

**NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)**

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Office of Program Development and Research
Occupational Information Development Project
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Submitted on www.regulations.gov

Re: Request for Comments on Occupational Information System, Docket No. SSA-2010-0018

Dear SSA Occupational Information Development Project:

We are submitting these comments on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR) in response to the Request for Comments on the recommendations submitted to the Social Security Administration (SSA) by the Occupational Information Development Advisory Panel" ("Panel") in its September 2009 report. 75 Fed. Reg. 23834 (May 4, 2010).

Founded in 1979, NOSSCR is a professional association of attorneys and other advocates who represent individuals seeking Social Security disability or Supplemental Security Income (SSI) benefits. NOSSCR members represent these individuals with disabilities in legal proceedings before the Social Security Administration and in federal court. NOSSCR is a national organization with over 3,900 members from the private and public sectors and is committed to the highest quality legal representation for claimants.

The objective and mission of the Panel is set forth in its Charter: To offer advice and recommendations on plans to replace the Dictionary of Occupational Titles (DOT); to advise SSA on creating an occupational information system (OIS) tailored specifically for SSA's disability programs and adjudicative needs; and to offer advice and recommendations to SSA in specified and other areas "that would enable SSA to develop

an occupational information system suited to its disability programs and improve the medical-vocational adjudication policies and processes.” Based on the Panel’s Charter, its primary mission is to advise SSA regarding medical-vocational analysis in the agency’s disability determination process.

We strongly support changes to make the process more efficient so long as those changes do not affect the fairness of the procedures used to determine a claimant’s entitlement to benefits. The purposes of the Social Security and SSI programs are to provide cash benefits to those who need them and have earned them and who meet the eligibility criteria. While there may be ways to improve the decision-making process from the perspective of the adjudicators, the critical measure for assessing initiatives for achieving administrative changes must be how they affect the very claimants and beneficiaries for whom the system exists.

The current framework used in the Social Security and SSI disability claims process takes into account the medical-vocational factors required by the statute and calibrates those factors to benefit individuals with the most adverse vocational factors. For instance, regarding the current Medical-Vocational Guidelines (“the Grid Rules”),¹ the United States Supreme Court has noted that:

[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.²

The Grid Rules acknowledge the interplay between the various vocational factors used in the Grids – age, education, work experience, and residual functional capacity (RFC). The rules must, by statute, be weighed in favor of those with more adverse vocational characteristics. For example, under SSA’s current framework, 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 Grid Rules recognize that the occupational base is so restricted that a finding of “disabled” is warranted.

If nonexertional limitations are involved, the Grid Rules do not apply directly, but do offer a framework, thus recognizing the difficulty in quantifying such limitations in any type of objective matrix. Other SSA policies, e.g., regulations and Social Security Rulings, provide the necessary guidance to adjudicators.

Given that the general framework works, it would be inappropriate to jettison the entirety of the current process if there are only specific parts of it that need to be changed. For example, everyone agrees that the concept of the DOT needs to be updated. That does not mean that the Panel should see that need as a reason to reform the framework as a whole.

¹ 20 C.F.R., Part 404, Subpt. P, App. 2.

² *Heckler v. Campbell*, 461 U.S. 458, 461-62 (1983).

We understand that the U.S. Department of Labor's (DOL) Occupational Information Network (O*NET) system is not totally suitable for SSA's disability determination process. Yet, it is reasonable to consider whether O*NET can be modified or parts of it used to meet SSA's needs. This approach would be faster, less expensive, less duplicative, and more objective.

However, instead of building on the O*NET and/or having the DOL survey the world of work, a job that is within its expertise, SSA has decided that it will take on this task. For SSA, this decision raises significant concerns: It is an enormous project that falls outside SSA's area of expertise; it will take years to complete; and it will be extremely expensive at a time of limited resources. In addition, the involvement of the DOL would address the perception that SSA wants to create its own OIS so that it can control the outcome of disability determinations.

We urge SSA to adopt the recent recommendations by the National Research Council of the National Academies of Science (NRC Report), that SSA and the DOL work together to study the viability of modifying O*NET to accommodate the needs of SSA with regard to disability determination.³

The NRC Report provides a number of cogent rationales for SSA collaborating with the DOL. Specifically, we support the following findings:

Given public demand for budgetary restraint and efficient government, which acquire additional importance in times of economic recession and slow economic growth, duplication in government functions should be prevented. Therefore, the development of parallel, possibly redundant, occupational information systems, one for general purposes termed O*NET and the other tailored to the needs of SSA, is of concern to taxpayers. In addition, dual data collection processes would seem unnecessarily expensive.

