

NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)

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Jo Anne B. Barnhart
Commissioner of Social Security
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Filed via <http://policy.ssa.gov>

Re: Age as a Factor in Evaluating Disability, 70 Fed. Reg. 67101 (Nov. 4, 2005)

Dear Commissioner Barnhart:

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR) in response to the proposed rules published at 70 Fed. Reg. 67101 (Nov. 4, 2005). These proposed rules increase the age categories used in making disability determinations.

NOSSCR is a membership organization of more than 3,500 attorneys and others from across the country who represent claimants for Social Security and Supplemental Security Income (SSI). Collectively, we have many years of experience in representing claimants at every level of the administrative and judicial process. NOSSCR is committed to providing the highest quality representation and advocacy on behalf of persons seeking Social Security and SSI benefits.

As advocates for people with disabilities, we are extremely concerned about the detrimental impact of these changes on vulnerable individuals with disabilities and the disparate impact on specific groups. **For the reasons set forth below, we strongly oppose these changes and urge that they be withdrawn.**

SSA justifies the change using erroneous and misleading logic. SSA argues that, since there is evidence that the average health of older workers has improved and many older persons are working, the age categories in the disability grids should be adjusted upward.

Indeed, while the proposed regulation cites much evidence that would justify an increase in the retirement age, this evidence has little to do with the ability to work of persons with severe health problems, who are not working and have applied for disability benefits. That is, the average health of a population reveals little about the individuals who apply for disability benefits, who

by definition are not enjoying the average health of the population at large. For them, the “minimal increase” in the age categories is extremely detrimental.

According to the proposed rule’s preface, SSA believes that

[I]t is now appropriate to redraw the lines established in 1978 [when the Grids were published]... This minimal increase is a reasonable adjustment to reflect public health factors which have had significant positive effects on the health of older workers and their ability to do other work.

70 Fed. Reg. 67102. In the preface, SSA provides four reasons for the NPRM:

- (1) “Overwhelming evidence” that the average health of the elderly population is improving;
- (2) An increase in the number of older persons working because of an increase in “healthy, active years” and opportunities for individuals with disabilities to work;
- (3) Congress’ acknowledgment that “it is both reasonable and necessary for people to work longer before retiring”; and
- (4) SSA’s adjudicative experience with the Medical-Vocational Guidelines (“the grids”) which “suggests” changes to “more accurately reflect the ages at which adjustment to other work becomes increasingly difficult.”

We address below each of the four reasons in the NPRM preamble and explain why they do not provide supportable grounds for the age increase.

I. IMPROVEMENTS IN THE HEALTH OF THE ELDERLY POPULATION HAVE NOT BEEN UNIFORM.

The preface cites to a number of studies and reports that “there is clear and overwhelming evidence that the average health of the elderly population is improving.” According to these selected reports: (1) Adults over age 65 are reporting significant improvement in their ability to perform their activities of daily living and in their functional limitations; and (2) There has been a decline in disability among those over age 50, with “significant and consistent improvement” regarding functional limitations.

While the “average” health of older persons has improved, these improvements have not been uniform. The literature is replete with studies showing that major differences in disability rates still exist among various demographic groups. Socioeconomic status, which is based on occupation, education, and income, is a strong predictor for whether the disability rate has improved, or worsened, for certain groups. And, these factors come into play regarding the disability rates based on race or ethnicity. Unfortunately, the disability rates still remain much higher for blacks and Native Americans than for whites.

For individuals with disabilities who have the most adverse vocational characteristics, the impact of increasing the age categories will not be “minimal.” Further, the proposed change will have a disparate impact on individuals in certain racial and ethnic minorities.

A. Individuals with Lower Educational Levels Have Higher Disability Rates Which is Acknowledged by the Current Regulations.

