

Section 203.00, Appendix 2 to Subpart P of Part 404

As already noted, we are revising the third sentence of section 203.00(b) to conform to the changes in new §§ 404.1562(a) and 416.962(a).

Public Comments: We published these regulatory provisions in the **Federal Register** as a Notice of Proposed Rulemaking (NPRM) on June 11, 2002 (67 FR 39904). We provided the public a 60-day comment period. The comment period closed on August 12, 2002. We heard from eight commenters in response to this notice. The commenters included attorneys, an organization whose members include attorneys and others who represent the interest of disabled persons, a State agency that makes disability determinations on our behalf, and individuals who did not identify a particular affiliation. A summary of the comments we received and our responses to the comments are set out below.

Because some of the comments were detailed and lengthy, we have condensed, summarized, or paraphrased them. We have, however, tried to summarize the commenters' views accurately and to respond to all of the significant issues raised by the commenters that are within the scope of these rules.

Comment: One commenter expressed concerns about whether the proposed revisions would apply to all cases or if they would only apply to cases filed after the effective date of the revisions. This commenter stated that it would be preferable to apply the new rules only to cases filed after the effective date of the revisions.

Response: These new rules, as stated in **DATES**, above, will be effective 30 days after the date published in the **Federal Register**. As is our usual practice when we amend our regulations, the new rules will apply to all administrative determinations and decisions made on or after that effective date, regardless of the date on which an application was filed.

Comment: This same commenter stated that although the burden is on the claimant to produce evidence to show disability, the 5th Circuit Court of Appeals has ruled that the Commissioner has the burden of ensuring that evidentiary gaps are filled and the record is complete. The commenter stated that, if an administrative law judge (ALJ) is not satisfied with the development of the record, he or she should "reset the case" to complete the record if possible, rather than issue an unfavorable decision.

Response: We believe that our existing regulations (§§ 404.1512(d) and 416.912(d)) and the new rules at §§ 404.1545(a)(3) and 416.945(a)(3) address the commenter's concerns, and clearly explain our responsibility to develop the record and to assist claimants in obtaining evidence. Before making a determination that an individual is not disabled, our adjudicators, including ALJs, will develop the individual's complete medical history.

Comment: One commenter stated that the proposed rules should clarify at § 404.1560 that past relevant work must exist in the national economy in order to be considered as past relevant work for the purpose of denying benefits under the sequential evaluation process. He stated that finding an individual can perform past work that no longer exists is not in conformity with the Social Security Act's requirement that, to be considered gainful employment, work must exist in the national economy.

Response: We do not agree with the commenter's interpretation of the Social Security Act. Sections 223(d)(2)(A) and 1614(a)(3)(B) of the Act provide that:

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

In this excerpt, the phrase "which exists in the national economy" relates to "any other kind of substantial gainful activity" (i.e., work other than an individual's previous work). It does not relate to "previous work." Thus, the Act does not require that an individual's previous work exist in significant numbers in the national economy. (See SSR 82-40, "Titles II and XVI: The Vocational Relevance of the Past Work Performed in a Foreign Country.") Consequently, we do not consider job prevalence at step 4 of sequential evaluation. Neither do we consider an individual's age, education, and work experience. The issue at step 4 is whether or not an individual's impairment(s) prevents him or her from being able to perform the job duties of his or her past relevant work. If he or she has the residual functional capacity

to still do his or her past relevant work, we will make a finding of not disabled at step 4 and deny the claim whether or not that previous work exists in significant numbers in the national economy. In response to this comment, we are making additional changes in §§ 404.1560 and 416.960 to ensure that other members of the public do not misunderstand this.

Comment: One commenter stated that the proposed rules would not be a clarification of our rules, but a change. He stated that the proposed rules would force claimants to prove at step 4 that they cannot do other work (their past job, as performed in the national economy) against testimony from a trained VE. He stated that it is not fair that the claimant would have the burden of proof at step 4, yet have no ability to rebut testimony from a trained expert, and that VE testimony and all opinion evidence regarding other work should be limited to step 5 where the Commissioner has the burden of proof.

Response: We do not agree that these new rules represent a change in policy. Our longstanding policy is that evaluation of ability to do past relevant work at step 4 involves two aspects. We will find that a claimant is not disabled at this step if he or she retains the physical and mental capacity to perform either the functional demands and job duties of a particular past relevant job (i.e., the job as the individual actually performed it) or the functional demands and job duties of the occupation as generally required by employers throughout the national economy. (See SSR 82-61: "Titles II and XVI: Past Relevant Work—The Particular Job or the Occupation as Generally Performed.") Thus, evaluation of capacity to do past relevant work as generally performed in the national economy is not, as the commenter suggests, an assessment of ability to do "other work" (i.e., step 5 of sequential evaluation). In addition, allowing for expert testimony on the issue of how work is generally performed in the national economy is not unfair. VE testimony can be examined and rebutted at any step of sequential evaluation.

Comment: One commenter, who generally supported the proposed rules, recommended that the new rules clarify that adjudicators may obtain VE testimony about past relevant work, but that such testimony is not required. The commenter also suggested that we clarify that the VE's role at step 4 should be limited to explaining how the claimant's past relevant work is normally performed in the national economy. The commenter stated that the VE should not determine whether