

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

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Executive Director
Barbara Silverstone

March 15, 2019

Nancy Berryhill
Acting Commissioner
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-6401

Submitted via www.regulations.gov

Re: Notice of Proposed Rulemaking on Removing Inability To Communicate in English as an Education Category, 84 Fed. Reg. 1006 (February 1, 2019), Docket No. SSA-2017-0046

Dear Acting Commissioner Berryhill:

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR).

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a specialized bar association for attorneys and advocates who represent Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) claimants throughout the adjudication process and in federal court. Founded in 1979, NOSSCR is a national organization with a current membership of more than 3,000 members from the private and public sectors and is committed to the highest quality representation for claimants and beneficiaries. NOSSCR's mission is to advocate for improvements in Social Security disability programs and to ensure that individuals with disabilities applying for SSDI and SSI benefits have access to highly qualified representation and receive fair decisions.

Introduction and Background

The Social Security Administration (SSA)'s disability determination standard is the second-strictest among Organisation for Economic Cooperation and Development countries; fewer than four in ten applicants are granted benefits after all stages of appeals.¹ SSA uses a five-step sequential evaluation process to determine disability.² Step 1 involves whether a claimant is

¹ <https://www.cbpp.org/research/social-security/chart-book-social-security-disability-insurance>.

² See 20 CFR §404.1520.

performing “substantial gainful activity.” If not, Step 2 establishes whether the claimant has a “severe” impairment or combination of impairments that meets the durational requirement. If so, Step 3 considers whether a claimant’s impairment meets or equals a “listing.”³ Benefits are awarded if a listing is met or equaled; if not, the adjudicator determines the claimant’s “residual functional capacity” (RFC), which is the maximum the claimant can do despite her impairments. At step 4, the adjudicator considers whether the claimant, given her RFC, could return to any of her past relevant work. If she can return, benefits are denied. If she cannot return, Step 5 considers the claimant’s RFC and her “age, education, and work experience to see if [she] can make an adjustment to other work.”⁴ Benefits are only awarded if the claimant cannot make an adjustment to other work.

Step 5 of the sequential evaluation process has changed over time. 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.⁵

At first, 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. SSA issued final regulations in 1978, codifying these “Medical-Vocational Guidelines” (often referred to as the “grids”) and other policies for the disability determination process.⁶ The 1978 regulations provided greater uniformity and efficiency in the treatment of individuals applying for Social Security and SSI disability benefits.

The grids acknowledge the interplay between the various vocational factors required by the Social Security Act: age, education, work experience, and RFC. While a claimant experiencing adversity in one of those areas might be able to adjust to other work, the more severe the adversity and the more vocational factors in which a claimant experiences adversity, the more limited he will be in his ability to adjust to other work. One issue currently considered as part of the educational factor is a claimant’s ability to communicate in English.

Inability to communicate in English is never the sole reason for an award of disability benefits, and many disability claimants who are unable to communicate in English are denied. There are only two places in the current grids where inability to communicate in English is an educational category that changes whether the adjudicator is directed to a finding of disability or non-disability:

- Rules 201.17 and 201.18, addressing people age 45-49 whose RFC limits them to sedentary work and who have either unskilled or no past relevant work experience. If a claimant is “illiterate or unable to communicate in English,” he is disabled; if his

³ Listings are descriptions of impairments so limiting that vocational factors are not needed to determine disability. They are divided into 12 body systems and found in Appendix 1 to subpart P of part 404 of 20 CFR.

⁴ *Id.*

⁵ 42 U.S.C. § 423(d)(2)(A).

⁶ 43 Fed. Reg. 55349 (Nov. 28, 1978).

education is “limited or less” but he is literate and able to communicate in English, the grids indicate a finding of non-disability.⁷

- Rules 202.09 and 202.10, addressing people age 50-54 whose RFC limits them to light work and who have either unskilled or no past relevant work experience. If a claimant is “illiterate or unable to communicate in English,” she is disabled; if her education is “limited or less” but she is literate and able to communicate in English, the grids indicate a finding of non-disability.

In Fiscal Year 2016, there were 2,548,732 initial disability decisions, of which 33% were favorable.⁸ Of these, the supporting materials in the NPRM indicate 2,487—or 0.29%—were awarded based on these grid rules.

