SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Regulation Nos. 4 and 16]

RIN 0960–AF19

Evidentiary Requirements for Making Findings About Medical Equivalence

AGENCY: Social Security Administration.

ACTION: Proposed rule.

SUMMARY: We propose to revise our regulations that pertain to the processing of claims for disability benefits under title II and title XVI of the Social Security Act (the Act). The proposed revisions would make the language in the rules we use under title II of the Act for making findings about medical equivalence consistent with the language in the rules that we use under title XVI of the Act. The proposed revisions would also clarify our rules about the evidence we use when we make findings about medical equivalence for adults and children. We also propose to update and clarify our rules that explain the Listing of Impairments (the listings) and how your impairment(s) can meet a listing.

DATES: To be sure your comments are considered, we must receive them by August 16, 2005.

ADDRESSES: You may give us your comments by: using our Internet site facility (*i.e.*, Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs* or the Federal eRulemaking Portal at *http://www.regulations.gov;* e-mail to *regulations@ssa.gov;* telefax to (410) 966–2830, or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703. You may also deliver them to the Office of Regulations, Social Security Administration, 100 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted on our Internet site, at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs,* or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

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FOR FURTHER INFORMATION CONTACT: Robert Augustine, Social Insurance Specialist, Office of Regulations, Social Security Administration, 100 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–0020 or TTY (410) 966–5609. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet Web site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: We propose to revise our regulations that explain how we make findings about whether your impairment(s) medically equals a listing. Since February 11, 1997, § 416.926, our regulation for making findings about medical equivalence under title XVI, has included different language from § 404.1526, our regulation about medical equivalence under title II. We are now proposing to update § 404.1526 so that it is the same as § 416.926.

As we discuss in more detail below, we are also proposing revisions to clarify language that was at issue in the decision in *Hickman* v. *Apfel,* 187 F.3d 683 (7th Cir. 1999), about the evidence we consider when we make findings about medical equivalence. When we issue any final rules, we will consider whether to rescind the Acquiescence Ruling (AR) that we issued in response to the court's decision (AR 00–2(7)) and to restore national uniformity in our adjudications.

In addition, we are proposing to update and clarify our rules in §§ 404.1525 and 416.925. As we explain below, the proposed changes are not substantive.

We are also proposing minor editorial changes throughout §§ 404.1525, 404.1526, 416.925, and 416.926, as well as conforming changes in other regulations to reflect the changes we are proposing in these sections.

What Programs Would These Proposed Regulations Affect?

These proposed regulations would affect disability determinations and decisions that we make under title II and title XVI of the Act. In addition, to the extent that Medicare entitlement and Medicaid eligibility are based on whether you qualify for disability benefits under title II or title XVI, these proposed regulations would also affect the Medicare and Medicaid programs.

Who Can Get Disability Benefits?

Under title II of the Act, we provide for the payment of disability benefits if you are disabled and belong to one of the following three groups:

- Workers insured under the Act,
- Children of insured workers, and
- Widows, widowers, and surviving divorced spouses (see § 404.336) of insured workers.

Under title XVI of the Act, we provide for Supplemental Security Income (SSI) payments on the basis of disability if you are disabled and have limited income and resources.

How Do We Define Disability?

Under both the title II and title XVI programs, disability must be the result of any medically determinable physical or mental impairment or combination of impairments that is expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months. Our definitions of disability are shown in the following table:

If you file a claim under . . .	And you are . . .	Disability means you have a medically determinable impairments(s) as described above that result in . . .
Title II	An adult or child	The inability to do any substantial gainful activity (SGA).
Title XVI	A person age 18 or older	The inability to do any SGA.
Title XVI	A person under age 18	Marked and severe functional limitations.

How Do We Decide Whether You Are Disabled?

If you are seeking benefits under title II of the Act, or if you are an adult seeking benefits under title XVI of the Act, we use a five-step ''sequential evaluation process'' to decide whether you are disabled. We describe this five-step process in our regulations at §§ 404.1520 and 416.920. We follow the five steps in order and stop as soon as we can make a determination or decision. The steps are:

1. Are you working, and is the work you are doing substantial gainful activity? 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. If you are not, we will go on to step 2.

2. Do you have a ''severe'' impairment? If you do not have an impairment or combination of impairments that significantly limits your physical or mental ability to do basic work activities, we will find that you are not disabled. If you do, we will go on to step 3.

3. Do you have an impairment(s) that meets or medically equals the severity of an impairment in the listings? If you do, and the impairment(s) meets the duration requirement, we will find that you are disabled. If you do not, we will go on to step 4.

4. Do you have the residual functional capacity to do your past relevant work? If you do, we will find that you are not disabled. If you do not, we will go on to step 5.

5. Does your impairment(s) prevent you from doing any other work that exists in significant numbers in the national economy, considering your residual functional capacity, age, education, and work experience? If it does, and it meets the duration requirement, we will find that you are disabled. If it does not, we will find that you are not disabled.

We use a different sequential evaluation process for children who apply for payments based on disability under SSI. If you are already receiving benefits, we also use a different sequential evaluation process when we decide whether your disability continues. See §§ 404.1594, 416.924, 416.994, and 416.994a of our regulations. However, all of these processes include steps at which we consider whether your impairment(s) meets or medically equals one of our listings.

