No. 00-1937

In the Supreme Court of the United States

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

CLEVELAND B. WALTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title II and Title XVI of the Social Security Act define disability as the "inability to engage in any substantial gainful activity by reason of any * * * impairment which can be expected to result in death or which has lasted or can be expected to last for * * * not less than 12 months." 42 U.S.C. 423(d)(1)(A); 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. IV 1998). Under Title II, once a claimant is entitled to disability insurance benefits, the claimant may engage in substantial gainful activity during a "trial work period" of up to nine (not necessarily consecutive) months without being disqualified from receiving benefits. 42 U.S.C. 422(c). The questions presented are:

1. Whether a claimant is entitled to disability benefits under Titles II and XVI of the Social Security Act if he has a physical or mental impairment that has lasted or can be expected to last at least 12 months, but his inability to engage in substantial gainful activity by reason of that impairment has not lasted or cannot be expected to last 12 months.

2. Whether a claimant under Title II may be under a disability and entitled to a "trial work period" if, at the time his disability insurance benefits claim is adjudicated, his impairment no longer prevents him from performing substantial gainful activity.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Acting Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 235 F.3d 184. The opinion and judgment of the district court (App., *infra*, 15a-26a, 27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2000. A petition for rehearing was denied on February 27, 2001 (App., *infra*, 62a). On May 21, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and

including June 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Social Security Act, 42 U.S.C. 301 *et seq.*, and the relevant regulations, 20 C.F.R. Pts. 404 and 416, are set forth in the appendix to the petition, App., *infra*, 63a-104a.

STATEMENT

This case concerns the meaning of a fundamental term—"disability"—under the disability insurance program established by Title II of the Social Security Act (Act) and the Supplemental Security Income program established by Title XVI of that Act.

1. a. Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, which was first enacted in 1935, provides old-age, survivor, and disability benefits for insured individuals. Congress added the disability insurance benefits provisions to Title II in 1956. Social Security Amendments of 1956, Pub. L. No. 880, Tit. I, § 103, 70 Stat. 815. As originally enacted, the disability insurance program provided for the payment of monthly benefits to anyone who was unable to "engage in any substantial gainful activity by reason of" an "impairment which can be expected to result in death or to be of long-continued and indefinite duration." 42 U.S.C. 423(c)(2) (1958); S. Rep. No. 404, 89th Cong., 1st Sess. 98-99 (1965).

The requirement that the disability be of "long-continued and indefinite duration" proved difficult to administer and, in 1965, Congress amended the Act to make the duration requirement more certain. See Social Security Amendments of 1965, Pub. L. No. 89-97, Tit. III, § 303(a)(1), 79 Stat. 366. In the previous decade, a disability that lasted 12 months was found in

the "great majority" of cases to be of "long-continued and indefinite duration" within the meaning of the Act and thus sufficient to entitle the claimant to benefits. S. Rep. No. 404, *supra*, at 99. A 12-month disability requirement, Congress concluded, would generally prevent the program, which was directed at long-term disabilities, from being required to pay "disability benefits in cases of short-term, temporary disability." *Id.* at 98. Accordingly, the Social Security Amendments of 1965 replaced the "long-continued and indefinite duration" requirement with a 12-month disability requirement. 79 Stat. 366. Title II of the Social Security Act thus now provides:

> The term "disability" means—inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. 423(d)(1)(A).

Title II further provides 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." 42 U.S.C. 423(d)(2)(A) (emphasis added); see *Bowen* v. *Yuckert*, 482 U.S. 137, 147-148 (1987). That section was added by the Social Security Amendments of 1967 in response to a decision of the Fourth Circuit, *Leftwich* v. *Gardner*, 377 F.2d 287 (1967), which had held that a claimant was under a disability despite his performance of work at a level that, according to the Secretary of

Health, Education and Welfare, demonstrated the claimant's ability to engage in substantial gainful activity. See H.R. Rep. No. 544, 90th Cong., 1st Sess. 29, 31 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. 46-50, 263-264 (1967). The 1967 amendments also added a provision directing that the Commissioner "shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity," and providing as a general rule that "an individual whose services or earnings meet such criteria shall * * * be found not to be disabled." 42 U.S.C. 423(d)(4)(A); see note 1, *infra*.

To encourage individuals to return to work, the Title II disability insurance benefit program also provides for a "trial work period" during which individuals may engage in what would otherwise be considered "substantial gainful activity" without losing disability benefits. 42 U.S.C. 422(c). The "period of trial work" begins "with the month in which [the claimant] becomes entitled to disability insurance benefits," 42 U.S.C. 422(c)(3), and ends after the individual has performed services for nine months (which need not be consecutive), or the month in which the disability actually ceases, if that is earlier, 42 U.S.C. 422(c)(4)(A) and (B). "[A]ny services rendered by an individual during a period of trial work" are "deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period." 42 U.S.C. 422(c)(2). Thus, under the trial work provisions, once an individual is entitled to benefits under the disability insurance program, he may work for up to nine months without losing benefits. See *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805 (1999).

b. Congress enacted Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.*, in 1972 to provide Supplemental Security Income (SSI) to financially needy persons who are aged, blind, or disabled. See Pub. L. No. 92-603, Tit. III, § 301, 86 Stat. 1465. Unlike Title II, which is an insurance program, the SSI program established by Title XVI is a welfare program that looks to financial need. *Bowen* v. *Yuckert*, 482 U.S. at 140. Both programs, however, use the same definition of disability. The SSI program thus provides that a claimant is "disabled" for purposes of Title XVI if he is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months," 42 U.S.C. 1382c(a)(3)(A) (1994 & Supp. IV 1998), and further provides that an individual "shall be determined to be under a disability only if" the impairment is "of such severity that" the individual cannot engage in any "substantial gainful work which exists in the national economy," 42 U.S.C. 1382c(a)(3)(B). Unlike Title II's disability insurance program, however, Title XVI's SSI program does not provide for a trial work period. See Employment Opportunities for Disabled Americans Act, Pub. L. No. 99-643, 100 Stat. 3574 (amending 42 U.S.C. 1382c to eliminate trial work period).[1]

c. For approximately three decades, the Commissioner of Social Security has interpreted the Social

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[1] Beginning July 1, 1987, under Section 1619 of the Social Security Act, 42 U.S.C. 1382h, a disabled SSI recipient who has earnings ordinarily considered to represent substantial gainful activity can still receive SSI payments so long as his income does not make him financially ineligible to receive SSI.

Security Act as precluding an award of disability benefits unless the claimant's inability to perform substantial gainful activity has lasted or can be expected to last for 12 consecutive months. See, *e.g.* Social Security Ruling (S.S.R.) 73-7 (Cum. Ed. 1971-1975); S.S.R. 82-52, at 328 (Cum. Ed. 1981-1985) ("In considering duration, it is the inability to engage in [substantial gainful activity] that must last the required 12-month period."). The Commissioner's five-step sequential evaluation process for adjudicating disability claims, established by regulation and considered by this Court on a number of occasions (see, *e.g.*, *Cleveland* v. *Policy Mgmt. Sys. Corp.*, 526 U.S. at 804; *Bowen* v. *Yuckert*, 482 U.S. at 140-142), has long incorporated at the first step the requirement that the inability to engage in substantial gainful activity last for at least 12 months. See *Bowen* v. *Yuckert*, 482 U.S. at 140 (citing 20 C.F.R. 404.1520, 416.920 (1986)); S.S.R. 82-52, at 331 ("The denial determination or decision for insufficient duration should not be understood as independent of the sequential evaluation process."). The Commissioner's new final rules governing the determination of substantial gainful activity and the trial work period under Title II, issued last year, also incorporate that 12-month disability requirement. See Determining Disability and Blindness; Substantial Gainful Activity Guides, 65 Fed. Reg. 42,774 (2000) (final rules); see also Determining Disability and Blindness; Substantial Gainful Activity Guides, 60 Fed. Reg. 12,168 (1995) (notice of proposed rulemaking).

Thus, under the Commissioner's longstanding construction of the Act, it is not enough that an individual's underlying medical *impairment* has already lasted or can be expected to last for at least 12 months. 65 Fed. Reg. at 42,774, 42,780. Instead, the disability—the

inability to engage in substantial gainful activity by reason of the claimed impairment—must have lasted or be expected to last for at least 12 months. Consequently, a claimant who is able to work within one year of the onset of his inability to work is generally not considered disabled. As the Commissioner recently explained, it has been his "longstanding interpretation" of the Act that "the duration requirement to establish disability will not be met and a disability claim will be denied based on evidence that, within 12 months after the onset of an impairment which prevented substantial gainful activity and before [the agency] ha[s] issued any notice of determination or decision finding disability, the impairment no longer prevents substantial gainful activity." *Ibid.* See also 20 C.F.R. 404.1520(b) ("If you are working and the work you are doing is substantially gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience."); 20 C.F.R. 404.1520(f) ("*Your impairment(s) must prevent you from doing any other work*."); 20 C.F.R. 404.1571 ("If you are able to engage in substantial gainful activity, we will find that you are not disabled.").

Disability determinations can also be made based on the *expected* duration of the disability. In particular, if the disability determination is made before the expiration of 12 months after the onset of the alleged inability to engage in substantial gainful activity, the claimant may be determined to be disabled if the inability to engage in substantial gainful activity is by reason of an impairment that "can be expected to last" 12 months. 42 U.S.C. 423(d)(1)(A). Thus, it is not necessary for the Commissioner to wait 12 months from the onset of the alleged disability to adjudicate a disability claim. Instead, so long as the inability to work "can be

expected" to last 12 months, the claimant may be determined to be disabled. See 65 Fed. Reg. at 42,774 ("We believe that Congress provided that disability can be found based on an impairment which 'can be expected to last' 12 months simply to provide a means for us to adjudicate disability claims without having to wait 12 months from onset."); S. Rep. No. 404, *supra*, at 99 ("[W]here disability has existed for 12 calendar months or more, no prognosis would be required. Where a worker has been under a disability which has lasted for less than 12 months, the bill would require only a prediction that the worker's disability will continue for a total of at least 12 calendar months after onset of the disability.").[2]

The Commissioner has also issued regulations governing entitlement to a trial work period for purposes of the disability insurance program under Title II. Under the Social Security Act and the Commissioner's regulations, an individual is not entitled to a trial work period unless the individual is "entitled to disability insurance benefits." 42 U.S.C. 422(c)(3) (trial work period begins when individual "becomes entitled to disability insurance benefits"); 65 Fed. Reg. at 42,787 (to be codified at 20 C.F.R. 404.1592(d)(1)(2001)) ("You are generally entitled to a trial work period if you are entitled to disability insurance benefits."). As explained above, the Commissioner has determined that entitlement to disability benefits is contingent on the

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[2] Because that disability determination turns on a prediction that is sometimes wrong—*i.e.*, a claimant who the Commissioner expected would not be able to return to work within 12 months in fact may return to work during that period—there is a narrow class of individuals who are entitled to and receive disability benefits even though they were able to work within 12 months of the onset of their disability.

claimant being unable to engage in substantial gainful activity, or being expected to be unable to engage in such activity, for at least 12 months. Accordingly, an individual who has been unable to work for a full 12-month period is "entitled" to benefits and thus to a trial work period; similarly, an individual who is determined by the Commissioner to be *expected* to be unable to work for such a period is "entitled" to benefits and a trial work period. *Ibid.* But if the Commissioner does not find that the individual is expected to be unable to engage in substantial gainful activity for at least 12 months by reason of the impairment, and if the individual in fact returns to work within 12 months, the individual is not entitled to benefits and is not entitled to a trial work period. See 65 Fed. Reg. at 42,774 ("Because the person cannot become entitled to disability benefits in this situation, there can be no trial work period."). Accordingly, as the Commissioner's regulations explain, a claimant is not entitled to a trial work period if he "perform[s] work demonstrating the ability to engage in substantial gainful activity within 12 months of the onset of the impairment(s) that prevented [the claimant] from performing substantial gainful activity and before the date of any notice of determination or decision finding that [the claimant is] disabled." 65 Fed. Reg. at 42,787 (to be codified at 20 C.F.R. 404.1592(d)(2)(iii) (2001)).

2. On October 31, 1994, respondent Cleveland B. Walton was terminated as an in-school suspension teacher. After several work attempts, he was diagnosed in March 1995 as suffering from schizophrenia. In May of that year, respondent began working part-time as a cashier at a grocery store. By October 1995, he earned more than $500 a month, raising a presumption of substantial gainful activity under the regulations

issued by the Commissioner pursuant to 42 U.S.C. 423(d)(4) (A). See 20 C.F.R. 404.1574(b)(2).[3] Respondent began to work full time at the grocery store in December 1995, and he worked there successfully for two years before being suspended for selling alcohol to a minor. App., *infra*, 53a-54a; A.R. 440, 444.

In March 1995, respondent applied for disability insurance benefits under Title II and SSI benefits under Title XVI, citing his schizophrenia and related depression. In 1996, the Administrative Law Judge (ALJ) determined that respondent had not engaged in substantial gainful activity and otherwise satisfied the definition of disability for the period, which exceeded 12 months, between October 1994, when respondent was discharged by the school district, and December 1995, when respondent began to work full time at the grocery store. App., *infra*, 52a-61a. The Appeals Council of the Social Security Administration remanded the case to determine whether respondent had engaged in substantial gainful activity within one year of the alleged onset of his disability. Under S.S.R. 82-52, the Appeals Council noted, such activity before the lapse of the 12-month period following onset requires a denial of benefits. *Id.* at 47a-49a. On remand, the ALJ denied respondent's claim for benefits. *Id.* at 39a-46a. Like the Appeals Council, the ALJ noted that, under the Commissioner's construction of the Social Security Act set forth in S.S.R. 82-52, a claim must be denied when an individual returns to work within 12 months of the

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[3] As discussed above, p. 4, *supra*, Section 423(d)(4)(A) directs the Commissioner to issue regulations for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity and thereby render him not disabled.

impairment's onset. See *id.* at 41a (The "duration requirement provides that [the claimant] must be prevented from performing substantial gainful activity for a 12-month period even if his impairment lasted or was expected to last for 12 months."). Reviewing the evidence and applying the regulatory criteria for determining whether work performed or earnings derived from such work demonstrate an ability to engage in substantial gainful activity, the ALJ concluded that respondent had engaged in substantial gainful employment as of October 1995, within one year of the onset of his impairment. App., *infra*, 41a-44a; see p. 4, *supra*. Accordingly, the ALJ held that respondent was not disabled and was not entitled to benefits. App., *infra*, 45a.

The ALJ also determined that respondent was not entitled to a trial work period. App., *infra*, 44a. Respondent "returned to substantial gainful activity beginning in October 1995," the ALJ explained, and thus could "not be found to be under a 'disability' because he was not prevented from working for any continuous period of 12 months." *Ibid.* Because respondent "is not under a 'disability,'" the ALJ further explained, "he is not entitled to a cash benefit or to a trial work period under the Regulations." *Ibid.*

3. Respondent sought review in district court. The magistrate judge recommended granting summary judgment in favor of the Commissioner, App., *infra*, 30a-35a, and the district court accepted that recommendation, *id.* at 15a-26a.

The magistrate and district court both concluded that a claimant's disability (*i.e.*, his inability to engage in substantial gainful activity) and not just his impairment must last at least 12 months. In this case, they observed, respondent had engaged in substantial gainful activity within 12 months of the date of onset. Accord-

ingly, the magistrate and district court held that respondent's claim failed at the first step of the sequential evaluation process, because respondent could not be found unable to engage in substantial gainful activity for the requisite 12-month period. See App., *infra*, 23a-24a, 33a-34a.

The magistrate and district court also rejected respondent's request for a trial work period. Because respondent was not entitled to disability benefits, they held, respondent was not entitled to a trial work period. App., *infra*, 17a n.2, 34a.

4. The court of appeals reversed. App., *infra*, 1a-14a. The court of appeals sustained the ALJ's conclusion that respondent engaged in substantial work activity in October 1995, less than 12 months after the onset of his alleged inability to work, *id.* at 2a n.1, 5a, but it rejected the Commissioner's interpretation of the Act's definition of disability, under which such activity rendered respondent ineligible for benefits, *id.* at 6a-10a. Applying the two-step test of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court rejected the Commissioner's interpretation under step one as contrary to the "clear and unambiguous" language of the statute. App., *infra*, 6a. The statute's text, in the court's view, plainly requires only that the *impairment* giving rise to the disability last, or be expected to last, more than a year; the inability to work itself, the court held, need not last that long. *Id.* at 7a. The court first observed that 42 U.S.C. 423(d)(1)(A) defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." App.,

infra, 7a. The court then found it dispositive that the phrase "which has lasted or can be expected to last for a continuous period of not less than 12 months" modifies "impairment," not "inability to engage in substantial gainful activity." *Id.* at 7a-8a. See also *id.* at 11a. Accordingly, the court concluded that "a claimant whose impairment was 'expected to result in death,' or which 'lasted' or 'was expected to last' for a continuous period of not less than twelve months may be disabled, even if the inability to engage in substantial gainful activity does not cause death or actually persist for twelve months." *Id.* at 8a.