The panel is not advocating the adoption of O*NET by SSA or the development of a hybrid O*NET-Disability system in the disability determination process. However, we conclude that a considerably modified and expanded O*NET may be capable of informing the disability determination process. There are also some potential economies of scale to be derived from the development of a single occupational information system to be used by both agencies, which may allow cost-sharing of resources in such functions as data collection and system maintenance.

³ National Research Council (2010). *A Database for a Changing Economy: Review of the Occupational Information Network (O*NET)*, Panel to Review the Occupational Information Network (O*NET), Nancy T. Tippins and Margaret L. Hilton, editors. Committee on National Statistics, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. Available at www.nap.edu/catalog/12814.html.

NRC Report, p. 161. The NRC report concludes that “there are commonalities in the descriptors used in these two systems [SSA’s RFC descriptors and O*NET’s descriptors], even though substantial differences remain in the level of detail, specificity, and types of scales employed to measure them ... [T]he differences and similarities suggest that continued collaboration between DOL and SSA is in the interest of efficient use of government resources.” NRC Report, p. 168.

The NRC Report recommends that SSA and DOL create an interagency task force “to study the viability of potential modifications of O*NET to accommodate the needs of SSA with regard to disability determination.” The NRC Report recommends that the task force first “conduct (1) an in-depth needs analysis of the occupational information required by the current disability determination process and (2) an interagency cost-benefit and cost-sharing analysis of the additional resources that would be needed to make O*NET suitable to the disability determination process.” *Id.*

We recognize, as noted above, that O*NET is not suitable in its present form for use in the SSA disability determination process. A primary reason is the reduction from the DOT’s more than 12,000 occupational titles to the O*NET’s current 1,102 occupations. This point is recognized by the NRC Report, and it recommends that the DOL conduct further research “to determine whether and to what extent O*NET occupations represent excessively heterogeneous clusters of jobs (in terms of their physical and cognitive requirements) for purpose of disability determination.” *Id.*, p. 169.

Whether O*NET can provide a basis for SSA’s occupational information needs in its disability determination process is not clear at this time. But, for a number of reasons, we agree with the NRC Report that collaboration with the DOL is an avenue that SSA should explore in terms of “efficient use of government resources,” given the DOL’s expertise in the area of job analysis.

General Principles

We believe that the Panel should focus on the following general principles:

1. The DOT job descriptions should be updated to describe the jobs that exist in today’s economy.
2. The vocational factors identified in the Social Security Act (the Act) – age, education, work experience, and residual functional capacity – and the interplay between the factors must be included in any new or revised OIS used by SSA.
3. Evaluation of symptoms is unique to each individual claimant, cannot be quantified, and requires an individualized assessment. Current regulations and other SSA policy provide detailed guidance regarding the evaluation of subjective symptoms, including pain.⁴ Factors which must be included in the disability determination include:

⁴ See, e.g., 20 C.F.R. §§ 404.1529 and 416.929.

- Pain (which can impact physical exertional limits as well as focus and concentration);
- Fatigue (requiring extra rest breaks during work period);
- Reaching limitations;
- Manipulative functions, including circumstances where person has lost effective use of one upper extremity;
- Sensory loss (vision, hearing, feeling);
- Dizziness (often caused as a side effect of medications);
- Impairment of bodily functions requiring frequent restroom breaks;
- Balance limitations due to dizziness or physical impairments;
- Environmental limitations due to allergies;
- Mental demands (including level of task complexity; intensity of concentration, persistence, pace; types and intensity of interpersonal interactions with co-workers, supervisors, and public; and degree of stress in work).

4. As required by the Act, only those jobs existing in “significant” numbers that a claimant is able to perform in light of his/her age, education, work experience, and residual functional capacity should be identified.

5. Any changes in the framework for analyzing medical-vocational factors must ensure that individuals who meet the statutory definition of disability are found eligible for benefits. The process cannot be subject to eligibility criteria that could be susceptible to political pressures to exclude eligible applicants. We recommend that the Panel issue a “Beneficiary Impact Statement” to determine the impact of its proposed changes on applicant groups.

Comments

I. Update Job Descriptions

We received a number of comments from NOSSCR members regarding the need to update the job descriptions currently found in the DOT. Their comments are summarized below:

- Delete jobs that no longer exist in the national economy or no longer exist in “significant” numbers.
- Ensure that job tasks are consistent with required exertional levels.
- Ensure that the exertional levels of similar jobs in the same occupation groups are consistent with each other.
- Include jobs that now exist in significant numbers, e.g., computer/IT jobs.
- Update job descriptions for accuracy.
- Update job descriptions for jobs that still exist but are performed differently now, e.g., a worker may now need computer literacy.