What Are the Listings?

The listings are examples of impairments that we consider severe enough to prevent you as an adult from doing any gainful activity. If you are a child seeking SSI payments based on disability, the listings describe impairments that we consider severe enough to result in marked and severe functional limitations. Although the listings are contained only in appendix 1 to subpart P of part 404 of our regulations, we incorporate them by reference in the SSI program in § 416.925 of our regulations, and apply them to claims under both title II and title XVI of the Act.

How Do We Use the Listings?

The listings are in two parts. There are listings for adults (part A) and for children (part B). If you are a person age 18 or over, we apply the listings in part A when we assess your claim, and we never use the listings in part B.

If you are a person under age 18, we first use the criteria in part B of the listings. If the listings in part B do not apply, and the specific disease process(es) has a similar effect on adults and children, we then use the criteria in part A. (See §§ 404.1525 and 416.925.) If your impairment(s) does not meet any listing, we will also consider whether it medically equals any listing; that is, whether it is as medically severe. (See §§ 404.1526 and 416.926.)

What if You Do Not Have an Impairment(s) That Meets or Medically Equals a Listing?

We use the listings only to decide that you are disabled or that you are still disabled. We will never deny your claim or decide that you no longer qualify for benefits because your impairment(s) does not meet or medically equal a listing. If you have a severe impairment(s) that does not meet or medically equal any listing, we may still find you disabled based on other rules in the ''sequential evaluation process.'' Likewise, we will not decide that your disability has ended only because your impairment(s) does not meet or medically equal a listing.

Also, when we conduct reviews to determine whether your disability continues, we will not find that your disability has ended because we have changed a listing. Our regulations explain that, when we change our listings, we continue to use our prior listings when we review your case, if you qualified for disability benefits or SSI payments based on our determination or decision that your impairment(s) met or medically equaled a listing. In these cases, we determine whether you have experienced medical improvement, and if so, whether the medical improvement is related to the ability to work. If your condition(s) has medically improved, so that you no longer meet or medically equal the prior listing, we evaluate your case further to determine whether you are currently disabled. We may find that you are currently disabled, depending on the full circumstances of your case. See §§ 404.1594(c)(3)(i) and 416.994(b)(2)(iv)(A). If you are a child who is eligible for SSI payments, we follow a similar rule when we decide whether you have experienced medical improvement in your condition(s). See § 416.994a(b)(2).

Why Are We Proposing To Revise Our Evidentiary Requirements for Making Findings About Medical Equivalence?

Current §§ 404.1526 and 416.926 do not contain the same language because of changes we made to § 416.926 in final rules that we published on February 11, 1997. On that date, we published interim final rules to implement the childhood disability provisions of Public Law 104–193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The rules became effective on April 14, 1997 (62 FR 6408).

Before April 14, 1997, §§ 404.1526 and 416.926 were essentially identical, with only minor differences specific to titles II and XVI. However, § 416.926 applied only to adults; our rules for evaluating medical equivalence for children under the SSI program were in § 416.926a of our regulations, along with our policies about functional equivalence in children. In the interim final rules that became effective on April 14, 1997, we moved the rules for medical equivalence in children into the same section as the rules for medical equivalence in adults, reserving § 416.926a solely for functional equivalence.

Before April 14, 1997, we provided more detailed rules for determining medical equivalence for children in § 416.926a than in the corresponding rules for determining medical equivalence for adults in §§ 404.1526 and 416.926. We adopted this language in our childhood regulations from internal operating instructions about medical equivalence that we applied to all individuals. When we revised § 416.926 in 1997, we decided to use the more detailed rules for both children and adults. We explained in the preamble to the interim final rules that:

> [w]e decided to use the provisions of former § 416.926a(b) to explain our rules for determining medical equivalence for both adults and children. This is not a substantive change, but a clearer statement of our longstanding policy on medical equivalence than was previously included in prior § 416.926(a), as it was clarified for children in prior § 416.926a(b). This merely allows us to address only once in our regulations the policy of medical equivalence, which is and always has been the same for adults and children.

62 FR at 6413

While we did not revise § 404.1526 when we revised § 416.926 in 1997, we also recognized that there was no substantive difference between the two rules. We noted in the preamble that ''[a]lthough some of the text of [§ 416.926(a)] will differ from the text of

§ 404.1526(a), both sections * * * will continue to provide the same substantive rules.'' 62 FR at 6413. Since we did not revise § 404.1526 when we published the interim final rules for evaluating disability in children, we also did not revise it when we published final rules in 2000. 65 FR 54747, 54768 (2000). We are now proposing to revise § 404.1526 so that it includes the same language as § 416.926.

