



**Cornell University**  
**School of Industrial**  
**and Labor Relations**

**Raymond Cebula**  
Extension Associate Faculty  
Work Incentives Support Center  
Employment and Disability  
Institute  
25 Tobey Rd., #57  
Dracut, MA 01826  
t. 617.312.3261  
f. 978.937.0799  
tty. 607.255.2891  
[ray.cebula@comcast.net](mailto:ray.cebula@comcast.net)

October 31, 2005

**to: PABSS, BPAO, EDI**

**from: Ray Cebula**

**re: NPRM, Exemption of Work Activity as a Basis for  
a Continuing Disability Review, October 11, 2005**

---

The Commissioner of SSA has released a notice of public rulemaking concerning how work activity will be considered during a work related continuing disability review (CDR) as well as how work activity will be considered during a beneficiary's use of a ticket to work. Comments must be submitted by December 12, 2005, in order to be considered by the Commissioner during the promulgation of final regulations.

**What is the purpose of this notice of proposed rulemaking?**

SSA is taking steps to implement section 221(m) of the Social Security Act.

SSA states in its summary that these proposed regulations are codifying existing POMS instructions discussing how SSA will deal with work activity at the last two steps in the CDR process. This is important information indicating SSA's intent to implement these regulations as they have the relevant POMS provisions.

The benefits populations involved are the group of Title II recipients who have received cash payment for at least 24 months, all individuals (SSDI and SSI) experiencing a work related CDR, those requesting expedited reinstatement (EXR) whose determination process moves to the last two steps of the sequential evaluation, and beneficiaries who are using a ticket to work.

**What are continuing disability reviews and when does SSA start them?**

In most cases, SSA will start a CDR because they must routinely evaluate whether a current beneficiary continues to be entitled to benefits as a disabled or blind individual. A beneficiary is subject to regularly scheduled CDRs at intervals ranging from 6 months to 7 years depending on whether, and the degree to which, SSA expects the individual's impairment(s) to improve.

SSA may also start a CDR because the beneficiary has returned to work or when SSA receives information that raises a question about whether the beneficiary is still under a disability, e.g., upon the completion of VR services.

The proposals contain lots of very useful information by way of reviewing the CDR processes and how SGA will impact an individual's disability status. For purposes of review some of that information will be contained in this memo.

### **How does SSA determine whether the individual's disability continues or ends?**

Federal regulations at 20 CFR 404.1594 (Title II) and 416.994 (Title XVI) will control the determination process SSA uses during a CDR. These rules generally provide that SSA must determine if there has been any medical improvement and, if so, whether that medical improvement is related to the individual's ability to work. There also exist exceptions to the medical improvement standard.

An 8 Step Sequential Evaluation process is used during the CDR determination in SSDI cases. A 7 step sequential evaluation is used in the SSI program. The sequential evaluation process for an SSI beneficiary skips Step 1 as there is no consideration of SGA in the SSI program after initial entitlement is established.

The 8 steps are as follows:

1. Is the individual engaging in substantial gainful activity (SGA)? If so, and the TWP has ended, SSA will find that the disability has ended and the process stops.
  2. If the individual is not engaging in SGA, does the individual have an impairment (or combination of impairments) that meets or equals the severity of any impairment in SSA's Listing of Impairments? If yes, the disability will be found to continue and the process stops.
  3. If the individual's impairment(s) does not meet the severity of a listed impairment, has there been medical improvement? The current status of impairments used during the initial disability eligibility process is used and compared to the severity of those impairments at the time of the initial determination to decide if medical improvement has occurred. If there has been medical improvement as shown by a decrease in the medical severity of the individual's impairments, SSA moves on to step 4. If there has not been medical improvement, SSA moves to step 5 (skipping step 4).
  4. If there has been medical improvement SSA must determine if that improvement is related to the individual's ability to work. If the medical improvement is not related to the individual's ability to work, SSA moves on to step 5. If the medical improvement is determined to be related to the individual's ability to work, SSA moves on to step 6 (skipping step 5).
  5. If SSA found, at Step 3, that there has been no medical improvement, SSA will consider the exceptions to medical improvement and whether any of the exceptions apply to the individual's case and the process stops. The same result will occur if SSA found, at Step 4, that the medical improvement was not related to the individual's ability to work. If none of the exceptions apply, SSA will find that the individual's disability continues. If one of the exceptions applies, SSA will either find that the disability has ended or that the case must move to Step 6, depending upon which exception applies. See 20 CFR 404.1594(d) & (e) for the list of exceptions.
  6. If SSA found that the medical improvement was related to the individual's ability to work, or if one of the exceptions applies to the case, SSA will determine whether the impairment(s) is severe (according to 20 CFR 404.1521). If the impairment(s) is not severe, SSA will determine that the individual's disability has ended and the process stops.
  7. If SSA determines that the individual's impairment(s) is severe, SSA will then assess the individual's residual functional capacity (RFC) based on all current impairments and consider whether the individual
- Cornell University is an equal opportunity, affirmative action educator and employer.

can still do work that s/he has done in the past. If SSA determines that past work can be done the impairment will be determined to have ended.

8. If the individual is not able to do past work considering all current impairments, SSA will then consider whether the individual's RFC, age, education and past work experience, will allow for the performance of other work. If the individual is determined able to engage in other work, disability will end. If not, disability will be continued.

**When will the performance of SGA affect disability continuation?**

SSDI – SSA will determine that the individual's disability has ceased in the first month in which that individual performs SGA following the completion of any applicable trial work period (TWP).

SSI – The performance of SGA does not affect the ability to continue SSI eligibility.

**Section 221(m) of the Social Security Act**

Section 221(m) of the Act provides that if an individual has received SSDI benefits, on the basis of disability or blindness, for at least 24 months SSA may not schedule a CDR solely as a result of the individual's work activity. Further, SSA may not use the individual's work activity as evidence that the individual's disability has ended nor may they use any work stoppage will be evidence of the individual's inability to work.

