

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

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Executive Director
Barbara Silverstone

December 10, 2015

The Honorable Carolyn Colvin
Acting Commissioner
Social Security Administration
6401 Security Boulevard
Baltimore, Maryland 21235

Submitted at www.regulations.gov

Re: Comments on Advance Notice of Proposed Rulemaking on Vocational Factors of Age, Education, and Work Experience in the Adult Disability Determination Process, 80 Fed. Reg. 55050 (Sept. 14, 2015)

Dear Acting Commissioner Colvin:

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR). NOSSCR is an organization of approximately 3800 attorneys and other advocates who represent Social Security Disability Insurance and Supplemental Security Income (SSI) claimants through the adjudication process. The organization has been a pioneer in legal continuing education and public policy advocacy since 1979. These comments are adapted from those submitted by the Consortium for Citizens with Disabilities (CCD) Social Security Task Force. NOSSCR fully endorses the more extensive comments submitted by CCD.

NOSSCR appreciates the opportunity to comment on the advance notice of proposed rulemaking that the Social Security Administration (SSA) issued on September 14, 2015, regarding the vocational factors of age, education, and work experience in the adult disability determination process.

Introduction and Background:

In 1967, Congress amended the Social Security Act to specifically require consideration of the requisite vocational factors – age, education, and work experience – if the individual claimant was not disabled based solely on his/her medical impairments and was not able to return to past

relevant work.¹ SSA issued final regulations in 1978, codifying these “Medical-Vocational Guidelines” and other policies for the disability determination process.²

Prior to the 1978 regulations, SSA relied on the testimony of vocational experts (VEs) to evaluate the impact of the statutory vocational factors on an individual’s ability to engage in substantial gainful activity. However, this process was resource-intensive and at times inconsistent. The 1978 regulations provided greater uniformity in the treatment of individuals applying for Social Security and SSI disability benefits.

The Medical-Vocational Guidelines (often referred to as the “Grids”) acknowledge the interplay between the various vocational factors required by the Social Security Act— age, education, work experience, and residual functional capacity (RFC). The rules must, by statute, be weighted in favor of those with more adverse vocational characteristics. For example, under SSA’s current framework, low educational attainment 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 Guidelines recognize that the occupational base is so restricted that a finding of “disabled” is warranted for certain age groups.

If non-exertional limitations are involved, the Medical-Vocational Guidelines do not apply directly, but do offer a framework for determining whether an individual is disabled. This is because of the difficulty in quantifying such non-exertional limitations in any type of objective matrix. The preface to the final 1978 regulations discusses when the Guidelines apply – and when they do not:

Because the rules consider only impairments which result in exertional limitations, they are not applicable where an individual’s impairment(s) causes only non-exertional limitations, e.g., certain mental, sensory, or skin impairments. Further, the rules may not apply where a combination of impairments significantly limits the range of work an individual can perform at a given exertional level; nor do the rules apply where a finding of fact concerning age, education, or work experience differs from the vocational characteristics covered by a rule ... In any case where a rule does not apply, full consideration must be given to all the facts of the case in accordance with the definitions and discussions of each factor in the regulations.³

The built-in limits on the applicability of the Guidelines were also discussed by the Supreme Court in *Heckler v. Campbell*:

The regulations recognize that the rules only describe “major functional and vocational patterns” ... If an individual’s capabilities are not described accurately by a rule, the regulations make clear that the individual’s particular limitations must be considered ... Additionally, the regulations ... recognize that some claimants may possess limitations that are not factored into the guidelines ... Thus, the regulations provide that the rules will be applied only when they describe a claimant’s abilities and limitations accurately.⁴

Caution regarding the search for efficiencies. While we generally support the goal of achieving increased efficiency throughout the adjudicatory process, the purpose of SSA’s disability programs is to provide cash benefits to those who need them, have earned them, and who meet the eligibility criteria. We believe that the critical measure for assessing initiatives for achieving administrative efficiencies must be the potential impact on claimants and beneficiaries.

¹ 42 U.S.C. § 423(d)(2)(A).

² 43 Fed. Reg. 55349 (Nov. 28, 1978).

³ 43 Fed. Reg. at 55351.

⁴ 461 U.S. at 462 n.5.

People with work-limiting disabilities face a myriad of personal, family, and financial circumstances that will have an impact on how well or efficiently they can maneuver the complex system for determining eligibility. Many claimants will not be successful in addressing all of SSA's requirements for proving eligibility until they reach a point where they obtain the assistance of an experienced representative. Proposals for increasing administrative efficiencies must bend to the realities of claimants' lives and accept that people face innumerable obstacles at the time they apply for disability benefits and beyond. SSA must continue, and improve, its established role in ensuring that a claim is fully developed before a decision is made and must ensure that its rules reflect this administrative responsibility.