There is a strong relationship between educational attainment and disability rates. “Inequalities in education and income underlie many health disparities in the United States... [P]opulation groups that suffer the worst health status also are those that have the highest poverty rates and the least education.”¹ “Recent health gains for the U.S. population as a whole appear to reflect the achievements among the higher socioeconomic groups; lower socioeconomic groups continue to lag behind.”²

Individuals with a high school or less education have higher disability rates than those individuals with a college education. “Research has shown that having a college degree is often closely tied to other outcomes such as higher income and better health.”³ Indeed, these disparities are not limited only to disability rates. For persons aged 25-64, the overall death rate for individuals with less than 12 years of education is more than twice that for people with 13 or more years of education.

Several significant government reports clearly establish the fact that those with lower education levels and income levels suffer from poorer health and work disability.

Summary Health Statistics for the U.S. Population: National Health Interview Survey, 2003.⁴ This recent report underscores the relationship of socioeconomic factors and disability:

- The percent of persons in excellent health increases with increased levels of education and income;
- Persons with the least education and lowest income are most likely to have an activity limitation. Poor adults are three to four times as likely as nonpoor adults to require help with activities of daily living; and
- Most relevant to these comments, persons with the least education and lowest income are the most likely to be unable to work due to health problems.⁵

Congressional Budget Office.⁶ This 2004 report uses data from a national survey to provide information about individuals who leave the labor force before age 62 and their sources of income. “Survey responses indicate that the circumstances of men and women not in the labor force because of a disability were quite different from those of the men and women who had

¹ *Healthy People 2010: A Systematic Approach to Health Improvement* at 6 (“*Healthy People 2010*”). Accessed at www.healthypeople.gov/document.

² *Healthy People 2010* at 7.

³ Government Accountability Office (GAO), *Older Workers: Labor Can Help Employers and Employees Plan Better for the Future*, GAO-06-80 (Dec. 2005), p. 21 n. 28 (“GAO-06-80”).

⁴ Vital and Health Statistics, Series 10, No. 224 (April 2005), U.S. Dept. of HHS, CDC, Nat’l Center for Health Statistics.

⁵ *Id.* at pp. 4-5.

⁶ Ralph E. Smith, *Disability and Retirement: The Early Exit of Baby Boomers from the Labor Force* (Congressional Budget Office, Nov. 2004)(“CBO”).

retired.” The report finds that individuals who leave work because of disability have a much lower median income and higher poverty rates, and are much less likely to have a high school education.⁷ Disability was cited as the most frequent reason for leaving the labor force – it was the reason for two-thirds of men and two-fifths of women. Compared to retired workers, people who leave work due to disability have a much lower education level: 34% of men (vs. 11% of retired men) and 40% of women (vs. 15% of retired women) did not have a high school diploma.

Recent reports by AARP also establish the strong relationship between educational levels and disability rates. “Education can influence the likelihood of having a disability, and having a disability can influence educational opportunities.”⁸ Another report that surveys data on disability rate declines concluded that the data “found that only those with more than 12 years of education experienced significant declines in disability rates.”⁹ In fact, the disability rate for those with more than 12 years of education may be about one-half the rate for those less educated.¹⁰

B. Individuals with Lower Income Levels Have Higher Disability Rates.

The previous section discusses the correlation between low education, low income, and higher disability rates. While it focuses on education, “[i]ncome and education are intrinsically related and often serve as proxy measures for each other...”¹¹ Many of the studies and reports discussed above also corroborate the fact that low income leads to poorer health and higher disability rates, establishing that lower socioeconomic groups, the very individuals who benefit most from the grids, continue to lag behind the higher socioeconomic groups.¹²

C. Some Racial and Ethnic Groups Have Higher Disability Rates Due to Overall Low Education and Income Levels.

One of the most troubling aspects of the preface to this NPRM is the way it generalizes about data on improved health for older individuals. Unfortunately, significant racial differences in health status exist in reasons for leaving the labor force. Nonwhites report in much larger numbers that disability, versus retirement, is the reason. Policy makers should be cautioned about drawing conclusions from statistical averages when data for different races are pooled.

