
Social Security Administration

Refer to: TAHB6	Office of Hearing and Appeals
[Social Security Number Omitted]	5107 Leesburg Pike
	Falls Church, VA 22041-3255
	[Mar. 12, 1999]

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Pauline Thomas
106 Storms Avenue, Apt. 2
Jersey City, NJ 07304

Dear Ms. Thomas:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on January 16, 1998.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or

conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970 and 416.1470).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Commissioner of Social Security in your case. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

Your representative contends, in part, that the Administrative Law Judge did not give full and fair consideration to the evidence favorable to your case. A review of the record, however, shows that the Administrative Law Judge fully considered all of the evidence presented at the hearing; the Appeals Council has found no indication that the Administrative Law Judge decided the case on a basis other than his evaluation of the issues and evidence of record.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 405(g) and 1383(c)(3)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

original signed by
Stephen L. Nailor
Appeal Officer

cc: Abraham S. Alter, Esq.

APPENDIX E

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR
	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
Pauline Thomas (Claimant)	
_____ (Wage Earner)	[omitted] (Social Security Number)

This case is before the Administrative Law Judge on a request for hearing. After due notice, a hearing was held in Newark, New Jersey, on September 9, 1997. The claimant was present and testified. Also present and not testifying was the claimant's daughter, Kathy Thomas. The Administrative Law Judge has carefully considered the hearing testimony, arguments presented, and all the documentary evidence[,] including evidence and arguments submitted subsequent to the hearing on December 2, 1997. The evidence of record is sufficient to support the conclusions of this decision.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under sections 216(i) and 223, respectively of the Social Security Act, as amended; and whether the claimant is disabled under section 1614(a)(3)(A) of the Act. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement to a period of disability insurance benefits.

EVALUATION OF THE EVIDENCE

Upon careful consideration of all the evidence, the Administrative Law Judge concludes the claimant is not disabled within the meaning of the Social Security Act.

The claimant filed her applications for disability insurance benefits and supplemental security income on June 11, 1996, alleging disability since August 25, 1995. She reported she worked for about two weeks as a checker of mail bags for the postal service. Because of the brief duration of the job, this was considered an unsuccessful work attempt (Exhibits 1D and 3E).

The claimant testified she was laid off her job on August 25, 1995 because an elevator operator was not needed. Her attorney amended her onset date to July 8, 1996, which is the date she reportedly broke her right ankle.

When she filed for benefits, the claimant alleged she was unable to work because of cervical lumbar radiculopathy and heart disease (Exhibit 1E, pg. 1). At the hearing she claimed she was hospitalized for a week in July 1996 because of a broken ankle. She also reported she was hospitalized a week in August 1997 for a stroke.

In a report dated July 2, 1996, M. C. Cruz, M.D. reported the claimant had been seen two times a year between October 1992 and December 1995 for hypertension and cardiac arrythmia. When she was first seen, she reported she had a heart attack in 1998, but was doing well without chest pain or shortness of breath. Echocardiogram in October 1992 showed eccentric left ventricular hypertrophy but was otherwise normal. Most recent blood pressure reading was 150/100. Weight varied from 198 to 213 pounds. Dr. Cruz advised the claimant was not disabled (Exhibit 3F).

Emergency room records from Jersey City Medical Center show the claimant was seen in January 1996 for complaints of injury when a slow moving vehicle brushed her elbow and caused her to fall. Physical examination was essentially unremarkable. X-rays of the right leg, entire right arm, and pelvis were normal. The chest x-ray showed slight enlargement which could be secondary to magnification but was otherwise normal (Exhibit 3F).

A chiropractor, John Cerf, D.C., reported in June 1996 the claimant had been seen three times a week since April 2, 1996 for cervical strain/sprain. He referred to x-rays which showed degenerative joint disease of the cervical spine and an MRI which showed C4-5 disc herniation but did not submit copies of these records. Chiropractor Cerf advised treatment which consisted of manipulation and electrical muscle stimulation had resulted in 60 percent reduction of pain. Range of motion chart showed there was some reduction of ranges of motion of the cervical and lumbar spine (Exhibit 2F).

The claimant was hospitalized at Jersey City Medical Center on July 31, 1997 for complaints of right sided weakness and shoulder pain. CT scan of the head was normal. Doppler study of the carotids show bilateral plaques in the bulbs of the common carotids arteries, but no significant stenosis. Discharge diagnosis on August 6, 1997 was transient ischemic attack (Exhibit 6F).

The discharge summary for the July 31 to August 6, 1997 hospitalization, submitted at the hearing, shows the claimant was to followup in the cardiac clinic in two weeks. This discharge notice listed prescribed medications and advised the claimant could resume normal activities (Exhibit 5F).

The only other medical reports in file are To Whom It May Concern notes from a neurologist, Magdy Alamir, M.D. Dr. Alamir advised the claimant was unable to work "at the present time" because of lumbar radiculopathy and cervical radiculopathy (Exhibit 4F). Attempts to obtain detailed records from Dr. Alamir were unsuccessful.

The claimant testified she resides with her daughter who does household chores. She claimed she cannot work because she fatigues easily, low back pain limits her ability to sit for only a few minutes, and since she fractured her right ankle in July 1996, she must elevate it frequently. She alleged that as a result of the "stroke" she had in August 1997, she drops things from her right hand. Her medications are Augmentin (an antibiotic), Tenormin, Procardia, Metoprolol, and Vasotec. She does not take any medication for pain. The request for hearing indicated she was taking one Ecotrin (a non-prescription pain reliever) once a day (Exhibit 8, pg. 2).

The claimant has failed to established the presence of an impairment which would preclude her from engaging in past relevant work as an elevator operator. In fact, based on the evidence in the record, there is considerable question as to whether there is even a "severe" impairment. The only cardiac abnormality is left ventricular hpyertrophy and somewhat elevated blood pressure. In his July 2, 1996 report, Dr. Cruz advised the claimant was not disabled and could do work-related physical activities. There was no evidence of physical or mental impairment and/or limitations (Exhibit 3F).

While it is reasonable to conclude that the alleged right ankle fracture might restrict the claimant to sedentary work activity, this determination cannot be made without medical records to verify that a fracture actually took place. The fact that the claimant does not take any pain relievers except, perhaps, Ecotrin, tends to contradict her allegation of limiting pain from either

the ankle or the back. Further, the ankle fracture should have healed in far less than 12 months.

The allegation of a "stroke" in August 1997 appears to be an exaggeration. This is confirmed by the hospital record which shows the claimant had a transient ischemic attack. Upon discharge she was allowed to resume normal activities. The medications listed at discharge were routinely prescribed cardiac medications and antacid and the aforementioned Ecotrin.

The Administrative Law Judge finds it reasonable to conclude the claimant retains the functional capacity for work through at least a light level of exertion. Thus, she retains the functional capacity to return to past work as an elevator operator.

In finding the claimant capable of engaging in her past relevant work as an elevator operator, the Administrative Law Judge has considered the argument of claimant's attorney that her past relevant work as an elevator operator (which is a light job) no longer exists in the national economy, and therefore the vocational rules must be used. 20 CFR 404.1560(b) and 416.960(b) states that an individual will not be found disabled if she has the physical and mental capacity to meet the demands of her past relevant work. A close reading of this section of the regulations shows that no reference is made to whether or not the past relevant work must exist in significant numbers in the national economy. Even though SSR 82-40 is not strictly applicable to this case, the ruling emphasizes the proper test in the fourth step of the sequential evaluation process is whether the individual can do her previous work. If the claimant can meet the sitting, standing, walking, lifting, manipulative, intellectual, emotional and other physical and

mental requirements of a past job, she is capable of performing that job. It is only after the claimant has proved that she cannot do her previous work that the burden shifts to the Commissioner and the vocational rules are applied.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on July 8, 1996, the amended onset of disability, and continues to meet them through the date of this decision.

2. The claimant has not engaged in substantial gainful activity since August 1995.

3. The medical evidence establishes that the claimant has hypertension, cardiac arrythmia, cervical and lumbar strain/sprain, and a transient ischemic attack, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's subjective complaints are somewhat out of proportion to clinical findings as well as the fact she does not take any prescription pain medication.

5. The claimant has the residual functional capacity to perform work-related activities except for perhaps medium and heavy lifting

and extensive bending and stooping (20 CFR 404.1545 and 416.954).

6. The claimant's past relevant work as an elevator operator did not require the performance of work-related activities precluded by the above limitation(s) (20 CFR 404.1565 and 416.965).

7. The claimant's impairments do not prevent the claimant from performing her past relevant work as an elevator operator.

8. The claimant was not under a "disability" as defined in the Social Security Act, at any time through the date of the decision (20 CFR 404.1520(e) and 416.920(e)).

DECISION

It is the decision of the Administrative Law Judge that, based upon the applications filed on June 11, 1996, the claimant is not entitled to a period of disability or disability insurance benefits under section 216(i) and 223, respectively, of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A) of the Act.

/s/ CARL E. STEPHAN
CARL E. STEPHAN
Administrative Law Judge

[Jan. 16, 1998]
Date

APPENDIX F

SOCIAL SECURITY ADMINISTRATION
SUPPLEMENTAL SECURITY INCOME
NOTICE OF RECONSIDERATION—DISABILITY

Date: Oct. 21, 1996

Pauline Thomas
32 Gardener Ave
2nd Fl
Jersey City NJ 07304

Social Security Number: [omitted]
Reconsideration Filed: 09/30/96

Upon receipt of your request for reconsideration we had your claim independently reviewed by a physician and disability examiner in the State agency which works with us in making disability determinations. The evidence in your case has been thoroughly evaluated; this includes the medical evidence and the additional information received since the original decision. We find that the previous determination denying your claim was proper under the law. Below is an explanation of the decision we made in your claim and how we arrived at it.