Changes to the guidelines must be evidence-based. It is important for SSA to continue considering non-exertional factors and vocational factors during step five of the disability determination. The current policy is well thought out and effective. NOSSCR supports improvements to step five of the sequential evaluation process that assist in accurately and effectively completing an individualized evaluation of each applicant based on the factors identified in the Social Security Act. However, it is vital that any changes are based on evidence that specifically proves that the current guidelines are inaccurate and on evidence that proposed changes would enhance accuracy, effectiveness, and fairness of individualized evaluations. SSA should look for evidence that is specific to people with severe impairments, who are the only claimants being evaluated at step five. SSA should reject suggested changes based on evidence that applies to the United States population generally or that would limit the agency's ability to make individualized assessments of claimants.

Question 1. Is the factor of age predictive in determining an individual's ability to work or to adjust to other work? If it is predictive, what are the vocationally significant age milestones we should consider? If it is not predictive, what data support that assertion?

In 2005, SSA proposed to change the age categories in the Grids, raising them by two years. 70 Fed. Reg. 67101 (Nov. 4, 2005). Following significant opposition to the proposed rule, SSA formally withdrew the notice of proposed rulemaking. 74 Fed. Reg. 21563 (May 8, 2009). We again urge SSA to exercise extreme caution if it is considering an increase in the age categories.

Age is a predictive factor when determining whether an individual is able to work or adjust to different work. Older individuals are different than younger individuals in a variety of ways that can affect their ability to work or adjust to new jobs.

Mortality increases with age. The probability of dying within one year more than doubles from age 40 to 50 among the general population. From age 50 to 60, it more than doubles again.⁵ A group of people who are so much more likely to die are also more likely to have difficulty working or adapting to new work. The effect of age on work ability and adaptability is even more significant among individuals with disabilities. In all age groups, Social Security Disability Insurance (SSDI) and SSI beneficiaries have higher death rates than their same-aged peers. Age also exacerbates the gap in death rates between people receiving SSDI and SSI and the general population. At age 20, men receiving SSDI/SSI have death rates about one

⁵ See <https://www.ssa.gov/oact/STATS/table4c6.html>

percentage point higher than all men of that age. At age 50, the difference widens to nearly three percentage points, and by age 60 to almost four points. Women have lower death rates but show the same increasing disparity between disability beneficiaries and the general population.⁶

In addition to being more likely to die than younger people, older people experience higher rates of physical and mental impairments that present an obstacle to working and adjusting to new work. Musculoskeletal disorders become much more prevalent as individuals leave the 30-44 age group and enter the 45-59 age group; rates continue to increase for people in their 60s and above.⁷ These limitations impose particular challenges on more physically demanding work.

There are many non-exertional limitations that increase with age as well. A large-scale, decade-long study showed that cognitive declines begin as early as age 45 and accelerate with age.⁸ Hearing loss is also more common with age. According to the National Institutes of Health's National Institute of Deafness and Other Communications Disorders, "about 2 percent of adults aged 45 to 54 have disabling hearing loss. The rate increases to 8.5 percent for adults aged 55 to 64. Nearly 25 percent of those aged 65 to 74 and 50 percent of those who are 75 and older have disabling hearing loss."⁹ Even lower levels of hearing loss can limit an individual's ability to work or adjust to new work, and these losses occur more frequently among older people. While about 15% of the general population reports some level of hearing loss,¹⁰ "there is a strong relationship between age and reported hearing loss: 18 percent of American adults 45-64 years old, 30 percent of adults 65-74 years old, and 47 percent of adults 75 years old, or older, have a hearing impairment."¹¹ People in their 40s and older also often begin to experience vision changes that lead to difficulties reading and performing other close work, decreased color perception, and difficulty handling glare.¹² Unsurprisingly, cognitive and sensory changes lead to decrease in what is known as "perceptuo-motor" skills, or the ability to combine perception and action. There is a "50s cliff" in this area, meaning that individuals experience a slow decline in their abilities to learn new perceptuo-motor tasks in their 20s, 30s, and 40s, a large rapid decrease when they are in their 50s, and another slow decline in their 60s through 80s.¹³

These physical and mental changes all contribute to challenges older individuals face in job training. Older adults, on average, take longer to complete training and show lower levels of mastery when learning new skills. Older individuals also experience slower rates of learning and

⁶ Kathy Ruffing, Center on Budget and Policy Priorities, "No Surprise: Disability Beneficiaries Experience High Death Rates," April 4, 2013. <http://www.cbpp.org/blog/no-surprise-disability-beneficiaries-experience-high-death-rates>

⁷ Anthony D. Woolf & Bruce Pflieger, Bulletin of the World Health Organization 2003;81:646-656. "Burden of Musculoskeletal Diseases," <http://www.who.int/bulletin/volumes/81/9/Woolf.pdf>.

