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Dated: October 15, 2003.

**Matthew S. Borman,**

*Acting Assistant Secretary for Export Administration.*

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## RAILROAD RETIREMENT BOARD

### 20 CFR Part 220

RIN 3220-AA99

#### Determining Disability

**AGENCY:** Railroad Retirement Board.

**ACTION:** Final rule.

**SUMMARY:** The Railroad Retirement Board (Board) updates its regulations to reflect a change in how it evaluates pain and other subjective symptoms when determining if an individual is disabled from all regular employment to reflect recent changes in law.

**DATES:** This rule is effective on October 22, 2003.

**ADDRESSES:** Secretary to the Board, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois 60611-2092.

**FOR FURTHER INFORMATION CONTACT:** Marguerite P. Dadabo, Assistant General Counsel, (312) 751-4945, TDD (312) 751-4701.

**SUPPLEMENTARY INFORMATION:** Courts have consistently held that disability for all regular employment under section 2(a)(1)(v) of the Railroad Retirement Act (45 U.S.C. 231a(a)(1)(v)) is synonymous with the inability to perform any substantial gainful activity under section 223(d) of the Social Security Act (42 U.S.C. 423(d)). Therefore, the Board has generally patterned its regulations dealing with the adjudication of claims for disability based upon the inability to engage in all regular employment (20 CFR Part 220) on regulations promulgated by the Social Security Administration (20 CFR Part 404, Subpart P). On November 14, 1991, the Social Security Administration published its final rule (56 FR 57928) expanding its regulations pertaining to how it evaluates symptoms, including pain, in its disability adjudication. The Board has generally followed these regulations in adjudication of claims for disability based on inability to engage in

regular employment and now amends its regulations to conform thereto.

Section 220.100(f) explains how a symptom, such as pain, is considered when it appears as a criterion in the Listing of Impairments found in Appendix 1 of this part. Appendix 1 contains medical criteria for finding a person disabled on medical factors alone without consideration of the person's age, education, and work experience.

Section 220.112(a) is amended by eliminating the reference to remarried widow(ers) and surviving divorced spouses. Section 5103 of Public Law 101-508 revised the standard of disability for these groups of beneficiaries to require the consideration of other than medical factors, such as age, education, and experience, in determining disability for all substantial activity for these groups. Prior to the amendment, only medical factors were required to be used in a disability determination for these beneficiaries.

Section 220.114 is revised to parallel the Social Security regulation dealing with the same subject. See § 404.1529 of this chapter. Section 220.114 provides guidance on the evaluation of symptoms, including pain. The regulation conforms to the Board's current procedures and applicable court decisions on the evaluation of symptoms, especially pain, in making disability determinations.

Section 220.114(a) is a general statement of how symptoms, such as pain, are considered in determining disability. It explains that the Board will consider a claimant's symptoms along with other objective medical evidence and other evidence relating to a claimant's condition.

Section 220.114(b) explains that the Board will not find that pain will affect an individual's ability to do basic work activities unless the claimant first establishes that he or she has a medically determinable physical or mental impairment, supported by medical signs and laboratory findings, to which the allegation of pain can reasonably be related.

Section 220.114(c) provides that when a symptom, such as pain, is established, the Board must then evaluate the intensity and persistence of the symptom with respect to how it limits the claimant's capacity for work. In making this evaluation the Board considers all available evidence, including the claimant's medical history, statements from the claimant and his treating physician, and statements from others who have knowledge of the claimant's situation.

Section 220.114(d) explains how symptoms, such as pain, are evaluated in the sequential evaluation process required in disability adjudication.

Section 220.120 is revised to explain that in determining the claimant's residual functional capacity the Board considers the claimant's symptoms, such as pain, and that such pain or other symptoms may limit the claimant's residual functional capacity beyond what can be determined from anatomical or physiological abnormalities taken alone. Consistent with the revision of § 220.120, a new § 220.135 explains that a claimant's symptoms, such as pain, may cause both exertional and nonexertional limitations. This new section defines those terms. Only when the claimant's impairments and related symptoms impose solely exertional restrictions do the rules set forth in Appendix 2 of this part direct a conclusion.

Appendix 2 contains the medical-vocational guidelines or "grids". The grids direct a finding of disabled or not disabled based on specified limitations combined with the individual's age, education and work experience. The amendment to § 200.00 of Appendix 2 of this part conforms the section to the revised § 220.120.

#### Collection of Information Requirements

The amendments to this part do not impose information collection and recordkeeping requirements. Consequently, the final rule need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

#### Regulatory Impact Statement

Prior to publication of this final rule, the Board submitted the rule to the Office of Management and Budget for review pursuant to Executive Order 12866. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for rules that constitute significant regulatory action, including rules that have an economic effect of \$100 million or more annually. This rule is not a major rule in terms of the aggregate costs involved. Specifically, we have determined that this rule is not a major rule with economically significant effects because it would not result in increases in total expenditures of \$100 million or more per year.