We did not obtain any additional reports because the reports used on the initial level contained enough information to re-evaluate your claim.

The following was considered in making our decision:

* Your condition is expected to improve with prescribed treatment.

* You have experienced heart problems. However, following a recovery period, you should be able to work.

* While you still experience some pain in your lower back, there is no severe muscle weakness or loss of feeling in your limbs.

Based on the description of your job of elevator operator which you performed for 6 years, we have concluded that you have the ability to return to this work.

If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You may make your request through any Social Security office. Read the enclosed leaflet and "Your Right To Appeal" notice for a full explanation.

NEW APPLICATION

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with this decision and you file a new application instead of appealing you might lose some benefits, or not qualify for any benefits. So, if you disagree with this decision you should file an appeal within 60 days.

Please get in touch with Social Security if you believe this decision is wrong or you have any questions or need more information. Most questions can be handled by phoning or writing any Social Security office. If you visit a Social Security office, please bring this notice with you. If the decision in your case is based on incorrect information, we will be happy to make whatever change is necessary. The office that serves your area is located at:

861 Bergen Avenue
Jersey City NJ 07306

YOUR RIGHT TO APPEAL

If you still are not satisfied with the decision, you may request a hearing of this decision by the Office of Hearings and Appeals. YOU MUST REQUEST THE HEARING IN WRITING WITHIN 60 DAYS FROM THE DATE YOU RECEIVE THIS NOTICE. If you cannot send us a written request for a hearing within 60 days, be sure to contact us by phone. If you wait longer than 60 days, we will not conduct a hearing review of our decision unless you have a good reason for the delay.

If you request a hearing, your case will be assigned to an administrative law judge of the Office of Hearings and Appeals. The administrative law judge will let you know when and where your case will be heard.

The hearing proceedings are informal. The administrative law judge will summarize the facts in your case, explain the law, and state what must be decided. Then you will have an opportunity to explain why you disagree with the decision made in your case, to present additional evidence and to have witnesses testify for

you. You can also request the administrative law judge to subpoena unwilling witnesses to appear for cross-examination and to bring with them any information about your case. You have the right to request the administrative law judge to issue a decision based on the written record without you personally appearing before him/her. If you decide not to appear at the hearing, you still have the right to submit additional evidence. The administrative law judge will base the decision on the evidence in your file plus any new evidence submitted.

In having your case heard, you can represent yourself or be represented by a lawyer, a friend, or any other person. Contact your Social Security office for names of organizations that can help you.

Abraham S Alter ESQ
2096 Saint Georges Ave
P.O. Box 1798
Rahway NJ 07065

Enclosure:
SSA Pub. No. 70-10281

SSA-L1130 (7/91) GLE

APPENDIX G

SOCIAL SECURITY ADMINISTRATION
RETIREMENT, SURVIVORS, AND DISABILITY INSURANCE
SUPPLEMENTAL SECURITY INCOME
Notice of Disapproved Claims

Telephone: (201) 451-2246

Date: Feb. 1, 1996

Pauline Thomas
32 Gardner Ave
Jersey City NJ 07304

Claim Number: [omitted]

We are writing about your claims for Social Security and Supplemental Security Income (SSI) disability benefits. Based on a review of your health problems you do not qualify for benefits on either claim. This is because you are not disabled or blind under our rules.

We have enclosed information about the disability and blindness rules.

An explanation is provided below of why we decided you are not disabled.

The following reports, covering the periods listed were considered in deciding your claim:

DR. JOHN L CROF M.D.	04/02/96	06/13/96
DR MERLE CRUZ MD	10/15/92	12/29/95
JERSEY CITY MEDICAL CTR	01/15/96	01/17/96

We did not obtain any other reports because the ones shown above had enough information to evaluate your condition.

We have determined that your condition does not keep you from working. We considered the medical and other information, your age, education, training, and work experience in determining how your condition affects your ability to work.

You said you were disabled because of heart disease & cervical lumbar radiculopathy.

The following factors were considered in making our decision:

* You do suffer from chest pain as a result of a heart condition. However, the exercise test indicated your heart could tolerate a level of exertion which should allow you to work.

* While you still experience some pain in your neck, there is no severe muscle weakness or loss of feeling in your limbs.

* The evidence shows no other condition which significantly limits your ability to work.

Based on the description of your job of elevator operator which you performed for six years, we have concluded that you have the ability to return to this work.

IF YOUR CONDITION GETS WORSE AND KEEPS YOU FROM WORKING, WRITE, CALL OR VISIT ANY SOCIAL SECURITY OFFICE ABOUT FILING ANOTHER APPLICATION.

ABOUT THE DECISIONS

Doctors and other trained staff looked at your case and made these decisions. They work for your State but used our rules.

Please remember that there are many types of disability programs, both government and private, which use different rules. A person may be receiving benefits under another program and still not be entitled under our rules. This may be true in your case.

IF YOU DISAGREE WITH THE DECISIONS

If you disagree with these decisions, you have the right to appeal. We will review your case and consider any new facts you have. A person who did not make the first decision will decide your case.

* You have 60 days to ask for an appeal.

* The 60 days start the day after you get this letter. We assume you got this letter 5 days after the date on it unless you show us that you did not get it within the 5-day period.

* You must have a good reason for waiting more than 60 days to ask for an appeal.

* You have to ask for an appeal in writing. We will ask you to sign a form SSA-561-U2,

called "Request for Reconsideration." Contact one of our offices if you want help.

Please read the enclosed pamphlets, "Your Right to Question the Decision Made on Your Social Security Claim" and "Your Right to Question the Decision Made on Your SSI Claim." They contain more information about appeals.

NEW APPLICATION

You have the right to file a new application at any time, but filing a new application is not the same as appealing a decision. If you disagree with either of these decisions and you file a new application for Social Security or SSI instead of appealing, you might lose some benefits, or not qualify for any benefits. Also, we could deny the new Social Security application using this decision, if the facts and issues are the same. So, if you disagree with either decision, you should ask for an appeal within 60 days.

IF YOU WANT HELP WITH YOUR APPEAL

You can have a friend, lawyer, or someone else help you. There are groups that can help you find a lawyer or give you free legal services if you qualify. There are also lawyers who do not charge unless you win your appeal. Your local Social Security office has a list of groups that can help you with your appeal.

If you get someone to help you, you should let us know. If you hire someone, we must approve the fee before he or she can collect it. And if you hire a lawyer, we will withhold up to 25 percent of any past due Social

Security benefits to pay toward the fee. We do not withhold money from SSI benefits to pay your lawyer.

IF YOU HAVE ANY QUESTIONS

If you have any questions, you may call us toll-free at 1-800-772-1213, or call your local Social Security office at the number shown on page 1. We can answer most questions over the phone. You can also write or visit any Social Security office. The office that serves your area is located at:

861 Bergen Avenue
Jersey City NJ 07306

If you do call or visit an office, please have this letter with you. It will help us answer your questions. Also, if you plan to visit an office, you may call ahead to make an appointment. This will help us serve you more quickly.

Regional Commissioner

Enclosure:
SSA Publication No. 05-11008 and 05-10058
Disability Rules and Other Benefits Fact Sheets

SSA-L442-A (5/94) JLA

APPENDIX H

STATUTORY AND REGULATORY PROVISIONS

1. Section 423(d) of Title 42 of the United States Code provides, in relevant part:

(d) "Disability" defined

(1) The term "disability" means—

(A) 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 deathor which has lasted or can be expected to last for a continuous period of not less than12 months; or

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 416(i)(1) of this title), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(2) For purposes of paragraph (1)(A)—

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For

purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

2. Section 1382c of Title 42 of the United States Code provides, in relevant part:

§ 1382c. Definitions

* * * * *

(3)(A) Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this subchapter if he is unable 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 or can be expected to last for a continuous period of not less than twelve months.

(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

3. 20 C.F.R. pt. 404 (2000) provides in relevant part:

§ 404.1505 Basic definition of disability.

(a) The law defines disability as the inability to do 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 or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. To determine whether you are able to do any other work, we consider your residual functional capacity and your age, education, and work experience. We will use this definition of disability if you are applying for a period of disability, or disability insurance benefits as a disabled worker, or child's insurance benefits based on disability before age 22 or, with respect to disability benefits payable for months after December 1990, as a widow, widower, or surviving divorced spouse.

* * * * *

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all evidence in your case record when we make a determination or decision whether you are disabled. When you file a claim for a period of disability and/or disability insurance benefits or for child's benefits based on disability, we use the following evaluation process. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider

the effect of your physical or mental impairment; if you have more than one impairment, we will also consider the combined effect of your impairments. Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity, your past work, and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review your claim further. Once you have been found entitled to disability benefits, we follow a somewhat different order of evaluation to determine whether your entitlement continues, as explained in § 404.1594(f).

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in appendix 1 or is equal to a listed impair-

ment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

§ 404.1521 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, co-workers and usual work situations; and

(6) Dealing with changes in a routine work setting.

§ 404.1522 When you have two or more unrelated impairments—initial claims.

(a) *Unrelated severe impairments.* We cannot combine two or more unrelated severe impairments to meet the 12-month duration test. If you have a severe impairment(s) and then develop another unrelated severe impairment(s) but neither one is expected to last for 12 months, we cannot find you disabled, even though the two impairments in combination last for 12 months.