The individual meeting the criteria set forth above will still be subjected to regularly scheduled medical CDRs that are not triggered by work activity. If, during this medical CDR process, the individual is performing SGA, benefits and disability status can be terminated in the case of a Title II beneficiary. The proposals explain that concurrent Title II and Title XVI beneficiaries will be treated as if they were Title II only beneficiaries for this purpose. As SGA is not a factor for post-entitlement individuals, there are no section 221(m) impacts on the SSI only population.

**Proposed Regulations**

Please note that all sections of the proposal will not be discussed in this summary. This summary provide highlights of the sections of most significance to the PABSS and BPAO client populations.

**SSDI/Title II Proposals**

Current Regulation

Proposed Change

<b>20 CFR 404.903</b> – Administrative actions that are not initial determinations.	New language added  (x) Starting or discontinuing a continuing disability review.
---	---

Initial determinations are those that are subject to the SSA administrative appeals process. The proposed regulation would not allow such a review for SSA's decision to initiate a CDR. This is consistent with current practice. However, SSA would allow for an individual who believes s/he is protected by section 221(m) to request that SSA review the initiation of a CDR. This opportunity, not an appeal, will be made in the initial notice informing the individual that a CDR has begun. 20 CFR 416.1403 is amended in a manner consistent with this proposal.

**20 CFR 404.1574** – Evaluation guides if you are an employee.

(3)(B)(iii) – no existing language

(3)(B)(iii) – Special rule for considering earnings alone when evaluating the work you do after you have received social security disability benefits for at least 24 months.

Notwithstanding paragraph (b)(3)(ii) of this section, we will not consider other information in addition to your earnings to evaluate the work you are doing or have done if –

(A)At the time you do the work, you are entitled to social security disability benefits and you have received such benefits for at least 24 months (see paragraph (b)(3)(iv) of this section); and

(B)We are evaluating that work to consider whether you have engaged in substantial gainful activity or demonstrated the ability to engage in substantial gainful activity for the purpose of determining whether your disability has ceased because of your work activity (see §§404.1592a(a)(1) and (3)(ii) and 404.1594(d)(5) and (f)(1).

(iv)When we consider you to have received social security disability benefits for at least 24 months. For purposes of paragraph (b)(3)(iii) of this section, social security disability benefits means disability insurance benefits for a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability. We consider you to have received such benefits for at least 24 months beginning with the first day of the first month following the 24<sup>th</sup> month for which you received social security disability benefits that you were due. The 24 months do not have to be consecutive. Any months for which you were entitled to benefits but did not receive a benefits payment will not be counted for the 24-month requirement; for example, a month for which you did not receive a benefit payment because of worker's compensation offset or because you repaid an overpayment to us. If you also receive supplemental security income payments based on

	disability or blindness under title XVI of the Social Security Act, months for which you received only supplemental security income payments will not be counted for the 24-month requirement.
--	--

Employee regulation proposals will amend the current regulations to bring them into parity with current practice as documented in the POMS. SSA proposes to remove the “secondary SGA” tests for considering work activity performed before January, 2001. This will allow SSA to consider all work activity in a similar manner. Secondary investigations in SGA determinations will only occur when SSA believes that circumstances indicate that SGA is being performed despite average wages below the appropriate dollar amount for that period, or when the individual may be in a position to control the amount of wages actually paid.

The “special rule” for considering earnings alone if the individual is protected by section 221(m) is new and will allow SSA to determine that disability has ended for this category of recipients. The requirements for meeting the 24-month period set forth in section 221(m) are set forth in the new proposals. Benefits payments do not need to be received in consecutive months. Any month in which the individual was eligible to receive SSDI but was not paid will not be counted toward the 24 month period. Nor will months in which a concurrent SSD/I recipient received SSI only.

<p><b>20 CFR 404.1575</b> – Evaluation guides if you are self-employed.</p> <p>(a) <i>If you are a self-employed person.</i> If you are working or have worked as a self-employed person, we will use the provisions in paragraphs (a) through (d) of this section that are relevant to your work activity. We will use these provisions whenever they are appropriate, whether in connection with your application for disability benefits (when we make an initial determination on your application and throughout any appeals you may request), after you have become entitled to a period of disability or to disability benefits, or both. We will consider your activities and their value to your business to decide whether you have engaged in substantial gainful activity if you are self-employed. We will not consider your income alone because the amount of income you actually receive may depend on a number of different factors, such as capital investment and profit-sharing agreements. We will generally consider work that you were forced to stop or reduce to below substantial gainful activity after 6 months or less because of your impairment as an unsuccessful work attempt. See paragraph (d) of this section.</p>	<p>(a) If you are a self-employed person. If you are working or have worked as a self-employed person, we will use the provisions in paragraphs (a) through (e) of this section that are relevant to your work activity. We will use these provisions whenever they are appropriate, whether in connection with your application for disability benefits (when we make an initial determination on your application and throughout any appeals you may request), after you have become entitled to a period of disability or to disability benefits, or both.</p> <p>(1) How we evaluate the work you do after you have become entitled to disability benefits. If you are entitled to social security disability benefits and you work as a self-employed person, the way we will evaluate your work activity will depend on whether the work activity occurs before or after you have received such benefits for at least 24 months and on the purpose of the evaluation. For purposes of paragraphs (a) and (e) of this section, social security disability benefits means disability insurance benefits for a disabled worker, child's</p>
--	--

We will evaluate your work activity based on the value of your services to the business regardless of whether you receive an immediate income for your services. We determine whether you have engaged in substantial gainful activity by applying three tests. If you have not engaged in substantial gainful activity under test one, then we will consider tests two and three. The tests are as follows:

(1) *Test One:* You have engaged in substantial gainful activity if you render services that are significant to the operation of the business and receive a substantial income from the business. Paragraphs (b) and (c) of this section explain what we mean by significant services and substantial income for purposes of this test.

(2) *Test Two:* You have engaged in substantial gainful activity if your work activity, in terms of factors such as hours, skills, energy output, efficiency, duties, and responsibilities, is comparable to that of unimpaired individuals in your community who are in the same or similar businesses as their means of livelihood.

(3) *Test Three:* You have engaged in substantial gainful activity if your work activity, although not comparable to that of unimpaired individuals, is clearly worth the amount shown in §404.1574(b)(2) when considered in terms of its value to the business, or when compared to the salary that an owner would pay to an employee to do the work you are doing.