Many recent reports look at racial disparities in the health and disability rates of whites and nonwhites in the United States. The findings are striking and demonstrate the disparate impact of the proposed change in the NPRM on certain racial groups. Older blacks have higher disability rates than whites and others. While Hispanics and Asians seem to have somewhat lower rates, Native Americans and Alaskans much higher rates than whites.

⁷ *Id.* at 3.

⁸ AARP, *Beyond 50: A Report to the Nation on Independent Living and Disability* (2003), p. 43. Available online at: <http://www.aarp.org/research/housing-mobility/homecare/Articles/aresearch-import-752-D17817.html>.

⁹ Donald L. Redfoot, Ph.D. and Sheel M. Pandya, M.P.H., *Before the Boom: Trends in Long-Term Supportive Services for Older Americans with Disabilities*, AARP Public Policy Institute, Pub. No. 2002-15 (Oct. 2002), p. 16. Available online at: <http://www.aarp.org/research/health/disabilities/aresearch-import-568-2002-15.html>.

¹⁰ *Id.* at 16-17.

¹¹ *Healthy People 2010* at 6.

¹² *Id.* at 7.

While the intent of this NPRM is not to discriminate against certain racial groups, the impact of raising the age categories most assuredly leads to a perception of discrimination if the proposed rule is adopted.

Two studies presented at SSA-sponsored symposia on SSI provide graphic findings regarding the racial disparities in health that continue to exist in this country. One study analyzes the significance of socioeconomic status in explaining the race gap in chronic health conditions by looking at the rise of health problems among middle-aged (age 51-63) blacks and whites.¹³ The following are key findings of this report:

- Blacks live fewer years than any other group and live more years with a chronic health problem.
- Although blacks are not disadvantaged across all medical conditions, the prevalence of functional limitation is substantially higher than for whites.
- All forms of disability are more prevalent among blacks than whites, including significantly higher incidence rates of work disability.
- Health restrictions severely limit the ability of blacks to engage in economic and domestic productive activities during their peak earnings years.
- The level of disease prevalence that blacks experience in their early fifties is not experienced by whites until their mid to late sixties.
- **Blacks' lower levels of income increase the chances that chronic health conditions are disabling.** "Blacks experience extraordinary rates of premature aging" which is caused by diminished economic well-being. Blacks' rates of economic achievement lag significantly behind whites, which in turn deprive blacks of good health relative to whites.
- Since low income is a key indicator of disability and blacks are over-represented in poor households, they experience a broad range of health problems at ages decades younger than whites.

The second study analyzes racial inequality in active life among adults, taking a close look at disability prevalence based on race.¹⁴ A significant finding compares disability rates between racial/ethnic groups:

- The highest rate is for Native Americans. At ages 30-34, 12% report being disabled.
- The rate for blacks is only "marginally lower," reaching the same level of disability in their late 30's.
- Hispanics and whites do not reach the same level of disability until ages 50-54.
- Asian Americans have the lowest rate, not reaching the same level of disability until age 60.

¹³ Mark D. Hayward and Eileen M. Crimmins, *The Significance of Household Income and Wealth in Explaining the Race Gap in Chronic Health Conditions*, presented at Symposium on Long Range Issues Facing the Social Security Supplemental Security Income Program, October 23-24, 1997. This study was revised and published in the journal, *American Sociological Review*, Vol. 65, No. 6, pages 910-930 (2000).

¹⁴ Mark D. Hayward and Melonie Heron, *Racial Inequality in Active Life Among Adult Americans*, presented at *Academic Symposium: Future Demographic Trends on Supplemental Security Income*, December 3-4, 1998. The symposium was a collaboration between the Howard University School of Social Work and the Social Security Administration Office of Policy. This study was published in the journal, *Demography*, Vol. 35, No. 1, pages 77-91 (1999).

Like the report discussed above, the study finds that black men can expect to live the fewest years with a higher percentage of life spent in poor health compared to other race groups. Native Americans live longer than blacks but the difference is spent living with a chronic health problem.