Having invalidated the Commissioner's construction of the statute, the court of appeals then concluded that respondent is entitled to disability insurance benefits. In this case, the court explained, respondent's impairment was expected to last (and did last) more than 12 months. Moreover, at the expiration of the five-month waiting period after the onset of respondent's disability (*i.e.*, by April 1995), respondent had not returned to work.[4] Accordingly, the court concluded that respondent had met the statutory requirements for entitlement to an award of disability insurance benefits under Title II. App., *infra*, 9a. The court did not separately address respondent's claim for SSI benefits under Title XVI of the Social Security Act, which has no statutory waiting period.

The court of appeals also held that respondent was entitled to a trial work period. App., *infra*, 9a-10a. Respondent's entitlement to a trial work period, the court

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[4] Under 42 U.S.C. 423(a) and (c)(2), there is no entitlement to receive benefits until after the expiration of the earliest period of five consecutive months "throughout which" the individual is "under a disability."

stated, is "conclusively settled" in his favor by the court's earlier conclusion that respondent was entitled to disability benefits as of April 1995, when the five-month waiting period expired. *Id.* at 9a. The court noted that the period of trial work begins once the claimant becomes entitled to disability benefits. Having found that respondent was entitled to benefits beginning in April 1995, the court further concluded that respondent qualified for a nine-month trial work period as of that date. *Ibid.* Because the "trial work period precludes consideration of the October 1995 [work]," the court stated, respondent "meets even the Commissioner's extra-statutory requirements for a finding of disability"—*i.e.*, that the inability to work, like the underlying impairment, must have lasted or be expected to last at least 12 months—since no work "during the period of twelve months from his disability onset date, October 31, 1994, could have been considered." *Id.* at 10a.

The court also rejected the Commissioner's construction of the Social Security Act as unreasonable under the second step of *Chevron*. App., *infra*, 10a-13a. In so doing, however, the court mostly repeated its textual analysis of the Act. *Id.* at 10a-11a. In addition, the court rejected as unreasonable the Commissioner's position that the trial work period cannot begin until after either (a) benefits are granted or (b) the individual is unable to work for 12 consecutive months. The Commissioner, the court noted, had interpreted the phrase "can be expected to last" in the definition of disability as having been included "so that [the agency could] 'adjudicate disability claims without having to wait 12 months from the alleged onset of disability, rather than to permit claims to be allowed in the face of evidence that the claimant's impairment did not prevent sub-

stantial gainful activity for 12 continuous months.'" *Id.* at 12a (quoting 60 Fed. Reg. at 12,168). The court rejected that interpretation because the Act does not explicitly mention adjudication as a prerequisite to a finding of disability; because no other part of the Act "differentiates between claims adjudicated within twelve months, and claims adjudicated after twelve months"; and because "under the Commissioner's interpretation, a finding of disability, or entitlement to benefits or a trial work period, would be determined, in part, by when the Commissioner adjudicated a claim." *Id.* at 13a-14a.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case set aside the Commissioner's longstanding—indeed, decades-old—construction of a fundamental provision of the Social Security Act, holding that claimants are entitled to disability insurance benefits under Title II and Supplemental Security Income (SSI) benefits under Title XVI of that Act even though they are able to work within a year of the onset of their disabilities, so long as the underlying impairment has lasted or can be expected to last more than 12 months. That decision is in direct conflict with the decision of the Tenth Circuit in *Alexander* v. *Richardson*, 451 F.2d 1185 (1971), cert. denied, 407 U.S. 911 (1972), and the decision of the Eighth Circuit in *Titus* v. *Sullivan*, 4 F.3d 590, 594-595 (1993). If allowed to stand, it would impose an estimated $9.8 billion in additional costs on the Social Security disability programs over the next 10 years in the Fourth Circuit alone, and would impose more than $80 billion in additional costs over that same period if applied nationwide. Finally, the court of appeals' decision fundamentally misconstrues the Social

Security Act, converting programs that were intended to address long-term disabilities into short-term disability programs that Congress specifically declined to enact.

1. The court of appeals' decision in this case squarely conflicts with those of two other circuits. Invalidating the Commissioner's longstanding construction and application of the Social Security Act, the court of appeals held that the Act does not require—and in fact unambiguously forecloses the Commissioner from interpreting it to require—that a claimant's disability (*i.e.*, the inability to work on account of an impairment) last or be expected to last at least 12 months. Instead, the court held, a claimant is entitled to benefits under both the disability insurance program established by Title II and the SSI program established by Title XVI where the claimant's inability to engage in substantial gainful activity has not lasted and is not expected to last 12 months, so long as the impairment that allegedly gave rise to that inability lasts or is expected to last at least 12 months. App., *infra*, 11a.

Two other courts of appeals, however, have reached the opposite conclusion. In *Alexander* v. *Richardson*, *supra*, for example, the Tenth Circuit affirmed the denial of benefits because "this disability extended for a period of less than twelve months, although there was an impairment which lasted for more than one year." 451 F.2d at 1186. The court explained:

> To recover disability benefits under the Act an applicant must be unable to engage in any substantial gainful activity. Disability is established by showing a medically determinable mental or physical impairment which prevents [the applicant from] engaging in any gainful activity. Inability to engage

> in any gainful activity and the impairment which causes it cannot be separated. The two components of disability must exist at the same time.

Ibid. The court further concluded that the history of the 1965 amendments to the Social Security Act, which introduced the 12-month duration requirement, showed that Congress intended to require that the *disability*—*i.e.*, the inability to work on account of the impairment—and not merely the impairment itself last at least 12 months. Congress, the court explained, expressly declared that it sought to require that insured workers be or be expected to be "*totally disabled*," *i.e.*, unable to work, for the entire 12-month period. See *id.* at 1187. The Eighth Circuit followed *Alexander* in *Titus*, 4 F.3d at 594 ("We agree with the district court that the interpretation of 'duration of impairment' was settled in *Alexander v. Richardson*, 451 F.2d 1185 (10th Cir. 1971).").

2. The court of appeals' decision, moreover, has profound programmatic and fiscal implications for the Social Security programs. The question of how long a claimant's disability must last or be expected to last in order for the claimant to be entitled to benefits is one of the most fundamental issues in the administration of the Title II and Title XVI disability programs, in which approximately two million claims are filed annually. As noted above, it is the longstanding position of the Commissioner that benefits are not awarded where the claimant was capable of returning to work within 12 months after the onset of the inability to engage in substantial gainful activity, and millions of claims have been denied on that basis since the 12-month duration requirement was enacted in 1965. The court of appeals' decision thus represents a dramatic departure from the

way the disability programs long have been administered.

The fiscal impact of that departure, moreover, is potentially enormous. Obviously, many claimants who are capable of working will have impairments that will last for longer than a year. See, *e.g.*, *Alexander*, 451 F.2d at 1186 ("For example, an applicant may have an injury from which he has lost one of his hands. The result is a physical impairment for the remainder of his life, but if he is able to engage in any gainful activities within a year from his injury he is not entitled to benefits."). We have been informed by the Social Security Administration that its Office of the Chief Actuary estimates that, in the Fourth Circuit alone, the increase in disability insurance benefits and SSI payments that would result from complying with the decision would cost the Social Security programs approximately $9.8 billion over the next ten years (2002-2011); if the decision were applied nationwide, the estimated additional costs would be $80 billion.[5]

The court of appeals' decision, if allowed to stand, would also have a substantial impact on the agency's ability to administer the program effectively. Because the decision relaxes the standards of eligibility for disability insurance benefits under Title II and for SSI benefits under Title XVI, it may dramatically increase the number of applications the agency must process;

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[5] These estimates may in fact prove somewhat conservative. For example, the estimates are based on the number of denials on duration grounds under current experience; they do not attempt to account for the increase in applications for benefits that would be caused by the court of appeals' decision. Because the decision below relaxes the requirements to qualify for benefits, a substantial increase in the number of applications appears likely if the decision is not reversed.

the agency already must process several million applications under those programs each year. The impact may be particularly profound in the context of Title XVI's SSI program. As discussed above, the disability insurance program of Title II imposes a five-month waiting period; thus, even if the applicant's disability is expected to last at least 12 months from the outset, the applicant is not eligible for benefits until the disability has lasted at least five months. 42 U.S.C. 423(c)(2)(A). Unlike Title II, however, Title XVI does not impose a waiting period.[6] Thus, under the court of appeals' decision, SSI benefits must be paid if an impairment causes an inability to work of *any duration*. It is unlikely that Congress intended such a result, or to impose the resulting burdens on the agency.

The extent to which the court of appeals' decision undermines the fundamental premises of the Act is underscored by its effect on the application of other provisions of the Act. For example, under 42 U.S.C. 423(f)(1), the Commissioner may terminate benefits where "the individual is now able to engage in substantial gainful activity" *if* "there has been any medical improvement in the individual's impairment." Because the court of appeals' decision permits individuals to obtain benefits even if their impairments no longer prevent them from engaging in substantial gainful activity, it would make terminations under Section 423(f)(1) problematic. Where the individual already can work notwithstanding the impairment—where maximum medical improvement has already been

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[6] To the extent the court of appeals intended to suggest otherwise, see App., *infra*, 9a n.7, it was mistaken. The statutory provisions cited in that footnote apply only under Title II of the Act; they do not apply under Title XVI.

achieved—at the time the award is made, it may prove difficult if not impossible to show further "medical improvement" that could be a basis for termination. The agency therefore could be required to continue paying benefits indefinitely to individuals who can work notwithstanding their impairments because it cannot show "medical improvement" between the date of the award and the date of the proposed termination. See 20 C.F.R. 404.1594.

3. The court of appeals' decision rests on an erroneous interpretation of the Act and a misapplication of *Chevron* deference principles. The court emphasized that the definition of disability requires that the *impairment* last 12 months. App., *infra*, 7a-8a. The court, however, ignored two critical features of the statutory framework. First, the definition of disability requires not only an underlying medical impairment that has already lasted or can be expected to last in the future for at least 12 months, but also an inability to engage in substantial gainful activity "by reason of" that impairment. 42 U.S.C. 423(d)(1)(A). The inability to work and the impairment giving rise to that inability are thus directly linked. Where, as here, the claimant returns to work within 12 months, he does not meet the definition of disability, because he does not have, for the duration of the 12-month qualifying period, an inability to work "by reason of" the underlying impairment. *Alexander*, 451 F.2d at 1186 ("[i]nability to engage in any gainful activity and the impairment which causes it cannot be separated"). Second, the court ignored Section 423(d)(2)(A), which was added to the definition of disability in 1967 and provides that an individual is disabled "only if" the impairment is "of such severity" that it precludes substantial gainful activity. Where the individual is able to engage in substantial gainful

activity, the impairment is not sufficiently severe and the individual cannot be considered disabled. In this case, the court of appeals effectively read out of the Act Section 423(d)(2)'s command that the claimant be considered disabled "only if" he is unable to work.

Furthermore, the legislative history of the 1965 amendments to the Social Security Act demonstrates that Congress intended to require that the disability (and not merely the impairment) last 12 months. When Congress first imposed the 12-month duration requirement in 1965, it rejected a shorter six-month period proposed in the House of Representatives' version of the bill. Explaining that decision, the Senate Finance Committee noted that the "the House provision could result in the payment of disability benefits in cases of short-term, temporary disability." S. Rep. No. 404, 89th Cong., 1st Sess. 98 (1965). "Under the House provision," the committee explained, "benefits could be paid for several months in cases of temporary disability resulting from accidents or illnesses requiring a limited period of immobility." *Ibid.* To avoid awarding benefits in cases of only temporary disability, the Senate committee believed it "necessary to require that a worker be *under a disability* for a somewhat longer period than 6 months in order to qualify for disability benefits." *Ibid.* (emphasis added). By eliminating the requirement that the inability to engage in substantial gainful activity must last 12 months, the court of appeals' decision creates precisely the short-term disability benefits program Congress sought to avoid. And that result conflicts with Congress's intent, evident throughout the legislative history, that the *disability* last 12 months. See *id.* at 98 (bill modified "to provide for the payment of disability benefits for an insured worker who has been or can be expected to be *totally disabled*

throughout a continuous period of 12 calendar months").[7]

At the very least, in light of the text, structure and legislative history of the Act, the Commissioner's long-standing interpretation of the definition of disability is reasonable and therefore entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). As a matter of grammar, the court of appeals was correct in concluding that Section 423(d) expressly requires the *impairment* to last at least 12 months, as does Section 1382c(a)(3)(A), which governs the SSI program. But the court of appeals was incorrect to assert that the Act thereby unambiguously *precludes* the Commissioner from requiring that the disability—the inability to engage in substantial gainful activity by reason of the impairment—last 12 months as well. The Act nowhere expressly declares that there is no minimum duration requirement for the disability itself, and requiring the disability to be co-extensive with the underlying impairment for the qualifying 12-month period is the most sensible construction of the Act. Titles II and XVI of the Act are designed to provide *disability* benefits to those who cannot engage in substantial gainful activity, not to provide *impairment* benefits to

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[7] It is no answer to note that disability insurance benefits are not paid until after a five-month waiting period. As the legislative history discussed in the text makes clear, Congress considered even a six-month disability to be too short or temporary in nature to warrant the payment of benefits under Title II. Moreover, there is no waiting period for SSI benefits, which means that an SSI claimant apparently would be entitled to receive benefits under the court of appeals' decision for a disability of *any* duration, so long as the underlying impairment lasts or is expected to last 12 months or more.

those who can. By contrast, the court of appeals offered no plausible reason why Congress would have insisted that the underlying impairment last for 12 months but at the same time insisted that the claimant's inability to work have no minimum duration.

4. The court of appeals' invalidation of the Commissioner's regulations governing the availability of trial work periods under 42 U.S.C. 422(c) also warrants this Court's review. Indeed, the court's ruling that respondent was entitled to a trial work period appears to stand or fall with its resolution of the question of whether respondent was entitled to disability benefits notwithstanding his return to substantial gainful activity within 12 months of the onset of his inability to work. The court of appeals concluded that respondent's claim to a trial work period was "conclusively settled" in his favor by the court's earlier conclusion that he was entitled to disability benefits. App., *infra*, 9a.[8]

The court of appeals, moreover, gave the Commissioner's construction of the Act inappropriately short shrift. The Commissioner has consistently construed

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[8] The court of appeals does not appear to have construed the trial work period provision independently of its interpretation of the duration requirement. To the extent the court of appeals' decision could be read as holding that respondent was entitled to a trial work period notwithstanding the 12-month duration requirement because his inability to work was, at some point after onset, "expected to last" 12 months—even though he had resumed substantial gainful activity before the expiration of that 12-month period—such a holding would not affect the need for plenary review. That holding would itself conflict with the decision by the Fifth Circuit in *Cieutat* v. *Bowen*, 824 F.2d 348, 358-359 (1987). As that court correctly held, the trial work provision precludes the Commissioner "only from considering work done *after* disability commences and only for purposes of determining whether the disability has *ceased*." *Ibid.*

Section 422 as making a trial work period available only where the impairment has precluded substantial gainful activity for 12 continuous months, or where there has been a determination that it can be expected to do so. See S.S.R. 82-52 (Cum. Ed. 1981-1985); 65 Fed. Reg. 42,787 (2000) (to be codified at 20 C.F.R. 404.1592(d)(2) (2001)) ("You are not entitled to a trial work period" if "you perform work demonstrating the ability to engage in substantial gainful activity within 12 months of the onset of the impairment(s) that prevented you from performing substantial gainful activity and before the date of any notice of determination or decision finding that you are disabled."). The Commissioner explained:

> Because section [422(c)] provides that a trial work period shall begin with the month in which a person becomes entitled to title II disability benefits, a claimant who does not become entitled to disability benefits cannot receive a trial work period. Under our interpretation of the duration requirement, a person cannot be found to be under a disability if he or she performs work demonstrating the ability to perform substantial gainful activity within 12 months after onset and before we have issued any notice of determination or decision finding disability. * * * On the other hand, if a claimant returns to work before we have made a determination or decision finding disability, but more than 12 months from onset, the duration requirement may be satisfied * * *, the claimant may become entitled to benefits, and the work may be protected by the trial work period even though the work began prior to a finding of disability.

65 Fed. Reg. at 42,774.

The court of appeals expressed concern that the Commissioner's construction of the Act has the potential to yield different results based on when the disability determination is made. App., *infra*, 13a ("under the Commissioner's interpretation, a finding of disability, or entitlement to benefits or a trial work period, would be determined, in part, by when the Commissioner adjudicated a claim"). The court reasoned that, if the disability determination is made within 12 months of onset, and at that point the disability was "expected to last" 12 months, an individual could be entitled to a trial work period even though he or she later returns to work before 12 months lapse. If the disability determination were made after the claimant has already returned to work, however, the individual would be found not disabled. *Ibid.*

The court of appeals' reasoning is unsupported. As the Commissioner explained, Congress permitted the agency to find a disability "based on an impairment which 'can be expected to last' 12 months"—rather than limiting the agency to finding disability where the impairment had *already* lasted 12 months—in order "to provide a means for [the agency] to adjudicate disability claims without having to wait 12 months from onset, rather than to permit claims to be allowed in the face of specific evidence that the claimant's impairment did not, in fact, prevent him or her from engaging in substantial gainful activity for 12 continuous months." 65 Fed. Reg. at 42,774. The court of appeals nowhere offered an alternative explanation for the "expected to last" language in the definition of disability. Moreover, although the Commissioner's construction might cause disability determinations to depend, in a few cases, on when the determination is made, Congress was aware of that possibility and specifically chose to permit it.