- Identify whether a job is full-time or part-time. The Social Security Act makes clear that, for an individual who cannot do their past relevant work, SSA must show evidence of full-time jobs that the individual would be able to do. Some jobs that were previously full-time are now considered part-time.
- Consider whether the job includes task rotation. Supervisors in some jobs are required to perform more exertional tasks if necessary. For example, a restaurant manager may need to wait on tables and clear tables. A fire department supervisor may need to respond to a fire call.
- Obtain hard data on jobs that allow for a sit/stand option.
- Obtain hard data on unskilled sedentary jobs that exist in “significant” numbers.
- SSA should coordinate with other government agencies that maintain job census data to ascertain the existence of jobs in “significant” numbers.
- Social Security Ruling (SSR) 00-4p provides guidance to adjudicators in resolving conflicts between vocational expert testimony and the DOT. We believe that, as policy guidance, SSR 00-4p works well. SSR 00-4p provides that a vocational source can offer evidence that differs from the DOT, including information that is not found in the DOT. In that case, the adjudicator is required to resolve the conflict by determining whether the explanation provided by the vocational source or expert is “reasonable.”

II. Skills

The definition of “skill” in SSA’s regulations and other policies, e.g., SSR 82-41, should be retained. Under SSR 82-41, a “skill” is defined as:

... [K]nowledge of a work activity which requires the exercise of significant judgment that goes beyond the carrying out of simple job duties and is acquired through performance of an occupation which is above the unskilled level (requires more than 30 days to learn). It is practical and familiar knowledge of the principles and processes of an art, science or trade, combined with the ability to apply them in practice in a proper and approved manner. This includes activities like making precise measurements, reading blueprints, and setting up and operating complex machinery. A skill gives a person a special advantage over unskilled workers in the labor market.

As required by the regulations, SSA must look at the individual’s past relevant work history and determine the skill level of that work, if that work is semi-skilled or skilled, and whether the skills can be used in other work.

A revised occupational information system must recognize the existence of unskilled work. Hard data should be obtained regarding unskilled jobs at the sedentary and other exertional levels that currently exist in “significant” numbers in the national economy. Under SSR 82-41:

Skills are not gained by doing unskilled jobs, and a person has no special advantage if he or she is skilled or semiskilled but can qualify only for an unskilled job because his or her skills cannot be used to any significant degree in other jobs.

Regarding transferable skills, there is no software program that can answer the question whether skills are transferable. As noted by SSR 82-41:

The table rules in Appendix 2 [the Grids] are consistent with the provisions regarding skills because the same conclusion is directed for individuals with an unskilled work background and for those with a skilled or semiskilled work background whose skills are not transferable. A person's acquired work skills may or may not be commensurate with his or her formal educational attainment.

Given SSA's policy for evaluation of transferable skills, an individualized assessment is required. For example, under current regulations:

(1) For individuals age 50 to 54, a finding of disabled is warranted if claimant, limited to sedentary work, has a high school education which does not provide for direct entry into skilled work and has no transferable skills from semi-skilled or skilled past work.⁵

(2) 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.⁶

The regulations and SSR 82-41 provide guidance in determining transferability of skills, which is part of the larger issue of vocational adjustment. These agency policy directives make it clear that a generalized categorization, assuming that the individual has acquired certain skills, is inappropriate. The adjudicator must make an individualized assessment of the claimant, including consideration of exertional and nonexertional limitations, past work, whether any skills were acquired in semi-skilled or skilled past work, and whether the claimant's limitations allow acquired skills to be used in other jobs.

III. Mental Demands of Jobs

As noted above, evaluation of nonexertional limitations requires an individualized assessment. These types of limitations cannot be quantified, which is recognized by SSA regulations precluding the use of the Grid Rules if a claimant has only nonexertional impairments. This approach is particularly important for individuals with work limitations caused by mental impairments.

Any attempt to create a quantifiable matrix or rating system to be used in such cases would be subject to close scrutiny regarding its legality, in light of past policies implemented by SSA.

In the 1980s, SSA had an illegal, clandestine policy to deny the claims of individuals with mental impairments. The agency used a form to rate the severity of 17 signs and symptoms and decided the claim based on the numerical rating. An individualized

⁵ 20 C.F.R., Part 404, App. 2, § 201.00(g).