Relevant to this NPRM, the study asks the key question: Does longer life mean better health? The answer: It depends. “[T]he link between morbidity and mortality is neither as simple nor closely timed as sometimes implied... Stated simply, longer life does not necessarily lead to better or worse health – it all depends. In this case, the relationship depends on the race/ethnic group.”¹⁵ The study finds that the most disadvantaged group is blacks: They live substantially fewer years than other groups and they live a higher proportion of those years with a chronic health impairment.

II. CHANGES IN THE WORKFORCE HAVE NOT INCREASED WORK OPPORTUNITIES FOR ALL OLDER INDIVIDUALS.

Based on the studies it cited in the NPRM preface showing an increase in “healthy, active years,” SSA again refers to a general shift among older adults who are working past 65. SSA also states that economic and social changes have increased opportunities for individuals with disabilities to work. As discussed in the previous section, the agency should exercise caution in generalizing about the ability of older persons to work and remain in the labor force.

The NPRM preface infers that older workers can remain in the labor force because, since the 1978 publication of the Grids, “the economy has shifted toward service and knowledge-based jobs that may allow for greater participation for *some* persons with physical limitations.” 70 Fed. Reg. 67102 (emphasis added). While it is generally acknowledged that there are fewer physically demanding jobs now, the relevance of this shift is questionable as it relates to older workers with disabilities who do not have the education or skills or ability to work in service or knowledge-based jobs.

Having disabilities is a consistently significant factor in determining work status. Rather than generalizing about older persons working longer, it is critical that SSA pay considerable attention to the circumstances of men and women who are no longer in the labor force because of a disability. The Congressional Budget Office (CBO) report found that of persons under age 62 who were not in the work force at any time in 2001, 64% of men and 40% of women stated that the reason was due to disability. Most had worked before withdrawing from the labor force and few had subsequent earnings.¹⁶

As pointed out by the CBO, their circumstances are “quite different from those of the men and women who had retired” – they have lower income, higher poverty rates, and fewer assets. They are more dependent on disability benefits – about 80% receive SSDI and/or SSI.¹⁷ Another significant finding is that they have less choice about deciding not to work than those who retire.¹⁸

¹⁵ *Id.* at 11.

¹⁶ CBO at 16.

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 9.

Similarly, the Government Accountability Office (GAO) found that “[h]ealth was the most-often cited constraint on work and retirement decisions by [focus group] participants without college degrees.” These individuals had no choice but to leave or limit work when they did because of health problems.¹⁹

The GAO report also finds that the majority of workers age 55-74 are in white collar and service occupations and points out that their movement is away from blue collar work, which is generally more physically demanding. An earlier GAO report found that the majority of older workers who stop working do not re-enter the labor force.²⁰ Clearly, health and disability status and the physical demands of their job play a major role. “[W]orkers in poor health are less able to continue working, and retirees in poor health are less able to have worked longer than they did.”²¹ For many older workers in physically demanding jobs, they eventually reach their physical limits and can no longer work.

Other reasons cited by SSA to support the NPRM are the “economic and social changes [which] have also increased opportunities for individuals to participate in the workforce.” 70 Fed. Reg. 67102. In these comments, we have previously cautioned the agency about generalizations regarding the ability of persons with disabilities to work. Many people surviving injuries, disabling diseases or traumatic accidents live with significant disabilities but do not have access to state-of-the-art services or medical advances, resulting in broad discrepancies in work opportunities.

There also needs to be a recognition that advances in medical treatment or technological innovations or expansions/improvements in labor market conditions are likely to benefit those persons with disabilities who have a high level of education and/or work experience and whose disabilities are relatively easy to accommodate. Further, such advances may not necessarily work for those with severe cognitive or mental disabilities, communications difficulties, multiple impairments, or other adverse vocational factors.