(b) *What we mean by significant services.* (1) If you are not a farm landlord and you operate a business entirely by yourself, any services that you render are significant to the business. If your business involves the services of more than one person, we will consider you to be rendering significant services if you contribute more than half the total time required for the management of the business, or you render management services for more than 45 hours a month regardless of the total management time required by the business.

(2) If you are a farm landlord, that is, you rent farm land to another, we will consider you to be rendering significant services if you materially participate in the production or the management of the production of the things raised on the rented farm. (See §404.1082 of this chapter for an explanation of *material participation*.) If you were

insurance benefits based on disability, or widow's or widower's insurance benefits based on disability. We will use the rules in paragraph (e)(2) of this section to determine if you have received such benefits for at least 24 months.

(i) We will use the guides in paragraph (a)(2) of this section to evaluate any work activity you do before you have received social security disability benefits for at least 24 months to determine whether you have engaged in substantial gainful activity, regardless of the purpose of the evaluation.

(ii) We will use the guides in paragraph (e) of this section to evaluate any work activity you do after you have received social security disability benefits for at least 24 months to determine whether you have engaged in substantial gainful activity for the purpose of determining whether your disability has ceased because of your work activity.

(iii) If we have determined under Sec. 404.1592a(a)(1) that your disability ceased in a month during the reentitlement period because you performed substantial gainful activity, and we need to decide under Sec. 404.1592a(a)(2)(i) or (a)(3)(i) whether you are doing substantial gainful activity in a subsequent month in or after your reentitlement period, we will use the guides in paragraph (a)(2) of this section (subject to the limitations described in Sec. 404.1592a(a)(2)(i) and (a)(3)(i)) to determine whether your work activity in that month is substantial gainful activity. We will use the guides in paragraph (a)(2) of this section for these purposes, regardless of whether your work activity in that month occurs before or after you have received social security disability benefits for at least 24 months.

(2) General rules for evaluating your work activity if you are self-employed. We will consider your activities and their value to your business to decide whether you have engaged in substantial gainful activity if you are self-employed. We will not consider your income alone because the amount of income you actually receive may depend on a number of different factors, such as capital investment and profit-sharing agreements. We will generally consider work that you were forced to stop or reduce to below substantial gainful activity after 6 months or less because of your impairment

given social security earnings credits because you materially participated in the activities of the farm and you continue these same activities, we will consider you to be rendering significant services.

(c) *What we mean by substantial income.* We deduct your normal business expenses from your gross income to determine net income. Once we determine your net income, we deduct the reasonable value of any significant amount of unpaid help furnished by your spouse, children, or others. Miscellaneous duties that ordinarily would not have commercial value would not be considered significant. We deduct impairment-related work expenses that have not already been deducted in determining your net income. Impairment-related work expenses are explained in §404.1576. We deduct unincurred business expenses paid for you by another individual or agency. An unincurred business expense occurs

as an unsuccessful work attempt. See paragraph (d) of this section. We will evaluate your work activity based on the value of your services to the business regardless of whether you receive an immediate income for your services. We determine whether you have engaged in substantial gainful activity by applying three tests. If you have not engaged in substantial gainful activity under test one, then we will consider tests two and three. The tests are as follows:

(i) Test one: You have engaged in substantial gainful activity if you render services that are significant to the operation of the business and receive a substantial income from the business. Paragraphs (b) and (c) of this section explain what we mean by significant services and substantial income for purposes of this test.

(ii) Test Two: You have engaged in substantial gainful activity if your work activity, in terms of factors such as hours, skills, energy output, efficiency, duties, and responsibilities, is comparable to that of unimpaired individuals in your community who are in the same or similar businesses as their means of livelihood.

(iii) Test Three: You have engaged in substantial gainful activity if your work activity, although not comparable to that of unimpaired individuals, is clearly worth the amount shown in Sec. 404.1574(b)(2) when considered in terms of its value to the business, or when compared to the salary that an owner would pay to an employee to do the work you are doing.

(c) What we mean by substantial income. (1) Determining countable income. We deduct your normal business expenses from your gross income to determine net income. Once we determine your net income, we deduct the reasonable value of any significant amount of unpaid help furnished by your spouse, children, or others. Miscellaneous duties that ordinarily would not have commercial value would not be considered significant. We deduct impairment-related work expenses that have not already been deducted in determining your net income. Impairment-related work expenses are explained in Sec. 404.1576. We deduct unincurred business expenses paid for you by another individual or agency. An unincurred business expense occurs when a sponsoring agency

when a sponsoring agency or another person incurs responsibility for the payment of certain business expenses, e.g., rent, utilities, or purchases and repair of equipment, or provides you with equipment, stock, or other material for the operation of your business. We deduct soil bank payments if they were included as farm income. That part of your income remaining after we have made all applicable deductions represents the actual value of work performed. The resulting amount is the amount we use to determine if you have done substantial gainful activity. We will generally average your income for comparison with the earnings guidelines in §§404.1574(b)(2) and 404.1574(b)(3). See §404.1574a for our rules on averaging of earnings. We will consider this amount to be substantial if—

(1) It averages more than the amounts described in §404.1574(b)(2); or

(2) It averages less than the amounts described in §404.1574(b)(2) but it is either comparable to what it was before you became seriously impaired if we had not considered your earnings or is comparable to that of unimpaired self-employed persons in your community who are in the same or a similar business as their means of livelihood.

or another person incurs responsibility for the payment of certain business expenses, e.g., rent, utilities, or purchases and repair of equipment, or provides you with equipment, stock, or other material for the operation of your business. We deduct soil bank payments if they were included as farm income. That part of your income remaining after we have made all applicable deductions represents the actual value of work performed. The resulting amount is the amount we use to determine if you have done substantial gainful activity. For purposes of this section, we refer to this amount as your countable income. We will generally average your countable income for comparison with the earnings guidelines in Sec. 404.1574(b)(2). See Sec. 404.1574a for our rules on averaging of earnings.