(b) *Concurrent impairments.* If you have two or more concurrent impairments which, when considered in combination, are severe, we must also determine whether the combined effect of your impairments can be expected to continue to be severe for 12 months. If one or more of your impairments improves or is expected to improve within 12 months, so that the combined effect of your remaining impairments is no longer severe, we will find that you do not meet the 12-month duration test.

§ 404.1523 Multiple impairments.

In determining whether your physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under the law, we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity. If we do find a medically severe combination of impairments, the combined impact of the impairments will be considered throughout the disability determination process. If we do not find that you have a medically severe combination of impairments, we will determine that you are not disabled (see § 404.1520).

* * * * *

§ 404.1525 Listing of Impairments in appendix 1.

(a) *Purpose of the Listing of Impairments.* The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity. Most of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.

(b) *Adult and childhood diseases.* The Listing of Impairments consists of two parts:

(1) *Part A* contains medical criteria that apply to adult persons age 18 and over. The medical criteria in part A may also be applied in evaluating impairments in

persons under age 18 if the disease processes have a similar effect on adults and younger persons.

(2) *Part B* contains additional medical criteria that apply only to the evaluation of impairments of persons under age 18. Certain criteria in part A do not give appropriate consideration to the particular effects of the disease processes in childhood; i.e., when the disease process is generally found only in children or when the disease process differs in its effect on children than on adults. Additional criteria are included in part B, and the impairment categories are, to the extent possible, numbered to maintain a relationship with their counterparts in part A. In evaluating disability for a person under age 18, part B will be used first. If the medical criteria in part B do not apply, then the medical criteria in part A will be used.

(c) *How to use the Listing of Impairments.* Each section of the Listing of Impairments has a general introduction containing definitions of key concepts used in that section. Certain specific medical findings, some of which are required in establishing a diagnosis or in confirming the existence of an impairment for the purpose of this Listing, are also given in the narrative introduction. If the medical findings needed to support a diagnosis are not given in the introduction or elsewhere in the listing, the diagnosis must still be established on the basis of medically acceptable clinical and laboratory diagnostic techniques. Following the introduction in each section, the required level of severity of impairment is shown under "Category of Impairments" by one or more sets of medical findings. The medical findings consist of symptoms, signs, and laboratory findings.

(d) *Diagnosis of impairments.* We will not consider your impairment to be one listed in appendix 1 solely because it has the diagnosis of a listed impairment. It must also have the findings shown in the Listing of that impairment.

(e) *Addiction to alcohol or drugs.* If you have a condition diagnosed as addiction to alcohol or drugs, this will not, by itself, be a basis for determining whether you are, or are not, disabled. As with any other medical condition, we will decide whether you are disabled based on symptoms, signs, and laboratory findings.

(f) *Symptoms as criteria of listed impairment(s).* Some listed impairment(s) include symptoms usually associated with those impairment(s) as criteria. Generally, when a symptom is one of the criteria in a listed impairment, it is only necessary that the symptom be present in combination with the other criteria. It is not necessary, unless the listing specifically states otherwise, to provide information about the intensity, persistence or limiting effects of the symptom as long as all other findings required by the specific listing are present.

§ 404.1526 Medical equivalence.

(a) *How medical equivalence is determined.* We will decide that your impairment(s) is medically equivalent to a listed impairment in appendix 1 if the medical findings are at least equal in severity and duration to the listed findings. We will compare the symptoms, signs, and laboratory findings about your impairment(s), as shown in the medical evidence we have about your claim, with the medical criteria shown with the listed impairment. If your impairment is not listed, we will

consider the listed impairment most like your impairment to decide whether your impairment is medically equal. If you have more than one impairment, and none of them meets or equals a listed impairment, we will review the symptoms, signs, and laboratory findings about your impairments to determine whether the combination of your impairments is medically equal to any listed impairment.

(b) *Medical equivalence must be based on medical findings.* We will always base our decision about whether your impairment(s) is medically equal to a listed impairment on medical evidence only. Any medical findings in the evidence must be supported by medically acceptable clinical and laboratory diagnostic techniques. We will also consider the medical opinion given by one or more medical or psychological consultants designated by the Commissioner in deciding medical equivalence. (See § 404.1616.)

(c) *Who is a designated medical or psychological consultant.* A medical or psychological consultant designated by the Commissioner includes any medical or psychological consultant employed or engaged to make medical judgments by the Social Security Administration, the Railroad Retirement Board, or a State agency authorized to make disability determinations. A medical consultant must be an acceptable medical source identified in § 404.1513(a)(1) or (a)(3) through (a)(5). A psychological consultant used in cases where there is evidence of a mental impairment must be a qualified psychologist. (See § 404.1616 for limitations on what medical consultants who are not physicians can evaluate and the qualifications we consider necessary for a psychologist to be a consultant.)

* * * * *

§ 404.1545 Your residual functional capacity.

(a) *General.* Your impairment(s), and any related symptoms, such as pain, may cause physical and mental limitations that affect what you can do in a work setting. Your residual functional capacity is what you can still do despite your limitations. If you have more than one impairment, we will consider all of your impairment(s) of which we are aware. We will consider your ability to meet certain demands of jobs, such as physical demands, mental demands, sensory requirements, and other functions, as described in paragraphs (b), (c), and (d) of this section. Residual functional capacity is an assessment based upon all of the relevant evidence. It may include descriptions (even your own) of limitations that go beyond the symptoms, such as pain, that are important in the diagnosis and treatment of your medical condition. Observations by your treating or examining physicians or psychologists, your family, neighbors, friends, or other persons, of your limitations, in addition to those observations usually made during formal medical examinations, may also be used. These descriptions and observations, when used, must be considered along with your medical records to enable us to decide to what extent your impairment(s) keeps you from performing particular work activities. This assessment of your remaining capacity for work is not a decision on whether you are disabled, but is used as the basis for determining the particular types of work you may be able to do despite your impairment(s). Then, using the guidelines in §§ 404.1560 through 404.1569a, your vocational background is considered along with your residual functional capacity in arriving

at a disability determination or decision. In deciding whether your disability continues or ends, the residual functional capacity assessment may also be used to determine whether any medical improvement you have experienced is related to your ability to work as discussed in § 404.1594.

(b) *Physical abilities.* When we assess your physical abilities, we first assess the nature and extent of your physical limitations and then determine your residual functional capacity for work activity on a regular and continuing basis. A limited ability to perform certain physical demands of work activity, such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions (including manipulative or postural functions, such as reaching, handling, stooping or crouching), may reduce your ability to do past work and other work.

(c) *Mental abilities.* When we assess your mental abilities, we first assess the nature and extent of your mental limitations and restrictions and then determine your residual functional capacity for work activity on a regular and continuing basis. A limited ability to carry out certain mental activities, such as limitations in understanding, remembering, and carrying out instructions, and in responding appropriately to supervision, co-workers, and work pressures in a work setting, may reduce your ability to do past work and other work.

(d) *Other abilities affected by impairment(s).* Some medically determinable impairment(s), such as skin impairment(s), epilepsy, impairment(s) of vision, hearing or other senses, and impairment(s) which impose environmental restrictions, may cause limitations and restrictions which affect other work-related abilities. If

you have this type of impairment(s), we consider any resulting limitations and restrictions which may reduce your ability to do past work and other work in deciding your residual functional capacity.

(e) *Total limiting effects.* When you have a severe impairment(s), but your symptoms, signs, and laboratory findings do not meet or equal those of a listed impairment in appendix 1 of this subpart, we will consider the limiting effects of all your impairment(s), even those that are not severe, in determining your residual functional capacity. Pain or other symptoms may cause a limitation of function beyond that which can be determined on the basis of the anatomical, physiological or psychological abnormalities considered alone; e.g., someone with a low back disorder may be fully capable of the physical demands consistent with those of sustained medium work activity, but another person with the same disorder, because of pain, may not be capable of more than the physical demands consistent with those of light work activity on a sustained basis. In assessing the total limiting effects of your impairment(s) and any related symptoms, we will consider all of the medical and nonmedical evidence, including the information described in § 404.1529(c).

§ 404.1546 Responsibility for assessing and determining residual functional capacity.

The State agency staff medical or psychological consultants or other medical or psychological consultants designated by the Commissioner are responsible for ensuring that the State agency makes a decision about your residual functional capacity. In cases where the State agency makes the disability determination, a State agency staff medical or psychological consultant

must assess residual functional capacity where it is required. This assessment is based on all of the evidence we have, including any statements regarding what you can still do that have been provided by treating or examining physicians, consultative physicians, or any other medical or psychological consultant designated by the Commissioner. See § 404.1545. For cases in the disability hearing process, the responsibility for deciding your residual functional capacity rests with either the disability hearing officer or, if the disability hearing officer's reconsidered determination is changed under § 404.918, with the Director of the Office of Disability Hearings or his or her delegate. For cases at the Administrative Law Judge hearing or Appeals Council level, the responsibility for deciding your residual functional capacity rests with the Administrative Law Judge or Appeals Council.

* * * * *

§ 404.1560 When your vocational background will be considered.

(a) *General.* If you are applying for a period of disability, or disability insurance benefits as a disabled worker, or child's insurance benefits based on disability which began before age 22, or widow's or widower's benefits based on disability for months after December 1990, and we cannot decide whether you are disabled on medical evidence alone, we will consider your residual functional capacity together with your vocational background.

(b) *Past relevant work.* We will first compare your residual functional capacity with the physical and mental demands of the kind of work you have done in

the past. If you still have the residual functional capacity to do your past relevant work, we will find that you can still do your past work, and we will determine that you are not disabled, without considering your vocational factors of age, education, and work experience.