Even if the grids indicate a finding of non-disability, a claimant can be found disabled if his or her RFC includes exertional and non-exertional limitations that preclude adjustment to other work. For example, the grids do not consider limitations in social functioning, immunosuppression, the need for frequent unscheduled bathroom breaks, memory loss, or other factors that could reduce the ability to adjust to other work. As described in greater detail later in these comments, SSA will need to go beyond the grids and rely on VE testimony in more cases if the proposed rule is finalized. For this and several other reasons, the proposed rule should be withdrawn.

SSA presents an insufficient rationale for changing its rules

SSA’s longstanding policy is that “Since the ability to speak, read and understand English is generally learned or increased at school, we may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who doesn’t speak and understand English to do a job, regardless of the amount of education the person may have in another language.”⁹ The facts underlying this position have not appreciably changed and SSA should continue to consider ability to communicate in English as a vocational factor.

Claimants who are unable to communicate in English have fewer vocational opportunities than claimants with the same level of education who can communicate in English.

The NPRM says “claimants who cannot read, write, or speak English often have a formal education that may provide them with a vocational advantage.” However, the portion of 20 C.F.R. §§404.1564 and 416.964 that would remain unchanged by the proposed rule distinguishes different educational categories based on “ability in reasoning, arithmetic, and language skills.” Each of these abilities is diminished for a person unable to communicate in English, regardless of their formal education.

⁷ Social Security Ruling 96-9p states that: “[u]nder the Regulations, ‘sedentary work’ represents a significantly restricted range of work. Individuals who are limited to no more than sedentary work by their medical impairments have very serious functional limitations.”

⁸ <https://www.ssa.gov/budget/FY18Files/2018LAE.pdf> Table 3.42.

⁹ 20 CFR § 404.1564

Compare a claimant who received a high school degree in Japan and cannot communicate in English with one who is similarly unable to communicate in English but only completed the eighth grade in Japan. The additional ability in reasoning, arithmetic, and Japanese language abilities provided by four additional years of education is minimal compared to the detriment both claimants' inability to communicate in English poses to their vocational options.

Neither claimant would be able to convey her abilities to an English-speaking potential employer by completing a job application or interview. Neither claimant would be able to perform job duties expected of someone with her respective level of education, because people with the reasoning abilities expected of a high school graduate may still make less reasonable decisions in workplace situations that involve a language in which they cannot communicate; people with the arithmetic abilities expected of a person with an eighth-grade education may be unable to perform tasks involving a language in which they cannot communicate (for example, such an individual might have the arithmetic ability to make change, but could not understand a customer's request of "can I have that back as two fives and three singles?"); and people with the Japanese-language abilities expected of a Japanese high school graduate are no better able to communicate with English speakers than someone with less proficiency in Japanese.

As SSA states in Social Security Ruling (SSR) 85-15, the basic mental demands of competitive, remunerative, unskilled work include 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. That SSR was correct when it stated that 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." People who are unable to communicate in English have a different but possibly even more limiting situation as those who have experienced a substantial loss of the ability to meet these basic work-related activities: they never had the ability to perform them at all in an English-speaking workplace, and thus they too have severely limited occupational bases that deserve consideration. People who are unable to communicate in English have limitations in all three of these areas. Understanding and carrying out even simple instructions is harder or impossible when the instructions are conveyed in a language one does not speak. People who are unable to communicate in English literally cannot respond to English-speaking supervisors or coworkers. And such individuals may be unaware of or more easily confused by changes in the work setting: they could not read a sign saying "out of order" on a machine, could not understand a supervisor explaining a new work process, and would have more difficulty reporting problems or unusual circumstances. These severe limitations in the occupational base require consideration.

Similarly, SSA considers claimants to meet listing 2.09 if they experience loss of speech "due to any cause, with inability to produce by any means speech that can be heard, understood, or sustained." If a person who cannot speak is considered to meet a listing, it is implausible that the inability to communicate in English is completely vocationally irrelevant. When people who are unable to communicate in English are faced with the choice of trying to speak but not being understood versus not speaking at all, they will often opt to remain silent, demonstrating a similar functional limitation to those experiencing a loss of comprehensible speech.

When combined with age and work experience, the vocational impact of education in general—and ability to communicate in English in particular—are even more pronounced. The grid rules where a finding of disability can be directed for people who are unable to communicate in English all involve individuals with unskilled or no work experience, who are age 45 or older. They are likely to be decades away from their most recent education, and therefore to have less memory of their education and to have learned things that are less relevant to the current job market.

Demographic changes in the U.S. workforce do not justify a change to the medical-vocational guidelines

The NPRM says “since we adopted these rules, the U.S. workforce has become more linguistically diverse and work opportunities have expanded for individuals who lack English proficiency.”