In addition, we propose to make minor revisions to the language in our rules on medical equivalence to clarify that we consider all information that is relevant to our finding about whether your impairment(s) medically equals the criteria of a listing. In *Hickman* v. *Apfel*, 187 F.3d 683 (7th Cir. 1999), the Court of Appeals interpreted our statement in current § 416.926(b) that ''[w]e will always base our decision about whether your impairment(s) is medically equal to a listed impairment on medical evidence only'' differently from what we intended. The *Hickman* court held that this provision means that we can use evidence only from medical sources when we make findings about medical equivalence. However, we intend the phrase ''medical evidence only'' in this regulation section only to exclude consideration of the vocational factors of age, education, and work experience, as defined in a number of our regulations. See, for example, §§ 404.1501(g), 404.1505, 404.1520(g), and 404.1560(c)(1) in part 404, and §§ 416.901(j), 416.905, 416.920(g), and 416.960(c)(1) in part 416 of our regulations. Under our interpretation of our regulations, the phrase ''medical evidence'' includes not just findings reported by medical sources but other information about your medical condition(s) and its effects, including your own description of your impairment(s).

The *Hickman* court believed that when we amended the regulations in 1997 to add § 416.926(b) we added a rule that ''explicitly eliminates any recourse to non-medical evidence.'' *Hickman,* 187 F.3d at 688. However, as we have already noted in the above quotes from the preamble to the 1997 interim final regulations, we stated in that preamble that this was not our intent. Thus, the court's decision interpreted the language of our regulations more narrowly than we intended.

Because of this, we issued AR 00–2(7) to implement the Court of Appeals' holding within the States in the Seventh Circuit. 65 FR 25783 (2000). In the AR, we stated that we intended to clarify the language at issue in *Hickman* at §§ 404.1526 and 416.926 through the issuance of a regulatory change and that we might rescind the AR once we clarified the regulations. 65 FR at 25785. Likewise, when we published the final rules for evaluating disability in children on September 11, 2000, we indicated in response to comments that we planned to revise § 404.1526 to clarify this issue in response to *Hickman.* 65 FR at 54768. We are now proposing to clarify our longstanding interpretation of the regulations in response to the *Hickman* decision.

When Will We Start To Use These Proposed Rules?

We will not use these proposed rules until we evaluate the public comments we receive on them, determine whether they should be issued as final rules, and issue final rules in the **Federal Register**. If we publish final rules, we will explain in the preamble how we will apply them, and summarize and respond to the public comments. Until the effective date of any final rules, we will continue to use our current rules.

What Revisions Are We Proposing?

Section 404.1526 Medical Equivalence

Section 416.926 Medical Equivalence for Adults and Children

We propose to revise §§ 404.1526 and 416.926 so that they use the same language. We also propose to revise these sections to clarify that we consider all relevant evidence in your case record when we make a finding about whether your impairment or combination of impairments medically equals a listing. The specific proposals are as follows.

We propose to replace all of the headings with questions, to revise text to put it into active voice and use simpler language where possible, and to reorganize text and provide more subparagraphs for ease of reading.

Proposed §§ 404.1526(a) and 416.926(a)—''What is medical equivalence?''—correspond to the first sentence of current § 416.926(a)—''How medical equivalence is determined.'' They provide a basic definition of medical equivalence.

Proposed §§ 404.1526(b) and 416.926(b)—''How do we determine medical equivalence?''—correspond to the last sentence of current § 416.926(a) and the provisions of current §§ 416.926(a)(1) and (a)(2). Throughout these proposed sections, we propose to remove the word ''medical'' from the phrase ''medical findings'' to help clarify that we consider all relevant information when we determine whether your impairment(s) medically equals the requirements of a listing.

We are also proposing new §§ 404.1526(b)(4) and 416.926(b)(4) to provide cross-references to §§ 404.1529(d)(3) and 416.929(d)(3). Those sections explain how we consider symptoms when we make findings about medical equivalence.

Proposed §§ 404.1526(c) and 416.926(c)—''What evidence do we consider when we determine if your impairment(s) medically equals a listing?''—correspond to current §§ 404.1526(b) and 416.926(b) and the third sentence of current § 416.926(a). In these proposed sections, we clarify that we consider all evidence in your case record about your impairment(s) and its effects on you that is relevant to our finding whether your impairment(s) medically equals a listing. We also explain that this means only that we do not consider your vocational factors of age, education, and work experience. The last sentence of proposed §§ 404.1526(c) and 416.926(c) corresponds to the last sentence of §§ 404.1526(b) and 416.926(b). We are proposing minor editorial changes to the language of that sentence, including the deletion of the word ''medical'' from the phrase ''medical opinion.'' Under §§ 404.1527(a) and 416.927(a) of our regulations, the term ''medical opinion'' has a specific meaning that does not include opinions about medical equivalence. This proposed change will only update the language of §§ 404.1526(b) and 416.926(b) to match our other rules.

Because we are proposing to add new §§ 404.1526(c) and 416.926(c), we would redesignate current §§ 404.1526(c) and 416.926(c) as §§ 404.1526(d) and 416.926(d). These paragraphs explain who we consider to be designated medical and psychological consultants for purposes of determining medical equivalence. We propose only a minor editorial correction to the heading of current paragraph (c) (proposed paragraph (d)): the addition of a question mark.