⁶ 20 C.F.R., Part 404, App. 2, § 201.00(f).

assessment of the individual's ability to work was not performed at any step of the process. Class actions were filed challenging this policy. The courts found the procedure unlawful because it used a presumption that did not provide for the evaluation of residual functional capacity required by law.⁷ We strongly oppose any type of rating system that would provide a "bright line" determining who is disabled and who is not, if they have nonexertional limitations.

Mental RFC. In response to the litigation and Congressional action in the 1980s, SSA changed its policies regarding the assessment of limitations caused by mental impairments. SSR 85-15 still provides crucial guidance in the evaluation of mental residual functional capacity, stating that the mental RFC finding requires "careful consideration."

SSR 85-15 describes the basic mental demands of competitive, remunerative, unskilled work:

- The ability (on a sustained basis) to understand, carry out, and remember simple instructions;
- The ability to respond appropriately to supervision, coworkers, and usual work situations; and
- The ability to deal with changes in a routine work setting.

"A substantial loss of ability to meet any of these basic work-related activities would severely limit the potential occupational base. This, in turn, would justify a finding of disability because even favorable age, education, or work experience will not offset such a severely limited occupational base."

We believe that the policy guidance regarding the basic mental demands of work in SSR 85-15 must be retained.

Stress. A particular job is not, in and of itself, stressful. It is the individual's response to stress that is critical in evaluating mental RFC. SSR 85-15 provides excellent guidance addressing how stress should be assessed, emphasizing "the importance of thoroughness in evaluation on an individualized basis." SSR 85-15 cautions against creating any type of presumption in evaluating stress regarding a specific individual:

The reaction to the demands of work (stress) is highly individualized, and mental illness is characterized by adverse responses to seemingly trivial circumstances. The mentally impaired [sic] may cease to function effectively when facing such demands as getting to work regularly, having their performance supervised, and remaining in the workplace for a full day. A person may become panicked and develop palpitations, shortness of breath, or feel faint while riding in an elevator; another may experience terror and begin to hallucinate when approached by a stranger asking a

⁷ See *City of New York v. Heckler*, 578 F. Supp. 1109 (E.D.N.Y. 198 X), *aff'd*, 742 F.2d 729 (2nd Cir. 1984), *aff'd*, 476 U.S. 467 (1986); *Mental Health Ass'n of Minn. v. Schweiker*, 554 F. Supp. 157 (D.Minn. 1982), *aff'd*, 720 F.2d 965 (8th Cir. 1983).

question. Thus, the mentally impaired may have difficulty meeting the requirement of even so-called “low stress” jobs.

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

The guidance provided in SSR 85-15 remains relevant and should be retained by SSA in a revised OIS.

We also recommend that SSA find methods to measure and evaluate the individual’s ability to withstand work environment stressors.

IV. Job Accommodation

Current SSA policy does not include “reasonable accommodation” as a factor in determining whether an individual can perform a specific job. We believe that this policy is appropriate and should continue.

The “reasonable accommodation” provision in the Americans with Disabilities Act (ADA) and the SSA disability determination process provide two different but complimentary remedies for people with disabilities. The purposes of the two programs are completely different. The ADA “reasonable accommodation” provision deals with a single individual with disabilities, a specific employer, and a specific job. This is antithetical to the Social Security Act provision, which requires a determination whether a job exist in “significant numbers” in the national economy. A job with individualized accommodations does not exist in “significant numbers” and thus does not meet the requirement of the Social Security Act.

Over the years, there are some who have attempted to merge the purposes of the ADA and the Social Security and SSI disability programs. However, even the United States Supreme Court has recognized that the two programs are not inconsistent with each other but were designed for different purposes and can coexist. In *Cleveland v. Policy Management Systems Corp.*,⁸ the Court noted that the Social Security Act provides cash benefits to individuals under a “disability” as defined in the Act, while the ADA “seeks to

⁸ *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999).

eliminate unwarranted discrimination against disabled individuals.”⁹ The Court noted that “there are too many situations in which an SSDI [Social Security Disability Insurance] claim and an ADA claim can comfortably exist side by side.” As a result, the Court held that it would not apply a negative presumption that an individual who applies or receives SSDI cannot pursue an ADA claim.¹⁰ The Court provided specific examples how the ADA and SSDI programs “can comfortably exist side by side.”

Specifically relevant to the Panel’s work, the Court noted how the ADA defines a “qualified individual” to include a disabled person who can perform essential functions of a specific job “with reasonable accommodations,” a factor which is not part of Social Security statutory definition of disability. Thus, an ADA claim that a plaintiff can perform a specific job with reasonable accommodation “may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) *without* it.”

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Thank you for consideration of our comments.

Very truly yours,

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Executive Director

⁹ *Id.* at 801.

¹⁰ *Id.* at 802.