Although there has been a decrease in the percentage of Americans who only speak English, this does not necessarily mean that speakers of other languages have greater work opportunities. In fact, increasing linguistic diversity may actually mean that more people who speak uncommon languages—and therefore are unlikely to find fellow speakers to communicate with in the workplace—are living in the United States.

The NPRM’s selective focus on data about “individuals who lack English proficiency” is also misplaced. The proposed rule would affect a specific subset of that population—not people whose English is merely imperfect, but those who are unable to communicate in English at all. The NPRM groups together people who speak English “well,” “not well,” and “not at all” when it describes the work opportunities available for people with limited English proficiency, without providing any evidence that work opportunities have expanded for those who cannot communicate in English. ONET does not list a single job for which knowledge of the English language is completely unnecessary or unimportant.¹⁰

Labor force participation rates among people who cannot speak English, even if broken down by educational levels, are insufficient justification for the proposed rule change. The ORES data provided in the docket by SSA groups all individuals with less than a high school diploma together, and does not consider the additional factors of age (at least 45), work history (unskilled or none), and medical conditions (severe, lasting at least 12 months or expected to result in death, limiting an individual to sedentary or light work) that exist for all claimants for whom inability to communicate in English currently dictates a finding of disability. The NPRM has not shown that the labor market has improved for such individuals.

The mere presence of more low-skilled jobs in the national economy is similarly irrelevant. Some unskilled jobs are part-time, temporary, or otherwise not at the SGA level. Also, while the NPRM notes that “English language proficiency has the least significance for unskilled work because most unskilled jobs involve working with things rather than with data or people,” these jobs still do require some level of training, generally with verbal and/or written instruction.

¹⁰ <https://www.onetonline.org/find/descriptor/result/2.C.7.a?s=1&a=1>

Additionally, many unskilled jobs do require public contact and the ability to communicate in English. For example “fast food worker” (DOT 311.472-010) has a Specific Vocational Preparation level of 2, meaning one month or less of training is necessary, but includes duties such as taking customer orders and communicating them to the kitchen. Other jobs entail physical duties that exceed the RFC of a claimant limited to light or sedentary work: a “landscape laborer” (DOT 408.687-014) also has an SVP of 2 but is heavy work, involving tasks like digging holes and hauling topsoil. And there are many unskilled jobs that require both English skills and physical abilities beyond the capabilities of anyone considered under the two grid rules threatened by this NPRM. For example, the job of “child care attendant” (DOT 355.674-010) also has an SVP of 2; it is considered medium work that can involve lifting, bathing, and dressing children and helping them to walk, and it seems infeasible to perform these tasks without being able to communicate with coworkers, the children, and their families. While there are probably more fast food workers, landscape laborers, and child care attendants in the United States than there were in 1978, the jobs are just as unattainable for people whose RFCs limit them to less strenuous work and whose inability to communicate in English renders them unable to perform job duties.

Many disability claimants who are unable to communicate in English participated in the labor force before their impairments started or worsened. However, the fact that large percentages of claimants worked, as the NPRM states, “in occupations requiring lower level skills such as laborer, machine operator, janitor, cook, maintenance, and housekeeping” does not mean that the people whose disability claims are assessed at Step 5 can do them. If these claimants could perform their past relevant work, they would have been denied at step 4 of the sequential evaluation process. If they are being considered under the grid rules that direct a finding of disability for claimants unable to communicate in English, they are limited to sedentary or light work, which precludes such jobs. And if they did perform such jobs in the past, then their work history is likely unskilled, meaning that they lack skills to transfer to other occupations.

Contradiction with proposed “public charge” rule

The arguments in this NPRM are also directly contradicted by proposed rulemakings in other federal agencies. In an October 10, 2018 NPRM,¹¹ the Department of Homeland Security (DHS) stated that “an inability to speak and understand English may adversely affect whether an [immigrant] can obtain employment,” using that as a reason such an immigrant is more likely to become a public charge. While NOSSCR does not support the DHS public charge proposal and believes that many people with limited English proficiency can be self-supporting, SSA must consider the interaction between a claimant’s medical and vocational limitations. People with severe medically determinable impairments lasting one year or more or expected to be fatal, and who cannot return to their past relevant work—the only people who are assessed at Step 5 of the sequential evaluation process—are a group more likely to have obstacles to employment than the typical individual who is unable to communicate in English. When these limitations are combined with being over age 45 and having either a history of unskilled work or no past relevant work experience, as in the two current grid rules where inability to communicate in English can direct a finding of disability, the barriers to employment are even greater.