We would also redesignate current § 416.926(d) as § 416.926(e) because of the addition of proposed new § 416.926(c). This paragraph explains who is responsible for determining medical equivalence at each level of the administrative review process. We propose a minor correction to the second sentence to reflect our current organization. The current sentence refers to ''the Associate Commissioner for Disability.'' This reference is out of date because we no longer have an organization called the Office of Disability. The appropriate reference is now to ''the Associate Commissioner for Disability Determinations.'' For an

explanation of the reorganization that resulted in this change, see 67 FR 69287 (November 15, 2002). (For similar reasons, we are proposing to replace the title ''Director of the Office of Disability Hearings'' with the title ''Associate Commissioner for Disability Determinations'' in a number of our rules in subpart J of part 404 and subpart N of part 416 to update those rules as well. We are also making a minor revision in the heading of this paragraph.)

Section 404.1526 does not currently include a provision analogous to current § 416.926(d) (proposed § 416.926(e)), so we propose to add § 404.1526(e) to make § 404.1526 the same as proposed § 416.926.

What Other Revisions Are We Proposing?

Section 404.1525 Listing of Impairments in Appendix 1

Section 416.925 Listing of Impairments in Appendix 1 of Subpart P of Part 404 of This Chapter

We propose to update and clarify these sections, which describe the listings and how we use them. As in proposed §§ 404.1526 and 416.926, we propose to replace all of the headings with questions, to delete the word ''medical'' from the phrase ''medical criteria,'' to revise text to put it into active voice and into simpler language where possible, and to reorganize text and provide more subparagraphs for ease of reading. We also propose to explain better how we organize listings sections and to provide an explanation of what it means to ''meet'' a listing.

We are also proposing to update our descriptions of the part B listings to reflect the current listings. As we explain below, some of the current provisions regarding the part B listings date back to 1977 and no longer accurately describe the content of those listings. Finally, we propose to move the provisions on symptoms as they pertain to meeting the listings to §§ 404.1529 and 416.929, our rules on evaluating symptoms, and to delete a provision that is unnecessary because it is redundant of other rules.

The following is a summary of the major changes we are proposing in §§ 404.1525 and 416.925.

We propose to move the discussion of duration in the last two sentences of current §§ 404.1525(a) and 416.925(a) to proposed §§ 404.1525(c) and 416.925(c), where we discuss how we use the listings.

Proposed §§ 404.1525(b) and 416.925(b)—''How is appendix 1 organized?''— correspond to current §§ 404.1525(b) and 416.925(b). They explain that the listings are in two parts: part A, which is primarily for adults, and part B, which is only for children. In paragraph (b)(2), the paragraph that describes part B of the listings, we propose to delete language that is out of date and no longer necessary.

When we originally published the part B listings for children in 1977, we intended them to supplement the part A listings. In the preamble to the publication of the part B listings, we explained that we originally developed the part A listings primarily for determining disability in adults. We indicated that a number of the listings for adults at that time were appropriate for evaluating disability in children too, but that there were also some listings that were not appropriate because certain listed impairments had different effects in children. We also noted that there were some diseases and other impairments in young children that were not addressed in the adult listings. Therefore, we published the part B listings, which we referred to as ''additional criteria.'' See 42 FR 14705 (March 16, 1977). The regulation at that time stated:

> Part B is used where the criteria in Part A do not give appropriate consideration to the particular effects of disease processes in childhood; *i.e.*, when the disease process is generally found only in children or when the disease process differs in its effect on children than on adults. Where additional criteria are included in Part B, the impairment categories are, to the extent feasible, numbered to maintain a relationship with their counterparts in Part A. The method for adjudicating claims for children under age 18 is to look first to Part B. Where the medical criteria in Part B are not applicable, the medical criteria in Part A should be used.

20 CFR 416.906 (1977). (In 1977, we published the childhood listings and the regulation that explained them only in subpart I of part 416 of our regulations. In 1980, we changed to the current version of our rules, in which we publish both the child and adult listings only in appendix 1 of subpart P of part 404 of our regulations and provide explanations of the listings in both §§ 404.1525 and 416.925. (45 FR 55566, August 20, 1980.))

With minor editorial changes, the corresponding language of the current rules in §§ 404.1525(b)(2) and 416.925(b)(2) is essentially the same as the language that we first published. However, since we originally published the listings, we have greatly expanded the childhood listings in part B so that it is no longer appropriate to speak of them as a supplement to the part A listings. To the contrary, the part B listings are for the most part stand-alone; that is, in addition to listings that are specifically for children and with relatively few exceptions, they include the same listings as part A when those listings are applicable to both adults and children. Although it is still appropriate in claims of children to refer to certain listings in part A when the part B listings do not apply, the current relationship of part A to part B is the opposite of what it was when we first published the part B listings in 1977. For children, the primary listings are in part B, and we may use certain part A listings in addition to the part B listings.

We believe that the language in the first three sentences of current §§ 404.1525(b)(2) and 416.925(b)(2) is not only out of date but also unnecessary. We first published it (and the part B listings) to provide rules for adjudicating claims of children under the SSI program when that program was still relatively young. Rules explaining the relationship between part A and the new part B were helpful in those early years, but we believe that we do not need this kind of explanation in our regulations anymore. They do not provide rules for adjudication or guidelines for our adjudicators to follow when they determine disability in children under the listings, and we do not believe that they provide information that is especially helpful to public understanding of our rules.