(c) *Other work.* If we find that you can no longer do the kind of work you have done in the past, we will then consider your residual functional capacity together with your vocational factors of age, education, and work experience to determine whether you can do other work. By other work we mean jobs that exist in significant numbers in the national economy.

§ 404.1561 Your ability to do work depends upon your residual functional capacity.

If you can do your previous work (your usual work or other applicable past work), we will determine that you are not disabled. However, if your residual functional capacity is not enough to enable you to do any of your previous work, we must still decide if you can do any other work. To do this, we consider your residual functional capacity, and your age, education, and work experience. Any work (jobs) that you can do must exist in significant numbers in the national economy (either in the region where you live or in several regions of the country). Sections 404.1563 through 404.1565 explain how we evaluate your age, education, and work experience when we are deciding whether or not you are able to do other work.

* * * * *

§ 404.1563 Your age as a vocational factor.

(a) *General.* "Age" means your chronological age. When we decide whether you are disabled under § 404.1520(f)(1), we will consider your chronological age in combination with your residual functional capacity, education, and work experience; we will not consider your ability to adjust to other work on the basis of your age alone. In determining the extent to which age affects a person's ability to adjust to other work, we consider advancing age to be an increasingly limiting factor in the person's ability to make such an adjustment, as we explain in paragraphs (c) through (e) of this section. If you are unemployed but you still have the ability to adjust to other work, we will find that you are not disabled. In paragraphs (b) through (e) of this section and in appendix 2 to this subpart, we explain in more detail how we consider your age as a vocational factor.

(b) *How we apply the age categories.* When we make a finding about your ability to do other work under § 404.1520(f)(1), we will use the age categories in paragraphs (c) through (e) of this section. We will use each of the age categories that applies to you during the period for which we must determine if you are disabled. We will not apply the age categories mechanically in a borderline situation. If you are within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.

(c) *Younger person.* If you are a younger person (under age 50), we generally do not consider that your age will seriously affect your ability to adjust to other work. However, in some circumstances, we consider that persons age 45-49 are more limited in their ability to adjust to other work than persons who have not attained age 45. See Rule 201.17 in appendix 2.

(d) *Person closely approaching advanced age.* If you are closely approaching advanced age (age 50-54), we will consider that your age along with a severe impairment(s) and limited work experience may seriously affect your ability to adjust to other work.

(e) *Person of advanced age.* We consider that at advanced age (age 55 or older) age significantly affects a person's ability to adjust to other work. We have special rules for persons of advanced age and for persons in this category who are closely approaching retirement age (age 60-64). See § 404.1568(d)(4).

(f) *Information about your age.* We will usually not ask you to prove your age. However, if we need to know your exact age to determine whether you get disability benefits or if the amount of your benefit will be affected, we will ask you for evidence of your age.

§ 404.1564 Your education as a vocational factor.

(a) *General.* *Education* is primarily used to mean formal schooling or other training which contributes to your ability to meet vocational requirements, for example, reasoning ability, communication skills, and arithmetical ability. However, if you do not have formal schooling, this does not necessarily mean that you are uneducated or lack these abilities. Past work experience and the kinds of responsibilities you had

when you were working may show that you have intellectual abilities, although you may have little formal education. Your daily activities, hobbies, or the results of testing may also show that you have significant intellectual ability that can be used to work.

(b) *How we evaluate your education.* The importance of your educational background may depend upon how much time has passed between the completion of your formal education and the beginning of your physical or mental impairment(s) and by what you have done with your education in a work or other setting. Formal education that you completed many years before your impairment began, or unused skills and knowledge that were a part of your formal education, may no longer be useful or meaningful in terms of your ability to work. Therefore, the numerical grade level that you completed in school may not represent your actual educational abilities. These may be higher or lower. However, if there is no other evidence to contradict it, we will use your numerical grade level to determine your educational abilities. The term *education* also includes how well you are able to communicate in English since this ability is often acquired or improved by education. In evaluating your educational level, we use the following categories:

(1) *Illiteracy.* Illiteracy means the inability to read or write. We consider someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name. Generally, an illiterate person has had little or no formal schooling.

(2) *Marginal education.* Marginal education means ability in reasoning, arithmetic, and language skills

which are needed to do simple, unskilled types of jobs. We generally consider that formal schooling at a 6th grade level or less is a marginal education.

(3) *Limited education.* Limited education means ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. We generally consider that a 7th grade through the 11th grade level of formal education is a limited education.

(4) *High school education and above.* High school education and above means abilities in reasoning, arithmetic, and language skills acquired through formal schooling at a 12th grade level or above. We generally consider that someone with these educational abilities can do semi-skilled through skilled work.

(5) *Inability to communicate in English.* Since the ability to speak, read and understand English is generally learned or increased at school, we may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who doesn't speak and understand English to do a job, regardless of the amount of education the person may have in another language. Therefore, we consider a person's ability to communicate in English when we evaluate what work, if any, he or she can do. It generally doesn't matter what other language a person may be fluent in.

(6) *Information about your education.* We will ask you how long you attended school and whether you are able to speak, understand, read and write in English and do at least simple calculations in arithmetic. We

will also consider other information about how much formal or informal education you may have had through your previous work, community projects, hobbies, and any other activities which might help you to work.

§ 404.1565 Your work experience as a vocational factor.

(a) *General. Work experience* means skills and abilities you have acquired through work you have done which show the type of work you may be expected to do. Work you have already been able to do shows the kind of work that you may be expected to do. We consider that your work experience applies when it was done within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful activity. We do not usually consider that work you did 15 years or more before the time we are deciding whether you are disabled (or when the disability insured status requirement was last met, if earlier) applies. A gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply. The 15-year guide is intended to insure that remote work experience is not currently applied. If you have no work experience or worked only "off-and-on" or for brief periods of time during the 15-year period, we generally consider that these do not apply. If you have acquired skills through your past work, we consider you to have these work skills unless you cannot use them in other skilled or semi-skilled work that you can now do. If you cannot use your skills in other skilled or semi-skilled work, we will consider your work background the same as unskilled. However, even if you have no work experience, we may consider that you are able to

do unskilled work because it requires little or no judgment and can be learned in a short period of time.

(b) *Information about your work.* Under certain circumstances, we will ask you about the work you have done in the past. If you cannot give us all of the information we need, we will try, with your permission, to get it from your employer or other person who knows about your work, such as a member of your family or a co-worker. When we need to consider your work experience to decide whether you are able to do work that is different from what you have done in the past, we will ask you to tell us about all of the jobs you have had in the last 15 years. You must tell us the dates you worked, all of the duties you did, and any tools, machinery, and equipment you used. We will need to know about the amount of walking, standing, sitting, lifting and carrying you did during the work day, as well as any other physical or mental duties of your job. If all of your work in the past 15 years has been arduous and unskilled, and you have very little education, we will ask you to tell us about all of your work from the time you first began working. This information could help you to get disability benefits.

§ 404.1566 Work which exists in the national economy.

(a) *General.* We consider that work exists in the national economy when it exists in significant numbers either in the region where you live or in several other regions of the country. It does not matter whether—

(1) Work exists in the immediate area in which you live;

(2) A specific job vacancy exists for you; or

(3) You would be hired if you applied for work.

(b) *How we determine the existence of work.* Work exists in the national economy when there is a significant number of jobs (in one or more occupations) having requirements which you are able to meet with your physical or mental abilities and vocational qualifications. Isolated jobs that exist only in very limited numbers in relatively few locations outside of the region where you live are not considered "work which exists in the national economy". We will not deny you disability benefits on the basis of the existence of these kinds of jobs. If work that you can do does not exist in the national economy, we will determine that you are disabled. However, if work that you can do does exist in the national economy, we will determine that you are not disabled.

(c) *Inability to obtain work.* We will determine that you are not disabled if your residual functional capacity and vocational abilities make it possible for you to do work which exists in the national economy, but you remain unemployed because of—

(1) Your inability to get work;

(2) Lack of work in your local area;

(3) The hiring practices of employers;

(4) Technological changes in the industry in which you have worked;

(5) Cyclical economic conditions;

(6) No job openings for you;

(7) You would not actually be hired to do work you could otherwise do; or

(8) You do not wish to do a particular type of work.

(d) *Administrative notice of job data.* When we determine that unskilled, sedentary, light, and medium jobs exist in the national economy (in significant numbers either in the region where you live or in several regions of the country), we will take administrative notice of reliable job information available from various governmental and other publications. For example, we will take notice of—

(1) *Dictionary of Occupational Titles*, published by the Department of Labor;

(2) *County Business Patterns*, published by the Bureau of the Census;

(3) *Census Reports*, also published by the Bureau of the Census;

(4) *Occupational Analyses*, prepared for the Social Security Administration by various State employment agencies; and

(5) *Occupational Outlook Handbook*, published by the Bureau of Labor Statistics.

(e) *Use of vocational experts and other specialists.* If the issue in determining whether you are disabled is whether your work skills can be used in other work and the specific occupations in which they can be used, or there is a similarly complex issue, we may use the services of a vocational expert or other specialist. We will decide whether to use a vocational expert or other specialist.

§ 404.1567 Physical exertion requirements.

To determine the physical exertion requirements of work in the national economy, we classify jobs as *sedentary*, *light*, *medium*, *heavy*, and *very heavy*. These terms have the same meaning as they have in the *Dictionary of Occupational Titles*, published by the Department of Labor. In making disability determinations under this subpart, we use the following definitions:

(a) *Sedentary work.* Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

(b) *Light work.* Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

(c) *Medium work.* Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work.

(d) *Heavy work.* Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. If someone can do heavy work, we determine that he or she can also do medium, light, and sedentary work.