And even if these older workers could continue in the labor force, the general job environment is not yet conducive to hiring and retaining older workers. The GAO recently found that while some employers make a special effort to hire and retain older workers, most do not, including the federal government, which is usually considered ahead of the curve on employment issues.²²

III. THE REASONS FOR INCREASING THE RETIREMENT AGE DO NOT APPLY TO THE DISABILITY PROGRAM.

The retirement age is gradually increasing from age 65 to age 67 over the next 22 years (it will be age 66 in 2009 and age 67 in 2027). SSA cites this statutory change (passed by Congress in 1983) as Congress’ acknowledgment “that it is both reasonable and necessary for people to work

¹⁹ GAO 06-80 at 19.

²⁰ Government Accountability Office, *Older Workers: Demographic Trends Pose Challenges for Employers and Workers*, GAO 02-85 (Nov. 2001), p. 19.

²¹ Cori E. Uccello, *Factors Influencing Retirement: Their Implications for Raising Retirement Age*, AARP Public Policy Institute, Pub. No. 9810 (Oct. 1998), p. 7. Available online at:

<http://www.aarp.org/research/work/retirement/aresearch-import-283-9810.html>.

²² GAO 06-80 at 26-27.

longer before retiring.” 70 Fed. Reg. 67103. However, it is inappropriate for the agency to infer that Congress’ reasons for increasing the retirement age increase apply as well to increasing the age for disability determinations.

In fact, it can be argued that Congress has spoken on this issue, taking a position that undermines that taken by the agency in the NPRM. The NPRM preface states that “Congress has not made policy decisions with respect to age and its relationship to the determination of disability.” 70 Fed. Reg. 67103.

This statement ignores the fact that Congress has made a decision on this very issue by not acting to make a change. Widows and widowers between the ages of 50 and 59 are eligible for benefits if they are disabled, using the same standard that applies to disabled workers. 42 U.S.C. § 402(e)(1)(B)(ii). For this group, Congress has *not* changed the age in the statute. The fact that Congress has not acted to change the age of eligibility for disabled widows and widowers provides strong evidence of the NPRM’s inappropriateness in applying the reasons for increasing the retirement age to substantiate increasing the age categories for disability determinations.

[In addition, Congress’s retention of the age 50 to 59 statutory age category for disabled surviving spouse benefits raises the question: how would the proposed change in the age categories affect disabled widows and widowers? The regulatory change could not apply to surviving spouses in light of the statutory provision.]

What is the relationship, if any, between the retirement age and age as it relates to disability? As discussed above, SSA should proceed very cautiously in generalizing and applying average statistics to the population as a whole, since the improvements in health and ability to work have not been uniform for all segments of the population. As noted by AARP: “More years of life expectancy do not necessarily translate into more years of active life expectancy, the number of years one might expect to live without a disability.”²³ A study looking at racial inequality in active life among adults asks the key question: Does longer life mean better health? Once again, the answer is “it depends”:

[T]he link between morbidity and mortality is neither as simple nor closely timed as sometimes implied...Stated simply, longer life does not necessarily lead to better or worse health – it all depends.²⁴

In referring to the proposed age change as a “minimal” increase, the agency inappropriately diminishes the critical importance of the Social Security and SSI disability programs to disabled workers and their families. Over 7 million people with disabilities, their spouses, and children receive Title II benefits. People can plan for retirement over many years. But disability affects anyone at any time and often is completely unexpected. People with disabilities need Social Security benefits because:

- Millions of families face disability. About 3 in 10 men and 1 in 4 women become disabled before reaching normal retirement age.
- Adults with serious disabilities have a very low employment rate. According to a 2004 Harris Survey, only 35 percent of people with disabilities reported working full or part

²³ AARP, *Beyond 50* at 39.

²⁴ *Id.* at 11.

time, compared to 78 percent of those who do not have disabilities. Disabilities can interfere with the ability to work until normal retirement age and save for a family's future.

Although Social Security reduces poverty, disabled workers and their families still struggle financially. But without Social Security, their circumstances would be even worse:

- The poverty rate among disabled workers who receive Social Security and their families is twice as high as the rate for other Social Security beneficiaries. However, it is estimated that 55 percent of families of disabled workers would live in poverty without Social Security benefits.
- Social Security is half or more of the total family income for about one in two disabled worker beneficiaries.