Therefore, we propose to delete most of the language in the first three sentences of current §§ 404.1525(b)(2) and 416.925(b)(2). We propose to clarify in the third sentence of proposed §§ 404.1525(b)(2) and 416.925(b)(2)(i) that, if the criteria in part B do not apply, we may use the criteria in part A when those criteria give appropriate consideration to the effects of the impairment(s) in children. This is a more accurate statement of how we now use the part A listings in childhood claims. In the fourth sentence of the proposed rules, we propose to retain the provision in the third sentence of the current rules that explains that, to the extent possible, we number the provisions in part B to maintain a relationship with part A. We propose to retain this statement in our rules because there are still some body systems in part B in which the listings are not numbered consecutively because of this relationship, and this provision will continue to answer questions about why some listings in part B are not consecutively numbered.

In the current rules, § 416.925(b)(2) is longer than § 404.1525(b)(2). This is because the paragraph in part 416

includes rules about our definition of the phrase ''listing-level severity,'' which we use when we evaluate claims of children seeking SSI payments based on disability under title XVI of the Act. We do not propose any substantive changes to this language, but we are proposing minor editorial changes in proposed § 416.925(b)(2)(ii). None of these revisions would be a substantive change in our rules.

- First, because the current paragraph is long, we propose to divide it into two subparagraphs. Proposed § 416.925(b)(2)(i) would be the same as proposed § 404.1525(b)(2). Proposed § 416.925(b)(2)(ii) would contain the provisions unique to part 416 that now start at the sixth sentence of current § 416.925(b)(2).
- Second, the current section refers to both ''domains of functioning'' and ''broad areas of functioning.'' These terms are synonymous in our rules; however, we currently use the phrase ''domains of functioning'' more frequently. Therefore, in the proposed rules, we propose to change the phrase ''broad areas of functioning'' to ''domains of functioning'' for consistency of language within the rules.
- Third, in the current rules, we inadvertently refer inconsistently to both ''extreme *limitations*'' and ''extreme *limitation*'' in a domain as a standard of listing-level severity. We are correcting this inconsistency by changing the word ''limitations'' to ''limitation'' consistent with the standards in our other rules; see, for example, § 416.926a(a).
- Finally, we are deleting a duplicate cross-reference to § 416.926a. We inadvertently included the same parenthetical cross-reference to the definitions of the terms ''marked'' and ''extreme'' in the seventh and ninth sentences of current § 416.925(b). We propose to delete the second reference.

Proposed §§ 404.1525(c) and 416.925(c)—''How do we use the listings?''— correspond to current §§ 404.1525(c) and 416.925(c). We propose to break up the current paragraph into shorter subparagraphs and to make editorial changes for clarity. In the second sentence of proposed §§ 404.1525(c)(2) and 416.925(c)(2), we propose to expand and clarify the second sentence of current §§ 404.1525(c) and 416.925(c). The proposed rules would clarify that we sometimes provide information in the introductory section of each body system that is necessary to show whether your impairment meets the criteria of a particular listing, not just to establish a diagnosis or the existence of a medically determinable impairment. For example, to meet most musculoskeletal listings, you must show that you have either an ''inability to ambulate effectively'' or an ''inability to perform fine and gross movements effectively.'' We define these severity terms from the individual musculoskeletal listings in the introductory text of the musculoskeletal body system, in section 1.00B2 for adults and 101.00B2 for children. Likewise, to meet listings 12.05 and 112.05, you must have mental retardation that satisfies the criteria in the introductory paragraph of those listings (the so-called capsule definition) in addition to the criteria in one of the paragraphs that follows the capsule definition; that is, listing 12.05A, B, C, or D for adults or 112.05A, B, C, D, or E for children. We explain this requirement for meeting listings 12.05 and 112.05 in the fourth paragraph of section 12.00A for adults and the eighth paragraph of section 112.00A for children.

Proposed §§ 404.1525(c)(3) and 416.925(c)(3) correspond to the next-to-last sentence of current §§ 404.1525(c) and 416.925(c). However, we propose to expand the information and to clarify it to define what we mean when we say that your impairment ''meets'' the requirements of a listing. We propose to delete the explanation in the next-to-last sentence of the current rules that the required level of severity in a listing is shown by ''one or more sets of medical findings'' and to delete the last sentence, which says that the medical findings ''consist of symptoms, signs, *and* laboratory findings.'' These descriptions of our listings are no longer accurate. For many years, we have had listings that also include functional criteria. Further, we have a number of listings that do not include symptoms, signs, *and* laboratory findings in their criteria. We do not propose to replace the current sentences because we believe that the proposed rules would be clear enough without a detailed description of all the possible kinds of criteria a given listing might contain. Instead, we simply provide that your impairment(s) meets the requirements of a listing when it satisfies all of the criteria of that listing, including any relevant criteria in the introduction to the body system, and meets the duration requirement.