(e) *Very heavy work.* Very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. If someone can do very heavy work, we determine that he or she can also do heavy, medium, light and sedentary work.

§ 404.1568 Skill requirements.

In order to evaluate your skills and to help determine the existence in the national economy of work you are able to do, occupations are classified as unskilled, semiskilled, and skilled. In classifying these occupations, we use materials published by the Department of Labor. When we make disability determinations under this subpart, we use the following definitions:

(a) *Unskilled work.* Unskilled work is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. For example, we consider jobs unskilled if the primary work duties are handling, feeding and offbearing (that is, placing or removing materials from machines which are automatic or operated by others), or machine tending,

and a person can usually learn to do the job in 30 days, and little specific vocational preparation and judgment are needed. A person does not gain work skills by doing unskilled jobs.

(b) *Semi-skilled work.* Semi-skilled work is work which needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require alertness and close attention to watching machine processes; or inspecting, testing or otherwise looking for irregularities; or tending or guarding equipment, property, materials, or persons against loss, damage or injury; or other types of activities which are similarly less complex than skilled work, but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly to do repetitive tasks.

(c) *Skilled work.* Skilled work requires qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity of material to be produced. Skilled work may require laying out work, estimating quality, determining the suitability and needed quantities of materials, making precise measurements, reading blueprints or other specifications, or making necessary computations or mechanical adjustments to control or regulate the work. Other skilled jobs may require dealing with people, facts, or figures or abstract ideas at a high level of complexity.

(d) *Skills that can be used in other work (transferability)*—(1) *What we mean by transferable skills.* We consider you to have skills that can be used in other

jobs, when the skilled or semi-skilled work activities you did in past work can be used to meet the requirements of skilled or semi-skilled work activities of other jobs or kinds of work. This depends largely on the similarity of occupationally significant work activities among different jobs.

(2) *How we determine skills that can be transferred to other jobs.* Transferability is most probable and meaningful among jobs in which—

(i) The same or a lesser degree of skill is required;

(ii) The same or similar tools and machines are used; and

(iii) The same or similar raw materials, products, processes, or services are involved.

(3) *Degrees of transferability.* There are degrees of transferability of skills ranging from very close similarities to remote and incidental similarities among jobs. A complete similarity of all three factors is not necessary for transferability. However, when skills are so specialized or have been acquired in such an isolated vocational setting (like many jobs in mining, agriculture, or fishing) that they are not readily usable in other industries, jobs, and work settings, we consider that they are not transferable.

(4) *Transferability of skills for individuals of advanced age.* If you are of advanced age (age 55 or older), and you have a severe impairment(s) that limits you to *sedentary* or *light work*, we will find that you cannot make an adjustment to other work unless you have skills that you can transfer to other skilled or semiskilled work (or you have recently completed education which provides for direct entry into skilled

work) that you can do despite your impairment(s). We will decide if you have transferable skills as follows. If you are of advanced age and you have a severe impairment(s) that limits you to no more than *sedentary* work, we will find that you have skills that are transferable to skilled or semiskilled sedentary work only if the sedentary work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry. (See § 404.1567(a) and § 201.00(f) of appendix 2.) If you are of advanced age but have not attained age 60, and you have a severe impairment(s) that limits you to no more than *light* work, we will apply the rules in paragraphs (d)(1) through (d)(3) of this section to decide if you have skills that are transferable to skilled or semiskilled light work (see § 404.1567(b)). If you are *closely approaching retirement age* (age 60-64) and you have a severe impairment(s) that limits you to no more than *light* work, we will find that you have skills that are transferable to skilled or semiskilled light work only if the light work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry. (See § 404.1567(b) and Rule 202.00(f) of appendix 2 to this subpart.)

§ 404.1569 Listing of Medical-Vocational Guidelines in Appendix 2.

The Dictionary of Occupational Titles includes information about jobs (classified by their exertional and skill requirements) that exist in the national economy. Appendix 2 provides rules using this data reflecting major functional and vocational patterns. We apply

these rules in cases where a person is not doing substantial gainful activity and is prevented by a severe medically determinable impairment from doing vocationally relevant past work. The rules in Appendix 2 do not cover all possible variations of factors. Also, as we explain in § 200.00 of Appendix 2, we do not apply these rules if one of the findings of fact about the person's vocational factors and residual functional capacity is not the same as the corresponding criterion of a rule. In these instances, we give full consideration to all relevant facts in accordance with the definitions and discussions under vocational considerations. However, if the findings of fact made about all factors are the same as the rule, we use that rule to decide whether a person is disabled.

§ 404.1569a Exertional and nonexertional limitations.

(a) *General.* Your impairment(s) and related symptoms, such as pain, may cause limitations of function or restrictions which limit your ability to meet certain demands of jobs. These limitations may be exertional, nonexertional, or a combination of both. Limitations are classified as exertional if they affect your ability to meet the strength demands of jobs. The classification of a limitation as exertional is related to the United States Department of Labor's classification of jobs by various exertional levels (sedentary, light, medium, heavy, and very heavy) in terms of the strength demands for sitting, standing, walking, lifting, carrying, pushing, and pulling. Sections 404.1567 and 404.1569 explain how we use the classification of jobs by exertional levels (strength demands) which is contained in the Dictionary of Occupational Titles published by the Department of Labor, to determine the exertional

requirements of work which exists in the national economy. Limitations or restrictions which affect your ability to meet the demands of jobs other than the strength demands, that is, demands other than sitting, standing, walking, lifting, carrying, pushing or pulling, are considered nonexertional. Sections 404.1520(f) and 404.1594(f)(8) explain that if you can no longer do your past relevant work because of a severe medically determinable impairment(s), we must determine whether your impairment(s), when considered along with your age, education, and work experience, prevents you from doing any other work which exists in the national economy in order to decide whether you are disabled (§ 404.1520(f)) or continue to be disabled (§ 404.1594(f)(8)). Paragraphs (b), (c), and (d) of this section explain how we apply the medical-vocational guidelines in Appendix 2 of this subpart in making this determination, depending on whether the limitations or restrictions imposed by your impairment(s) and related symptoms, such as pain, are exertional, nonexertional, or a combination of both.

(b) *Exertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing, and pulling), we consider that you have only exertional limitations. When your impairment(s) and related symptoms only impose exertional limitations and your specific vocational profile is listed in a rule contained in Appendix 2 of this subpart, we will directly apply that rule to decide whether you are disabled.

(c) *Nonexertional limitations.* (1) When the limitations and restrictions imposed by your impairment(s)

and related symptoms, such as pain, affect only your ability to meet the demands of jobs other than the strength demands, we consider that you have only nonexertional limitations or restrictions. Some examples of nonexertional limitations or restrictions include the following:

(i) You have difficulty functioning because you are nervous, anxious, or depressed;

(ii) You have difficulty maintaining attention or concentrating;

(iii) You have difficulty understanding or remembering detailed instructions;

(iv) You have difficulty in seeing or hearing;

(v) You have difficulty tolerating some physical feature(s) of certain work settings, e.g., you cannot tolerate dust or fumes; or

(vi) You have difficulty performing the manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching.

(2) If your impairment(s) and related symptoms, such as pain, only affect your ability to perform the nonexertional aspects of work-related activities, the rules in appendix 2 do not direct factual conclusions of disabled or not disabled. The determination as to whether disability exists will be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in appendix 2.

(d) *Combined exertional and nonexertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain,

affect your ability to meet both the strength and demands of jobs other than the strength demands, we consider that you have a combination of exertional and nonexertional limitations or restrictions. If your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we will not directly apply the rules in appendix 2 unless there is a rule that directs a conclusion that you are disabled based upon your strength limitations; otherwise the rules provide a framework to guide our decision.

4. 20 C.F.R. pt. 416 (2000) provides in relevant part:

§ 416.905 Basic definition of disability for adults.

(a) The law defines disability as the inability to do 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 or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. To determine whether you are able to do any other work, we consider your residual functional capacity and your age, education, and work experience (see § 416.920).

* * * * *

§ 416.920 Evaluation of disability of adults, in general.

(a) *Steps in evaluating disability.* We consider all evidence in your case record when we make a determination or decision whether you are disabled. When you file a claim for Supplemental Security Income disability benefits and are age 18 or older, we use the following evaluation process. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider the effect of your physical or mental impairment; if you have more than one impairment, we will also consider the combined effect of your impairments. Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity, your past work, and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review your claim further. Once you have been found eligible for Supplemental Security Income benefits based on disability, we follow a somewhat different order of evaluation to determine whether your eligibility continues, as explained in § 416.994(b)(5).

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impair-

ments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing other work.*

(1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 416.962).

§ 416.921 What we mean by a not severe impairment(s) in an adult.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

§ 416.922 When you have two or more unrelated impairments—initial claims.

(a) *Unrelated severe impairments.* We cannot combine two or more unrelated severe impairments to meet the 12-month duration test. If you have a severe impairment(s) and then develop another unrelated severe impairment(s) but neither one is expected to last for 12 months, we cannot find you disabled, even though the two impairments in combination last for 12 months.

(b) *Concurrent impairments.* If you have two or more concurrent impairments which, when considered

in combination, are severe, we must also determine whether the combined effect of your impairments can be expected to continue to be severe for 12 months. If one or more of your impairments improves or is expected to improve within 12 months, so that the combined effect of your remaining impairments is no longer severe, we will find that you do not meet the 12-month duration test.

§ 416.923 Multiple impairments.

In determining whether your physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under the law, we will consider the combined effect of all of your impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity. If we do find a medically severe combination of impairments, the combined impact of the impairments will be considered throughout the disability determination process. If we do not find that you have a medically severe combination of impairments, we will determine that you are not disabled (see §§ 416.920 and 416.924).