The recent CBO report shows how important these benefits are to older workers who leave the labor force before age 62 due to disability. These individuals, aged 50-61, have a higher poverty rate than their counterparts of the same age who left the labor force by choice to retire.

- Retired workers living in poverty: 15% of men; 14% of women
- Disabled workers living in poverty: 24% of men; 34% of women

The fact that SSDI benefits keep older workers out of poverty is very apparent when the percentage of beneficiaries receiving these benefits is compared to the above percentage of these workers living in poverty. The percentage living of disabled workers living in poverty is much lower than the percentage receiving SSDI benefits:

- 64% of men received SSDI and 37% received SSI; overall, 82% received either SSDI and/or SSI
- 58% of women received SSDI and 44% received SSI; overall, 79% received either SSDI and/or SSI

The full impact of receiving these benefits is further reflected in the fact that SSDI and SSI benefits were a main source of income for disabled men and women.²⁵

IV. SSA'S "ADJUDICATIVE EXPERIENCE" DOES NOT SUPPORT INCREASING THE DISABILITY AGE CATEGORIES.

SSA asserts that its own adjudicative experience "suggests that the current rules should be revised to more accurately reflect the ages at which adjustment to other work becomes increasingly difficult." 70 Fed. Reg. 67103. This "adjudicative experience" is based on the agency's millions of step five determinations. "It appears that there are many jobs that individuals, despite their age, are capable of performing and adjusting to, even though they have not done those jobs previously." *Id.*

²⁵ CBO at 10-11.

One example to support this conclusion is provided: Individuals who can perform “light” work can generally do all tasks associated with sedentary work. The Grids “nevertheless require a finding of ‘disabled’ for individuals who are age 55 and over” and can still do a full range of light work, unless they have transferable skills or recent education leading to skilled work.

A closer look at the example provided does not provide support for increasing the age categories.

First, this example (and the rest of the NPRM preface) fails to recognize that the Grids are a set of rules that consider the vocational factors required by the statute. They are calibrated to benefit those individuals with the most adverse vocational factors:

[The guidelines] consist of a matrix of the four factors identified by Congress – physical ability, age, education, and work experience – and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy.²⁶

In a large body of well-developed case law, the courts have recognized that these four vocational factors must be evaluated together to develop a vocational profile that indicates whether or not an individual can make a successful vocational adjustment.²⁷ The courts also recognize that there is a direct relationship between age and the likelihood for employment.²⁸

Second, the example infers that the rules are too liberal in who will be found “disabled.” But who exactly are these individuals? Under the “Light Work” rules, the individuals who would be found “disabled” have the most adverse vocational factors.

“Advanced Age” -- Age 55-59:

- Less than a high school education and unskilled past work
- Less than a high school education and no transferable skills from semi-skilled or skilled past work
- High school education which does not provide for direct entry into skilled work and unskilled past work
- High school education which does not provide for direct entry into skilled work and no transferable skills from semi-skilled or skilled past work

For those under age 55, there is only **one** rule that leads to a finding of “disabled,” which is extremely limited – the individual must be age 50-54 and illiterate or unable to communicate in English with an unskilled or no past work history. All other claimants will be found “not disabled.”

The “Sedentary Work” rules include a few more categories of individuals who will be found “disabled” since sedentary work “represents a significantly restricted range of work.”²⁹ These rules extend the categories listed above for light work to individuals age 50-54. And the one category for persons who are illiterate or unable to communicate in English is extended to

²⁶ *Heckler v. Campbell*, 461 U.S. 458, 461-62 (1983).

²⁷ *See, e.g., Draeger v. Barnhart*, 311 F.3d 468 (2nd Cir. 2002); *Sykes v. Apfel*, 228 F.3d 259 (3rd Cir. 2000).

²⁸ *See, e.g., Varley v. Sec’y of Health and Human Services*, 820 F.2d 777 (6th Cir. 1987).