Proposed §§ 404.1525(c)(4) and 416.925(c)(4) correspond to the last two sentences of current §§ 404.1525(a) and 416.925(a). In the current rules, these sentences explain that

> [m]ost of the listed impairments are permanent or expected to result in death, or a specific statement of duration is made. For all others, the evidence must show that the impairment has lasted or is expected to last for a continuous period of at least 12 months.

We propose to move this language to the section of the proposed rules in which we explain how we decide whether your impairment(s) meets a listing because it is most relevant to that finding. We also propose to explain better what we mean by the statement ''or a specific statement of duration is made'' in our current rules. We mean by this that in some listings we say that we will find that your impairment(s) will meet the listing for a specific period of time. For example, in listings 13.06A and 113.06A, acute leukemia, we state that we will find that your impairment is disabling until at least 24 months from the date of diagnosis or relapse or at least 12 months from the date of the bone marrow or stem cell transplantation, whichever is later. Thereafter, we will evaluate any residual impairment under the criteria for the affected body systems. (For current listings 13.06 and 113.06, see 69 FR 67018, at 67034 and 67037 (November 15, 2004).)

Proposed §§ 404.1525(c)(5) and 416.925(c)(5) are new. They explain that when your impairment(s) does not meet a listing, it can ''medically equal'' the criteria of a listing, and provide a cross-reference to §§ 404.1526 and 416.926, our rules on medical equivalence. They also explain that when your impairment(s) does not meet or medically equal a listing we may find you disabled at a later step in the sequential evaluation process. We do not specify the step in the process at which we may find you disabled or still disabled because there are different sequential evaluation processes for adults and children who file initial claims and for continuing disability reviews of adults and children.

We propose to remove current §§ 404.1525(e) and 416.925(e) because they are redundant, and we have more recent rules. Our policy on how we consider drug addiction and alcoholism is in §§ 404.1535 and 416.935, which we published in 1995. See 60 FR 8140, at 8147 (February 10, 1995).

Because of this deletion, we would redesignate §§ 404.1525(f) and 416.925(f) as §§ 404.1525(e) and 416.925(e). We also propose to simplify these sections and to make our regulations on the evaluation of symptoms more consistent by exchanging the provisions in current §§ 404.1525(f) and 416.925(f) (proposed §§ 404.1525(e) and 416.925(e)) with the

provisions of §§ 404.1529(d)(2) and 416.929(d)(2). In current §§ 404.1529(d) and 416.929(d), we explain how we consider your symptoms (such as pain) at each step of the sequential evaluation process. For example, in paragraph (d)(1) we explain how we consider your symptoms when we determine if your impairment(s) is ''severe,'' and in paragraph (d)(3) we explain how we consider your symptoms when we determine if your impairment(s) medically equals a listing. However, in paragraph (d)(2), instead of explaining how we consider your symptoms when we determine if your impairment meets a listing, we currently provide only a cross-reference to §§ 404.1525(f) and 416.925(f), where we explain our policy on symptoms and meeting listings.

We believe that it would be more consistent to move our explanation of our policy on symptoms and meeting listings now in current §§ 404.1525(f) and 416.925(f) to §§ 404.1529(d)(2) and 416.929(d)(2) so that it is together with our explanations of how we consider symptoms at other steps in the sequential evaluation process. However, instead of removing the sections, we would in their place insert a cross-reference to §§ 404.1529(d)(2) and 416.929(d)(2) to ensure that our adjudicators refer to the policy. As we have already noted, we propose to add similar new §§ 404.1526(b)(4) and 416.926(b)(4) to provide cross-references to §§ 404.1529(d)(3) and 416.929(d)(3) to refer to our rules for considering medical equivalence.

Sections 404.1528 and 416.928 Symptoms, Signs, and Laboratory Findings

We propose to delete the opening statement of these sections, which says that ''[m]edical findings consist of symptoms, signs, and laboratory findings.'' We believe that the statement is unnecessary and that deleting it would help to remove any confusion about the evidence we consider wherever we use ''medical findings'' in our rules.

Sections 404.1529 and 416.929 How We Evaluate Symptoms, Including Pain

As we have already explained, we propose to replace §§ 404.1529(d)(2) and 416.929(d)(2) with the text of current §§ 404.1525(f) and 416.925(f). Except for minor editorial revisions, the language is unchanged.

We propose to add the word ''medically'' to the heading of §§ 404.1529(d)(3) and 416.929(d)(3) so that they read ''Decision whether the Listing of Impairments is medically equaled.'' We also propose to revise the third sentence in those sections, for conformity with the proposed changes in §§ 404.1526 and 416.926, to indicate that we will base a finding of medical equivalence on all evidence in the case record and its effect on the individual.

We propose to make a number of minor editorial changes throughout §§ 404.1529 and 416.929 to update them to match our current rules. For example, throughout these sections we are changing references to ''your treating or examining physician or psychologist'' to ''your treating or nontreating source.'' This change would update the rules to match the terms we now use in §§ 404.1502 and 416.902 and our other rules that refer to medical sources; it does not change the meaning of the sentence. We are also correcting a cross-reference in the second sentence of §§ 404.1529(a) and 416.929(a) to reflect our current rules.