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§ 416.925 Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter.

(a) *Purpose of the Listing of Impairments.* The Listing of Impairments describes, for each of the major body systems, impairments that are considered severe enough to prevent an adult from doing any gainful activity or, for a child, that causes marked and severe functional limitations. Most of the listed impairments are permanent or expected to result in death, or a

specific statement of duration is made. For all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.

(b) *Adult and childhood diseases.* The Listing of Impairments consists of two parts:

(1) *Part A* contains medical criteria that apply to adult persons age 18 and over. The medical criteria in Part A may also be applied in evaluating impairments in persons under age 18 if the disease processes have a similar effect on adults and younger persons.

(2) *Part B* contains additional medical criteria that apply only to the evaluation of impairments of persons under age 18. Certain criteria in Part A do not give appropriate consideration to the particular effects of the disease processes in childhood; i.e., when the disease process is generally found only in children or when the disease process differs in its effect on children than on adults. Additional criteria are included in Part B, and the impairment categories are, to the extent possible, numbered to maintain a relationship with their counterparts in Part A. In evaluating disability for a person under age 18, Part B will be used first. If the medical criteria in Part B do not apply, then the medical criteria in Part A will be used. Although the severity criteria in part B of the listings are expressed in different ways for different impairments, "listing-level severity" generally means the level of severity described in § 416.926a(a); i.e., "marked" limitations in two domains of functioning or an "extreme" limitation in one domain. (See § 416.926a(e) for the definitions of the terms "marked" and "extreme" as they apply to children.) Therefore, in general, a child's impairment(s) is of "listing-level severity" if it causes marked limitations in

two broad areas of functioning or extreme limitations in one such area. (See § 416.926a for definition of the terms *marked* and *extreme* as they apply to children.) However, when we decide whether your impairment(s) meets the requirements for any listed impairment, we will decide that your impairment is of "listing-level severity" even if it does not result in marked limitations in two broad areas of functioning, or extreme limitations in one such area, if the listing that we apply does not require such limitations to establish that an impairment(s) is disabling.

(c) *How to use the Listing of Impairments.* Each section of the Listing of Impairments has a general introduction containing definitions of key concepts used in that section. Certain specific medical findings, some of which are required in establishing a diagnosis or in confirming the existence of an impairment for the purpose of this Listing, are also given in the narrative introduction. If the medical findings needed to support a diagnosis are not given in the introduction or elsewhere in the listing, the diagnosis must still be established on the basis of medically acceptable clinical and laboratory diagnostic techniques. Following the introduction in each section, the required level of severity of impairment is shown under "Category of Impairments" by one or more sets of medical findings. The medical findings consist of symptoms, signs, and laboratory findings.

(d) *Diagnoses of impairments.* We will not consider your impairment to be one listed in Appendix 1 of Subpart P of Part 404 of this chapter solely because it has the diagnosis of a listed impairment. It must also have the findings shown in the Listing for that impairment.

(e) *Addiction to alcohol or drugs.* If you have a condition diagnosed as addiction to alcohol or drugs, this will not, by itself, be a basis for determining whether you are, or are not, disabled. As with any other medical condition, we will decide whether you are disabled based on symptoms, signs, and laboratory findings.

(f) *Symptoms as criteria of listed impairment(s).* Some listed impairment(s) include symptoms usually associated with those impairment(s) as criteria. Generally, when a symptom is one of the criteria in a listed impairment, it is only necessary that the symptom be present in combination with the other criteria. It is not necessary, unless the listing specifically states otherwise, to provide information about the intensity, persistence or limiting effects of the symptom as long as all other findings required by the specific listing are present.

§ 416.926 Medical equivalence for adults and children.

(a) *How medical equivalence is determined.* We will decide that your impairment(s) is medically equivalent to a listed impairment in appendix 1 of subpart P of part 404 of this chapter if the medical findings are at least equal in severity and duration to the listed findings. We will compare the symptoms, signs, and laboratory findings about your impairment(s), as shown in the medical evidence we have about your claim, with the corresponding medical criteria shown for any listed impairment. When we make a finding regarding medical equivalence, we will consider all relevant evidence in your case record. Medical equivalence can be found in two ways:

(1)(i) If you have an impairment that is described in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, but—

(A) You do not exhibit one or more of the medical findings specified in the particular listing, or

(B) You exhibit all of the medical findings, but one or more of the findings is not as severe as specified in the listing;

(ii) We will nevertheless find that your impairment is medically equivalent to that listing if you have other medical findings related to your impairment that are at least of equal medical significance.

(2) If you have an impairment that is not described in the Listing of Impairments in appendix 1, or you have a combination of impairments, no one of which meets or is medically equivalent to a listing, we will compare your medical findings with those for closely analogous listed impairments. If the medical findings related to your impairment(s) are at least of equal medical significance to those of a listed impairment, we will find that your impairment(s) is medically equivalent to the analogous listing.

(b) *Medical equivalence must be based on medical findings.* We will always base our decision about whether your impairment(s) is medically equal to a listed impairment on medical evidence only. Any medical findings in the evidence must be supported by medically acceptable clinical and laboratory diagnostic techniques. We will also consider the medical opinion given by one or more medical or psychological consultants designated by the Commissioner in deciding medical equivalence. (See § 416.1016.)

(c) *Who is a designated medical or psychological consultant.* A medical consultant must be an acceptable medical source identified in § 416.913(a)(1) or (a)(3) through (a)(5). A medical consultant must be a physician. A psychological consultant used in cases where there is evidence of a mental impairment must be a qualified psychologist. (See § 416.1016 for limitations on what medical consultants who are not physicians can evaluate and the qualifications we consider necessary for a psychologist to be a consultant.)

(d) *Responsibility for determining medical equivalence.* In cases where the State agency or other designee of the Commissioner makes the initial or reconsideration disability determination, a State agency medical or psychological consultant or other designee of the Commissioner (see § 416.1016) has the overall responsibility for determining medical equivalence. For cases in the disability hearing process or otherwise decided by a disability hearing officer, the responsibility for determining medical equivalence rests with either the disability hearing officer or, if the disability hearing officer's reconsideration determination is changed under § 416.1418, with the Associate Commissioner for Disability or his or her delegate. For cases at the Administrative Law Judge or Appeals Council level, the responsibility for deciding medical equivalence rests with the Administrative Law Judge or Appeals Council.

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§ 416.945 Your residual functional capacity.

(a) *General.* Your impairment(s), and any related symptoms, such as pain, may cause physical and mental limitations that affect what you can do in a work

setting. Your residual functional capacity is what you can still do despite your limitations. If you have more than one impairment, we will consider all of your impairment(s) of which we are aware. We will consider your ability to meet certain demands of jobs, such as physical demands, mental demands, sensory requirements, and other functions, as described in paragraphs (b), (c), and (d) of this section. Residual functional capacity is an assessment based upon all of the relevant evidence. It may include descriptions (even your own) of limitations that go beyond the symptoms, such as pain, that are important in the diagnosis and treatment of your medical condition. Observations by your treating or examining physicians or psychologists, your family, neighbors, friends, or other persons, of your limitations, in addition to those observations usually made during formal medical examinations, may also be used. These descriptions and observations, when used, must be considered along with your medical records to enable us to decide to what extent your impairment(s) keeps you from performing particular work activities. This assessment of your remaining capacity for work is not a decision on whether you are disabled, but is used as the basis for determining the particular types of work you may be able to do despite your impairment(s). Then, using the guidelines in §§ 416.960 through 416.969a, your vocational background is considered along with your residual functional capacity in arriving at a disability determination or decision. In deciding whether your disability continues or ends, the residual functional capacity assessment may also be used to determine whether any medical improvement you have experienced is related to your ability to work as discussed in § 416.994.

(b) *Physical abilities.* When we assess your physical abilities, we first assess the nature and extent of your physical limitations and then determine your residual functional capacity for work activity on a regular and continuing basis. A limited ability to perform certain physical demands of work activity, such as sitting, standing, walking, lifting, carrying, pushing, pulling, or other physical functions (including manipulative or postural functions, such as reaching, handling, stooping or crouching), may reduce your ability to do past work and other work.

(c) *Mental abilities.* When we assess your mental abilities, we first assess the nature and extent of your mental limitations and restrictions and then determine your residual functional capacity for work activity on a regular and continuing basis. A limited ability to carry out certain mental activities, such as limitations in understanding, remembering, and carrying out instructions, and in responding appropriately to supervision, coworkers, and work pressures in a work setting, may reduce your ability to do past work and other work.

(d) *Other abilities affected by impairment(s).* Some medically determinable impairment(s), such as skin impairment(s), epilepsy, impairment(s) of vision, hearing or other senses, and impairment(s) which impose environmental restrictions, may cause limitations and restrictions which affect other work-related abilities. If you have this type of impairment(s), we consider any resulting limitations and restrictions which may reduce your ability to do past work and other work in deciding your residual functional capacity.

(e) *Total limiting effects.* When you have a severe impairment(s), but your symptoms, signs, and labora-

tory findings do not meet or equal those of a listed impairment in appendix 1 of subpart P of part 404 of this chapter, we will consider the limiting effects of all your impairment(s), even those that are not severe, in determining your residual functional capacity. Pain or other symptoms may cause a limitation of function beyond that which can be determined on the basis of the anatomical, physiological or psychological abnormalities considered alone; e.g., someone with a low back disorder may be fully capable of the physical demands consistent with those of sustained medium work activity, but another person with the same disorder, because of pain, may not be capable of more than the physical demands consistent with those of light work activity on a sustained basis. In assessing the total limiting effects of your impairment(s) and any related symptoms, we will consider all of the medical and nonmedical evidence, including the information described in § 416.929(c).