S. Rep. No. 404, *supra*, at 99 ("[W]here disability has existed for 12 calendar months or more, no prognosis would be required. Where a worker has been under a disability which has lasted for less than 12 months, the bill would require only a prediction that the worker's disability will continue for a total of at least 12 calendar months after onset of the disability.").[9] The Commissioner's interpretation, which is consistent with Congress's intent as well as the text of the Act, is at the very least reasonable and therefore should be sustained.[10]

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[9] The court of appeals' other reasons for rejecting the Commissioner's interpretation of the expectancy provision also lack merit. First, the court rejected that interpretation because the Act does not explicitly mention adjudication as a prerequisite to a finding of disability. App., *infra*, 13a. But the Act does permit a finding of disability when the inability to perform substantial gainful activity "can be expected" to last 12 months. The Commissioner reasonably concluded that the relevant expectation is that found by the adjudicator at the time of the disability determination. Second, the court observed that no other part of the Act "differentiates between claims adjudicated within twelve months, and claims adjudicated after twelve months." *Ibid.* But no other part of the Act contains similar statutory language.

[10] In this particular error, the Fourth Circuit has considerable company. The Sixth, Seventh, Eighth, and Tenth Circuits have all misapplied the trial work provisions. See App., *infra*, 13a n.10. Under those cases, joined by the Fourth Circuit here, a claimant is entitled to a trial work period if at some point the claimant's inability to work can be expected to last 12 months even if, at the time the claim is adjudicated, 12 months have passed and the claimant has returned to work during that period. See *Salamalekis* v. *Commissioner of Soc. Sec.*, 221 F.3d 828, 834 (6th Cir. 2000); *Walker* v. *Secretary of Health and Human Servs.*, 943 F.2d 1257, 1260 (10th Cir. 1991); *McDonald* v. *Bowen*, 818 F.2d 559, 564 (7th Cir. 1986); *Newton* v. *Chater*, 92 F.3d 688, 694 (8th Cir. 1996). As explained above, the 12-month duration requirement applies to

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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the disability—both the impairment and the resulting inability to work. Accordingly, review of the first question presented will cause the Court to decide whether the trial work provisions apply to a claimant who returns to work less than 12 months after the onset of his disability.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1016

CLEVELAND B. WALTON, PLAINTIFF-APPELLANT

v.

KENNETH S. APFEL, COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT-APPELLEE

Argued: Oct. 30, 2000
Decided: Dec. 18, 2000

Before: NIEMEYER and LUTTIG, Circuit Judges, and WILLIAMS, United States District Judge for the District of Maryland, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge LUTTIG wrote the opinion, in which Judge NIEMEYER and Judge WILLIAMS joined.

OPINION

LUTTIG, Circuit Judge:

Cleveland B. Walton appeals the district court's grant of summary judgment affirming the decision by the Commissioner of the Social Security Administration

that Walton was not entitled to disability insurance benefits and supplemental security income under the Social Security Act. The Commissioner's denial of benefits, and the district court's affirmance of that decision, were pursuant to a regulatory interpretation of the Social Security Act by the Social Security Administration, which interpretation provides that a return to work prior to the lapse of a 12 month period after onset of disability and prior to the adjudication of disability precludes a finding that a claimant is disabled and does not allow the award of a trial work period. We hold that the agency interpretation upon which the district court and the Commissioner relied clearly contravenes the relevant, and unambiguous, provisions of the Social Security Act. *See* 42 U.S.C. §§ 423(d)(1)(A); 422(c)(3). Accordingly, we reverse the judgment of the district court granting summary judgment to the Commissioner and denying summary judgment to Walton, except with regard to the district court's conclusion that Walton began "substantial gainful activity" ("SGA")[1] in October 1995, when his earnings exceeded $500, which latter holding we affirm.

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[1] Substantial gainful activity is "work activity that is both substantial and gainful," and that involves "doing significant physical or mental activities." 20 C.F.R. §§ 404.1572, 416.972. According to the statutory guidelines, earnings between $300 and $500 per month may be deemed SGA, while earnings in excess of $500 per month create a rebuttable presumption of SGA. 20 C.F.R. §§ 404.1574(b)(2)(vii), 416.974(b)(2)(vii); *see also Payne v. Sullivan*, 946 F.2d 1081, 1083 (4th Cir. 1991). Moreover, the Commissioner considered the nature of appellant's work and his ability to do that work, in addition to his earnings. In this case, the regulations defining substantial gainful activity are reasonable, 42 U.S.C. § 405(a), the decision that appellant's October 1995 earnings were

I.

Cleveland B. Walton ("Walton"), a college graduate in his mid-thirties with a history of psychological problems, was diagnosed with schizophrenia after a six-day period of hospitalization in March 1995. He applied for disability insurance benefits ("DIB") and supplemental security income ("SSI") under the Social Security Act ("Act") on April 12, 1995, based on his claimed mental impairment—schizophrenic disorder with associated depression. His application was denied initially and upon reconsideration.

After an evidentiary hearing on July 10, 1996, an Administrative Law Judge ("ALJ") concluded that Walton was disabled by his mental impairment; at the request of the ALJ, Dr. Elliott J. Spanier, a board-certified psychiatrist, reviewed appellant's medical records and opined that Walton suffered from schizophrenic disorder with psychotic features, that the impairment met the criteria of a listed impairment,[2] and that the impairment had lasted 12 months.

Prior to his hearing before the ALJ, Walton advised the ALJ that he had worked at Food Lion from May 1995 until December 10, 1995, for five or six hours a day, and that he had begun working full-time at the same job on December 10, 1995. Based on this infor-

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SGA was supported by substantial evidence, and we affirm this part of the district court's judgment.

[2] A listed impairment is an impairment "considered severe enough to prevent a person from doing any gainful activity." 20 C.F.R. § 404.1525(a).

mation, the ALJ denied Walton a trial work period[3] because Walton had demonstrated the capacity for sustained work since May 1995, and because his disability ceased when he began working full time.

Instead, the ALJ held that Walton was entitled to benefits pursuant to a period of disability that commenced on the amended onset date of his impairment, October 31, 1994—the date his employment as an in-school suspension teacher was terminated—and ended on December 10, 1995—the date Walton started to work full-time at Food Lion.

Subsequently, the Social Security Administration (SSA) determined that Walton may have begun SGA within twelve months of his onset date. Based on agency policy, Walton was not disabled, and was not entitled to benefits, if he had returned to work that constituted SGA within twelve months of his disability onset date and prior to adjudication of his claim, even if his impairment had lasted or was expected to last for a continuous period of not less than 12 months. Consequently, the case was remanded to the ALJ to assess when Walton began SGA.

Substantial evidence that Walton remained mentally impaired was presented at the second hearing. However, the ALJ did not reach the issue of impairment because he concluded that Walton returned to SGA in October 1995, when his earnings from his part-time work as a grocery store cashier and stocker exceeded

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[3] A trial work period permits qualified claimants to test their ability to work for up to nine months and still be considered disabled. *See* 42 U.S.C. § 422(c); 20 C.F.R. § 404.1592.

$500.[4] And, because Walton was not unable to engage in SGA for a continuous period of at least twelve months from his disability onset date, the ALJ determined that he was not disabled and not entitled to a trial work period, and therefore denied him benefits.

Walton sought review of the ALJ's decision, which stands as the final decision of the Commissioner of the Social Security Administration ("Commissioner"). The district court adopted the proposed memorandum opinion of the magistrate judge and granted summary judgment to the Commissioner, holding that the Commissioner's decision that Walton engaged in SGA in October 1995 and was not disabled and entitled to benefits, was supported by substantial evidence, and that Walton was not entitled to a trial work period absent a finding of disability and entitlement to benefits. This appeal followed.

II.

Walton does not deny that he worked in October 1995. Rather, he claims, *inter alia*, that his work in October 1995 did not constitute SGA[5] and that, even if the work did constitute SGA, the district court improperly relied upon it because that SGA was part of a trial work period and, as such, could not be used as evidence

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[4] Under the Act's sequential evaluation process, the disability inquiry will end at the first step, and the claimant will be found not disabled, irrespective of impairment, if he has engaged in SGA. 20 C.F.R. §§ 404.1520(b), 416.920(b). As discussed *infra* at [10a], SGA during a trial work period is ignored, and will not end the evaluation process. 42 U.S.C. § 422(c)(2).

[5] We affirm that portion of the district court's opinion. *See supra* n. 1.

that he was not disabled. The Commissioner does not dispute that Walton suffered from a mental impairment, nor does he dispute that the impairment lasted for a continuous period of at least 12 months. Instead, the Commissioner asserts that the district court properly upheld the denial of benefits because, pursuant to the Act and agency policy, Walton was not under a disability when he engaged in SGA during October 1995, prior to the lapse of twelve months from his disability onset date and prior to adjudication of his claim. Further, the Commissioner claims that because Walton was not disabled, he was not entitled to a trial work period.

The Commissioner insists that his position is based on the plain language of the statute and that, even if the language of the Act were susceptible to another interpretation, deference is owed to the agency's interpretation of the Act. Appellee's Br. at 24. This interpretation is expressed in Social Security Ruling (SSR) 82-52 and Notice of Proposed Rule-making, 60 Fed. Reg. 12166 (March 6, 1995) ("NPRM").[6]

While we recognize *Chevron* deference where such deference is due, *see generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), we nonetheless reject the Commissioner's judgment in this case. In the first place, agency interpretation of the Act is not appropriate because the language of the statute is clear and unambiguous. Moreover, even if interpretation were required, the Commissioner's interpretation

[6] This proposed regulation (which reflects the position of SSR 82-52) became effective on August 10, 2000, and does not apply retroactively to Walton's case.

—which assumes either a duration period or adjudication requirement and does violence to the grammatical structure of the statute—conflicts with the very statute it purports to elucidate. We are bound to reject such constructions. *Id.* at 843 & n. 9, 104 S. Ct. 2778.

Consequently, the district court's holding that Walton was not under a disability when he engaged in SGA prior to the lapse of twelve months from his onset date and prior to adjudication of his claim, and its holding that Walton was not entitled to a trial work period, are reversed.

A.

Beyond question, the statutory language speaks clearly to the issue of whether an individual can be under a "disability," even though he engaged in SGA prior to the expiration of a twelve-month period from his disability onset date and prior to the adjudication of his disability and an award of benefits. The statutory language is unambiguous, requires no agency interpretation, and leaves no doubt that neither a duration requirement for the inability to engage in substantial gainful activity nor a requirement that the benefits have been "awarded" or adjudicated, exists. Rather, the relevant provision, 42 U.S.C. § 423(d)(1)(A), defines "disability" simply as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

In addition to the facial clarity of the language, the grammatical structure and logic of the statute further

compel the conclusion that the clause, "which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months," refers to the impairment, not to the inability to engage in SGA; the clause manifestly does not modify "substantial gainful activity."

In the first place, based solely on grammar and sentence structure, the clause modifies the prepositional phrase "by reason of any medically determinable physical or mental impairment." Additionally, a single referent for the *entire* adjectival phrase must exist. Thus, as a matter of pure logic, it is clear that the duration clause *must* modify impairment, and only impairment, because to hold otherwise would lead to the absurd construction dictated by the Commissioner's interpretation, that "[d]isability is the inability to engage in substantial gainful activity . . . which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Obviously it is the impairment, and not the SGA, that Congress believed could lead to death, and it is thus the impairment, and not the SGA, which is subject to the "not less than twelve months" requirement. We decline to construe it otherwise.

Accordingly, we hold that a claimant whose impairment was "expected to result in death," or which "lasted" or "was expected to last" for a continuous period of not less than twelve months may be disabled, even if the inability to engage in substantial gainful activity does not cause death or actually persist for twelve months. 42 U.S.C. § 423(d)(1)(A). Moreover, such individual *becomes entitled* to disability insurance benefits, if under a disability, for each month *after the*

five-month waiting period imposed by section 423(c)(2)[7] if the individual (1) is insured for disability benefits; (2) is below retirement age; and (3) has filed an application for benefits. 42 U.S.C. § 423(a).

In this case, the ALJ found in the first hearing that Walton was disabled and had an impairment that had lasted for twelve months from the disability onset date in October 1994. It is further undisputed that Walton did not engage in a successful work attempt until May 1995, two months after the five-month waiting period, and did not engage in SGA until October 1995, well after the five-month waiting period had elapsed. Consequently, Walton met the statutory prerequisites for entitlement to disability insurance benefits.

Walton's claim that he was entitled to a trial work period is likewise affirmed by the statutory language. For, whether Walton is entitled to a trial work period, in light of his return to part-time work in May 1995 and SGA in October 1995, is conclusively settled by the determination that Walton was disabled and entitled to disability benefits after the five-month waiting period, *i.e.*, beginning in April 1995.

Contrary to the Commissioner's position, the statute allows a trial work period to begin prior to twelve months from the disability onset date, and before benefits are granted. Unambiguously, the statute provides that a "period of trial work . . . *shall begin* with the

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[7] There is no entitlement to receive benefits until after this waiting period, which refers to the earliest period of five consecutive calendar months "throughout which the individual with respect to such application is filed has been under a disability." 42 U.S.C. § 422(c)(2); *see also* 42 U.S.C. § 423(a).

month in which [the claimant] *becomes entitled* to disability insurance benefits." 42 U.S.C. § 422(c)(3) (emphasis added). And, as discussed *supra,* Walton met the requirements of 42 U.S.C. § 423(a) and was entitled to disability insurance benefits as of April 1995.

Under the statute, "any services rendered by an individual during a period of trial work will be deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period." 42 U.S.C. § 422(c)(2).[8] Thus, given that Walton's trial work period precludes consideration of the October 1995 SGA, Walton meets even the Commissioner's extra-statutory requirements for a finding of disability, because no SGA during the period of twelve months from his disability onset date, October 31, 1994, could have been considered.

Consequently, in light of our holdings that Walton was under a "disability," "entitled to disability benefits," and "entitled to a trial work period," we must also hold that the district court's consideration of the October 1995 SGA as evidence that Walton had engaged in SGA prior to the expiration of twelve months from his disability onset date was in contravention of the Act.

B.

Even if the statute we interpret herein were ambiguous, and thus susceptible to interpretation, we would nonetheless reject as unreasonable the Commissioner's

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[8] Once the trial work period is over, the agency can consider the work done during the work period in determining whether the disability has ended after the work period. 20 C.F.R. § 404.1592(a).

contrary interpretation, which rests on the premise that it is the "inability to engage in any substantial gainful activity" which must "last" or "be expected to last for a continuous period of not less than 12 months." And, it is based on this supposition that the Commissioner concludes that the definition of disability—and a prerequisite for entitlement to a trial work period—includes the requirement that *either* the impairment *must have prevented SGA* for a period of no less than twelve months *or* the claim must have been *adjudicated* and benefits awarded. *See* 60 Fed. Reg. 12166, 12168; SSR 82-52. It is clear, however, that the Commissioner's position is directly belied by the language, structure, and grammar of 42 U.S.C. § 423(d)(1)(A).

For, to obtain the outcome the Commissioner desires, one is required in the first instance to separate a single adjectival clause in section 423(d)(1)(A)— "which can be expected to result in death or has lasted or is expected to last in excess of twelve months"—so that "which can be expected to result in death" modifies only "impairment," while "which has lasted or can be expected to last" modifies both impairment and "inability to engage in substantial gainful activity." There is no mode of statutory construction which allows such. As discussed *supra* at [8a], parts of a single adjectival phrase cannot modify different antecedents. The only logical referent for both constituents parts of the clause is "impairment."

We further conclude that the agency's interpretation is contrary to the clear statutory language in other respects. For example, while the Commissioner *accepts* "an award of benefits" as an alternate requirement to being unable to engage in SGA for a period of twelve

months, "an award of benefits" is nowhere to be found in the statutes that define "disability" and outline the parameters of "trial work period." Additionally, though the Commissioner seeks to make the trial work period, as well as a finding of disability, contingent upon either the duration of SGA or adjudication,[9] *see* 60 Fed. Reg. 12166, 12168; SSR 82-52, the "shall begin" language in 42 U.S.C. § 422(c)(3) is conditioned *only* on being "eligible to receive benefits," as determined under section 423(a)(1). The conflict between the statute and the agency interpretation is both apparent and significant.