⁸ Archana Singh-Manoux, Mika Kivimaki, M Maria Glymour, et al. *BMJ* (January 2012) "Timing of onset of cognitive decline: results from Whitehall II prospective cohort study" <http://www.bmj.com/content/344/bmj.d7622>

⁹ National Institutes of Health, National Institute of Deafness and Other Communications Disorders. "Quick Statistics" <http://www.nidcd.nih.gov/health/statistics/pages/quick.aspx>

¹⁰ *Id.*

¹¹ NIH Senior Health, "Hearing Loss." <http://nihseniorhealth.gov/hearingloss/hearinglossdefined/01.html>

¹² American Optometric Association, "Adult Vision: 41 to 60 Years of Age" <http://www.aoa.org/patients-and-public/good-vision-throughout-life/adult-vision-19-to-40-years-of-age/adult-vision-41-to-60-years-of-age?sso=y> See also National Eye Institute "Age Related Eye Diseases" https://nei.nih.gov/healthyeyes/aging_eye

¹³ Rachel O. Coats, Andrew D. Wilson, Winona Snapp-Childs, et al. "The 50s Cliff: Perceptuo-Motor Learning Rates across the Lifespan." *PLoS One*. 2014; 9(1): e85758. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3901653/>

more time off task.¹⁴ In a comparison of adults aged 18-28 and 55-62, the older participants experienced more difficulty learning a keying sequence and were slower to perform it once trained.¹⁵ As a 2006 report performed for AARP's Public Policy Institute found:

One of the most robust laws of aging is that older adults (typically those in their 60s and 70s) take roughly 50 percent to 100 percent longer than younger adults (those in their 20s) to perform any new task. General slowing is seen in all kinds of activities, both mental (learning) and physical (response time). Some of the slowing may be attributable to older adults' preference for accuracy over speed, with the reverse holding true for younger adults. In addition, older adults generally require more help and "hands-on" practice.¹⁶

It is therefore appropriate for SSA to consider older individuals less adaptable to different types of work. It is also not surprising that people who begin receiving SSDI benefits in their 60s are significantly less likely to return to work than those who started in their 50s, who are less likely than those who began receiving benefits in their 40s or earlier.¹⁷

The significant differences among various age groups in health status, mortality rate, and achievement in learning new skills all support SSA's current policies. Although there are research studies that show age-related declines beginning later in life, especially at age 65, it is likely that many of these findings are related to survey design. Many studies group subjects as either under 65 or over 65, making it impossible to compare subjects in their 40s to those in their 50s or early-to-mid 60s. Social Security disability policy should use research on age groups below full retirement age, as those are the individuals who apply for and receive disability benefits.

Barring sudden injury, most age-related declines are likely to appear gradually, increase in severity as an individual ages, and rarely improve. Therefore, any grouping of individuals into age categories by the Social Security Administration creates a situation where individuals above and below "cut-points" are treated differently. The challenges this poses are overcome by the individualized assessment of residual functional capacity and the non-mechanical application of the Grids, especially when a claimant is close to a different age category.¹⁸ The current system of using five-year age categories is relatively simple for SSA to administer and applicants for disability benefits to understand. The studies cited above did not use narrower age bands. Some used broader age categories, but focused on age-related changes into individuals' 70s, 80s, and 90s, which is past the age at which individuals are eligible for Social Security and SSI disability benefits. Therefore, we believe that the current age categories on the Grids are appropriate and should continue.

¹⁴ *Id.*

¹⁵ Willem B. Verwey, Elger L. Abrahamse, Marit F. L. Ruitenberg et al. *Psychol Res.* 2011 Sep; 75(5): 406–422. "Motor skill learning in the middle-aged: limited development of motor chunks and explicit sequence knowledge" <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3155672/>

¹⁶ Neil Charness and Sara J. Czaja. AARP Public Policy Institute #2006-22 "Older Worker Training: What We Know and Don't Know" http://assets.aarp.org/rgcenter/econ/2006_22_worker.pdf

¹⁷ Su Liu and David Stapleton. Center for Studying Disability Policy, No. 10-01, April 2010. "How Many SSDI Beneficiaries Leave the Rolls for Work? More Than You Might Think" http://www.mathematica-mpr.com/~media/publications/PDFs/disability/ssdi_benef_ib.pdf

¹⁸ 20 CFR §§404.1563(b), 416.963.

Challenges with using life expectancy data as a decision-making tool: There are journalists, researchers, and politicians who advocate for the abolition or increase of age categories in Step 5 of the sequential evaluation process based on general increases in life expectancy. Although average life expectancy may have increased in the United States as a whole in recent decades, that is not a sufficient reason to either stop considering age as a vocational factor, or to raise the age categories used in the Grids. A focus on life expectancy fails to address the critical distinction between an individual's survival and his or her ability to work. Average life expectancy does not take into account gender, racial, and educational disparities. Looking at average life expectancy also includes gains for people who are over full-retirement age, whose age makes them ineligible for Social Security disability benefits.