Clarity of These Proposed Rules

Executive Order 12866, as amended by Executive Order 13258, requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make these proposed rules easier to understand. For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rules clearly stated?
- Do the rules contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rules easier to understand?

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the criteria for a significant regulatory action under Executive Order 12866, as amended by Executive Order 13258. Thus, they were reviewed by OMB.

Regulatory Flexibility Act

We certify that these proposed rules would not have a significant economic impact on a substantial number of small entities because they would affect only individuals. Thus, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These proposed rules contain reporting requirements as shown in the following table.

Section	Annual number of responses	Frequency of response	Average burden per response (min.)	Estimated annual burden [1] (hrs.)
404.918(d)	1932	1	60	1932
416.1418(d)	7268	1	60	7268
Total	9200	1	60	9200

[1] The annual burden is an estimate. We do not have management information about (1) the number of predecisional notices sent, (2) the number of individuals who actually avail themselves of the opportunity to provide additional information, or (3) the percentage of cases that result in a changed decision because individuals respond.

An Information Collection Request has been submitted to OMB for clearance. We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Comments should be submitted and/or faxed to the Office of Management and Budget at the following address/number: Office of Management and Budget, Attn: Desk Officer for SSA, Fax Number: 202–395–6974.

Comments can be received for up to 60 days after publication of this notice

and will be most useful if received within 30 days of publication. To receive a copy of the OMB clearance package, you may call the SSA Reports Clearance Officer on 410–965–0454.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old–Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: March 15, 2005.

Jo Anne B. Barnhart,

Commissioner of Social Security.

For the reasons set forth in the preamble, we propose to amend subparts J and P of part 404 and subparts I and N of part 416 of chapter III of title 20 of the Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart J—[Amended]

1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a), (b), (d)–(h), and (j), 221, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a), (b), (d)–(h), and (j), 421, 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note).

2. Section 404.914 is amended by revising the first sentence of paragraph (c)(1) to read as follows:

§ 404.914 Disability hearing—general.

* * * * *

(c) *Time and place*—(1) *General.* Either the State agency or the Associate Commissioner for Disability Determinations or his or her delegate, as appropriate, will set the time and place of your disability hearing. * * *

* * * * *

3. Section 404.915 is amended by revising the second sentence of paragraph (a) and paragraph (c) introductory text to read as follows:

§ 404.915 Disability hearing—disability hearing officers.

(a) *General.* * * * The disability hearing officer will be an experienced disability examiner, regardless of whether he or she is appointed by a State agency or by the Associate Commissioner for Disability Determinations or his or her delegate, as described in paragraphs (b) and (c) of this section.

* * * * *

(c) *Federal hearing officers.* The disability hearing officer who conducts your disability hearing will be appointed by the Associate Commissioner for Disability Determinations or his or her delegate if:

* * * * *

4. Section 404.917 is amended by revising paragraph (d) to read as follows:

§ 404.917 Disability hearing—disability hearing officer's reconsidered determination.

* * * * *

(d) *Effect.* The disability hearing officer's reconsidered determination, or, if it is changed under § 404.918, the reconsidered determination that is issued by the Associate Commissioner for Disability Determinations or his or her delegate, is binding in accordance with § 404.921, subject to the exceptions specified in that section.

5. Section 404.918 is revised to read as follows:

§ 404.918 Disability hearing—review of the disability hearing officer's reconsidered determination before it is issued.

(a) *General.* The Associate Commissioner for Disability Determinations or his or her delegate may select a sample of disability hearing officers' reconsidered determinations, before they are issued, and review any such case to determine its correctness on any grounds he or she deems appropriate. The Associate Commissioner or his or her delegate shall review any case within the sample if:

(1) There appears to be an abuse of discretion by the hearing officer;

(2) There is an error of law; or

(3) The action, findings or conclusions of the disability hearing officer are not supported by substantial evidence.

Note to paragraph (a): If the review indicates that the reconsidered determination prepared by the disability hearing officer is correct, it will be dated and issued immediately upon completion of the review. If the reconsidered determination prepared by the disability hearing officer is found by the Associate Commissioner or his or her delegate to be deficient, it will be changed as described in paragraph (b) of this section.

(b) *Methods of correcting deficiencies in the disability hearing officer's reconsidered determination.* If the reconsidered determination prepared by the disability hearing officer is found by the Associate Commissioner for Disability Determinations or his or her delegate to be deficient, the Associate Commissioner or his or her delegate will take appropriate action to assure that the deficiency is corrected before a reconsidered determination is issued. The action taken by the Associate Commissioner or his or her delegate will take one of two forms:

(1) The Associate Commissioner or his or her delegate may return the case file either to the component responsible for preparing the case for hearing or to the disability hearing officer, for appropriate further action; or

(2) The Associate Commissioner or his or her delegate may issue a written reconsidered determination which corrects the deficiency.