The Commissioner seeks to reconcile this apparent tension by reference to the use of different verb tenses within 42 U.S.C. § 423(d)(1)(A). We are told that the Congress included the "expected to last" language in section 423(d)(1)(A) so that the SSA can "adjudicate disability claims without having to wait 12 months from the alleged onset of disability, rather than to permit claims to be allowed in the face of evidence that the claimant's impairment did not prevent substantial gainful activity for 12 continuous months." 60 Fed. Reg. 12166, 12168. In support of this position, appellee points to the fact that in its "definition of 'disability,' Congress used two different verb tenses to provide for the fact that the Agency would decide claims at two different times relative to the onset of a claimant's disability." Appellee's Br. at 14.

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[9] The Commissioner's "interpretation" mandates that a trial work period may "not be awarded when a claimant performs work demonstrating the ability to engage in substantial gainful activity within 12 months after the alleged onset of disability and prior to an award of benefits." J.A. 97.

If for no other reason, juxtaposition of this "verb tense" analysis with the timing of agency adjudication exposes its weakness, and makes the argument unpersuasive as a statutory matter. As an initial matter —and significantly—neither section 423(a)(1) nor section 423(d)(1)(A) even *mentions* adjudication as a prerequisite to "disability" or "entitlement to disability benefits." Second, no part of the Act of which we are aware differentiates between claims adjudicated within twelve months, and claims adjudicated after twelve months, a distinction upon which the Commissioner's verb tense analysis rests. Lastly, under the Commissioner's interpretation, a finding of disability, or entitlement to benefits or a trial work period, would be determined, in part, by when the Commissioner adjudicated a claim; we decline to make findings and entitlements of such nature turn upon the vagaries of agency efficiency.

In sum, the Commissioner's position, grounded in SSR 82-52 and the NPRM, is both in actual conflict with the statutory language and unreasonable, and our duty is therefore clear—we must reject the agency interpretation and apply the statute as enacted.[10]

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[10] We join no fewer than four other circuit courts of appeal in the assessment that the agency's position contradicts the plain language of the governing statute. *See Salamalekis v. Commissioner of Social Security*, 221 F.3d 828, 832 (6th Cir. 2000) (agency position and SSR 82-52 an invalid interpretation of the Act); *Newton v. Chater*, 92 F.3d 688, 693-94 (8th Cir. 1996) (trial work period starts in the month that disability entitlement begins, *i.e.*, after five-month waiting period; agency ruling is inconsistent with the statutory provisions); *Walker v. Secretary of Health and Human Services*, 943 F.2d 1257, 1259-60 (10th Cir. 1991) (same); *McDonald v. Bowen*, 818 F.2d 559, 564 (7th Cir. 1987) (same).

For the above reasons, those portions of the judgment of the district court affirming the Commissioner's conclusions that Walton is not disabled based on his return to SGA within twelve months of his onset date and is not entitled to a trial work period are reversed. However, that portion of the district court's judgment affirming the Commissioner's conclusion that appellant's work in October 1995 was SGA is affirmed. The case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:98CV339

CLEVELAND B. WALTON, PLAINTIFF

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

[Filed: Oct. 20, 1999]

MEMORANDUM OPINION

Cleveland B. Walton appeals the final decision of the Commissioner of the Social Security Administration ("Commissioner") denying Walton's claim for disability insurance benefits ("DIB") and supplemental security income benefits ("SSI"). For the reasons which follow, the Commissioner's decision at issue is supported by substantial evidence, the Proposed Memorandum Opinion of the Magistrate Judge denying Walton's motion for summary judgment and granting the Commissioner's motion for summary judgment is approved.

PROCEDURAL BACKGROUND AND STATEMENT OF FACTS

Walton was first hospitalized for depression with psychotic features in October 1990. Upon his release

five days later, Walton was treated with medication as an outpatient until he re-entered the hospital in May 1994, for depression. He was released ten days later and continued to receive medication and treatment as an outpatient until March 1995 when he was diagnosed with schizophrenia and hospitalized for approximately six days. Once again, Walton's condition stabilized and he was released and treated with medication as an outpatient. The record shows that Walton's mental health continued in that posture until April 12, 1995, when he filed his claims for SSI and DIB with the Social Security Administration.[1]

From 1992 through October 1994, Walton worked as an in-school suspension teacher which entailed supervision of students who were suspended from attending regular classes. After that employment was terminated, Walton worked for several different employers. These jobs, which the administrative law judge. ("ALJ") found were unsuccessful work attempts and therefore were not considered in determining whether Walton was able to perform substantial gainful activity, included: a salesman for a clothing store; a stocker at a department store; an unidentified position with the Post Office; an unidentified position with a survey service; and a stocker at a grocery store.

In May 1995, approximately three months after having been diagnosed with schizophrenia, Walton began working part-time at a grocery store as a cashier and stocker. By October 1995, Walton was earning more than $500 per month. On December 10, 1995, Walton

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[1] Walton's mother filed a protective application for disability insurance benefits and supplemental security income on his behalf on March 14, 1995.

became a full-time employee and his hourly rate increased from $5.50 per hour to $6.50 per hour.

On April 12, 1995, Walton filed an application for DIB and SSI, alleging that he had been disabled since February 20, 1995, due to psychiatric impairments, i.e., a schizophrenic disorder with associated depression. The Commission determined that Walton's condition was not severe enough to prevent him from working because it was well controlled with medication. Thus, Walton's application was denied initially and upon reconsideration. An ALJ conducted a de novo review based on an evidentiary hearing on July 10, 1996, at which Walton was represented by counsel. At the hearing, Walton amended the date of the onset of condition from February 20, 1995 to October 31, 1994. Walton's mother, Joyce Walton, and vocational expert, Dr. Andrew V. Beale, also testified at the hearing.

On August 30, 1996, the ALJ issued a decision concluding that Walton was entitled to a period of disability commencing October 31, 1994, the alleged onset date of Walton's disability due to psychiatric impairments, and ending December 10, 1995, when Walton started to work full-time at the convenience store. The ALJ held that Walton was entitled to receive DIB and SSI benefits from October 31, 1994 until February 29, 1996, two months after the month in which his disability ceased, but that he was not entitled to a trial work period.[2] On December 11, 1996, the Commissioner's

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[2] Walton's attorney argued that a trial work period was warranted in this case. A trial work period would allow Walton to have worked an additional nine months while receiving benefits. Thus, a trial work period is an opportunity for an applicant to "test his ability to work and still be considered disabled." 20 C.F.R.

Appeals Council vacated and remanded the ALJ's decision based on additional evidence which showed that Walton had engaged in substantial gainful activity prior to the lapse of the twelve months after the onset date of his disability on October 31, 1994.

On August 15, 1997, after a second hearing, the ALJ held that, beginning in October 1995, when his earnings consistently were in excess of $500 per month, Walton's work activity as a grocery store cashier and stocker constituted substantial gainful activity. For that, reason, the ALJ determined that Walton was not entitled to a period of disability or DIB under sections 216(i) and 223 of the Social Security Act, and was not eligible for SSI under sections 1602 and 1614(a)(3)(A) of the Social Security Act.

DISCUSSION

A. Standard of Review

The task of judicial review is to determine whether there is substantial evidence to support the final decision of the Commissioner that Walton is not entitled to

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§ 404.1592(a). A trial work period begins with the month in which a claimant becomes entitled to DIB and ends with the close of the ninth month in which the claimant has performed services ("any activity, even though it is not substantial gainful activity, which is done by a person in employment or self-employment for pay or profit, or is the kind normally done for pay or profit." 20 C.F.R. 404.1592(b)) or with the close of the month in which new evidence, other than evidence relating to work done during the trial work period, shows that the claimant is not disabled. *See* 20 C.F.R. § 404.1592(e)(1), (2). The ALJ found that, a trial work period was not warranted because Walton had demonstrated the capacity for sustained work since May 1995. Further, if Walton is not entitled to DIB or SSI, he is not entitled to a trial work period.

DIB or SSI benefits. *See* 42 U.S.C. § 405(g). Substantial evidence is defined as "relevant evidence a reasonable mind might accept as adequate to support a conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966). Consequently, a reviewing court should not substitute its judgment for that of the Commissioner. *See id.*; *see also Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990). "[T]he language of § 205(g) precludes a de novo judicial proceeding and requires that the court uphold the Secretary's decision even should the court disagree with such decision as long as it is supported by 'substantial evidence.'" *Blalock v. Richardson*, 483 F.2d 773, 775 (4th Cir. 1972). Thus, it is the duty of the court to determine whether there was substantial evidence to justify the Commissioner's decision.

B. Analysis

To qualify for DIB or SSI under the Social Security Act, a claimant must be disabled and must meet the earnings requirement as defined by the Act. "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§ 416(i)(1)(A), 423(d)(1)(A), 1382c(a)(3)(A); *see e.g., Stewart v. Apfel*, 182 F.3d 909 (4th Cir. 1999); *Pass v. Chater*, 65 F.3d 1200 (4th Cir. 1995); *Mullins v. Chater*, 53 F.3d 328 (4th Cir. 1995); *Rosa v. Callahan*, 168 F.3d 72 (2d Cir. 1999).

In addition, a claimant will be found 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.

42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see e.g., Pass v. Chater*, 65 F.3d 1200 (4th Cir. 1995); *English v. Shalala*, 10 F.3d 1080 (9th Cir. 1993); *Bush v. Shalala*, 94 F.3d 40, 45 n.3 (2d Cir. 1996).

1. Substantial Gainful Activity

According to the Act, a claimant will be considered disabled "if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382(c)(a)(3)(A). Substantial gainful activity is "work activity that is both substantial and gainful." 20 C.F.R. §§ 404.1572, 426.972. Substantial work activity "involves doing significant physical or mental activities." 20 C.F.R. §§ 404.1572(a), 916.972(a). Work may be substantial even if it is part time. *See id.* Gainful work activity is work that is done for pay or profit. 20 C.F.R. §§ 404.1572(b), 416.972(b). The ALJ concluded that, beginning in October 1995, Walton's work as a cashier

and stocker at the grocery store was both substantial and gainful. The date claimed as the onset of disability was October 31, 1994, less than twelve months before he performed substantial gainful activity. For that reason, the ALJ held that Walton did not satisfy the durational requirement of 20 C.F.R. §§ 404.1505, 416.905.

The Commissioner has promulgated a five-step process to determine whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920. Under the regulations, the ALJ must consider whether the claimant (1) is working and the work he is doing is substantial gainful activity; (2) has a severe impairment; (3) has an impairment that meets or equals the requirements of a listed impairment; (4) has an impairment that prevents him from doing past relevant work; and (5) whether his impairment prevents him from performing other work. *See* 20 C.F.R. §§ 404.1520, 416.920; *see also, Hunter v. Sullivan*, 993 F.2d 31 (4th Cir. 1992) (discussing five step process). The claimant bears the burden of production and proof in the first four steps of the inquiry. *See Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir. 1992). If the claimant discharges that obligation, the burden then shifts to the Secretary to show, in the fifth step, that other jobs exist in the national economy that the claimant can perform reconsidering his age, education, and work experience. *See id.*

If, at any point in the analysis, the ALJ finds that the claimant has not satisfied any step of the process, review does not proceed to the next step. *See* 20 C.F.R. §§ 404.1520, 416.920; *see also Hunter*, 993 F.2d at 35. Thus, if the ALJ determines that the claimant is working and the work he is doing is substantial gainful

activity, the Commissioner will find that he is not disabled without regard to his medical condition, age, education or work experience. *See* 20 C.F.R. §§ 404.1520(b), 416.920(b), *see also Pass v. Chater*, 65 F.3d 1200 (4th Cir. 1995).

Applying these principles, Walton was found to be engaged in substantial gainful activity and, therefore, he was not disabled within the meaning of the Act. Thus, the analysis ended at that step of the process and his claim was denied. There was substantial evidence in the record upon which the ALJ could reach that decision. Thus, even though Walton's condition met the requirements of a listed impairment (step three) the analysis never reached that stage.

Walton attacks the ALJ's findings and insists that he was not engaged in substantial gainful activity before the lapse of the twelve month duration requirement. Walton argues that the ALJ allegedly failed to properly average Walton's earnings and deduct impairment-related work expenses. For the reasons set forth below, Walton's arguments lack merit.

a. Walton's Earnings Create a Rebuttable Presumption of Substantial Gainful Activity.

According to the statutory guidelines, earnings in excess of $500 per month, for work done between January 1990 and June 1999, create a rebuttable presumption of substantial gainful activity. *See* 20 C.F.R. §§ 404.1574 (b)(2)(vii), 416.974(b)(2) (vii); *see also Payne v. Sullivan*, 946 F.2d 1081, 1083 (4th Cir. 1991); *Garnett v. Sullivan*, 905 F.2d 778, 780 n.1 (4th Cir. 1990); *Jones v. Shalala*, 21 F.3d 191, 192 (7th Cir. 1994). Beginning in October 1995, Walton's earnings were consistently in excess of $500 per month. Hence, the ALJ correctly

held that there was a rebuttable presumption that Walton was engaging in substantial gainful activity within twelve months of his alleged onset date.

Walton's argument that his out-of-pocket expenses for high blood pressure medication should be deducted from his total earnings to reduce his average monthly earnings is flawed. Although impairment-related work expenses may be deducted from earnings when deciding if the claimant has performed substantial gainful activity, only certain expenses qualify for the deduction. *See* 20 C.F.R. §§ 404.1576(c), 416.976(c). Examples of deductible drugs and medical services are anti-convulsant drugs to control epilepsy, anti-depressant medication for mental disorders, and radiation treatment or chemotherapy for cancer patients. The ALJ correctly held that blood pressure medication did not qualify as a deductible drug under the regulations because to be deductible, the drugs or services must be directly related to the claimant's impairment. *See* 20 C.F.R. §§ 404.1576(c)(5)(iii), 416.976(c)(5)(iii). The medication taken by Walton for his mental disorder was provided to him by a mental health agency and did not, therefore, represent an out-of-pocket expense. Thus, Walton's earnings should not have been reduced by any impairment-related expenses.

b. Walton Failed to Rebut the Presumption of Substantial Gainful Activity.

Walton sought to rebut the presumption of substantial gainful activity by arguing that, when his earnings are averaged over the entire period of time that he worked, his average earnings fall below $500 per month until December 1995. Thus, Walton argues that the

period in which he engaged in substantial gainful activity began in December 1995.

The ALJ relied on Social Security Ruling 83-35 in rejecting Walton's argument. Social Security Ruling 83-35 provides that "[w]hen there is significant change in work patterns or earnings during the period of work requiring evaluation, earnings are not averaged over the entire period of work involved. . . . the earnings must be averaged over each separate period of work involved to determine if either effort was SGA." SSR 83-35. The ALJ found that there was a "significant change in the claimant's ability to function and in his earnings (since he consistently earned in excess of $500 a month for months after October 1995, as compared to earnings averaging only $350 from June to September 1995)." Tr. at 15. Thus, the ALJ averaged earnings after October 1995 and found that Walton consistently earned in excess of $500 beginning in October 1995.

Walton also argues that, even if he did engage in substantial gainful activity within twelve months of the onset of his disability, he is nevertheless entitled to DIB because his impairment was *expected to last* more than twelve months. The ALJ pointed out that "the duration requirement provides that [the claimant] must be prevented from performing substantial gainful activity for a 12-month period even if his impairment lasted or was expected to last for 12 months." Tr. at 13. *See* 20 C.F.R. §§ 404.1520(b), 416.920(b) ("If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition . . .").

c. Even if Walton's Earnings Averaged Slightly Less Than $500 per Month, He Was Still Engaged in Substantial Gainful Activity.

The regulations provide "that the amount of a claimant's earnings *may* show that he engaged in substantial gainful activity. *See* 20 C.F.R. §§ 404.1574, 416.974 (emphasis added). However, the regulations also provide that "the fact that [a claimant's] earnings are not substantial will not necessarily show that [he] is not able to do substantial gainful activity." 20 C.F.R. §§ 404.1574(a), 416.974(a).

If a claimant's monthly income averages between $300 and $500 per month, the Commissioner will consider other factors to determine whether his work constitutes substantial gainful activity. *See* 20 C.F.R. §§ 404.1574(b)(6), 416.974 (b)(6); *Payne v. Sullivan*, 946 F.2d 1081, 1083 (4th Cir. 1991). For example, if Walton's work was comparable to that of unimpaired people in the community who have the same or similar occupations, that can serve as additional evidence that his work constituted substantial gainful activity. *See* 20 C.F.R. §§ 404.1574(b)(6)(i), 416.974(b)(6)(i).

In this case, even if Walton's monthly income averaged slightly less than $500 per month, other factors suggest that his work constituted substantial gainful activity. As the Magistrate Judge pointed out, "[t]here was no evidence that plaintiff was being subsidized or that he was provided any special considerations to continue his employment. In fact, Walton denied any such special consideration. There is no evidence that Walton was working in a sheltered or special environment or that he was not actually earning his pay." Mag. Proposed Mem. Op. at 4. Thus, there is

additional evidence that Walton's work constituted substantial gainful activity.[3]

CONCLUSION

The Commissioner's decision that Walton was not entitled to DIB or SSI was supported by substantial evidence. Therefore, Walton's objections to the Proposed Memorandum Opinion are overruled. The Proposed Memorandum Opinion is affirmed and, as approved herein, shall constitute the final decision of this Court.