(2) When countable income is considered substantial. We will consider your countable income to be substantial if--

(i) It averages more than the amounts described in Sec. 404.1574(b)(2); or

(ii) It averages less than the amounts described in Sec. 404.1574(b)(2) but it is either comparable to what it was before you became seriously impaired if we had not considered your earnings or is comparable to that of unimpaired self-employed persons in your community who are in the same or a similar business as their means of livelihood.

e) Special rules for evaluating the work you do after you have received social security disability benefits for at least 24 months.

(1) General. We will apply the provisions of this paragraph to evaluate the work you are doing or have done if, at the time you do the work, you are entitled to social security disability benefits and you have received such benefits for at least 24 months. We will apply the provisions of this paragraph only when we are evaluating that work to consider whether you have engaged in substantial gainful activity or demonstrated the ability to engage in substantial gainful activity for the purpose of determining whether your disability has ceased because of your work activity (see Sec. Sec. 404.1592a(a)(1) and (3)(ii) and 404.1594(d)(5) and (f)(1)). We will use the countable income test described in paragraph (e)(3) of this section to determine whether the work you do after you have

received such benefits for at least 24 months is substantial gainful activity or demonstrates the ability to do substantial gainful activity. We will not consider the services you perform in that work to determine that the work you are doing shows that you are able to engage in substantial gainful activity and are, therefore, no longer disabled. However, we may consider the services you perform to determine that you are not doing substantial gainful activity. We will generally consider work that you were forced to stop or reduce below substantial gainful activity after 6 months or less because of your impairment as an unsuccessful work attempt. See paragraph (d) of this section.

(2) The 24-month requirement. For purposes of paragraphs (a)(1) and (e) of this section, we consider you to have received social security disability benefits for at least 24 months beginning with the first day of the first month following the 24th month for which you received social security disability benefits that you were due. The 24 months do not have to be consecutive. Any months for which you were entitled to benefits but for which you did not receive a benefit payment will not be counted for the 24-month requirement; for example, a month for which you did not receive a benefit payment because of worker's compensation offset or because you repaid an overpayment to us. If you also receive supplemental security income payments based on disability or blindness under title XVI of the Social Security Act, months for which you received only supplemental security income payments will not be counted for the 24-month requirement.

(3) Countable income test. We will compare your countable income to the earnings guidelines in Sec. 404.1574(b)(2) to determine if you have engaged in substantial gainful activity. See paragraph (c)(1) of this section for an explanation of countable income. We will consider that you have engaged in substantial gainful activity if your monthly countable income averages more than the amounts described in Sec. 404.1574(b)(2) for the month(s) in which you work, unless the evidence shows that you did not render significant services in the month(s). See paragraph (b) of this section for what we mean by significant services. If your average monthly countable income is equal to or

	<p>less than the amounts in Sec. 404.1574(b)(2) for the month(s) in which you work, or if the evidence shows that you did not render significant services in the month(s), we will consider that you work as a self-employed person shows that you have not engaged in substantial gainful activity.</p> <p>6. Section 404.1590 is amended by adding three new sentences to the end of paragraph (a), revising paragraph (b) introductory text and paragraphs (b)(6), (b)(7)(i), and (b)(8), and adding new paragraphs (h) and (i) to read as follows:</p>
--	--

Given the protections provided by section 221(m) to those individuals who have received Title II (or concurrent Title II and XVI) benefits for at least 24 months, SSA has created a new test to be used when considering whether work activity is SGA for purposes of whether a disability has ended. This new test is the “countable income test”. The use of the SGA tests now contained in this section will depend upon whether the work activity performed by the beneficiary occurs before or after the individual has received SSDI benefits for at least 24 months as well as the purpose of the evaluation. If the work activity occurs after the 24 month requirement is met, SSA will use the “countable income test” to evaluate whether work is SGA for the purpose of determining whether disability has ceased. In all other situations (when work occurs before the 24-month period is met), SSA will apply the three pre-existing tests to evaluate self-employment and SGA.

After SSA makes a determination that disability has ceased in the reentitlement period because of the performance of SGA, SSA will use the three pre-existing tests to determine whether the individual is doing SGA in subsequent months in or after the reentitlement period regardless of whether work activity occurs before or after the 24-month period. This SGA determination is made to decide whether benefits should be started or stopped for a subsequent month(s) during the reentitlement period and to decide when entitlement to benefits terminates.

The three tests are used because they do not involve deciding whether the individual is still disabled, but rather determine whether the individual is eligible for payments.

The “countable income test” will be used after the individual has met the 24-month period requirement and to determine whether or not disability has ceased. SSA will apply certain deductions to income to decide the amount of income used to make an SGA determination. SSA will not consider the services performed by the individual to determine if the work being done indicates an ability to perform SGA and, therefore, the individual is no longer disabled. SSA will consider these services to decide that no ability to perform SGA exists.

Once SSA arrives at “countable income”, that amount will be compared to the appropriate SGA guidelines in order to determine if the individual has engaged in SGA. SGA will have been performed if the average monthly income is higher than the applicable guideline unless evidence exists to show that the individual did not engage in SGA. When the countable income amount is equal to or less than the appropriate guideline SSA will determine that no SGA has been performed in the absence of other evidence to the contrary.

The proposal contains the rules for determining which month of receipt will count toward the 24-month period and which types of benefits can be used to meet this requirement.