The purpose of Social Security's disability benefits programs is to provide financial support for people living with severe, work-limiting disabilities.¹⁹ Applicants for Social Security disability benefits are evaluated not on whether they have a lifespan-shortening impairment but on how their impairments affect their ability to work. Therefore, changes in population-level life expectancy are not relevant to disability incidence rates, the age at which people are more likely to develop work-limiting impairments, or whether an individual applicant qualifies for disability benefits. A majority of SSDI disabled worker beneficiaries are aged 55-64,²⁰ and while death rates for that age group have declined in recent years, the incidence of chronic and frequently work-limiting conditions have not. From 2002-2012, the rate of diabetes, hypertension, obesity, and high cholesterol in that age group increased, and a greater percentage of individuals in that age group experienced serious psychological distress.²¹

It is not useful to examine changes in life expectancy that occur in age groups that are ineligible for Social Security disability benefits: age 65 for SSI and full retirement age for SSDI. However, much of the increase in life expectancy has occurred among individuals who are too old for disability benefits and instead receive age-based or retirement benefits from Social Security. For example, from 1950 to 2013, life expectancy at birth increased 10.6 years, and life expectancy at age 65 increased 5.4 years.²² Living longer in retirement means little to nothing about whether individuals approaching retirement age experience work-limiting disabilities.

In addition, studying the average life expectancy in the United States obscures deep disparities along gender, educational, class, and racial lines. Increases in life expectancy for the United States in general have not changed the fact that women have longer life expectancies than men, and white people have longer life expectancies than African-Americans.²³ The life expectancy

¹⁹ Paul O'Leary, Elisa Walker, and Emily Roessel. "Social Security Disability Insurance at Age 60: Does it Still Reflect Congress' Original Intent?" Social Security Administration Issue Paper 2015-1, September 2015 <https://www.ssa.gov/policy/docs/issuepapers/ip2015-01.html>

²⁰ Social Security Administration, Disabled worker beneficiaries in current payment status at the end of June 2015, https://www.ssa.gov/oact/progdata/benefits/da_age201506.html. An additional 5.22% of SSDI disabled worker beneficiaries are 65 years old.

²¹ Centers for Disease Control and Prevention. *Health United States 2014: With Special Feature on Adults Age 55-64*, at pp.25-7.

²² *Id.* at Table 16. "Life expectancy at birth, at age 65, and at age 75, by sex, race, and Hispanic origin: United States, selected years 1900-2013."

²³ U.S. Census Bureau. *2012 Statistical Compendium*, Table 104. "Expectation of Life at Birth, 1970 to 2008, and Projections, 2010 to 2020." <http://www.census.gov/compendia/statab/2012/tables/12s0105.pdf>

of those of Hispanic origin continues to be greater than that of non-Hispanic blacks or whites.²⁴ The gap in life expectancy between individuals with 16 or more years of education and less than 12 years of education widened substantially between 1990 and 2008; in fact, the life expectancy of white men and women with limited education decreased during that time period.²⁵

Similar to education, disparities in life expectancy by income level are also increasing. Comparing women born in 1930 to those born in 1960, the only income quintile that saw an increase in life expectancy at age 50 was the highest-earning. Men show similar inequities: over a 30-year period, those in the bottom income quintile showed no increase in life expectancy at age 50, while the highest-earning quintile enjoyed a seven-year increase.²⁶ Gender, race, education, and income are tightly interwoven with each other, and each is related to life expectancy. Changing disability benefits policy based on changes in average life expectancy would have different impacts on different demographic groups, and would likely cause the greatest harm to those with the least income and education.

Another argument made by some is that when increasing the normal retirement age, Congress acknowledged that “it is both reasonable and necessary for people to work longer before retiring.” But Congress has also spoken on the relationship of age and disability. In the law, widows and widowers between the ages of 50 and 59 are eligible for benefits if they are disabled. Congress has chosen **not** to change these age limits. All the above data and arguments also refute the notion that because people are generally living longer that the age categories in the guidelines are inaccurate or need to be adjusted.

Evaluation of young adults. When evaluating young adults under the Grids, we want to emphasize the importance of considering the Grids in conjunction with the guidance of Social Security Ruling (“SSR”) 11-2p. Under the Grids, when a young adult has only exertional limitations and has an RFC and vocational factors that match the guidelines, the Grid rules always direct a decision of “not disabled.” SSR 11-2p, however, directs adjudicators to proceed cautiously if a young adult has a very low education level or is illiterate. Low education level or illiteracy in young adults may be an indication of an underlying, but yet undetected, non-exertional impairment that should be considered when assessing the young adult’s residual functional capacity. It is essential that adjudicators consider whether there is an underlying non-exertional impairment, because frequently undiagnosed impairments, like Intellectual Disability, borderline intellectual functioning, or a learning disability, may cause limitations in addition to illiteracy that hinder a claimant’s ability to sustain full-time competitive employment, including the ability to understand and remember instructions or maintain sustained attention on tasks.

²⁴ Centers for Disease Control and Prevention, *supra* note 23, at Table 16. “Life expectancy at birth, at age 65, and at age 75, by sex, race, and Hispanic origin: United States, selected years 1900–2013.”

<http://www.cdc.gov/nchs/data/hus/hus14.pdf>.