The Clerk is directed to send a copy of this Memorandum opinion to all counsel of record.

It is so ORDERED.

/s/ ROBERT E. PAYNE
United States District Judge

Richmond, Virginia
Date: October 26, 1999

[3] Walton also argues that the ALJ erred by giving deference to the Commissioner's explanation of its policy despite the fact that the Commissioner relied on a non-final Social Security Ruling set forth in a Notice of Proposed Rulemaking. Given the resolution of the other arguments, it is unnecessary to address that one.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:98CV339

CLEVELAND B. WALTON, PLAINTIFF

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

ORDER

For the reasons set forth in the accompanying memorandum Opinion, it is hereby **ORDERED** that the Proposed Memorandum Opinion is affirmed and, as approved, shall constitute the final decision of this Court.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is so ORDERED.

/s/ ROBERT E. PAYNE
United States District Judge

Richmond, Virginia
Date: October 26, 1999

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:98CV339

CLEVELAND B. WALTON, PLAINTIFF

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

[Filed: Apr. 14, 1999]

ORDER

Pursuant to Title 28 U.S.C. 636(b)(1)(c), it is **ORDERED** that the attached proposed memorandum opinion be, and the same hereby is, **FILED**. All parties are advised that they may file objections to the proposed memorandum opinion within twelve (12) days of the date hereof. Failure to object in writing setting forth with specificity the objection, may result in the Court's adopting the proposed memorandum and the entry of an order in accordance therewith.

Let the Clerk send a copy of this order, and a copy of the attached memorandum, to counsel for the plaintiff

and counsel for the defendant.

/s/ ILLEGIBLE
UNITED STATES MAGISTRATE JUDGE

Date: April 14, 1999

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:98CV339

CLEVELAND B. WALTON, PLAINTIFF

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

[Filed: Apr. 14, 1999]

PROPOSED MEMORANDUM OPINION

Cleveland B. Walton, the plaintiff, brings this action for review of the final decision of the Commissioner of Social Security denying his claim for disability insurance benefits and supplemental security income under the Social Security Act. Jurisdiction is appropriate pursuant to 42 U.S.C. 405(g).

The plaintiff testified at an initial hearing before an administrative law judge (ALJ) on July 10, 1996, that he was 32 years old and had a BS degree in music education. He worked from November, 1992 to October, 1994 as a teacher. In November, 1994, he was employed in sales at a retail clothing store and in December, 1994, he worked in a grocery store. In May, 1995,

plaintiff worked parttime in the grocery store and became a full time employee on December 10, 1995. He said he became disabled in October, 1994, due to a psychiatric impairment. Joyce Walton, plaintiff's mother, testified that Walton had his first psychiatric in 1990 and was hospitalized in March, 1995. She said that his breakdowns occur when he forgets to take his prescribed medications. She did not believe that he could continue working without some support.

On August 30, 1996, the ALJ found that Walton had not worked from October 31, 1994 through December 10, 1995; that he had severe paranoid schizophrenia with depression and anxiety; that his impairment met listing 12.03A, B and C; that he was disabled since October 31, 1994; and that his disability terminated on December 10, 1995, when he returned to full-time work.

The Appeals Council found that Walton's work record since October 31, 1994, showed that he engaged in substantial gainful activity and remanded this matter to the ALJ to evaluate his work record since October 31, 1994.

On remand, a hearing was conducted by the ALJ on June 3, 1997, and plaintiff testified that he went back to work for Food Lion in June, 1995 and earned $354.00 a month through December, 1995, when he began earning $1,140.00 a month. He was suspended in March, 1996. Plaintiffs mother, Joyce Walton, testified that she has to remind him to take his medicine and she did not believe he would take them if he lived alone. She said her son was fired at Food Lion due to his failure to pay for food he had eaten.

On August 15, 1997, the ALJ found that Walton's monthly earnings averaged in excess of $500.00 in October, 1995 and since he has not been unable to engage in substantial activity for a continuous period of at least twelve months, he is not disabled.

The Appeals Council denied plaintiff's request for a review on April 3, 1998, and plaintiff appeals that final decision.

The medical evidence of record begins with a hospital record where plaintiff was hospitalized for major depression in October, 1990.

Plaintiff underwent a psychological evaluation in May, 1994, which resulted in a diagnosis of Major Depression with psychotic features.

On January 3, 1996, Dr. William A. Shepard completed a Medical Assessment of plaintiff's ability to perform work-related activities. He reported that "with medication management [Walton] carries out reasonable conversation and duties at a minimal scale". He concluded that Walton's lack of touch with reality even though maintained on medications still leaves him with defects that are possibly permanent.

On June 30, 1996, Dr. Elliott J. Spanier, a psychiatrist and medical advisor, opined that Walton's impairments met listing 12.03, that they have lasted or would be expected to last for a continuous period of not less than 12 months, and that his thought disorders, hallucinations, and paranoid thinking made it unlikely that he could engage in sustained work activity.

The issue is whether the final decision of the Commissioner is supported by substantial evidence. *Blalock v. Richardson,* 483 F.2d 773 (4th Cir. 1976).

The scope of judicial review in disability cases is narrow, and is limited to a determination of whether the final decision of the Commissioner is supported by substantial evidence in the record as a whole. *Richardson v. Prates,* 402 U.S. 389, 91 S. Ct. 1420 (1971). The Commissioner's factual findings are conclusive if they are supported by substantial evidence. "Substantial evidence" has been defined as being more than a mere scintilla, but something less than a preponderance. *Laws v. Celebrezze,* 368 F.2d 640 (4th Cir. 1966).

20 CFR 404.1571 provides, in part, "if you are able to engage in substantial gainful activity, we will find that you are not disabled." Section 404.1574(2)(vii) provides "We will consider that your earnings from your work activities as an employee show that you have engaged in substantial gainful activity if your earnings averaged more than $500 a month in calendar years after 1989". The Regulations define "Disability" as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

This case is unusual in that the medical evidence indicates that the plaintiff meets the requirements of a listed impairment during the period in question and would otherwise be found to be "disabled" except for the fact that the evidence shows that during this period of time the plaintiff was actually engaged in SGA. There was no evidence that plaintiff was being subsi-

dized or that he was provided special considerations to continue in his employment. In fact, plaintiff denied any such special consideration. There is no evidence that Walton was working in a sheltered or special environment or that he was not actually earning his pay. The ALJ correctly made an evaluation pursuant to Section 404.1520(a) and (b), which provides "If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience."

Plaintiff argues that the ALJ erred in not finding him disabled based on the fact that his impairment was "expected" to last for a continuous period of not less than 12 months. The ALJ, in reviewing plaintiff's work record during the relevant period, did not have to consider prospectively the expectations of the duration of his impairment because the ALJ had the benefit of knowing the actual amounts plaintiff did earn during the period. The ALJ averaged Walton's actual earnings and found that in October, 1995, he earned $523.77, in November, 1995, $640.26, and $1,140.33 in December, 1995. His earnings were consistently in excess of $500 per month beginning in October, 1995. Plaintiff's employment during the relevant period did not fulfill the requirements of being classified as "trial work periods" as defined in Section 404.1592.

The Commissioner's decision is supported by substantial evidence and was based upon a correct application of the law. It should, therefore, be affirmed.

Plaintiff's motion for summary judgment will be denied and defendant's motion for summary judgment will be granted.

An appropriate order shall issue.

/s/ ILLEGIBLE
UNITED STATES MAGISTRATE JUDGE

Date: April 14, 1999

APPENDIX F

[seal omitted]

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHB9
[Social Security
Number omitted]

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mr. Cleveland B. Walton
5 Shoal Ct.
Portsmouth, VA 23703

Dear Mr. Walton:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on August 15, 1997.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the court record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970 and 416.1470).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Commissioner of Social Security in your case. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

The Appeals Council has also considered the contentions raised in the material identified on the attached Order of Appeals Council, but concluded that these contentions do not provide a basis for changing the Administrative Law Judge's decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 405(g) and 1383(c)(3)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

original signed by
David O. Phillips
Administrative Appeals Judge

cc:
Kathryn L. Prior

APPENDIX G

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	**CLAIM FOR**
Cleveland B. Walton (Claimant)	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
_____ (Wage Earner)	[omitted] (Social Security Number)

PROCEDURAL HISTORY

The claimant filed concurrent applications for a period of disability, disability insurance benefits, and supplemental security income on April 12, 1995, with a protective filing on March 14, 1995. After two administrative denials, the claimant requested a hearing on October 12, 1995. A hearing was held on July 10, 1996, and on August 30, 1996 the undersigned Administrative Law Judge issued a decision finding that the claimant was entitled to a closed period of disability from October 31, 1994 to December 10, 1995 when, according to his testimony at the hearing, he returned to substantial gainful activity.

The Administration subsequently determined that the claimant's earnings beginning in October 1995 exceeded $500 per month (indicating an ability to engage in substantial gainful activity under sections 404.1574 and

416.974 of Regulation Nos. 4 and 16), and on March 12, 1997 the Appeals Council remanded the case to the undersigned to determine whether the claimant is, in fact, entitled to a cash benefit.

At both the original hearing and the supplemental hearing held in Richmond, Virginia, on June 3, 1997, the claimant was represented by Kathryn L. Pryor, Attorney at Law.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended; and whether he is disabled under section 1614(a)(3)(A) of the Act.

EVALUATION OF THE EVIDENCE

Sections 404.1505 and 416.905 of the Regulations provide the basic definition of disability—the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted, or can be expected to for a continuance period of not less than 12 months. Thus, the claimant must prove that he has a medically determinable impairment which prevents him from performing substantial gainful activity.

Social Security Ruling 82-52 provides that when an individual returns to work demonstrating the ability to engage in substantial gainful activity before approval of the award and prior to the lapse of the 12-month period after onset, the claim must be denied. While the undersigned concluded in the decision of August 30, 1996 that

Mr. Walton had an impairment meeting the requirements of section 12.03 of Appendix 1 to Subpart P of Regulations No. 4, the duration requirement provides that he must be prevented from performing substantial gainful activity for a 12-month period even if his impairment lasted or was expected to last for 12 months. The undersigned must determine whether the claimant engaged in substantial gainful activity as defined in the Regulations prior to October 31, 1995, 12 months after the alleged onset of disability.

At the initial hearing, the claimant testified that he had begun working as a general laborer and cashier at a grocery in May 1995. He testified that he worked on a part-time basis between May and December 10, 1995, five to six hours a day, three days a week, earning $5.50 an hour. Beginning December 10, 1995, he began working 40 hours a week on a full-time basis, earning $6.50 an hour.

When the Social Security District office began processing the claim for payment of supplemental security income, it obtained pay stubs from the claimant and earnings information directly from the personnel department of the grocery store for which the claimant worked. The records showed that the claimant actually earned $354.39 in June 1995, $519.43 in July 1995, $335.67 in August 1995, $392.94 in September 1995, $523.77 in October 1995, $640.26 in November 1995, and $1,140.33 in December 1995 (Exhibit 40). The Administration maintains that the claimant returned to substantial gainful activity in October 1995, when his earnings consistently were in excess of $500 a month.

Counsel argues that the above-described earnings should be averaged over the entire period of time that

the claimant worked, which would equal $461.07 a month from June through November 1995 and, with actual December 1995 earnings, would increase to an average of $566.68 a month (Exhibit 53).

Sections 404.1574 and 416.974 of the Regulations provide several guidelines to determine whether an individual is engaging in substantial gainful activity. Sections 404.1574(b) and 416.974(b) provide that the criteria in paragraph (a) of those sections, and sections 404.1576 and 416.976 be considered before looking at actual earnings.

Sections 404.1574(a) and 416.974(a) provide that earnings amounts may not necessarily show that an individual has the ability or inability to engage in substantial gainful activity. Only the amounts earned (and no subsidized earnings) will be considered, and work in a sheltered or special environment could be viewed differently than similar work in the civilian work force. The evidence in the case at hand does not show that the claimant's earnings were subsidized, or that he worked in a sheltered or special environment.

Sections 404.1576 and 416.976 provide that impairment related work expenses *may* be deducted from earnings to reduce the monthly wage amount. Included in those sections is payment for certain prescribed drugs and medical services. Counsel has maintained that the claimant's out-of-pocket expenses for high blood pressure medication should be deducted from his total earnings in October 1995. She indicated that his earnings of $523.77 should be offset by a payment of $24.38 for high blood pressure medicine made on October 17, 1995 (Exhibit 44). Sections 404.1576(c)(5) and 416.976(c)(5) provide that if an individual uses drugs or

medical services to control an impairment, the payments for them *may* be deducted. Examples of deductible drugs and medical services listed are anti-convulsant drugs to control epilepsy and anti-depressant medication for mental disorders. While the claimant in this case has a mental disorder and has taken medication for it, that medication was provided for the claimant by a mental health agency and did not represent an out-of-pocket expense. While the claimant apparently requires blood pressure medication, the undersigned finds that that medication would not be considered a deductible drug as intended by the Regulations.

Sections 404.1574 (b) and 416.974 (b) provide monetary guidelines for earnings that will ordinarily show that an individual has engaged in substantial gainful activity. For calendar years after 1989, there is a rebuttable presumption that earnings averaging more than $500 a month will *ordinarily* show that an individual is engaging in substantial gainful activity. As previously noted, the claimant earned $523.77 in October 1995, $640.26 in November 1995, and $2,140.33 in December 1995 (Exhibit 40). Although counsel argues that the entire period (from when the claimant returned to work in May 1995 until he began consistently earning in excess of $500 a month) should be considered when averaging earnings, SSR 83-35 provides that when there is a significant change in work patterns or earnings during the period of work requiring evaluation, earnings are not averaged over the entire period of work involved. It is noted that the claimant testified that he worked on a part-time basis until he was able to return to full-time work despite his impairment. There was a significant change in the claimant's ability to

function and in his earnings (since he consistently earned in excess of $500 a month for months after October 1995 as compared to earnings averaging only $350 from June to September 1995). The undersigned will average earnings after October 1995, and the record clearly demonstrates that the claimant consistently earned in excess of $500 beginning in October 1995.

There was evidence submitted by a former employer indicating that the claimant's performance was not ranked among the top as compared to other employees. As a matter of fact, the claimant ranked last in performance in March 1996 (Exhibit 51). While it is admirable that the claimant has continued to work despite his psychiatric impairment, the undersigned is bound by the law and regulations which indicate that the claimant returned to substantial gainful activity beginning October 1995.

Counsel argued that the claimant should be entitled to a trial work period beginning May 1995, when he returned to part-time work. Sections 404.1592(e) and 416.992(e) provide specifically that a trial work period will begin with the month in which an individual becomes entitled to a *cash benefit.* In this case, since the undersigned must find that the claimant returned to substantial gainful activity beginning in October 1995, he can not be found to be under a "disability" because he was not prevented from working for any continuous period of 12 months. Since he is not under a "disability," he is not entitled to a cash benefit or to a trial work period under the Regulations. The undersigned therefore concludes that the claimant is not entitled to a period of disability, disability insurance

benefits, or supplemental security income based on the applications filed protectively on March 14, 1995.

As previously indicated, the undersigned admires the claimant for his attempts to continue to work despite a Listing-level impairment, and if he should be prevented from engaging in substantial gainful for a period of 12 months or longer in the future, he is encouraged to file new applications for benefits.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following finding:

1. The claimant met the earnings requirements of the Social Security Act on October 31, 1994, the date that he alleges he became disabled, and continues to meet them through December 31, 2000.

2. The claimant began working with earnings averaging in excess of $500 a month in October 1995.

3. The claimant's work activity involved significant activities for pay, and constitutes substantial gainful activity within the meaning of the Regulations.

4. The claimant has not been unable to engage in substantial gainful activity for any continuous period of at least 12 months.

5. The claimant was not under a "disability" as defined in the Social Security Act at any time through the date of this decision.

DECISION

It is the decision of the Administrative Law Judge that, based on the applications filed protectively on March 14, 1995, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A) of the Act.

/s/ DAVID S. ANTROBUS
DAVID S. ANTROBUS
Administrative Law Judge
Main Street Centre, Rm 1720
600 East Main Street
Richmond, VA 23219-2406

AUG 15, 1997
Date

APPENDIX H

SOCIAL SECURITY ADMINISTRATION

OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL

REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

In the case of	**Claim for**
	Period of Disability
Cleveland B. Walton (Claimant)	Disability Insurance Benefits
_____	[omitted] _____
(Wage Earner)(Leave blank if same as above)	(Social Security Number)

Notice of own motion review was previously sent on December 11, 1996, advising of the Appeals Council's intention to review the Administrative Law Judge's decision issued on August 30, 1996, pursuant to 20 CFR 404.969, because there was an error of law and the action, findings or conclusions were not supported by substantial evidence (20 CFR 404.970). In that notice the Council also advised of its intention to remand this case for further proceedings and offered an opportunity for comment on that proposed action. Comments were received and were considered.