<p><b>20 CFR 404.1590</b> – When and how often we will conduct a continuing disability review.</p> <p>a) <i>General.</i> We conduct continuing disability reviews to determine whether or not you continue to meet the disability requirements of the law. Payment of cash benefits or a period of disability ends if the medical or other evidence shows that you are not disabled as determined under the standards set out in section 223(f) of the Social Security Act.</p> <p>(b) <i>When we will conduct a continuing disability review.</i> A continuing disability review will be started if—</p> <p>(6) You tell us that you have recovered from your disability or that you have returned to work;</p> <p>(7) Your State Vocational Rehabilitation Agency tells us that—</p> <p>(i) The services have been completed; or</p> <p>(ii) You are now working; or</p> <p>(iii) You are able to work;</p> <p>(8) Someone in a position to know of your physical or mental condition tells us that you are not disabled, that you are not following prescribed treatment, that you have returned to work, or that you are failing to follow the provisions of the Social Security Act or these regulations, and it appears that the report could be substantially correct;</p>	<p>(a) General. * * * In paragraphs (b) through (g) of this section, we explain when and how often we conduct continuing disability reviews for most individuals. In paragraph (h) of this section, we explain special rules for some individuals who are participating in the Ticket to Work program. In paragraph (i) of this section, we explain special rules for some individuals who work.</p> <p>(b) When we will conduct a continuing disability review. Except as provided in paragraphs (h) and (i) of this section, we will start a continuing disability review if—</p> <p>(6) You tell us that--</p> <p>(i) You have recovered from your disability; or</p> <p>(ii) You have returned to work;</p> <p>(7) Your State Vocational Rehabilitation Agency tells us that--</p> <p>(i) The services have been completed; or</p> <p>(8) Someone in a position to know of your physical or mental condition tells us any of the following, and it appears that the report could be substantially correct:</p> <p>(i) You are not disabled; or</p> <p>(ii) You are not following prescribed treatment;</p> <p>or</p> <p>(iii) You have returned to work; or</p> <p>(iv) You are failing to follow the provisions of the Social Security Act or these regulations;</p> <p>(h) If you are participating in the Ticket to Work program. If you are participating in the Ticket to Work program, we will not start a continuing disability review during the period in which you are using a ticket. However, this provision does not apply to reviews we conduct using the rules in Sec. Sec. 404.1571-404.1576 to determine whether</p>
---	---

the work you have done shows that you are able to do substantial gainful activity and are, therefore, no longer disabled. See subpart C of part 411 of this chapter.

(i) If you are working and have received social security disability benefits for at least 24 months.

(1) General. Notwithstanding the provisions in paragraphs (b)(4), (b)(5), (b)(6)(ii), (b)(7)(ii), and (b)(8)(iii) of this section, we will not start a continuing disability review based solely on your work activity if--

(i) You are currently entitled to disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability; and

(ii) You have received such benefits for at least 24 months (see paragraph (i)(2) of this section).

(2) The 24-month requirement.

(i) The months for which you have actually received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability that you were due will count for the 24-month requirement under paragraph (i)(1)(ii) of this section, regardless of whether the months were consecutive. Any month for which you were entitled to benefits but for which you did not receive a benefit payment will not be counted for the 24-month requirement; for example, a month for which you did not receive a benefit payment because of worker's compensation offset or because you repaid an overpayment to us. If you also receive supplemental security income payments based on disability or blindness under title XVI of the Social Security Act, months for which you received only supplemental security income payments will not be counted for the 24-month requirement. Benefits that are continued pending reconsideration and/or a hearing before an administrative law judge based on medical cessation determination (see Sec. Sec. 404.1597a) will not be counted for the 24-month requirement.

(ii) In determining whether paragraph (i)(1) of this section applies, we consider whether you have received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance

benefits based on disability for at least 24 months as of the date on which we start a continuing disability review. For purposes of this provision, the date on which we start a continuing disability review is the date on the notice we send you that tells you that we are beginning to review your disability case.

(3) When we may start a continuing disability review even if you have received social security disability benefits for at least 24 months. Even if you meet the requirements of paragraph (i)(1) of this section, we may still start a continuing disability review for a reason(s) other than your work activity. We may start a continuing disability review if we have scheduled you for a periodic review of your continuing disability, we need a current medical or other report to see if your disability continues, we receive evidence which raises a question as to whether your disability continues, or you fail to follow the provisions of the Social Security Act or these regulations. For example, we will start a continuing disability review when you have been scheduled for a medical improvement expected diary review, and we may start a continuing disability review if you failed to report your work to us.

(4) Reviews to determine whether the work you have done shows that you are able to do substantial gainful activity. Paragraph (i)(1) of this section does not apply to reviews we conduct using the rules in Sec. Sec. 404.1571-404.1576 to determine whether the work you have done shows that you are able to do substantial gainful activity and are, therefore, no longer disabled.

(5) Erroneous start of the continuing disability review. If we start a continuing disability review based solely on your work activity that results in a medical cessation determination, we will vacate the medical cessation determination if--

(i) You provide us evidence that establishes that you met the requirements of paragraph (i)(1) of this section as of the date of the start of your continuing disability review and that the start of the review was erroneous; and

(ii) We receive the evidence within 12 months of the date of the notice of the initial determination of medical cessation.

7. Section 404.1592a is amended by revising the second sentence of paragraph (a)(1), the sixth

	sentence of paragraph (a)(2)(i), and paragraph (a)(3) to read as follows:
--	---

The rules for the commencement of a CDR when an individual is participating in the ticket to work program and has a ticket in use or is protected by section 221(m) status will be added to this section of the federal regulations by the Commissioner’s proposal. A CDR will not be commenced while the individual is participating in the ticket to work program. Those individuals protected by section 221(m) will not see a CDR begun due to work activity alone. Regularly scheduled medical CDRs will continue on an “as scheduled basis”. The scheduling of a CDR is related to the individual’s coding as “medical improvement expected”, etc. The requirements of the 24-month period are also set out in this section of the proposal as well as are the types of Title II benefits that qualify an individual for 221(m) coverage.

This section of the proposal also contains language allowing the individual who has been notified of the commencement of a CDR to request a review by SSA should the individual believe that s/he is protected by section 221(m). This review is not an appeal, as the decision to commence a CDR is not an “initial determination” for administrative review purposes.