²⁵ S. Jay Olshansky, Toni Antonucci, Lisa Berkman, et al. “Differences In Life Expectancy Due To Race And Educational Differences Are Widening, And Many May Not Catch Up” *Health Affairs*, August 2012 vol. 31 no. 8, 1803-1813. <http://content.healthaffairs.org/content/31/8/1803.full> and

<http://www.agingsocietynetwork.org/differences-in-life-expectancy>. See also Centers for Disease Control and Prevention, *Health United States 2011*, Fig. 32 “Life expectancy at age 25, by sex and education level: United States, 1996 and 2006.” <http://www.cdc.gov/nchs/data/hus/hus11.pdf#fig32>

²⁶ The National Academies of Sciences, Engineering, and Medicine. *The Growing Gap in Life Expectancy by Income: Implications for Federal Programs and Policy Responses*, 2015 pp. 3-4.

<http://www.nap.edu/catalog/19015/the-growing-gap-in-life-expectancy-by-income-implications-for>

Question 2. When determining if age affects an individual's ability to work or to adjust to other work, what other factors or combination of factors should we consider?

SSA should continue to consider education and work experience as is currently required in the Social Security Act. An individual's educational attainment provides evidence of the individual's ability to learn, adapt to new environments, and succeed in competitive employment. In addition, an individual's past work experience can provide evidence of these same qualities and indicate whether an individual can learn new skills that required by another job.

The impact of technology. Technology has significantly changed the face of the American workplace in many ways. Some jobs no longer exist because technology has replaced the workers who performed them. Other jobs still exist but the skills required to do them have changed and make them out of reach for unskilled workers. Although some researchers argue that technology makes the workplace easier for people with disabilities, the reality is much less clear cut.

Technological advancements have largely eliminated jobs that involve routine tasks that do not require analytical skills.²⁷ This places an emphasis on other skills in the workplace that are often difficult for people with cognitive and mental impairments:

With manufacturing and other low-skill tasks in the services sector becoming increasingly automated, the need for routine cognitive and craft skills is declining, while the demand for information-processing skills and other high-level cognitive and interpersonal skills is growing. In addition to mastering occupation-specific skills, workers in the 21st century must also have a stock of information-processing skills, including literacy, numeracy and problem solving, and "generic" skills, such as interpersonal communication, self-management, and the ability to learn, to help them weather the uncertainties of a rapidly changing labour market.²⁸

With jobs in the retail sector being the jobs most available in the national economy²⁹ for people with low skills and low education, skills such as interpersonal communication and self-management are increasingly important to the ability to work. It can be challenging for some people with significant mental, cognitive, and intellectual impairments to work in environments that require constant interactions with others. While technology might have made work easier for certain people with certain disabilities in certain jobs, these advances have especially helped educated and skilled workers and have also eliminated many of the lower skilled jobs that people with certain impairments can do. Factory work, for example, involved routine repetitive tasks and allowed an individual to work by herself without significant interaction with others. Retail and other unskilled service industry jobs, on the other hand, require the ability to interact with others, often under stressful conditions; problem solving skills; and other skills that manufacturing jobs and other previously available unskilled jobs did not. In addition, the inclusion of computers and other technology into many jobs in the retail and service sector (e.g., the requirement to look up inventory on a computer or use computerized cash registers) have also had a negative impact on the ability of people with intellectual impairments to do jobs that are considered low skilled if they cannot use the technology involved.

²⁷ http://www.p21.org/storage/documents/21st_century_skills_education_and_competitiveness_guide.pdf, p. 6

²⁸ https://skills.oecd.org/documents/SkillsOutlook_2013_Chapter1.pdf, p. 46

²⁹ <http://www.dallasnews.com/business/personal-finance/headlines/20150425-most-u.s.-job-openings-are-for-low-skill-low-pay-workers.ece>

These workplace changes make it extremely important that the ability to function in the workplace and other non-exertional factors be included in the evaluation process at step five for people with cognitive or mental impairments. In response to litigation and Congressional action in the 1980s, SSA changed its policies regarding the assessment of limitations caused by mental impairments. In addition to issuing new Listings of Impairments for mental impairments, SSA issued Social Security Ruling (SSR) 85-15,³⁰ “Capability to Do Other Work – The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments.” SSR 85-15 still provides crucial guidance in the evaluation of mental residual functional capacity (RFC), emphasizing 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.”

Current SSA policy recognizes that the reaction to the demands of work is highly individualized and we caution against any approach that attempts to discount the highly individualized response to work for individuals with mental and/or cognitive limitations. As noted in SSR 85-15: “Any impairment-related limitations created by an individual’s response to demands of work... must be reflected in the RFC assessment.” 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 continues to provide 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 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

³⁰ https://www.socialsecurity.gov/OP_Home/rulings/di/02/SSR85-15-di-02.html. Social Security Rulings “are binding on all components of the Social Security Administration. These rulings represent precedent final opinions and orders and statements of policy and interpretations that we [SSA] have adopted.” 20 C.F.R. § 402.35(b)(1).

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 [sic] 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.