Under the authority of 20 CFR 404.977, the Appeals Council vacates the hearing decision and remands this case to an Administrative Law Judge for resolution of the following issue:

- The Administrative Law Judge found that the claimant was disabled beginning October 31,

> 1994 and that his disability benefits ceased on December 19, 1995, when he returned to full-time employment; however, the additional evidence suggests that the claimant returned to work demonstrating ability to engage in substantial gainful activity which occurred before the approval of the award and prior to the lapse of the 12-month period after onset. If this is so, in accordance with Social Security Ruling 82-52, the claimant's claim must be denied. A further evaluation of the claimant's work activity since October 31, 1994 is warranted.

Upon remand, the Administrative Law Judge will:

- Further consider the issues in this case, including the information regarding the claimant's work activity and evaluate his work activity since the established onset date of October 31, 1994.

In compliance with the above, the Administrative Law Judge will offer the claimant an opportunity for a hearing, take any further action needed to complete the administrative record and issue a new decision.

Section 8001 of Public Law 100-647 requires payment of interim benefits in cases where an Administrative Law Judge issues a favorable disability decision and no final decision is issued within 110 days after the date of the Administrative Law Judge's decision. Because the Appeals Council has exercised its own motion review authority in this case, interim benefits may be payable if a final decision is not issued within 110 days after the date of the Administrative Law Judge's decision. Those interim benefits will continue until a final deci-

sion is issued. Another Social Security Administration office will notify the claimant at the appropriate time as to the amount and the effective date of any interim payments.

APPEALS COUNCIL

/s/ DAVID O. PHILLIPS
DAVID O. PHILLIPS
Administrative Appeals Judge

/s/ RICHARD F. WHITE
RICHARD F. WHITE
Administrative Appeals Judge

Date: MAR. 4, 1997

APPENDIX I

[seal omitted]

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHB9
[Social Security
Number omitted]

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

Mr. Cleveland B. Walton
13606 Lucky Debonaire Ln.
Midlothian, VA 23112

NOTICE OF ORDER OF APPEALS COUNCIL REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

What This Order Means

We have sent your case back to an Administrative Law Judge. In the enclosed order, we explain why we did this and what actions the Administrative Law Judge will take on your claim.

In addition to what we directed the Administrative Law Judge to do, the Administrative Law Judge may also take any other action necessary to complete your claim.

The Next Action on Your Claim

An Administrative Law Judge will contact you to tell you what you need to do.

If you have any questions you may contact your local hearing office.

This notice and enclosed order of remand mailed MAR. 4, 1997

cc:
Kathryn L. Pryor, Esq.
RCALJ, Philadelphia

Kathryn L. Pryor, Esq.
P.O. Box 12206
Richmond, VA 23241

APPENDIX J

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	**CLAIM FOR**
Cleveland B. Walton (Claimant)	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
_____ (Wage Earner)	[omitted] (Social Security Number)

PROCEDURAL HISTORY

Cleveland B. Walton filed applications for disability insurance benefits and supplementary security income on March 14, 1995. They were denied initially on May 18, 1995, and upon reconsideration on August 16, 1995. He filed a timely request for hearing on October 12, 1995, and this case is now properly before this Administrative Law Judge for a decision pursuant to sections 404.930 and 416.1430 of Regulations Nos. 4 and 16. Mr. Walton meets the special earnings requirements for disability insured status under the Social Security Act through December 31, 1999.

At a hearing before this Administrative Law Judge on July 10, 1996 in Richmond, Virginia, Mr. Walton was represented by Attorney Kathryn L. Pryor. Also present and testifying were the claimant's mother, Joyce Walton, and vocational expert Dr. Andrew V. Beale.

Mr. Walton initially alleged disability commencing February 29, 1995, but at his hearing he amended that onset date to October 31, 1994, the date on which he was fired from a job as a substitute teacher (Exhibit 34).

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, as amended; and whether he is disabled under section 1614(a)(3)(A) of the Act. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairments which can be expected to either result in death or last for a period of not less than 12 months.

EVALUATION OF THE EVIDENCE

The claimant alleges disability since his amended onset date of October 31, 1994 due to psychiatric impairments, i.e., a schizophrenic disorder with associated depression. Subsequent to the alleged onset date, he worked briefly in November of 1994 as a suit salesman and processor in department and clothing stores, and in December of 1994 as a grocery store stocker. He also work briefly in February of 1994 as a night stocker for a grocery store (Exhibit 14). These episodes of employment reportedly ended due to his psychiatric impairments and as such, it is concluded by this Administrative Law Judge that they constituted unsuccessful work attempts.

It was further determined at the claimant's hearing that since May of 1995, he [h]as been employed at a grocery store as a general worker and cashier. He ini-

tially was employed on a part time basis between May and December 10, 1995, working five to six hours a day, three days a week, earning $5.50 per hour. Beginning December 10, 1995, he began working 40 hours per week on a full-time basis, earning $6.50 per hour. Earnings prior to December 10, 1995 averaged $396 per month. Since these earnings averaged less than $500 per month, he was not engaged in substantial gainful activity. However, beginning December 10, 1995 when he began working full time, his earnings have averaged $1,040 per month, clearly reflecting substantial gainful activity. Other than being placed on a night shift, he advised he received no special considerations in this job. The undersigned therefore concludes, based upon all above-described information, that the claimant was not engaged in substantial gainful activity from October 31, 1994 to December 10, 1995, but was engaged in substantial gainful activity subsequent to that date.

The claimant remarked that he works on the night shift for this grocery store because he did not "scan" fast enough as a checker or scanner. He indicated for the record that [ ] since being hospitalized for paranoid schizophrenia, he has had difficulty focusing on job duties. He undergoes outpatient psychiatric care and takes the medications Haldol, Cogentin, Ativan, and Calan.

He relies upon his mother to give him these medications. He is able to prepare simple meals for himself, care for his personal needs, and perform simple household chores. He requires assistance with handling his finances. He has few social activities or interactions other than attending church where he plays music. He has limited interaction with people other than family

members. He reported medication side effects of an occasional dry mouth, weight gain, and arm tremor (Exhibits 15 and 16). The claimant's mother, Joyce Walton, generally corroborated these statements. She noted that he has required hospitalizations for his psychiatric impairments and that since his last [ ] hospitalization she brought him home to live with her in Richmond. She noted that she must remind him to take his medication and she wakes him up to go to work. She was not sure he could live independently since he depends so much on her presently. These remarks were consistent with her statements in Exhibit 17.

The undersigned evaluated this testimony pursuant to [ ] 20 CFR sections 404.1529, 416.929, 404.1569a and 416.969a (SSR 96-7p), and found it to be fully credible and consistent with written statements for the record describing the claimant's impairment and restrictions.

Medical records in this case document the claimant's history of psychiatric treatment dating from 1990, when he was hospitalized in October of that year for major depression with psychotic features characterized by hallucinations, agitation, and difficulty eating and sleeping (Exhibit 18). He reportedly was treated on an outpatient basis and taking Haldol but experienced a deterioration warranting hospitalization on May 22, 1994. At that time he had become anxious and depressed about losing his job. He then became suspicious and paranoid and for several days was mute most of the time. He exhibited difficulty thinking and remembering, and his cognitive style was marked by obsessive-ness and rumination. Major depression with melancholia and psychotic features was again diagnosed (Exhibits 19 and 20). Further deterioration of his

condition occurred in March of 1995, at which time he was experiencing visual hallucinations, anxiety and agitation (Exhibit 21). Paranoid schizophrenia was diagnosed and he was hospitalized from March 5 to March 11, 1995. During this admission he exhibited evidence of catatonic schizophrenia. His condition gradually stabilized with prescribed medications. He was discharged to be followed on an outpatient basis (Exhibits 22 and 23).

The record confirms that Mr. Walton is under the outpatient psychiatric care with Dr. R. Neil Johnston. His records note ongoing prescription of medications, but that the claimant is generally isolated with activities confined to his home. He exhibits a flattened affect. It was noted that he had been dismissed from eight jobs in a year due to a decline in his productivity level, concentration problems, and difficulty following instructions (Exhibits 24-27). Dr. William A. Shepard, another treating psychiatrist, obeserved [*sic*] that even with medication management, the claimant carries out reasonable conversation and duties on only a minimal scale. His isolation and paranoia have decreased his cognitive abilities and social boundaries. He opined that the claimant lacked the ability to understand, remember and carry out complex job instructions and that he had only a fair ability to handle simpler instructions (Exhibit 28).

The medical evidence in this case was transmitted to board-certified psychiatrist and medical expert Dr. Elliot J. Spanier with the request that he review the evidence and respond to interrogatories posed by this Administrative Law Judge (Exhibit 31). Dr. Speanier [*sic*] advised in Exhibit 33 that the claimant clearly had

a schizophrenic disorder meeting the requirements of section 12.03 of Appendix 1 of Subpart P of Regulation No. 4. He noted that the record revealed objective signs of schizophrenia meeting the "A" criteria of that section: delusions and hallucinations, catatonic behavior, incoherence, loosening of associations and illogical thinking with a flattened affect, and emotional withdrawal and isolation. In addition, he observed that the claimant had significant functional limitations (the "B" criteria of section 12.03). Specifically, the record demonstrates a moderate restriction of activities [o]f daily living given his reliance upon his mother to assist with a good deal of the household structure, marked difficulty mai[n]taining social functioning given his isolation and withdrawal, constant deficiencies of concentration, and continual episodes of deterioration in a work setting demonstrated by his multiple job losses. The undersigned further reviewed the record and noted that the claimant has a condition meeting section 12.03 in that he has a medically documented history of one or more episodes of acute symptoms and signs of paranoid schizophrenia although they are currently attenuated by medication or psychosocial support. He has demonstrated repeated episodes of deterioration in work settings causing him to withdraw from the situation or to experience an excerbation of his symptoms, and has a documented history of the inability to function outside of a highly supportive living situation, which is reflected in his current situation in which he lives with his mother.

Since the record in this case clearly establishes an impairment meeting the requirements of section 12.03A, B, and C, the undersigned concludes that Mr. Walton was "disabled" commencing October 31, 1994.

However, as noted previously herein, he returned to full time employment on December 10, 1995 and has engaged in substantial gainful activity demonstrated by earnings averaging $1,040 per month. While counsel for the claimant argued that the award of a trial work period is warranted in this case, (i.e., an opportunity to work an additional nine months and receive benefits during those months), the undersigned does not concur. Mr. Walton has demonstrated a capacity for sustained work since at least May of 1995 in view of his part time work activity. Even though that was not substantial gainful activity in terms of his earnings, that continuous employment since May of 1995 through the present date persuades the undersigned that an additional trial period is unnecessary. The claimant has clearly established an ability to return to full time employment despite his psychiatric impairment.

Accordingly, Mr. Walton is entitled [ ] to [a] period of disability commencing October 31, 1994, and to disability insurance benefits and supplementary security income pursuant to the applications filed protectively on March 14, 1995. It is further concluded that since his disability ceased on December 10, 1995 due to his return to substantial gainful activity, his entitlement to benefits ended February 29, 1996, the second month after the month in which his disability ceased.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the disability insured status requirements of the Act on October 31, 1994, the date the claimant stated he became unable to work, and continues to meet them through December 31, 1999.

2. The claimant was not engaged in substantial gainful activity from October 31, 1994 until his return to full time employment on December 10, 1995, earning an average of $1,040 per month since that date.

3. The medical evidence establishes that the claimant has severe paranoid schizophrenia with underlying depression and anxiety.

4. The severity of the claimant's impairment meets the requirements of section 12.03A, B, and C, Appendix 1, Subpart P, Regulations No. 4 and has precluded him from working for at least 12 continuous months.

5. The claimant was under a "disability," as defined in the Social Security Act, beginning October 31, 1994 (20 CPR 404.1520(d) and 416.920(d)).

6. Beginning December 10, 1995, the claimant returned to work as a general worker and cashier for a grocery store, working 40 hours per week, earning an average of $6.50 per hour or $1,040 per month.

7. The claimant's work activity involves significant physical or mental activities for pay or profit and constitutes substantial gainful activity within the meaning of the regulations (20 CFR 44.532 and 416.972).

8. In view of his return to substantial gainful activity, the claimant's disability ceased on December 10, 1995.

9. In view of the claimant's part-time and full-time work since May of 1995, the further award of a trial work period is not warranted.

DECISION

It is the decision of the Administrative Law judge that, based on the application filed on March 14, 1995, the claimant is entitled to a period of disability commencing on October 31, 1994 and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

It is the further decision of the Administrative Law Judge that, based on the application filed on March 14, 1995, the claimant has been disabled since October 31, 1994 under 1614(a)(3)(A) of the Social Security Act.

It is the further decision of the Administrative Law Judge that based on the finding that disability ceased on December 10, 1995, entitlement to a period of disability and disability insurance benefits, and eligibility for supplemental security income, ended effective February 29, 1996, the end of the second calendar month after the month in which the disability ceased.

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise the claimant regarding the nondisability requirements for these payments, and if eligible, the amount and the month(s) for which payment will be made.

/s/ DAVID S. ANTROBUS
DAVID S. ANTROBUS
Administrative Law Judge
Main Street Centre, Rm 1720
600 East Main Street
Richmond, VA 23219-2406

AUG. 30, 1996
Date

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CLEVELAND B. WALTON, PLAINTIFF-APPELLANT

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT-APPELLEE

FILED: February 27, 2001

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

APPENDIX L

1. 42 U.S.C. 422(c) states as follows:

(c) "Period of trial work" defined

(1) The term "period of trial work", with respect to an individual entitled to benefits under section 423, 402(d), 402(e), or 402(f) of this title, means a period of months beginning and ending as provided in paragraphs (3) and (4).

(2) For purposes of sections 416(i) and 423 of this title, any services rendered by an individual during a period of trial work shall be deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period. For purposes of this subsection the term "services" means activity (whether legal or illegal) which is performed for remuneration or gain or is determined by the Commissioner of Social Security to be of a type normally performed for remuneration or gain.

(3) A period of trial work for any individual shall begin with the month in which he becomes entitled to disability insurance benefits, or, in the case of an individual entitled to benefits under section 402(d) of this title who has attained the age of eighteen, with the month in which he becomes entitled to such benefits or the month in which he attains the age of eighteen, whichever is later, or, in the case of an individual entitled to widow's or widower's insurance benefits under section 402(e) or (f) of this title who became entitled to such benefits prior to attaining age 60, with the month in which such individual becomes so entitled. Notwithstanding the preceding sentence, no period of trial work

may begin for any individual prior to the beginning of the month following September 1960; and no such period may begin for an individual in a period of disability of such individual in which he had a previous period of trial work.

(4) A period of trial work for any individual shall end with the close of whichever of the following months is the earlier:

(A) the ninth month, in any period of 60 consecutive months, in which the individual renders services (whether or not such nine months are consecutive); or

(B) the month in which his disability (as defined in section 423(d) of this title) ceases (as determined after application of paragraph (2) of this subsection).

2. 42 U.S.C. 423 states as follows:

§ 423. Disability insurance benefit payments

(a) Disability insurance benefits

(1) Every individual who—

(A) is insured for disability insurance benefits (as determined under subsection (c)(1) of this section),

(B) has not attained retirement age (as defined in section 416(*l*) of this title),

(C) has filed application for disability insurance benefits, and

(D) is under a disability (as defined in subsection (d) of this section)

shall be entitled to a disability insurance benefit (i) for each month beginning with the first month after his waiting period (as defined in subsection (c)(2) of this section) in which he becomes so entitled to such insurance benefits, or (ii) for each month beginning with the first month during all of which he is under a disability and in which he becomes so entitled to such insurance benefits, but only if he was entitled to disability insurance benefits which terminated, or had a period of disability (as defined in section 416(i) of this title) which ceased, within the 60-month period preceding the first month in which he is under such disability, and ending with the month preceding whichever of the following months is the earliest: the month in which he dies, the month in which he attains retirement age (as defined in section 416(*l*) of this title), or, subject to subsection (e) of this section, the termination month. For purposes of the preceding sentence, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 422(c)(4)(A) of this title, the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following

such period of trial work in which he engages or is determined able to engage in substantial gainful activity. No payment under this paragraph may be made to an individual who would not meet the definition of disability in subsection (d) of this section except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity, and no payment may be made for such month under subsection (b), (c), or (d) of section 402 of this title to any person on the basis of the wages and self-employment income of such individual. In the case of a deceased individual, the requirement of subparagraph (C) may be satisfied by an application for benefits filed with respect to such individual within 3 months after the month in which he died.

(2) Except as provided in section 402(q) of this title and section 415(b)(2)(A)(ii) of this title, such individual's disability insurance benefit for any month shall be equal to his primary insurance amount for such month determined under section 415 of this title as though he had attained age 62 in—

(A) the first month of his waiting period, or

(B) in any case in which clause (ii) of paragraph (1) of this subsection is applicable, the first month for which he becomes entitled to such disability insurance benefits,

and as though he had become entitled to old-age insurance benefits in the month in which the application for disability insurance benefits was filed and he was entitled to an old-age insurance benefit for each month for which (pursuant to subsection (b) of this section) he was entitled to a disability insurance benefit. For the

purposes of the preceding sentence, in the case of an individual who attained age 62 in or before the first month referred to in subparagraph (A) or (B) of such sentence, as the case may be, the elapsed years referred to in section 415(b)(3) of this title shall not include the year in which he attained age 62, or any year thereafter.