<p><b>20 CFR 404.1592a</b> – The reentitlement period.</p> <p>(a)(1) The first time you work after the end of your trial work period <i>and</i> engage in substantial gainful activity, we will find that your disability ceased. When we decide whether this work is substantial gainful activity, we will apply all of the relevant provisions of §§404.1571-404.1576 including, but not limited to, the provisions for averaging earnings, unsuccessful work attempts, and deducting impairment-related work expenses. We will find that your disability ceased in the first month after the end of your trial work period in which you do substantial gainful activity, applying all the relevant provisions in §§404.1571-404.1576.</p> <p>(2)(i) If we determine under paragraph (a)(1) of this section that your disability ceased during the reentitlement period because you perform substantial gainful activity, you will be paid benefits for the first month after the trial work period in which you do substantial gainful activity (i.e., the month your disability ceased) and the two succeeding months, whether or not you do substantial gainful activity in those succeeding months. After those three months, we will stop your benefits for any month in which you do substantial gainful activity. (See §§404.316, 404.337, 404.352 and 404.401a.) If your benefits are stopped because you do substantial gainful</p>	<p>(a)(1) * * * When we decide whether this work is substantial gainful activity, we will apply all of the relevant provisions of Sec. Sec. 404.1571-404.1576 including, but not limited to, the provisions for averaging earnings, unsuccessful work attempts, and deducting impairment-related work expenses, as well as the special rules for evaluating the work you do after you have received disability benefits for at least 24 months. * * *</p>
--	---

activity, they may be started again without a new application and a new determination of disability if you stop doing substantial gainful activity in a month during the reentitlement period. In determining whether you do substantial gainful activity in a month for purposes of stopping or starting benefits during the reentitlement period, we will consider only your work in, or earnings for, that month. Once we have determined that your disability has ceased during the reentitlement period because of the performance of substantial gainful activity as explained in paragraph (a)(1) of this section, we will not apply the provisions of §§404.1574(c) and 404.1575(d) regarding unsuccessful work attempts or the provisions of §404.1574a regarding averaging of earnings to determine whether benefits should be paid for any particular month in the reentitlement period that occurs after the month your disability ceased.

(3) The way we will consider your work activity after your reentitlement period ends (see paragraph (b)(2) of this section) will depend on whether you worked during the reentitlement period and if you did substantial gainful activity. If you worked during the reentitlement period and we decided that your disability ceased during the reentitlement period because of your work under paragraph (a)(1) of this section, we will find that your entitlement to disability benefits terminates in the first month in which you engage in substantial gainful activity after the end of the reentitlement period (see §404.325). (See §404.321 for when entitlement to a period of disability ends.) When we make this determination, we will consider only your work in, or earnings for, that month; we will not apply the provisions of §§404.1574(c) and 404.1575(d) regarding unsuccessful work attempts or the provisions of §404.1574a regarding averaging of earnings. If we did not find that your disability ceased because of work activity during the reentitlement period, we will apply all of the relevant provisions of §§404.1571-404.1576 including, but not limited to, the provisions for

2)(i) \* \* \* Once we have determined that your disability has ceased during the reentitlement period because of the performance of substantial gainful activity as explained in paragraph (a)(1) of this section, we will not apply the provisions of Sec. Sec. 404.1574(c) and 404.1575(d) regarding unsuccessful work attempts, the provisions of Sec. 404.1574a regarding averaging of earnings, or the special rules in Sec. Sec. 404.1574(b)(3)(iii) and 404.1575(e) for evaluating the work you do after you have received disability benefits for at least 24 months, to determine whether benefits should be paid for any particular month in the reentitlement period that occurs after the month your disability ceased.

(3) The way we will consider your work activity after your reentitlement period ends (see paragraph (b)(2) of this section) will depend on whether you worked during the reentitlement period and if you did substantial gainful activity.

(i) If you worked during the reentitlement period and we decided that your disability ceased during the reentitlement period because of your work under paragraph (a)(1) of this section, we will find that your entitlement to disability benefits terminates in the first month in which you engaged in substantial gainful activity after the end of the reentitlement period (see Sec. 404.325). (See Sec. 404.321 for when entitlement to a period of disability ends.) When we make this determination, we will consider only your work in, or earnings for, that month; we will not apply the provisions of Sec. Sec. 404.1574(c) and 404.1575(d) regarding unsuccessful work attempts, the provisions of Sec. 404.1574a regarding averaging of earnings, or the special rules in Sec. Sec. 404.1574(b)(3)(iii) and 404.1575(e) for evaluating the work you do after you have received disability benefits for at least 24 months.

<p>averaging earnings, unsuccessful work attempts, and deducting impairment-related work expenses, to determine whether your disability ceased because you performed substantial gainful activity after the reentitlement period. If we find that your disability ceased because you performed substantial gainful activity in a month after your reentitlement period ended, you will be paid benefits for the month in which your disability ceased and the two succeeding months. After those three months, your entitlement to a period of disability or to disability benefits terminates (see §§404.321 and 404.325).</p>	<p>(ii) If we did not find that your disability ceased because of work activity during the reentitlement period, we will apply all of the relevant provisions of Sec. Sec. 404.1571-404.1576 including, but not limited to, the provisions for averaging earnings, unsuccessful work attempts, and deducting impairment-related work expenses, as well as the special rules for evaluating the work you do after you have received disability benefits for at least 24 months, to determine whether your disability ceased because you performed substantial gainful activity after the reentitlement period. If we find that your disability ceased because you performed substantial gainful activity in a month after your reentitlement period ended, you will be paid benefits for the month in which your disability ceased and the two succeeding months. After those three months, your entitlement to a period of disability or to disability benefits terminates (see Sec. Sec. 404.321 and 404.325).* * * * *</p>
---	--

The proposal adds language indicating the use of the 24-month protection of section 221(m) to the list of special tests that are used to determine if disability ends following the end of a TWP. Whether the special rules will be used depends upon whether the individual worked during the reentitlement period and whether that work was SGA.

If SSA determines that disability ceased during the reentitlement period benefits will be terminated after the first SGA month after the EPE ends. No special tests (unsuccessful work attempts, income averaging or 24-month rules) will be used.

If SSA determines that disability did not cease during the EPE because of SGA, all special rules will be used to determine when disability ends post-EPE due to SGA.

<p><b>20 CFR 404.1594</b> – How we will determine whether your disability continues or ends.</p> <p>(b) <i>Terms and definitions.</i> There are several terms and definitions which are important to know in order to understand how we review whether your disability continues.</p>	<p>(b) * * * In addition, see paragraph (i) of this section if you work during your current period of entitlement based on disability or during certain other periods.* * *</p>
---	---

(c) *Determining medical improvement and its relationship to your abilities to do work.* Paragraphs (b) (1) through (3) of this section discuss what we mean by medical improvement, medical improvement not related to your ability to work and medical improvement that is related to your ability to work. How we will arrive at the decision that medical improvement has occurred and its relationship to the ability to do work, is discussed below.