Past work experience. The fast pace of technological change in the economy and the workplace also argues for consideration of changing the length of time for which past work experience should be considered as relevant work experience. Currently, SSA regulations consider jobs done over the past 15 years as relevant work experience.³¹ However, with workplaces changing so quickly, it is highly probable that a job done 15 years ago is not indicative of the ability to do a similar job today. Someone who worked as a file clerk in 2000 might not be able to do a similar job now because the job might require the ability to enter information regarding file location or contents into a database. SSA should consider shortening the timeframe for consideration of recent work experience or require a determination that a job done more than a few years ago remains relevant given the technological changes that may have altered the skills required to do a particular job since the individual was so employed.

SSA should also consider whether the pace of technological change, and the rapid evolution of workplaces in response to it, require including how long ago someone completed their education in the evaluation at step five. Technology is integrated into modern education and recent graduates will be computer literate and experienced in the use of a variety of devices. This will not necessarily be the case for individuals who might have completed their education many years ago. An individual who graduated from college in the 1980s may be less able to adapt to a technologically advanced workplace than an individual with less, but more recent, education. SSA considers the recency of education in certain circumstances³² and should evaluate whether to incorporate recency into more evaluations of individual applicants' ability to work.

The impact of the Americans with Disabilities Act and accommodations. For many years, SSA has had clear policy that the "reasonable accommodations" provision in the Americans with Disabilities Act (ADA) should not be a factor in determining whether an individual claimant is able to perform a specific job in the SSA disability process. There is no "reasonable accommodation" requirement in the Social Security Act. The Social Security disability process addresses the issue of available jobs that exist in significant numbers on a hypothetical basis. Trying to determine reasonable accommodations by a hypothetical class of employers for hypothetical jobs is antithetical to the purpose of the ADA, which looks at evidence about how an individual will function in a particular employment situation.

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, the distinction between the two programs was recognized by SSA as long ago as 1993 when the former SSA Associate Commissioner for the Office of Hearings and Appeals (now Office of Disability Adjudication and Review)

³¹ 20 C.F.R §§404.1565(a), 416.960.

³² See 20 C.F.R 404, Subpart P, Appendix 2, 201.00. See also SSRs 82-41, 83-10, and 96-9p and POMS DI 25001.001.

addressed the issue when it first arose in some Administrative Law Judge (ALJ) hearings. He noted:

Whether or how an employer might be willing (or required) to alter job duties to suit the limitations of a specific individual would not be relevant because our assessment must be based on broad vocational patterns ... rather than on any individual employer's practices.

He concluded that “the ADA and the disability provisions of the Social Security Act have different purposes and have no direct application to one another.”³³

The United States Supreme Court also has recognized that the two programs were designed for different purposes. In *Cleveland v. Policy Management Systems Corp.*,³⁴ 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 eliminate unwarranted discrimination against disabled individuals.”³⁵ The Supreme Court found 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” and thus held it would not apply a negative presumption that an individual who applies for or receives SSDI cannot pursue an ADA claim.³⁶ The Supreme Court provided specific examples how the ADA and SSDI programs “can comfortably exist side by side.”

Injecting the ADA requirement of “reasonable accommodations” into the SSA disability process misreads the intent of the ADA. The ADA is a civil rights law protecting, among others, employees and job applicants with disabilities. The SSA is not charged with enforcement over employers under the ADA. Establishing criteria in the SSA disability determination process that assumes reasonable accommodations by the employer may potentially establish barriers for the individual by shifting the employer’s burden of compliance with the ADA onto potential employees, i.e., claimants.

The inclusion of ADA criteria in the SSA disability determination process would confuse and hinder accurate disability determinations. For example, what happens if an individual with severe disabilities who was denied employment is determined to be “not disabled” by SSA if the adjudicator finds that a reasonable accommodation could have been made because that occurred for a worker with “similar” limitations? Could SSA conclude, without conducting an individualized assessment, that a claimant is “not disabled” because an incumbent worker with the “same” impairments and limitations is able to perform substantial gainful activity because of a reasonable accommodation?

Access to advances in medicine and assistive technology. Some have argued that SSA needs to take into account scientific and medical advances in the disability determination process. In addition, they argue that SSA should consider the possible effect that treatments or assistive technologies could have on a claimant’s ability to work.

³³ Memorandum dated June 2, 1993, from Daniel Skoler, Associate Commissioner of the Office of Hearings and Appeals [now known as the Officer of Disability Adjudication and Review].

³⁴ *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999). The Supreme Court cited to the Skoler Memorandum. *Id.* at 803.

³⁵ *Id.* at 801.

³⁶ *Id.* at 802.

Many individuals live with significant disabilities but they do not all have access to state-of-the-art medical advances. And unfortunately, many do not have access to *any* medical treatment. While there have been many advances in medical treatments, efforts to incorporate such changes into SSA's disability determination process, whether at Step 3 (Listing of Impairments) or Step 5, must be examined in the overall environment in which people with disabilities find themselves.³⁷

There must 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. The advances to which some refer may not necessarily work for those with severe cognitive or mental disabilities, communications difficulties, multiple impairments, or other adverse vocational factors.