(b) Filing application

An application for disability insurance benefits filed before the first month in which the applicant satisfies the requirements for such benefits (as prescribed in subsection (a)(1) of this section) shall be deemed a valid application (and shall be deemed to have been filed in such first month) only if the applicant satisfies the requirements for such benefits before the Commissioner of Social Security makes a final decision on the application and no request under section 405(b) of this title for notice and opportunity for a hearing thereon is made, or if such a request is made, before a decision based upon the evidence adduced at the hearing is made (regardless of whether such decision becomes the final decision of the Commissioner of Social Security). An individual who would have been entitled to a disability insurance benefit for any month had he filed application therefor before the end of such month shall be entitled to such benefit for such month if such application is filed before the end of the 12th month immediately succeeding such month.

(c) Definitions; insured status; waiting period

For purposes of this section—

(1) An individual shall be insured for disability insurance benefits in any month if—

(A) he would have been a fully insured individual (as defined in section 414 of this title) had he attained age 62 and filed application for benefits under section 402(a) of this title on the first day of such month, and

(B)(i) he had not less than 20 quarters of coverage during the 40-quarter period which ends with the quarter in which such month occurred, or

(ii) if such month ends before the quarter in which he attains (or would attain) age 31, not less than one-half (and not less than 6) of the quarters during the period ending with the quarter in which such month occurred and beginning after he attained the age of 21 were quarters of coverage, or (if the number of quarters in such period is less than 12) not less than 6 of the quarters in the 12-quarter period ending with such quarter were quarters of coverage, or

(iii) in the case of an individual (not otherwise insured under clause (i)) who, by reason of section 416(i)(3)(B)(ii) of this title, had a prior period of disability that began during a period before the quarter in which he or she attained age 31, not less than one-half of the quarters beginning after such individual attained age 21 and ending with the quarter in which such month occurs are quarters of coverage, or (if the number of quarters in such period is less than 12) not less than 6 of the quarters in the 12-quarter period ending with such quarter are quarters of coverage;

except that the provisions of subparagraph (B) of this paragraph shall not apply in the case of an individual who is blind (within the meaning of "blindness" as defined in section 416(i)(1) of this title). For purposes of subparagraph (B) of this paragraph, when the number of quarters in any period is an odd number, such number shall be reduced by one, and a quarter shall not be counted as part of any period if any part of such quarter was included in a period of disability unless such quarter was a quarter of coverage.

(2) The term "waiting period" means, in the case of any application for disability insurance benefits, the earliest period of five consecutive calendar months—

(A) throughout which the individual with respect to whom such application is filed has been under a disability, and

(B)(i) which begins not earlier than with the first day of the seventeenth month before the month in which such application is filed if such individual is insured for disability insurance benefits in such seventeenth month, or (ii) if he is not so insured in such month, which begins not earlier than with the first day of the first month after such seventeenth month in which he is so insured.

Notwithstanding the preceding provisions of this paragraph, no waiting period may begin for any individual before January 1, 1957.

(d) "Disability" defined

(1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 416(i)(1) of this title), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(2) For purposes of paragraph (1)(A)—

(A) 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 (with respect to any individual), "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.

(B) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

(C) An individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

(4)(A) The Commissioner of Social Security shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity. No individual who is blind shall be regarded as having demonstrated an ability to engage in substantial gainful activity on the basis of earnings that do not exceed an amount equal to the exempt amount which would be applicable under section 403(f)(8) of this title, to individuals described in

subparagraph (D) thereof, if section 102 of the Senior Citizens' Right to Work Act of 1996 had not been enacted. Notwithstanding the provisions of paragraph (2), an individual whose services or earnings meet such criteria shall, except for purposes of section 422(c) of this title, be found not to be disabled. In determining whether an individual is able to engage in substantial gainful activity by reason of his earnings, where his disability is sufficiently severe to result in a functional limitation requiring assistance in order for him to work, there shall be excluded from such earnings an amount equal to the cost (to such individual) of any attendant care services, medical devices, equipment, prostheses, and similar items and services (not including routine drugs or routine medical services unless such drugs or services are necessary for the control of the disabling condition) which are necessary (as determined by the Commissioner of Social Security in regulations) for that purpose, whether or not such assistance is also needed to enable him to carry out his normal daily functions; except that the amounts to be excluded shall be subject to such reasonable limits as the Commissioner of Social Security may prescribe.

(B) In determining under subparagraph (A) when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity, the Commissioner of Social Security shall apply the criteria described in subparagraph (A) with respect to services performed by any individual without regard to the legality of such services.

(5)(A) An individual shall not be considered to be under a disability unless he furnishes such medical and

other evidence of the existence thereof as the Commissioner of Social Security may require. An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability. Any non-Federal hospital, clinic, laboratory, or other provider of medical services, or physician not in the employ of the Federal Government, which supplies medical evidence required and requested by the Commissioner of Social Security under this paragraph shall be entitled to payment from the Commissioner of Social Security for the reasonable cost of providing such evidence.

(B) In making any determination with respect to whether an individual is under a disability or continues to be under a disability, the Commissioner of Social Security shall consider all evidence available in such

individual's case record, and shall develop a complete medical history of at least the preceding twelve months for any case in which a determination is made that the individual is not under a disability. In making any determination the Commissioner of Social Security shall make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from any other source on a consultative basis.

(6)(A) Notwithstanding any other provision of this subchapter, any physical or mental impairment which arises in connection with the commission by an individual (after October 19, 1980) of an offense which constitutes a felony under applicable law and for which such individual is subsequently convicted, or which is aggravated in connection with such an offense (but only to the extent so aggravated), shall not be considered in determining whether an individual is under a disability.

(B) Notwithstanding any other provision of this subchapter, any physical or mental impairment which arises in connection with an individual's confinement in a jail, prison, or other penal institution or correctional facility pursuant to such individual's conviction of an offense (committed after October 19, 1980) constituting a felony under applicable law, or which is aggravated in connection with such a confinement (but only to the extent so aggravated), shall not be considered in determining whether such individual is under a disability for purposes of benefits payable for any month during which such individual is so confined.

(e) Engaging in substantial gainful activity

(1) No benefit shall be payable under subsection (d)(1)(B)(ii), (d)(6)(A)(ii), (d)(6)(B), (e)(1)(B)(ii), or (f)(1)(B)(ii) of section 402 of this title or under subsection (a)(1) of this section to an individual for any month, after the third month, in which he engages in substantial gainful activity during the 36-month period following the end of his trial work period determined by application of section 422(c)(4)(A) of this title.

(2) No benefit shall be payable under section 402 of this title on the basis of the wages and self-employment income of an individual entitled to a benefit under subsection (a)(1) of this section for any month for which the benefit of such individual under subsection (a)(1) of this section is not payable under paragraph (1).

(f) Standard of review for termination of disability benefits

A recipient of benefits under this subchapter or subchapter XVIII of this chapter based on the disability of any individual may be determined not to be entitled to such benefits on the basis of a finding that the physical or mental impairment on the basis of which such benefits are provided has ceased, does not exist, or is not disabling only if such finding is supported by—

(1) substantial evidence which demonstrates that—

(A) there has been any medical improvement in the individual's impairment or combination of impairments (other than medical improvement which is not related to the individual's ability to work), and

(B) the individual is now able to engage in substantial gainful activity; or

(2) substantial evidence which—

(A) consists of new medical evidence and a new assessment of the individual's residual functional capacity, and demonstrates that—

(i) although the individual has not improved medically, he or she is nonetheless a beneficiary of advances in medical or vocational therapy or technology (related to the individual's ability to work), and

(ii) the individual is now able to engage in substantial gainful activity, or

(B) demonstrates that—

(i) although the individual has not improved medically, he or she has undergone vocational therapy (related to the individual's ability to work), and

(ii) the individual is now able to engage in substantial gainful activity; or

(3) substantial evidence which demonstrates that, as determined on the basis of new or improved diagnostic techniques or evaluations, the individual's impairment or combination of impairments is not as disabling as it was considered to be at the time of the most recent prior decision that he or she was under a disability or continued to be under a disability, and that therefore the individual is able to engage in substantial gainful activity; or

(4) substantial evidence (which may be evidence on the record at the time any prior determination of the

entitlement to benefits based on disability was made, or newly obtained evidence which relates to that determination) which demonstrates that a prior determination was in error.

Nothing in this subsection shall be construed to require a determination that a recipient of benefits under this subchapter or subchapter XVIII of this chapter based on an individual's disability is entitled to such benefits if the prior determination was fraudulently obtained or if the individual is engaged in substantial gainful activity, cannot be located, or fails, without good cause, to cooperate in a review of the entitlement to such benefits or to follow prescribed treatment which would be expected to restore his or her ability to engage in substantial gainful activity. In making for purposes of the preceding sentence any determination relating to fraudulent behavior by any individual or failure by any individual without good cause to cooperate or to take any required action, the Commissioner of Social Security shall specifically take into account any physical, mental, educational, or linguistic limitation such individual may have (including any lack of facility with the English language). Any determination under this section shall be made on the basis of all the evidence available in the individual's case file, including new evidence concerning the individual's prior or current condition which is presented by the individual or secured by the Commissioner of Social Security. Any determination made under this section shall be made on the basis of the weight of the evidence and on a neutral basis with regard to the individual's condition, without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been determined to be

disabled. For purposes of this subsection, a benefit under this subchapter is based on an individual's disability if it is a disability insurance benefit, a child's, widow's, or widower's insurance benefit based on disability, or a mother's or father's insurance benefit based on the disability of the mother's or father's child who has attained age 16.

(g) Continued payment of disability benefits during appeal

(1) In any case where—

(A) an individual is a recipient of disability insurance benefits, or of child's, widow's, or widower's insurance benefits based on disability,

(B) the physical or mental impairment on the basis of which such benefits are payable is found to have ceased, not to have existed, or to no longer be disabling, and as a consequence such individual is determined not to be entitled to such benefits, and

(C) a timely request for a hearing under section 421(d) of this title, or for an administrative review prior to such hearing, is pending with respect to the determination that he is not so entitled,

such individual may elect (in such manner and form and within such time as the Commissioner of Social Security shall by regulations prescribe) to have the payment of such benefits, the payment of any other benefits under this subchapter based on such individual's wages and self-employment income, the payment of mother's or father's insurance benefits to such individual's mother or father based on the disability of such individual as a

child who has attained age 16, and the payment of benefits under subchapter XVIII of this chapter based on such individual's disability, continued for an additional period beginning with the first month beginning after January 12, 1983, for which (under such determination) such benefits are no longer otherwise payable, and ending with the earlier of (i) the month preceding the month in which a decision is made after such a hearing, or (ii) the month preceding the month in which no such request for a hearing or an administrative review is pending.

(2)(A) If an individual elects to have the payment of his benefits continued for an additional period under paragraph (1), and the final decision of the Commissioner of Social Security affirms the determination that he is not entitled to such benefits, any benefits paid under this subchapter pursuant to such election (for months in such additional period) shall be considered overpayments for all purposes of this subchapter, except as otherwise provided in subparagraph (B).

(B) If the Commissioner of Social Security determines that the individual's appeal of his termination of benefits was made in good faith, all of the benefits paid pursuant to such individual's election under paragraph (1) shall be subject to waiver consideration under the provisions of section 404 of this title. In making for purposes of this subparagraph any determination of whether any individual's appeal is made in good faith, the Commissioner of Social Security shall specifically take into account any physical, mental, educational, or linguistic limitation such individual may have (including any lack of facility with the English language).

(h) Interim benefits in cases of delayed final decisions

(1) In any case in which an administrative law judge has determined after a hearing as provided under section 405(b) of this title that an individual is entitled to disability insurance benefits or child's, widow's, or widower's insurance benefits based on disability and the Commissioner of Social Security has not issued the Commissioner's final decision in such case within 110 days after the date of the administrative law judge's determination, such benefits shall be currently paid for the months during the period beginning with the month preceding the month in which such 110-day period expires and ending with the month preceding the month in which such final decision is issued.

(2) For purposes of paragraph (1), in determining whether the 110-day period referred to in paragraph (1) has elapsed, any period of time for which the action or inaction of such individual or such individual's representative without good cause results in the delay in the issuance of the Commissioner's final decision shall not be taken into account to the extent that such period of time exceeds 20 calendar days.

(3) Any benefits currently paid under this subchapter pursuant to this subsection (for the months described in paragraph (1)) shall not be considered overpayments for any purpose of this subchapter (unless payment of such benefits was fraudulently obtained), and such benefits shall not be treated as past-due benefits for purposes of section 406(b)(1) of this title.

(i) Reinstatement of entitlement[*]

(1)(A) Entitlement to benefits described in subparagraph (B)(i)(I) shall be reinstated in any case where the Commissioner determines that an individual described in subparagraph (B) has filed a request for reinstatement meeting the requirements of paragraph (2)(A) during the period prescribed in subparagraph (C). Reinstatement of such entitlement shall be in accordance with the terms of this subsection.

(B) An individual is described in this subparagraph if

(i) prior to the month in which the individual files a request for reinstatement—

(I) the individual was entitled to benefits under this section or section 402 of this title on the basis of disability pursuant to an application filed therefor; and

(II) such entitlement terminated due to the performance of substantial gainful activity;

(ii) the individual is under a disability and the physical or mental impairment that is the basis for the finding of disability is the same as (or related to) the physical or mental impairment that was the basis for the finding of disability that gave rise to the entitlement described in clause (i); and

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[*] This subsection was added December 17, 1999, by Pub. L. No. 106-170, Title I, § 112(a), (c), 113 Stat. 1881, 1886, and became effective on January 1, 2001.

(iii) the individual's disability renders the individual unable to perform substantial gainful activity.

(C)(i) Except as provided in clause (ii), the period prescribed in this subparagraph with respect to an individual is 60 consecutive months beginning with the month following the most recent month for which the individual was entitled to a benefit described in subparagraph (B)(i)(I) prior to the entitlement termination described in subparagraph (B)(i)(II).

(ii) In the case of an individual who fails to file a reinstatement request within the period prescribed in clause (i), the Commissioner may extend the period if the Commissioner determines that the individual had good cause for the failure to so file.

(2)(A)(i) A request for reinstatement shall be filed in such form, and containing such information, as the Commissioner may prescribe.

(ii) A request for reinstatement shall include express declarations by the individual that the individual meets the requirements specified in clauses (ii) and (iii) of paragraph (1)(B).

(B) A request for reinstatement filed in accordance with subparagraph (A) may constitute an application for benefits in the case of any individual who the Commissioner determines is not entitled to reinstated benefits under this subsection.

(3) In determining whether an individual meets the requirements of paragraph (1)(B)(ii), the provisions of subsection (f) shall apply.

(4)(A)(i) Subject to clause (ii), entitlement to benefits reinstated under this subsection shall commence with the benefit payable for the month in which a request for reinstatement is filed.

(ii) An individual whose entitlement to a benefit for any month would have been reinstated under this subsection had the individual filed a request for reinstatement before the end of such month shall be entitled to such benefit for such month if such request for reinstatement is filed before the end of the twelfth month immediately succeeding such month.

(B)(i) Subject to clauses (ii) and (iii), the amount of the benefit payable for any month pursuant to the reinstatement of entitlement under this subsection shall be determined in accordance with the provisions of this title.

(ii) For purposes of computing the primary insurance amount of an individual whose entitlement to benefits under this section is reinstated under this subsection, the date of onset of the individual's disability shall be the date of onset used in determining the individual's most recent period of disability arising in connection with such benefits payable on the basis of an application.

(iii) Benefits under this section or section 202 payable for any month pursuant to a request for reinstatement filed in accordance with paragraph (2) shall be reduced by the amount of any provisional benefit paid to such individual for such month under paragraph (7).

(C) No benefit shall be payable pursuant to an entitlement reinstated under this subsection to an individual for any month in which the individual engages in substantial gainful activity.

(D) The entitlement of any individual that is reinstated under this subsection shall end with the benefits payable for the month preceding whichever of the following months is the earliest:

(i) The month in which the individual dies.

(ii) The month in which the individual attains retirement age.

(iii) The third month following the month in which the individual's disability ceases.

(5) Whenever an individual's entitlement to benefits under this section is reinstated under this subsection, entitlement to benefits payable on the basis of such individual's wages and self-employment income may be reinstated with respect to any person previously entitled to such benefits on the basis of an application if the Commissioner determines that such person satisfies all the requirements for entitlement to such benefits except requirements related to the filing of an application. The provisions of paragraph (4) shall apply to the reinstated entitlement of any such person to the same extent that they apply to the reinstated entitlement of such individual.

(6) An individual to whom benefits are payable under this section or section 402 of this title pursuant to a reinstatement of entitlement under this subsection for 24 months (whether or not consecutive) shall, with

respect to benefits so payable after such twenty-fourth month, be deemed for purposes of paragraph (1)(B)(i)(I) and the determination, if appropriate, of the termination month in accordance with subsection (a)(1) of this section, or subsection (d)(1), (e)(1), or (f)(1) of section 402 of this title, to be entitled to such benefits on the basis of an application filed therefor.