¹¹ 83 Fed. Reg. 51114.

Claimants and beneficiaries in Puerto Rico and outside the United States are not a reason to change the rules

The NPRM says “our current rules treat English language proficiency as a relevant vocational factor even when claimants live in countries outside the U.S. or in U.S. territories where English is not a dominant language, leading to disparate results based on the location of the claimants.” But the issues in Puerto Rico and countries with totalization agreements are not a reason to change the program for everyone, especially given that the vast majority of claimants who are unable to communicate in English live in areas where English is the predominant language. Disregarding ability to communicate in English as a vocational factor because a small number of claimants live in an area where another language predominates ignores the fact that some claimants who are unable to communicate in English are also unable to communicate in the predominant language where they live (for example, a Japanese-speaker living in Denmark).

The current policy also provides uniformity, because people who are unable to communicate in English are treated equally regardless of where they live. Given that the U.S. citizens living in Puerto Rico and other territories can and often do move to the United States permanently or temporarily, and many workers receiving disability benefits while living abroad hold U.S. citizenship or otherwise have the right to live in the United States, it is appropriate to make rules based on the dominant language of the national economy, which remains English. The number of people receiving disabled-worker benefits under totalization agreements is very small: just 2,021 worldwide in 2017,¹² with approximately one-third living in countries where English is the dominant language. The NPRM does not provide any information about how many disabled workers receiving benefits under totalization agreements were awarded benefits under the relevant two grid rules: it is possible that none of them were.

Similarly, the NPRM describes in detail the number of claimants in Puerto Rico who reported an inability to communicate in English and describes the fact that many reported a high school education or more. Yet it obscures the fact that of the 11,564 Puerto Rican claimants reporting an inability to communicate in English in Fiscal Year 2016, just 777 were awarded benefits at the initial level based on grid rules 201.17 and 202.09, and does not indicate whether any of those awarded benefits had high school degrees. The NPRM also does not describe whether Fiscal Year 2016 was a year in which an unusually high number of claims were granted under these two grid rules, but it may have been: the OIG report cited in the NPRM¹³ found only 244 claimants in calendar years 2011-2013 who were granted benefits by Puerto Rico’s DDS (at either the initial or reconsideration level) based on these grid rules.

Inability to communicate in English can be probative of ability to make vocational adjustments and thus should be considered a vocational factor.

Prohibiting adjudicators from considering “an individual's educational attainment to be at a lower education category than his or her highest numeric grade” because “the individual

¹² <https://www.ssa.gov/policy/docs/statcomps/supplement/2018/5m.html>

¹³ https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-13-13062_0.pdf

participated in an English language learner program, such as an English as a second language class”, as the NPRM would, makes little sense.

Disability claimants who participated in programs designed to teach them to communicate in English, yet who remain unable to do so, clearly did not experience the educational attainment such programs are intended to provide. Though claimants who are unable to communicate in English may have been physically present for a year of education, their educational attainment should not be considered equivalent to that of someone who both attended school and learned from it. In addition to not learning to communicate in English, such an individual likely missed out on the gains in reasoning, arithmetic, and communications abilities that SSA expects each additional year of education to convey.

A person who cannot adjust to communicating in a new language, even after attending English classes or living in a place where English is the dominant language, is also likely to have difficulty adjusting to the demands of a new job. As the DHS NPRM states, “numerous studies have shown that immigrants’ English language proficiency or ability to acquire English proficiency directly correlate to a newcomer’s economic assimilation into the United States.” And yet people whose claims are adjudicated at Step 5 of the sequential evaluation process would all have to adjust to different work, because at Step 4 they were found unable to return to their past relevant work. Difficulty in learning to communicate in English is a valuable proxy for difficulty learning the duties of a different job, and therefore SSA should continue to consider it.

This difficulty is likely amplified for older claimants whose prior work gave them no transferrable skills. Age is properly considered a vocational factor in the disability determination process: mortality rates double from age 40 to 50 and again from age 50 to 60; conditions such as osteoarthritis, low back pain, and rheumatoid arthritis become much more prevalent as individuals leave the 30-44 age group and enter the 45-59 age group; cognitive decline in every category except vocabulary begins as early as age 45 and accelerates with age, as does hearing loss; people in their 40s and older often begin to experience vision changes that lead to difficulties reading and performing other close work, decreased color perception, and difficulty handling glare; there is a rapid decline in “perceptuomotor” skills between age 50 and 60; and older adults, on average, take longer to complete training, show lower levels of mastery when learning new skills, experience slower rates of learning, and spend more time off task.¹⁴ A history of unskilled work experience, or no work experience at all, also creates a vocational disadvantage. When these adverse age and work experience profiles, plus an RFC limiting the claimant to sedentary or light work, are combined with the adverse factor of inability to communicate in English, the barriers to work are immense. Vocational adjustment is unlikely when all of these factors are present and the worker cannot communicate with supervisors or coworkers.