We urge extreme caution in any efforts that presume universal access to medical advances (or access to any treatment at all) and new assistive technologies. And even if medical advances and treatment options are available to individuals, it is inappropriate to assume that every person will respond in the same favorable way.

Question 3. How does literacy affect an individual's ability to do work or adjust to other work?

The research available today on literacy and the labor force comes from the National Adult Literacy Survey (NALS) and the National Assessment of Adult Literacy (NAAL).³⁸ The NALS established a modern concept of literacy as a continuum of proficiency in functional literacy tasks. There is no "cut point" on the scale that distinguishes between "illiterate" and "literate." NALS respondents were grouped into one of five levels based on their performance on various literacy tasks. Approximately 22 percent of respondents were in the lowest level – 62 percent of those in this group had not completed high school; 33 percent were age 65 or older; 26 percent had a physical or mental impairment that prevented them from fully participating in work or school; and 25 percent were non-native English speakers.

Another 26 percent were assigned to the second level of literacy proficiency, with literacy skills below a high school diploma level. Among all of the variables tested, literacy was shown to be most strongly correlated with education attainment. All of the adults surveyed who had 0 to 8 years of education were in the lowest two levels of literacy, while 80 percent of those with 9 to 12 years of education were in the lowest two levels.

³⁷ Current SSA policy states that benefits will not be denied because an individual is unable to afford prescribed treatment. See Social Security Ruling (SSR) 82-59.

³⁸ National Center for Education Statistics, *Adult Literacy in America: A First Look at the Results of the National Adult Literacy Survey*, US Dept of Education, Office of Educational Research and Improvement (1993); National Center for Education Statistics, *Literacy in the Labor Force: Results from the National Adult Literacy Survey*, US Dept of Education, Office of Educational Research and Improvement (1999); National Center for Education Statistics, *English Literacy and Language Minorities in the United States: Results from the National Adult Literacy Survey*, US Dept of Education, Office of Educational Research and Improvement (2001); National Center for Education Statistics, *National Assessment of Adult Literacy*, US Dept of Education, Office of Educational Research and Improvement (2003); National Center for Education Statistics, *Literacy in Everyday Life: Results from the 2003 National Assessment of Adult Literacy*, US Dept of Education, Office of Educational Research and Improvement (2007).

The NALS also clearly indicated a connection between adults' literacy skills and their socio-economic status, supporting the conclusion that lower literacy skills resulted in more limited employment opportunities. More than half of the adults who had the lowest level of literacy proficiency were out of the labor force, and 35 percent of those grouped in level 2 were out of the labor force. This compares with 25 percent of those at level 3 and only 10 to 18 percent of those at levels 4 and 5 being out of the labor force. Racial and ethnic minorities were found to be more likely than white adults to have the lowest levels of literacy; many of these were individuals born outside the United States who learned English as a second language.

Recent research has shown that job availability has increased at the extremes, among the highly educated and less educated workers, at the expense of those in the middle.³⁹ Developments in information technology and increasing computerization has resulted in "job polarization," assisting highly educated workers performing more complex tasks, and eliminating the jobs of moderately educated workers performing routine tasks in clerical, administrative and sales occupations. Many of the 25 fastest growing occupations in the United States have considerably higher literacy requirements than the average for all occupations.⁴⁰

There has also been substantial growth in jobs that require lower literacy skills, even below the level of a high school diploma. Some of the 25 fastest growing occupations also include those having below average literacy requirements, within the range identified by NALS as the second lowest level of literacy, such as home health aide, physical therapy aide, and child care worker.⁴¹ However, these jobs require workers who have the physical and mental capacity to perform relatively strenuous, non-routine manual tasks in service occupations such as those above, as well as cleaning and maintenance, and food preparation. And even these growing occupations with the lowest literacy requirements demand a level of literacy above the capabilities of the 22 percent of the adult population with the lowest level of literacy proficiency as measured by the NALS survey. Literacy is also necessary to obtain certifications required for many of these jobs.

Literacy affects the ability of individuals to adapt to different work. While jobs with a Specific Vocational Preparation level of 0 can be learned via a brief demonstration, most jobs require additional on-the-job training. The ability to read instructional manuals, warning signs, or product labels, and the ability to write down notes or questions during the training process, make it easier for an individual to learn and remember how to do a new job.

Question 4. Does the skill level of an individual's past work affect his or her ability to adjust to other work? If so, how? What data support the conclusion that the skill level of an individual's past work does or does not affect an individual's ability to do work or to adjust to other work? How does the skill level of an individual's past work considered along with an individual's educational level affect this adjustment?

Past relevant work experience is an important indicator of a claimant's ability to perform and adjust to different jobs. Individuals who have not obtained skills through prior work cannot be expected to use those skills in a new job. In contrast, claimants with a history of skilled work

³⁹ Daren Acemoglu and David Autor, "Chapter 12 – Skills, Tasks and Technologies: Implications for Employment and Earnings," in O. Ashenfelter and D. Card, eds., *Handbook of Labor Economics*, 1043-1171 (2011).