§ 416.946 Responsibility for assessing and determining residual functional capacity.

The State agency staff medical or psychological consultants or other medical or psychological consultants designated by the Commissioner are responsible for ensuring that the State agency makes a decision about your residual functional capacity. In cases where the State agency makes the disability determination, a State agency staff medical or psychological consultant must assess residual functional capacity where it is required. This assessment is based on all of the evidence we have, including any statements regarding what you can still do that have been provided by treating or examining physicians, consultative physicians, or any other medical or psychological consultant desig-

nated by the Commissioner. See § 416.945. For cases in the disability hearing process, the responsibility for deciding your residual functional capacity rests with either the disability hearing officer or, if the disability hearing officer's reconsidered determination is changed under § 416.918, with the Director of the Office of Disability Hearings or his or her delegate. For cases at the Administrative Law Judge hearing or Appeals Council level, the responsibility for deciding your residual functional capacity rests with the Administrative Law Judge or Appeals Council.

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§ 416.960 When your vocational background will be considered.

(a) *General.* If you are age 18 or older and applying for benefits based on disability and we cannot decide whether you are disabled on medical evidence alone, we will consider your residual functional capacity together with your vocational background.

(b) *Past relevant work.* We will first compare your residual functional capacity with the physical and mental demands of the kind of work you have done in the past. If you still have the residual functional capacity to do your past relevant work, we will find that you can still do your past work, and we will determine that you are not disabled, without considering your vocational factors of age, education, and work experience.

(c) *Other work.* If we find that you can no longer do the kind of work you have done in the past, we will then consider your residual functional capacity together with your vocational factors of age, education, and work experience to determine whether you can do other work.

By other work we mean jobs that exist in significant numbers in the national economy.

§ 416.961 Your ability to do work depends upon your residual functional capacity.

If you can do your previous work (your usual work or other applicable past work), we will determine that you are not disabled. However, if your residual functional capacity is not enough to enable you to do any of your previous work, we must still decide if you can do any other work. To do this, we consider your residual functional capacity, and your age, education, and work experience. Any work (jobs) that you can do must exist in significant numbers in the national economy (either in the region where you live or in several regions of the country). Sections 416.963-416.965 explain how we evaluate your age, education, and work experience when we are deciding whether or not you are able to do other work.

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§ 416.963 Your age as a vocational factor.

(a) *General.* "Age" means your chronological age. When we decide whether you are disabled under § 416.920(f)(1), we will consider your chronological age in combination with your residual functional capacity, education, and work experience; we will not consider your ability to adjust to other work on the basis of your age alone. In determining the extent to which age affects a person's ability to adjust to other work, we consider advancing age to be an increasingly limiting factor in the person's ability to make such an adjustment, as we explain in paragraphs (c) through (e) of this section. If you are unemployed but you still have the

ability to adjust to other work, we will find that you are not disabled. In paragraphs (b) through (e) of this section and in appendix 2 of subpart P of part 404 of this chapter, we explain in more detail how we consider your age as a vocational factor.

(b) *How we apply the age categories.* When we make a finding about your ability to do other work under § 416.920(f)(1), we will use the age categories in paragraphs (c) through (e) of this section. We will use each of the age categories that applies to you during the period for which we must determine if you are disabled. We will not apply the age categories mechanically in a borderline situation. If you are within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.

(c) *Younger person.* If you are a younger person (under age 50), we generally do not consider that your age will seriously affect your ability to adjust to other work. However, in some circumstances, we consider that persons age 45-49 are more limited in their ability to adjust to other work than persons who have not attained age 45. See Rule 201.17 in appendix 2 of subpart P of part 404 of this chapter.

(d) *Person closely approaching advanced age.* If you are closely approaching advanced age (age 50-54), we will consider that your age along with a severe impairment(s) and limited work experience may seriously affect your ability to adjust to other work.

(e) *Person of advanced age.* We consider that at advanced age (age 55 or older) age significantly affects a person's ability to adjust to other work. We have special rules for persons of advanced age and for persons in this category who are closely approaching retirement age (age 60-64). See § 416.968(d)(4).

(f) *Information about your age.* We will usually not ask you to prove your age. However, if we need to know your exact age to determine whether you get disability benefits, we will ask you for evidence of your age.

§ 416.964 Your education as a vocational factor.

(a) *General. Education* is primarily used to mean formal schooling or other training which contributes to your ability to meet vocational requirements, for example, reasoning ability, communication skills, and arithmetical ability. However, if you do not have formal schooling, this does not necessarily mean that you are uneducated or lack these abilities. Past work experience and the kinds of responsibilities you had when you were working may show that you have intellectual abilities, although you may have little formal education. Your daily activities, hobbies, or the results of testing may also show that you have significant intellectual ability that can be used to work.

(b) *How we evaluate your education.* The importance of your educational background may depend upon how much time has passed between the completion of your formal education and the beginning of your physical or mental impairment(s) and by what you have done with your education in a work or other setting. Formal education that you completed many years before your impairment began, or unused skills

and knowledge that were a part of your formal education, may no longer be useful or meaningful in terms of your ability to work. Therefore, the numerical grade level that you completed in school may not represent your actual educational abilities. These may be higher or lower. However, if there is no other evidence to contradict it, we will use your numerical grade level to determine your educational abilities. The term *education* also includes how well you are able to communicate in English since this ability is often acquired or improved by education. In evaluating your educational level, we use the following categories:

(1) *Illiteracy.* Illiteracy means the inability to read or write. We consider someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name. Generally, an illiterate person has had little or no formal schooling.

(2) *Marginal education.* Marginal education means ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs. We generally consider that formal schooling at a 6th grade level or less is a marginal education.

(3) *Limited education.* Limited education means ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. We generally consider that a 7th grade through the 11th grade level of formal education is a limited education.

(4) *High school education and above.* High school education and above means abilities in reasoning, arithmetic, and language skills acquired through formal

schooling at a 12th grade level or above. We generally consider that someone with these educational abilities can do semi-skilled through skilled work.

(5) *Inability to communicate in English.* Since the ability to speak, read and understand English is generally learned or increased at school, we may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who doesn't speak and understand English to do a job, regardless of the amount of education the person may have in another language. Therefore, we consider a person's ability to communicate in English when we evaluate what work, if any, he or she can do. It generally doesn't matter what other language a person may be fluent in.

(6) *Information about your education.* We will ask you how long you attended school and whether you are able to speak, understand, read and write in English and do at least simple calculations in arithmetic. We will also consider other information about how much formal or informal education you may have had through your previous work, community projects, hobbies, and any other activities which might help you to work.

§ 416.965 Your work experience as a vocational factor.

(a) *General. Work experience* means skills and abilities you have acquired through work you have done which show the type of work you may be expected to do. Work you have already been able to do shows the kind of work that you may be expected to do. We consider that your work experience applies when it was done within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful

activity. We do not usually consider that work you did 15 years or more before the time we are deciding whether you are disabled applies. A gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply. The 15-year guide is intended to insure that remote work experience is not currently applied. If you have no work experience or worked only *off-and-on* or for brief periods of time during the 15-year period, we generally consider that these do not apply. If you have acquired skills through your past work, we consider you to have these work skills unless you cannot use them in other skilled or semi-skilled work that you can now do. If you cannot use your skills in other skilled or semi-skilled work, we will consider your work background the same as unskilled. However, even if you have no work experience, we may consider that you are able to do unskilled work because it requires little or no judgment and can be learned in a short period of time.

(b) *Information about your work.* Under certain circumstances, we will ask you about the work you have done in the past. If you cannot give us all of the information we need, we will try, with your permission, to get it from your employer or other person who knows about your work, such as a member of your family or a co-worker. When we need to consider your work experience to decide whether you are able to do work that is different from what you have done in the past, we will ask you to tell us about all of the jobs you have had in the last 15 years. You must tell us the dates you worked, all of the duties you did, and any tools, machinery, and equipment you used. We will need to know about the amount of walking, standing, sitting, lifting

and carrying you did during the work day, as well as any other physical or mental duties of your job. If all of your work in the past 15 years has been arduous and unskilled, and you have very little education, we will ask you to tell us about all of your work from the time you first began working. This information could help you to get disability benefits.

§ 416.966 Work which exists in the national economy.

(a) *General.* We consider that work exists in the national economy when it exists in significant numbers either in the region where you live or in several other regions of the country. It does not matter whether—

(1) Work exists in the immediate area in which you live;

(2) A specific job vacancy exists for you; or

(3) You would be hired if you applied for work.

(b) *How we determine the existence of work.* Work exists in the national economy when there is a significant number of jobs (in one or more occupations) having requirements which you are able to meet with your physical or mental abilities and vocational qualifications. Isolated jobs that exist only in very limited numbers in relatively few locations outside of the region where you live are not considered *work which exists in the national economy.* We will not deny you disability benefits on the basis of the existence of these kinds of jobs. If work that you can do does not exist in the national economy, we will determine that you are disabled. However, if work that you can do does exist in the national economy, we will determine that you are not disabled.

(c) *Inability to obtain work.* We will determine that you are not disabled if your residual functional capacity and vocational abilities make it possible for you to do work which exists in the national economy, but you remain unemployed because of—

(1) Your inability to get work;

(2) Lack of work in your local area;

(3) The hiring practices of employers;

(4) Technological changes in the industry in which you have worked;

(5) Cyclical economic conditions;

(6) No job openings for you;

(7) You would not actually be hired to do work you could otherwise do, or;

(8) You do not wish to do a particular type of work.