(7)(A) An individual described in paragraph (1)(B) who files a request for reinstatement in accordance with the provisions of paragraph (2)(A) shall be entitled to provisional benefits payable in accordance with this paragraph, unless the Commissioner determines that the individual does not meet the requirements of paragraph (1)(B)(i) or that the individual's declaration under paragraph (2)(A)(ii) is false. Any such determination by the Commissioner shall be final and not subject to review under subsection (b) or (g) of section 405 of this title.

(B) The amount of a provisional benefit for a month shall equal the amount of the last monthly benefit payable to the individual under this title on the basis of an application increased by an amount equal to the amount, if any, by which such last monthly benefit would have been increased as a result of the operation of section 415(i) of this title.

(C)(i) Provisional benefits shall begin with the month in which a request for reinstatement is filed in accordance with paragraph (2)(A).

(ii) Provisional benefits shall end with the earliest of

(I) the month in which the Commissioner makes a determination regarding the individual's entitlement to reinstated benefits;

(II) the fifth month following the month described in clause (i);

(III) the month in which the individual performs substantial gainful activity; or

(IV) the month in which the Commissioner determines that the individual does not meet the requirements of paragraph (1)(B)(i) or that the individual's declaration made in accordance with paragraph (2)(A)(ii) is false.

(D) In any case in which the Commissioner determines that an individual is not entitled to reinstated benefits, any provisional benefits paid to the individual under this paragraph shall not be subject to recovery as an overpayment unless the Commissioner determines that the individual knew or should have known that the individual did not meet the requirements of paragraph (1)(B).

(j) Limitation on payments to prisoners

For provisions relating to limitation on payments to prisoners, see section 402(x) of this title.

3. 42 U.S.C. 1381a states as follows:

§ 1381a. Basic entitlement to benefits

Every aged, blind, or disabled individual who is determined under part A of this subchapter to be eligible on the basis of his income and resources shall, in accordance with and subject to the provisions of this subchapter, be paid benefits by the Commissioner of Social Security.

4. 42 U.S.C. 1382c(a)(3) states as follows:

§ 1382c. Definitions

* * * * *

(a)(3)(A) Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

(B) For purposes of subparagraph (A), 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 (with respect to any individual), "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.

(C)(i) An individual under the age of 18 shall be considered disabled for the purposes of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

(ii) Notwithstanding clause (i), no individual under the age of 18 who engages in substantial gainful activity (determined in accordance with regulations prescribed pursuant to subparagraph (E)) may be considered to be disabled.

(D) For purposes of this paragraph, a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

(E) The Commissioner of Social Security shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity. In determining whether an individual is able to engage in substantial gainful activity by reason of his earnings, where his disability is

sufficiently severe to result in a functional limitation requiring assistance in order for him to work, there shall be excluded from such earnings an amount equal to the cost (to such individual) of any attendant care services, medical devices, equipment, prostheses, and similar items and services (not including routine drugs or routine medical services unless such drugs or services are necessary for the control of the disabling condition) which are necessary (as determined by the Commissioner of Social Security in regulations) for that purpose, whether or not such assistance is also needed to enable him to carry out his normal daily functions; except that the amounts to be excluded shall be subject to such reasonable limits as the Commissioner of Social Security may prescribe. Notwithstanding the provisions of subparagraph (B), an individual whose services or earnings meet such criteria shall be found not to be disabled. The Commissioner of Social Security shall make determinations under this subchapter with respect to substantial gainful activity, without regard to the legality of the activity.

(F) Notwithstanding the provisions of subparagraphs (A) through (E), an individual shall also be considered to be disabled for purposes of this subchapter if he is permanently and totally disabled as defined under a State plan approved under subchapter XIV or XVI of this chapter as in effect for October 1972 and received aid under such plan (on the basis of disability) for December 1973 (and for at least one month prior to July 1973), so long as he is continuously disabled as so defined.

(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient

medical severity that such impairment or impairments could be the basis of eligibility under this section, the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Commissioner of Social Security does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

(H)(i) In making determinations with respect to disability under this subchapter, the provisions of sections 421(h), 421(k), and 423(d)(5) of this title shall apply in the same manner as they apply to determinations of disability under subchapter II of this chapter.

(ii)(I) Not less frequently than once every 3 years, the Commissioner shall review in accordance with paragraph (4) the continued eligibility for benefits under this subchapter of each individual who has not attained 18 years of age and is eligible for such benefits by reason of an impairment (or combination of impairments) which is likely to improve (or, at the option of the Commissioner, which is unlikely to improve).

(II) A representative payee of a recipient whose case is reviewed under this clause shall present, at the time of review, evidence demonstrating that the recipient is, and has been, receiving treatment, to the extent considered medically necessary and available, of the condition which was the basis for providing benefits under this subchapter.

(III) If the representative payee refuses to comply without good cause with the requirements of subclause (II), the Commissioner of Social Security shall, if the Commissioner determines it is in the best interest of the individual, promptly suspend payment of benefits to the representative payee, and provide for payment of benefits to an alternative representative payee of the individual or, if the interest of the individual under this subchapter would be served thereby, to the individual.

(IV) Subclause (II) shall not apply to the representative payee of any individual with respect to whom the Commissioner determines such application would be inappropriate or unnecessary. In making such determination, the Commissioner shall take into consideration the nature of the individual's impairment (or combination of impairments). Section 1383(c) of this title shall not apply to a finding by the Commissioner that the requirements of subclause (II) should not apply to an individual's representative payee.

(iii) If an individual is eligible for benefits under this subchapter by reason of disability for the month preceding the month in which the individual attains the age of 18 years, the Commissioner shall redetermine such eligibility—

(I) by applying the criteria used in determining initial eligibility for individuals who are age 18 or older; and

(II) either during the 1-year period beginning on the individual's 18th birthday or, in lieu of a continuing disability review, whenever the

Commissioner determines that an individual's case is subject to a redetermination under this clause.

With respect to any redetermination under this clause, paragraph (4) shall not apply.

(iv)(I) Except as provided in subclause (VI), not later than 12 months after the birth of an individual, the Commissioner shall review in accordance with paragraph (4) the continuing eligibility for benefits under this subchapter by reason of disability of such individual whose low birth weight is a contributing factor material to the Commissioner's determination that the individual is disabled.

(II) A review under subclause (I) shall be considered a substitute for a review otherwise required under any other provision of this subparagraph during that 12-month period.

(III) A representative payee of a recipient whose case is reviewed under this clause shall present, at the time of review, evidence demonstrating that the recipient is, and has been, receiving treatment, to the extent considered medically necessary and available, of the condition which was the basis for providing benefits under this subchapter.

(IV) If the representative payee refuses to comply without good cause with the requirements of subclause (III), the Commissioner of Social Security shall, if the Commissioner determines it is in the best interest of the individual, promptly suspend payment of benefits to the representative payee, and provide for payment of benefits to an alternative representative payee of the

individual or, if the interest of the individual under this subchapter would be served thereby, to the individual.

(V) Subclause (III) shall not apply to the representative payee of any individual with respect to whom the Commissioner determines such application would be inappropriate or unnecessary. In making such determination, the Commissioner shall take into consideration the nature of the individual's impairment (or combination of impairments). Section 1383(c) of this title shall not apply to a finding by the Commissioner that the requirements of subclause (III) should not apply to an individual's representative payee.

(VI) Subclause (I) shall not apply in the case of an individual described in that subclause who, at the time of the individual's initial disability determination, the Commissioner determines has an impairment that is not expected to improve within 12 months after the birth of that individual, and who the Commissioner schedules for a continuing disability review at a date that is after the individual attains 1 year of age.

(I) In making any determination under this subchapter with respect to the disability of an individual who has not attained the age of 18 years and to whom section 421(h) of this title does not apply, the Commissioner of Social Security shall make reasonable efforts to ensure that a qualified pediatrician or other individual who specializes in a field of medicine appropriate to the disability of the individual (as determined by the Commissioner of Social Security) evaluates the case of such individual.

(J) Notwithstanding subparagraph (A), an individual shall not be considered to be disabled for purposes

of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.

5. 20 C.F.R. 404.315(a) states as follows:

§ 404.315 Who is entitled to disability benefits.

(a) *General.* You are entitled to disability benefits while disabled before age 65 if—

(1) You have enough social security earnings to be *insured for disability,* as described in § 404.130;

(2) You apply;

(3) You have a disability, as defined in § 404.1505, or you are not disabled, but you had a disability that ended within the 12-month period before the month you applied; and

(4) You have been disabled for 5 full consecutive months. This 5-month waiting period begins with a month in which you were both insured for disability and disabled. Your waiting period can begin no earlier than the 17th month before the month you apply—no matter how long you were disabled before then. No waiting period is required if you were previously entitled to disability benefits or to a period of disability under § 404.320 any time within 5 years of the month you again became disabled.

6. 20 C.F.R. 404.321 (2001) (see 65 Fed. Reg. 42,782 (2000)) states as follows:

§ 404.321 When a period of disability begins and ends.

(a) *When a period of disability begins.* Your period of disability begins on the day your disability begins if you are insured for disability on that day. If you are not insured for disability on that day, your period of disability will begin on the first day of the first calendar quarter after your disability began in which you become insured for disability. Your period of disability may not begin after you become 65 years old.

(b) *When disability ended before December 1, 1980.* Your period of disability ends on the last day of the month before the month in which you become 65 years old or, if earlier, the last day of the second month following the month in which your disability ended.

(c) *When disability ends after November 1980.* Your period of disability ends with the close of whichever of the following is the earliest—

(1) The month before the month in which you become 65 years old;

(2) The month immediately preceding your termination month (§ 404.325); or

(3) If you perform substantial gainful activity during the reentitlement period described in § 404.1592a, the last month for which you received benefits.

(d) *When drug addiction or alcoholism is a contributing factor material to the determination of disability*. (1) Your entitlement to receive disability benefit payments ends the month following the month in which, regardless of the number of entitlement periods you may have had based on disability where drug addiction or alcoholism is a contributing factor material to the determination of disability (as described in § 404.1535)—

(i) You have received a total of 36 months of disability benefits. Not included in these 36 months are months in which treatment for your drug addiction or alcoholism is not available, months before March 1995, and months for which your benefits were suspended for any reason; or

(ii) Your benefits have been suspended for 12 consecutive months because of your failure to comply with treatment requirements.

(2) For purposes other than payment of your disability benefits, your period of disability continues until the termination month as explained in § 404.325.

7. 20 C.F.R. 404.1505 states as follows:

§ 404.1505 Basic definition of disability.

(a) The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you

must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. To determine whether you are able to do any other work, we consider your residual functional capacity and your age, education, and work experience. We will use this definition of disability if you are applying for a period of disability, or disability insurance benefits as a disabled worker, or child's insurance benefits based on disability before age 22 or, with respect to disability benefits payable for months after December 1990, as a widow, widower, or surviving divorced spouse.

(b) There are different rules for determining disability for individuals who are statutorily blind. We discuss these in §§ 404.1581 through 404.1587. There are also different rules for determining disability for widows, widowers, and surviving divorced spouses for monthly benefits for months prior to January 1991. We discuss these rules in §§ 404.1577, 404.1578, and 404.1579.

8. 20 C.F.R. 404.1509 states as follows:

§ 404.1509 How long the impairment must last.

Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months. We call this the duration requirement.

9. 20 C.F.R. 404.1520 states as follows:

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all evidence in your case record when we make a determination or decision whether you are disabled. When you file a claim for a period of disability and/or disability insurance benefits or for child's benefits based on disability, we use the following evaluation process. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider the effect of your physical or mental impairment; if you have more than one impairment, we will also consider the combined effect of your impairments. Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity, your past work, and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review your claim further. Once you have been found entitled to disability benefits, we follow a somewhat different order of evaluation to determine whether your entitlement continues, as explained in § 404.1594(f)(6).

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impair-

ments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no

longer do this kind of work, we use a different rule (see § 404.1562).

10. 20 C.F.R. 404.1572 states as follows:

§ 404.1572 What we mean by substantial gainful activity.

Substantial gainful activity is work activity that is both substantial and gainful:

(a) *Substantial work activity*. Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.

(b) *Gainful work activity*. Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.

(c) *Some other activities.* Generally, we do not consider activities like taking care of yourself, household tasks, hobbies, therapy, school attendance, club activities, or social programs to be substantial gainful activity.

11. 20 C.F.R. 404.1592 (2001) (see 65 Fed. Reg. 42,787 (2001)) states as follows:

§ 404.1592 The trial work period.

(a) *Definition of the trial work period.* The trial work period is a period during which you may test your ability to work and still be considered disabled. It begins and ends as described in paragraph (e) of this section. During this period, you may perform *services* (see paragraph (b) of this section) in as many as 9 months, but these months do not have to be consecutive. We will not consider those services as showing that your disability has ended until you have performed services in at least 9 months. However, after the trial work period has ended we will consider the work you did during the trial work period in determining whether your disability ended at any time after the trial work period.

* * * * *

(e) *When the trial work period begins and ends.* The trial work period begins with the month in which you become entitled to disability insurance benefits, to child's benefits based on disability or to widow's, widower's, or surviving divorced spouse's benefits based on disability. It cannot begin before the month in which you file your application for benefits, and for widows, widowers, and surviving divorced spouses, it cannot begin before December 1, 1980. It ends with the close of whichever of the following calendar months is the earliest:

(1) The 9th month (whether or not the months have been consecutive) in which you have performed services if that 9th month is prior to January 1992;

(2) The 9th month (whether or not the months have been consecutive and whether or not the previous 8 months of services were prior to January 1992) in which you have performed services within a period of 60 consecutive months if that 9th month is after December 1991; or

(3) The month in which new evidence, other than evidence relating to any work you did during the trial work period, shows that you are not disabled, even though you have not worked a full 9 months. We may find that your disability has ended at any time during the trial work period if the medical or other evidence shows that you are no longer disabled. See § 404.1594 for information on how we decide whether your disability continues or ends.

12. 20 C.F.R. 416.260 states as follows:

§ 416.260 General.

The regulations in §§ 416.260 through 416.269 describe the rules for determining eligibility for special SSI cash benefits and for special SSI eligibility status for an individual who works despite a disabling impairment. Under these rules an individual who works despite a disabling impairment may qualify for special SSI cash benefits and in most cases for Medicaid benefits when his or her gross earned income exceeds the applicable dollar amount which ordinarily represents SGA described in § 416.974(b)(2). The calculation of this gross earned income amount, however, is not to be considered an actual SGA determination. Also, for purposes of determining eligibility or continuing eligibility for Medicaid benefits, a blind or disabled in-

dividual (no longer eligible for regular SSI benefits or for special SSI cash benefits) who, except for earnings, would otherwise be eligible for SSI cash benefits may be eligible for a special SSI eligibility status under which he or she is considered to be a blind or disabled individual receiving SSI benefits. We explain the rules for eligibility for special SSI cash benefits in §§ 416.261 and 416.262. We explain the rules for the special SSI eligibility status in §§ 416.264 through 416.269.

13. 20 C.F.R. 416.261 states as follows:

§ 416.261 What are special SSI cash benefits and when are they payable.

Special SSI cash benefits are benefits that we may pay you in lieu of regular SSI benefits because your gross earned income in a month of initial eligibility for regular SSI benefits exceeds the amount ordinarily considered to represent SGA under § 416.974(b)(2). You must meet the eligibility requirements in § 416.262 in order to receive special SSI cash benefits. Special SSI cash benefits are not payable for any month in which your countable income exceeds the limits established for the SSI program (see subpart K of this part). If you are eligible for special SSI cash benefits, we consider you to be a disabled individual receiving SSI benefits for purposes of eligibility for Medicaid. We compute the amount of special SSI cash benefits according to the rules in subpart D of this part. If your State makes supplementary payments which we administer under a Federal-State agreement, and if your State elects to supplement the special SSI cash benefits, the rules in subpart T of this part will apply to these payments.

14. 20 C.F.R. 416.262 states as follows:

§ 416.262 Eligibility requirements for special SSI cash benefits.

You are eligible for special SSI cash benefits if you meet the following requirements—

(a) You were eligible to receive a regular SSI benefit or a federally administered State supplementary payment (see § 416.2001) in a month before the month for which we are determining your eligibility for special SSI cash benefits as long as that month was not in a prior period of eligibility which has terminated according to §§ 416.1331 through 416.1335;

(b) In the month for which we are making the determination, your gross earned income exceeds the amount ordinarily considered to represent SGA under § 416.974(b)(2);

(c) You continue to have a disabling impairment;

(d) If your disability is based on a determination that drug addiction or alcoholism is a contributing factor material to the determination of disability as described in § 416.935, you have not yet received SSI cash benefits, special SSI cash benefits, or special SSI eligibility status for a total of 36 months, or Social Security benefit payments when treatment was available for a total of 36 months; and

(e) You meet all the nondisability requirements for eligibility for SSI benefits (see § 416.202).

We will follow the rules in this subpart in determining your eligibility for special SSI cash benefits.