⁴⁰ Paul Barton, *What Jobs Require*, Educational Testing Service, at 14 (2000).

⁴¹ *Id.* at 16.

have specific skills required for their previous jobs and thus a wider range of potential occupations, subject to limitations imposed by their current residual functional capacity. In addition, individuals' skilled past relevant work experience demonstrates that they had the general ability to learn and carry out job skills.

Current Social Security disability policy is based on the fact that claimants with no past relevant work experience, as a group, face more difficulty performing substantial work and adapting to new work. This policy should remain intact. 20 C.F.R. § 404.1565(a) describes past relevant work as work that was "done within the last 15 years, lasted long enough for [the claimant for disability benefits] to learn to do it, and was substantial gainful activity...[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."

As described in the response to Question 2, there is no reason to believe that this "gradual change" has become any less gradual in recent years. If anything, many jobs require even more rapid acquisition of new skills, such as using different technology, terminology, or procedures. Individuals who have never worked or who have been out of the workforce for many years or decades may not be familiar with job duties that are critical yet rarely included in job descriptions, such as completing computerized timecards or operating an alarm system at the start and end of the work day. They may be out of practice performing the basic demands of work.⁴² Similarly, individuals who spent the past 15 years working below the substantial gainful activity level or who failed to maintain employment long enough to learn how to perform a job, and who have also been determined to have a severe and long-lasting or terminal impairment, will probably face obstacles in working or adjusting to other work.

Question 5. Are there other vocational factors or combinations of vocational factors that we should consider when determining an individual's ability to do work or to adjust to other work?

The right to an individualized assessment. The current definition of disability in the Social Security Act requires an individualized assessment of ability to perform substantial gainful activity by considering the individual's physical and mental functional limitations in light of his/her age, education, and work experience. The interplay between these statutory factors must be included in SSA's disability determination process.

The current methodology provides the individualized assessment envisioned by the statute through the use of the Grids, which consider an individual's physical limitations in light of his or her age, education, and prior work experience. The process also allows individual consideration of nonexertional limitations, such as pain and fatigue, and those caused by mental and cognitive impairments.

Any type of stand-alone standardized functional assessment criteria and instruments must be able to identify or capture the individual differences and diverse, yet significant, limitations of people with disabilities who legitimately merit a finding of "disabled." Heavy reliance on the notion

⁴² SSR 85-15 states that the basic mental demands of competitive unskilled work include "the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting."
<https://www.socialsecurity.gov/OP-Home/rulings/di/02/SSR85-15-di-02.html>

that SSA can assess the impact of functional limitations in an abbreviated, standardized form, disregards sound clinical thinking that most impairments impact persons in an individualized, personal way. It also fails to recognize the nature of many impairments, including multiple sclerosis and mental illnesses, the symptoms of which often wax and wane unpredictably over time. A snapshot in time does not capture the dynamic nature of such impairments and the resulting functional limitations.

As noted above, evaluation of non-exertional limitations also 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 non-exertional 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 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.⁴³ 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 non-exertional limitations.

Occupational Information System. The ANPRM states that SSA is not seeking public comments on development of a new and updated occupational information system. However, we agree with the need to update the concept of the Dictionary of Occupational Titles (DOT). Any new occupational information system must comply with the statutory requirement that a claimant be afforded the right to an individualized assessment. This assessment first must take into account the physical and cognitive limitations of the person, and then must provide clear standards by which to measure whether jobs exist that fit those limitations.

Conclusion

In 1978, the SSA created the Grids in order to adjudicate claims more objectively and consistently. The Supreme Court lauded the Grids as an innovative mechanism for advancing needed consistency. *Heckler v. Campbell*, 461 U.S. 458, 460 n. 2 (1983). Such consistency is a major advancement over a pre-Grid, *ad hoc* approach to determinations. In addition to promoting consistency, the Grids promote efficiency by obviating the need for time-consuming, costly and inconsistent vocational expert testimony in certain circumstances. Maintaining such efficiencies is essential right now, as the SSA is facing a large backlog of pending hearings that has been increasing since 2007. While decisional quality is paramount, it is clear that rubrics dictating findings in certain circumstances can decrease the complexity of individualized assessments in certain cases. The Grids should be maintained in their current form. To the extent that evidence specific to workers with significant impairments proves that any

⁴³ See *City of New York v. Heckler*, 578 F. Supp. 1109 (E.D.N.Y. 1984), *aff'd*, 742 F.2d 729 (2nd Cir. 1984), *aff'd on other grounds*, 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).

assumptions in the Grids are outdated or out-of-touch with current realities in the job market, the Grids, and the related Dictionary of Occupational Titles, should be updated using current research that focuses on people with severe disabilities aged 18-67, and the Grids should not be eliminated. The vocational factors of age, education (including English proficiency and literacy), and work experience should be maintained as well.

Respectfully submitted,

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