(d) *Administrative notice of job data.* When we determine that unskilled, sedentary, light, and medium jobs exist in the national economy (in significant numbers either in the region where you live or in several regions of the country), we will take administrative notice of reliable job information available from various governmental and other publications. For example, we will take notice of—

(1) *Dictionary of Occupational Titles*, published by the Department of Labor;

(2) *County Business Patterns*, published by the Bureau of the Census;

(3) *Census Reports*, also published by the Bureau of the Census;

(4) *Occupational Analyses* prepared for the Social Security Administration by various State employment agencies; and

(5) *Occupational Outlook Handbook*, published by the Bureau of Labor Statistics.

(e) *Use of vocational experts and other specialists.* If the issue in determining whether you are disabled is whether your work skills can be used in other work and the specific occupations in which they can be used, or there is a similarly complex issue, we may use the services of a vocational expert or other specialist. We will decide whether to use a vocational expert or other specialist.

§ 416.967 Physical exertion requirements.

To determine the physical exertion requirements of work in the national economy, we classify jobs as *sedentary*, *light*, *medium*, *heavy*, and *very heavy*. These terms have the same meaning as they have in the *Dictionary of Occupational Titles*, published by the Department of Labor. In making disability determinations under this subpart, we use the following definitions:

(a) *Sedentary work.* Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

(b) *Light work.* Light work involves lifting no more than 20 pounds at a time with frequent lifting or

carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

(c) *Medium work.* Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work.

(d) *Heavy work* Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. If someone can do heavy work, we determine that he or she can also do medium, light, and sedentary work.

(e) *Very heavy work.* Very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. If someone can do very heavy work, we determine that he or she can also do heavy, medium, light, and sedentary work.

§ 416.968 Skill requirements.

In order to evaluate your skills and to help determine the existence in the national economy of work you are able to do, occupations are classified as unskilled, semi-skilled, and skilled. In classifying these occupations, we

use materials published by the Department of Labor. When we make disability determinations under this subpart, we use the following definitions:

(a) *Unskilled work.* Unskilled work is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. For example, we consider jobs unskilled if the primary work duties are handling, feeding and offbearing (that is, placing or removing materials from machines which are automatic or operated by others), or machine tending, and a person can usually learn to do the job in 30 days, and little specific vocational preparation and judgment are needed. A person does not gain work skills by doing unskilled jobs.

(b) *Semi-skilled work.* Semi-skilled work is work which needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require alertness and close attention to watching machine processes; or inspecting, testing or otherwise looking for irregularities; or tending or guarding equipment, property, materials, or persons against loss, damage or injury; or other types of activities which are similarly less complex than skilled work, but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly to do repetitive tasks.

(c) *Skilled work.* Skilled work requires qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity of material to be produced. Skilled work may require laying out work, estimating quality, determining the

suitability and needed quantities of materials, making precise measurements, reading blueprints or other specifications, or making necessary computations or mechanical adjustments to control or regulate the work. Other skilled jobs may require dealing with people, facts, or figures or abstract ideas at a high level of complexity.

(d) *Skills that can be used in other work (transferability)*–(1) *What we mean by transferable skills.* We consider you to have skills that can be used in other jobs, when the skilled or semi-skilled work activities you did in past work can be used to meet the requirements of skilled or semi-skilled work activities of other jobs or kinds of work. This depends largely on the similarity of occupationally significant work activities among different jobs.

(2) *How we determine skills that can be transferred to other jobs.* Transferability is most probable and meaningful among jobs in which—

(i) The same or a lesser degree of skill is required;

(ii) The same or similar tools and machines are used; and

(iii) The same or similar raw materials, products, processes, or services are involved.

(3) *Degrees of transferability.* There are degrees of transferability of skills ranging from very close similarities to remote and incidental similarities among jobs. A complete similarity of all three factors is not necessary for transferability. However, when skills are so specialized or have been acquired in such an isolated vocational setting (like many jobs in mining, agriculture, or fishing) that they are not readily usable in other

industries, jobs, and work settings, we consider that they are not transferable.

(4) *Transferability of skills for individuals of advanced age.* If you are of *advanced age* (age 55 or older), and you have a severe impairment(s) that limits you to *sedentary* or *light* work, we will find that you cannot make an adjustment to other work unless you have skills that you can transfer to other skilled or semiskilled work (or you have recently completed education which provides for direct entry into skilled work) that you can do despite your impairment(s). We will decide if you have transferable skills as follows. If you are of advanced age and you have a severe impairment(s) that limits you to no more than *sedentary* work, we will find that you have skills that are transferable to skilled or semiskilled sedentary work only if the sedentary work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of tools, work processes, work settings, or the industry. (See § 416.967(a) and Rule 201.00(f) of appendix 2 of subpart P of part 404 of this chapter.) If you are of advanced age but have not attained age 60, and you have a severe impairment(s) that limits you to no more than light work, we will apply the rules in paragraphs (d)(1) through (d)(3) of this section to decide if you have skills that are transferable to skilled or semiskilled light work (see § 416.967(b)). If you are *closely approaching retirement age* (age 60-64) and you have a severe impairment(s) that limits you to no more than *light* work, we will find that you have skills that are transferable to skilled or semiskilled light work only if the light work is so similar to your previous work that you would need to make very little, if any, vocational adjustment in terms of

tools, work processes, work settings, or the industry. (See § 416.967(b) and Rule 202.00(f) of appendix 2 of subpart P of part 404 of this chapter.)

§ 416.969 Listing of Medical-Vocational Guidelines in Appendix 2 of Subpart P of Part 404 of this chapter.

The *Dictionary of Occupational Titles* includes information about jobs (classified by their exertional and skill requirements) that exist in the national economy. Appendix 2 provides rules using this data reflecting major functional and vocational patterns. We apply these rules in cases where a person is not doing substantial gainful activity and is prevented by a severe medically determinable impairment from doing vocationally relevant past work. The rules in Appendix 2 do not cover all possible variations of factors. Also, as we explain in § 200.00 of Appendix 2, we do not apply these rules if one of the findings of fact about the person's vocational factors and residual functional capacity is not the same as the corresponding criterion of a rule. In these instances, we give full consideration to all relevant facts in accordance with the definitions and discussions under vocational considerations. However, if the findings of fact made about all factors are the same as the rule, we use that rule to decide whether a person is disabled.

§ 416.969a Exertional and nonexertional limitations.

(a) *General.* Your impairment(s) and related symptoms, such as pain, may cause limitations of function or restrictions which limit your ability to meet certain demands of jobs. These limitations may be exertional, nonexertional, or a combination of both. Limitations are classified as exertional if they affect your ability to

meet the strength demands of jobs. The classification of a limitation as exertional is related to the United States Department of Labor's classification of jobs by various exertional levels (sedentary, light, medium, heavy, and very heavy) in terms of the strength demands for sitting, standing, walking, lifting, carrying, pushing, and pulling. Sections 416.967 and 416.969 explain how we use the classification of jobs by exertional levels (strength demands) which is contained in the Dictionary of Occupational Titles published by the Department of Labor, to determine the exertional requirements of work which exists in the national economy. Limitations or restrictions which affect your ability to meet the demands of jobs other than the strength demands, that is, demands other than sitting, standing, walking, lifting, carrying, pushing or pulling, are considered nonexertional. Sections 416.920(f) and 416.994(b)(5)(viii) explain that if you can no longer do your past relevant work because of a severe medically determinable impairment(s), we must determine whether your impairment(s), when considered along with your age, education, and work experience, prevents you from doing any other work which exists in the national economy in order to decide whether you are disabled (§ 416.920(f)) or continue to be disabled (§ 416.994(b)(5)(viii)). Paragraphs (b), (c), and (d) of this section explain how we apply the medical-vocational guidelines in appendix 2 of subpart P of part 404 of this chapter in making this determination, depending on whether the limitations or restrictions imposed by your impairment(s) and related symptoms, such as pain, are exertional, nonexertional, or a combination of both.

(b) *Exertional limitations.* When the limitations and restrictions imposed by your impairment(s) and

related symptoms, such as pain, affect only your ability to meet the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing, and pulling), we consider that you have only exertional limitations. When your impairment(s) and related symptoms only impose exertional limitations and your specific vocational profile is listed in a rule contained in Appendix 2, we will directly apply that rule to decide whether you are disabled.

(c) *Nonexertional limitations.* (1) When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the demands of jobs other than the strength demands, we consider that you have only nonexertional limitations or restrictions. Some examples of nonexertional limitations or restrictions include the following:

(i) You have difficulty functioning because you are nervous, anxious, or depressed;

(ii) You have difficulty maintaining attention or concentrating;

(iii) You have difficulty understanding or remembering detailed instructions;

(iv) You have difficulty in seeing or hearing;

(v) You have difficulty tolerating some physical feature(s) of certain work settings, e.g., you cannot tolerate dust or fumes; or

(vi) You have difficulty performing the manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching.

(2) If your impairment(s) and related symptoms, such as pain, only affect your ability to perform the non-

exertional aspects of work-related activities, the rules in appendix 2 do not direct factual conclusions of disabled or not disabled. The determination as to whether disability exists will be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations in appendix 2.

(d) *Combined exertional and nonexertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and de mands of jobs other than the strength demands, we consider that you have a combination of exertional and nonexertional limitations or restrictions. If your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we will not directly apply the rules in appendix 2 unless there is a rule that directs a conclusion that you are disabled based upon your strength limitations; otherwise the rules provide a framework to guide our decision.