¹⁴ Consortium for Citizens with Disabilities Social Security Task Force 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) <http://c-c-d.org/fichiers/CCD-SSTF-Comments-ANPRM-on-vocational-factors-final-12-14.pdf> pp.4-6.

The proposed rule will decrease efficiency

The grids were designed to increase efficiency and consistency in disability determinations. The proposed rule would reduce SSA's ability to reach either goal.

More, and more costly, appeals will be necessary

The proposed rule change will reduce efficiency for claimants who would be awarded benefits based grid rules 201.17 and 202.09. If they are denied benefits, many will file appeals, which are costly for SSA to adjudicate. Some will experience financial or medical peril, or even die, before receiving a final decision. Others will not pursue their claims (or may never apply for benefits in the first place), leaving them dependent on more costly government services like homeless shelters and emergency rooms than they otherwise might have needed. Many claimants will ultimately be awarded benefits as adjudicators move past the grids and to an individualized vocational analysis, but this requires them to wait longer for much-needed benefits and may require the testimony of a VE, which is not provided at the initial or reconsideration stages of the application process.

Adjudicators will be faced with assessing whether schooling completed in another language and/or another country provides "evidence that [the claimant's] educational abilities are higher or lower than the numerical grade level completed in school." While the proposed rule would not allow adjudicators to make this adjustment solely because the education was in another language, it is possible for education provided in another language to support a finding of educational abilities above or below the numerical grade completed in school. These determinations will be necessary for all claims adjudicated at Step 5 of the sequential evaluation process, not just those who previously would have been determined disabled under grid rules 201.17 and 202.09. The determinations will be especially complicated when they occur with older individuals whose education occurred many decades in the past. Yet the NPRM is silent on what, if any, training and guidance adjudicators will receive to make these determinations. It is unclear how an adjudicator would determine, for example, if a claimant's educational abilities are higher or lower than the nine years of Czechoslovakian education he obtained in the 1970s; it is even less clear how SSA will ensure consistency across its thousands of adjudicators when faced with questions such as these.

Under the proposed rule, VEs might need to testify not just about which jobs an individual with the claimant's vocational factors and residual functional capacity could perform, but also about how many of those jobs require the ability to communicate in English, so an adjudicator can determine if there are a significant number of jobs available. It is unclear what sources VEs would rely on for this information, and how SSA can provide consistent decisions if VE testimony on this issue varies substantially.

SSA's implementation plan is flawed

The NPRM proposes using these rules for "new applications, pending claims, and continuing disability reviews (CDR), as appropriate, as of the effective date of the final rules."

While this NPRM should not be finalized at all, using it for claims pending on the effective date of the final rule is especially inefficient. At any given time, SSA has tens of thousands of claims in which hearings have been held and decisions are in the process of being written; some decisions are not issued for many months after the hearing. ALJs who hold hearings before the effective date of the final rule will not have adduced the appropriate evidence to determine whether claims should be granted under the final rule. They might not even know what the final rule will say. This problem will lead to supplemental hearings, the need to change decisions and decision-writing instructions, and additional Appeals Council and federal court appeals. Cases pending at the initial and reconsideration levels may see similar challenges. If SSA does finalize rules altering the disability determination process, it is more appropriate for them to become effective with claims filed on or after the effective date. SSA used this method when it finalized its rule regarding evaluation of medical evidence.¹⁵

Conclusion

There is no justification for this proposed rule. Whether a disability claimant's education was in English or another language, and whether the claimant can communicate in English, have significant effects on the work he or she is able to perform. SSA's longstanding policy reflects these facts, and SSA has not provided sufficient justification for any change. Furthermore, SSA's plan to implement these changes is flawed and will lead to inefficiency in disability claims adjudication. SSA should rescind this NPRM and maintain its current regulations.

Thank you for the opportunity to comment on these proposed regulations.

Respectfully submitted,

Barbara Silverstone
Executive Director

¹⁵ 82 Fed. Reg. 5844 (January 18, 2017)