(f) *Evaluation steps.* To assure that disability reviews are carried out in a uniform manner, that decisions of continuing disability can be made in the most expeditious and administratively efficient way, and that any decisions to stop disability benefits are made objectively, neutrally and are fully documented, we will follow specific steps in reviewing the question of whether your disability continues. Our review may cease and benefits may be *continued* at any point if we determine there is sufficient evidence to find that you are still unable to engage in substantial gainful activity. The steps are:

c) Determining medical improvement and its relationship to your abilities to do work. \* \* \* (In addition, see paragraph (i) of this section if you work during your current period of entitlement based on disability or during certain other periods.) \* \* \*

(f) Evaluation steps. \* \* \* The steps are as follows. (See paragraph (i) of this section if you work during your current period of entitlement based on disability or during certain other periods.) \* \* \*

(i) If you work during your current period of entitlement based on disability or during certain other periods. (1) We will not consider the work you are doing or have done during your current period of entitlement based on disability (or, when determining whether you are entitled to expedited reinstatement of benefits under section 223(i) of the Act, the work you are doing or have done during or after the previously terminated period of entitlement referred to in section 223(i)(1)(B) of the Act) to be past relevant work under paragraph (f)(7) of this section or past work experience under paragraph (f)(8) of this section. In addition, if you are currently entitled to disability benefits under title II of the Social Security Act, we may or may not consider the physical and mental activities that you perform in the work you are doing or have done during your current period of entitlement based on disability, as explained in paragraphs (i)(2) and (3) below.

(2) If you are currently entitled to disability

	<p>insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability under title II of the Social Security Act, and at the time we are making a determination on your case you have received such benefits for at least 24 months, we will not consider the activities you perform in the work you are doing or have during your current period of entitlement based on disability if they support a finding that your disability has ended. (We will use the rules in Sec. 404.1590(i)(2) to determine whether the 24-month requirement is met.) However, we will consider the activities you do in that work if they support a finding that your disability continues or they do not conflict with a finding that your disability continues. We will not presume that you are still disabled if you stop working.</p> <p>(3) If you are not a person described in Sec. 404.1594(i)(2), we will consider the activities you perform in your work at any of the evaluation steps in paragraph (f) of this section at which we need to assess your ability to function.</p>
--	--

This proposal incorporates the use of the “medical improvement standard” when making disability cessation or continuation determinations, explains how treatment will differ for those individuals covered by the section 221(m) protections and how SSA will determine eligibility for EXR.

The proposal clarifies the last two steps of the sequential evaluation used during the medical improvement review to determine if disability has ended. SSA will not consider work that the individual is doing at the time of the review, or work done during the current period of disability to be past work for the purposes of the last two steps in the sequential evaluation process when dealing with the medical improvement standard.

This work would also not be considered when determining whether the individual is eligible for EXR. SSA will only consider work done during or after a previous period of disability or that work which recently ended and is the basis for the EXR request when determining EXR eligibility.

Section 221(m), protections, if applicable to the individual, will prohibit work activity engaged in by the individual to be used as evidence that the disability has ended. Any determination by SSA terminating disability must be based on other evidence. As noted above, this work can be considered to support an SSA determination that disability continues.

If the individual is not protected by section 221(m) the currently used work consideration rules will apply. These rules are currently set forth in POMS interpretations of the statutory provisions.

In the NPRM, SSA acknowledges that these provisions may be too complex and difficult for beneficiaries to understand but that no other interpretation of the statute would be appropriate.

**SSI/Title XVI Proposals**

<p><b>20 CFR 416.974</b> – Evaluation guides if you are an employee.</p>	<p>New proposals bring the SSI regulations into line with the SSDI proposed regulations by adjusting the consideration of work completed before January, 2001, and discuss SSA’s ability to look behind the numbers when making SGA determinations in certain circumstances.</p>
<p><b>20 CFR 416.990</b> – When and how often we will conduct a continuing disability review.</p> <p>(a) <i>General.</i> We conduct continuing disability reviews to determine whether or not you continue to meet the disability or blindness requirements of the law. Payment ends if the medical or other evidence shows that you are not disabled or blind as determined under the standards set out in section 1614(a) of the Social Security Act if you receive benefits based on disability or §416.986 of this subpart if you receive benefits based on blindness.</p> <p>b) <i>When we will conduct a continuing disability review.</i> A continuing disability review will be started if—</p> <p>(4) You return to work and successfully complete a period of trial work;</p> <p>(6) You tell us that you have recovered from your disability or that you have returned to work;</p>	<p>(a) General. * * * In paragraphs (b) through (g) of this section, we explain when and how often we conduct continuing disability reviews for most individuals. In paragraph (h) of this section, we explain special rules for some individuals who are participating in the Ticket to Work program. In paragraph (i) of this section, we explain special rules for some individuals who work and have received social security benefits as well as supplemental security income payments.</p> <p>(b) When we will conduct a continuing disability review. Except as provided in paragraphs (h) and (i) of this section, we will start a continuing disability review if—</p> <p>(4) You return to work;</p> <p>(6) You tell us that--</p> <p>(i) You have recovered from your disability; or</p> <p>(ii) You have returned to work;</p>

<p>(8) Someone in a position to know of your physical or mental condition tells us that you are not disabled or blind, that you are not following prescribed treatment, that you have returned to work, or that you are failing to follow the provisions of the Social Security Act or these regulations, and it appears that the report could be substantially correct;</p>	<p>(8) Someone in a position to know of your physical or mental condition tells us any of the following, and it appears that the report could be substantially correct:</p> <ul style="list-style-type: none"> <li>(i) You are not disabled or blind; or</li> <li>(ii) You are not following prescribed treatment;</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>(iii) You have returned to work; or</li> <li>(iv) You are failing to follow the provisions of the Social Security Act or these regulations;</li> </ul> <p>(h) If you are participating in the Ticket to Work program. If you are participating in the Ticket to Work program, we will not start a continuing disability review during the period in which you are using a ticket. See subpart C of part 411 of this chapter.</p> <ul style="list-style-type: none"> <li>(i) If you are working and have received social security disability benefits for at least 24 months. <ul style="list-style-type: none"> <li>(1) General. Notwithstanding the provisions in paragraphs (b)(4), (b)(5), (b)(6)(ii), (b)(7)(ii), and (b)(8)(iii) of this section, we will not start a continuing disability review based solely on your work activity if-- <ul style="list-style-type: none"> <li>(i) You are currently entitled to disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability under title II of the Social Security Act (see subpart D of part 404 of this chapter); and</li> <li>(ii) You have received such benefits for at least 24 months (see paragraph (i)(2) of this section).</li> </ul> </li> <li>(2) The 24-month requirement. (i) The months for which you have actually received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability that you were due under title II of the Social Security Act will count for the 24-month requirement under paragraph (i)(1)(ii) of this section, regardless of whether the months were consecutive. Any month for which you were entitled to social security disability benefits but for which you did not receive a benefit payment will not be counted for the 24-month requirement; for example, a month for which you did not receive a benefit payment because of worker's compensation offset or because you repaid an</li> </ul> </li> </ul>
--	---