²⁹ 20 C.F.R. Part 404, Subpt. P. App. 2, § 201.00.

persons age 45-49. This list summarizes who will be found “disabled” under the sedentary work rules:

Age 50-59:

- Less than a high school education and unskilled past work
- Less than a high school education and no transferable skills from semi-skilled or skilled past work
- High school education which does not provide for direct entry into skilled work and unskilled past work
- High school education which does not provide for direct entry into skilled work and no transferable skills from semi-skilled or skilled past work

Age 45-49:

- Illiterate or unable to communicate in English with an unskilled or no past work history.

These rules reflect some of the key factors discussed earlier in these comments: low education is an adverse vocational factor; lack of transferable skills is an adverse vocational factor; being limited to sedentary work is an adverse vocational factor. When these three factors are combined, the Grids recognize that the occupational base is so restricted that a finding of “disabled” is warranted.

The NPRM preface states that “there are many jobs that individuals, despite their age, are capable of performing and adjusting to, even though they have not done those jobs previously.” As another reason for changing the age categories, the NPRM preface mentions that there was “no hard data” to support the original age categories in 1978. 70 Fed. Reg. 67103. Yet the NPRM preface provides no “hard data” or cogent explanation how individuals with these types of adverse vocational factors are better able to “adjust” to other work. In fact, SSA’s current regulations explaining the sedentary work rules³⁰ suggest just the opposite:

- “Sedentary work” represents a significantly restricted range of work, and individuals with a maximum sustained work capability limited to sedentary work have very serious functional limitations.
- The adversity of functional restrictions to sedentary work at advanced age (55 and over) for individuals with no relevant past work or who can no longer perform vocationally relevant past work and have no transferable skills warrants a finding of disability.
- Advanced age and a history of unskilled work or no work experience would ordinarily offset any vocational advantages that might accrue by reason of any remote past education, whether it is more or less than limited education.
- In order to find transferability of skills to skilled sedentary work for individuals who are of advanced age (55 and over), there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry.
- Individuals approaching advanced age (age 50-54) may be significantly limited in vocational adaptability if they are restricted to sedentary work.

³⁰ *Id.*

In 2003, SSA published proposed rules to clarify the education and previous work experience categories in the Grids.³¹ The changes were proposed:

[T]o ensure that our regulations clearly reflect our longstanding policy that, if you have skilled or semiskilled work experience, but you cannot use your skills in other work (i.e., your skills are not transferable to other work), your ability to adjust to other work is no greater than it would be if you had only unskilled work experience.

These proposed regulations also clarified SSA policy on the Grid rules that apply if the individual is illiterate or unable to communicate in English. We are concerned that these proposed changes have not yet been issued as final rules, since the current unclear regulatory language could lead to improper denials by SSA adjudicators. The proposed rules, if adopted, will lead to more consistent decision making and proper application of SSA policies for claimants with particularly adverse vocational characteristics.

CONCLUSION

Referring to the change in the U.S. economy since 1978, from one that is primarily a manufacturing based economy to one that is service based, SSA states in the NPRM preface: “We would be remiss in our stewardship responsibilities if we failed to acknowledge these important developments.” 70 Fed. Reg. 67103. Does SSA’s “stewardship” of the program also extend to restricting eligibility and thereby saving money? The budgetary impact for Title II, SSI, Medicare, and Medicaid is enormous, as there is a significant reduction in program outlays. See 70 Fed. Reg. 67107 for a detailed chart of the savings.

Like the other bases for the rule change discussed above, the preface fails to discuss, let alone acknowledge, the interplay between the various vocational factors used in the Grids – age, education, work experience, and RFC – whose rules must, by statute, be weighed in favor of those with more adverse vocational characteristics.

For the reasons discussed above, we urge that the proposed rule be withdrawn.

Very truly yours,

Nancy G. Shor
Executive Director

Ethel Zelenske
Director of Government Affairs

³¹ 68 Fed. Reg. 40213 (July 17, 2003).