overpayment to us. Months for which you received only supplemental security income payments will not be counted for the 24-month requirement. Benefits that are continued pending reconsideration and/or a hearing before an administrative law judge based on medical cessation determination (see Sec. 416.996) will not be counted for the 24-month requirement.

(ii) In determining whether paragraph (i)(1) of this section applies, we consider whether you have received disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability under title II of the Social Security Act for at least 24 months as of the date on which we start a continuing disability review. For purposes of this provision, the date on which we start a continuing disability review is the date on the notice we send you that tells you that we are beginning to review your disability case.

(3) When we may start a continuing disability review even if you have received social security disability benefits for at least 24 months. Even if you meet the requirements of paragraph (i)(1) of this section, we may still start a continuing disability review for a reason(s) other than your work activity. We may start a continuing disability review if we have scheduled you for a periodic review of your continuing disability, we need a current medical or other report to see if your disability continues, we receive evidence which raises a question as to whether your disability or blindness continues, or you fail to follow the provisions of the Social Security Act or these regulations. For example, we will start a continuing disability review when you have been scheduled for a medical improvement expected diary review, and we may start a continuing disability review if you failed to report your work to us.

(4) Erroneous start of the continuing disability review. If we start a continuing disability review based solely on your work activity that results in a medical cessation determination, we will vacate the medical cessation determination if--

(i) You provide us evidence that establishes that you met the requirements of paragraph (i)(1) of this section as of the date of the start of your

	<p>continuing disability review and that the start of the review was erroneous; and</p> <p>(ii) We receive the evidence within 12 months of the date of the notice of the initial determination of medical cessation.</p>
--	---

See discussion above for 20 CFR 404.1590.

<p><b>20 CFR 416.994</b> – How we will determine whether your disability continues or ends, disabled adults.</p> <p>(b)(1)<i>Terms and definitions.</i> There are several terms and definitions which are important to know in order to understand how we review whether your disability continues.</p> <p>(2) <i>Determining medical improvement and its relationship to your abilities to do work.</i> Paragraphs (b)(1)(i) through (b)(1)(iii) of this section discuss what we mean by medical improvement, medical improvement not related to your ability to work, and medical improvement that is related to your ability to work. How we will arrive at the decision that medical improvement has occurred and its relationship to the ability to do work, is discussed below.</p> <p>(5) <i>Evaluation steps.</i> To assure that disability reviews are carried out in a uniform manner, that a decision of continuing disability can be made in the most expeditious and administratively efficient way, and that any decisions to stop disability benefits are made objectively, neutrally, and are fully documented, we will follow specific steps in reviewing the question of whether your disability continues. Our review may cease and benefits may be <i>continued</i> at any point if we determine there is sufficient evidence to find that you are still unable</p>	<p>(b)(1)* * * In addition, see paragraph (b)(8) of this section if you work during your current period of eligibility based on disability or during certain other periods.</p> <p>(2) * * * (In addition, see paragraph (b)(8) of this section if you work during your current period of eligibility based on disability or during certain other periods.)</p>
---	---

<p>to engage in substantial gainful activity. The steps are:</p>	<p>(5) * * * The steps are as follows. (See paragraph (b)(8) of this section if you work during your current period of eligibility based on disability or during certain other periods.)</p> <p>(8) If you work during your current period of eligibility based on disability or during certain other periods.</p> <p>(i) We will not consider the work you are doing or have done during your current period of eligibility based on disability (or, when determining whether you are eligible for expedited reinstatement of benefits under section 1631(p) of the Act, the work you are doing or have done during or after the previously terminated period of eligibility referred to in section 1631(p)(1)(B) of the Act) to be past relevant work under paragraph (b)(5)(vi) of this section or past work experience under paragraph (b)(5)(vii) of this section. In addition, if you are currently entitled to disability benefits under title II of the Social Security Act, we may or may not consider the physical and mental activities that you perform in the work you are doing or have done during your current period of entitlement based on disability, as explained in paragraphs (b)(8)(ii) and (iii).</p> <p>(ii) If you are currently entitled to disability insurance benefits as a disabled worker, child's insurance benefits based on disability, or widow's or widower's insurance benefits based on disability under title II of the Social Security Act, and at the time we are making a determination on your case you have received such benefits for at least 24 months, we will not consider the activities you perform in the work you are doing or have during your current period of entitlement based on disability if they support a finding that your disability has ended. (We will use the rules in Sec. 416.990(i)(2) to determine whether the 24-month requirement is met.) However, we will consider the activities you do in that work if they support a finding that your disability continues or they do not conflict with a finding that your disability continues. We will not presume that you are still disabled if you stop working.</p> <p>(iii) If you are not a person described in paragraph (b)(8)(ii) of this section, we will consider the activities you perform in your work at any of the evaluation steps in paragraph (f) of this section</p>
--	---

	at which we need to assess your ability to function.
--	--

See discussion above for 20 CFR 404.1594.

This is page two. Notice that the top and left margins are 1". **In order to use page 2, you will need to start your second page of content on this page.**

A section break occurs at the end of page 1. If you simply continue to input content above the section break, you will not see the new margins.

If you find that you do not require a second page, PLEASE DO NOT DELETE THIS PAGE. You will adversely affect the layout of page 1. Simply print only page 1.