(c) *Further action on your case if it is sent back by the Associate Commissioner for Disability Determinations or his or her delegate either to the component that prepared your case for hearing or to the disability hearing officer.* If the Associate Commissioner for Disability Determinations or his or her delegate sends your case back either to the component responsible for preparing the case for hearing or to the disability hearing officer for appropriate further action, as provided in paragraph (b)(1) of this section, any additional proceedings in your case will be governed by the disability hearing procedures described in § 404.916(f) or if your case is returned to the disability hearing officer and an unfavorable determination is indicated, a supplementary hearing may be scheduled for you before a reconsidered determination is reached in your case.

(d) *Opportunity to comment before the Associate Commissioner for Disability Determinations or his or her delegate issues a reconsidered determination that is unfavorable to you.* If the Associate Commissioner for Disability Determinations or his or her delegate proposes to issue a reconsidered determination as described in paragraph (b)(2) of this section, and that reconsidered determination is unfavorable to you, he or she will send you a copy of the proposed reconsidered determination with an explanation of the reasons for it, and will give you an

opportunity to submit written comments before it is issued. At your request, you will also be given an opportunity to inspect the pertinent materials in your case file, including the reconsidered determination prepared by the disability hearing officer, before submitting your comments. You will be given 10 days from the date you receive the Associate Commissioner's notice of proposed action to submit your written comments, unless additional time is necessary to provide access to the pertinent file materials or there is good cause for providing more time, as illustrated by the examples in § 404.911(b). The Associate Commissioner or his or her delegate will consider your comments before taking any further action on your case.

Subpart P—[Amended]

6. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a) (5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a) (5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189.

7. Section 404.1525 is revised to read as follows:

§ 404.1525 Listing of Impairments in appendix 1.

(a) *What is the purpose of the Listing of Impairments?* The Listing of Impairments (the listings) is in appendix 1 of this subpart. It describes for each of the major body systems impairments that we consider to be severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education, or work experience.

(b) *How is appendix 1 organized?* There are two parts in appendix 1:

(1) *Part A* contains criteria that apply to individuals age 18 and over. We may also use part A for individuals who are under age 18 if the disease processes have a similar effect on adults and children.

(2) *Part B* contains criteria that apply only to individuals who are under age 18; we never use the listings in part B to evaluate individuals who are age 18 or older. In evaluating disability for a person under age 18, we use part B first. If the criteria in part B do not apply, we may use the criteria in part A when those criteria give appropriate consideration to the effects of the impairment(s) in children. To the extent possible, we number the provisions in part B to maintain a relationship with their counterparts in part A.

(c) *How do we use the listings?* (1) Each body system section in parts A and B of appendix 1 is in two parts: an introduction, followed by the specific listings.

(2) The introduction to each body system contains information relevant to the use of the listings in that body system; for example, examples of common impairments in the body system and definitions used in the listings for that body system. We may also include specific criteria for establishing a diagnosis, confirming the existence of an impairment, or establishing that your impairment(s) satisfies the criteria of a particular listing in the body system. Even if we do not include specific criteria for establishing a diagnosis or confirming the existence of your impairment, you must still show that you have a severe medically determinable impairment(s), as defined in §§ 404.1508 and 404.1520(c).

(3) The specific listings follow the introduction in each body system, after the heading, *Category of Impairments*. Within each listing, we specify the objective medical and other findings needed to satisfy the criteria of that listing. We will find that your impairment(s) *meets* the requirements of a listing when it satisfies all of the criteria of that listing, including any relevant criteria in the introduction, and meets the duration requirement (see § 404.1509).

(4) Most of the listed impairments are permanent or expected to result in death. For some listings, we state a specific period of time for which your impairment(s) will meet the listing. For all others, the evidence must show that your impairment(s) has lasted or can be expected to last for a continuous period of at least 12 months.

(5) If your impairment(s) does not meet the criteria of a listing, it can *medically equal* the criteria of a listing. We explain our rules for medical equivalence in § 404.1526. We use the listings only to find that you are disabled or still disabled. If your impairment(s) does not meet or medically equal the criteria of a listing, we may find that you are disabled or still disabled at a later step in the sequential evaluation process.

(d) *Can your impairment(s) meet a listing based only on a diagnosis?* No. Your impairment(s) cannot meet the criteria of a listing based only on a diagnosis. To meet the requirements of a listing, you must have a medically determinable impairment(s) that satisfies all of the criteria in the listing.

(e) *How do we consider your symptoms when we determine whether your impairment(s) meets a listing?* Some listed impairments include symptoms, such as pain, as criteria. Section 404.1529(d)(2) explains how we consider your symptoms when your symptoms are included as criteria in a listing.

8. Section 404.1526 is amended by revising paragraphs (a) and (b), revising the heading of paragraph (c) and redesignating paragraph (c) as paragraph (d), and adding new paragraphs (c) and (e), to read as follows:

§ 404.1526 Medical equivalence.

(a) *What is medical equivalence?* Your impairment(s) is medically equivalent to a listed impairment in appendix 1 if it is at least equal in severity and duration to the criteria of any listed impairment.

(b) *How do we determine medical equivalence?* We can find medical equivalence in three ways.

(1)(i) If you have an impairment that is described in appendix 1, but—

(A) You do not exhibit one or more of the findings specified in the particular listing, or

(B) You exhibit all of the findings, but one or more of the findings is not as severe as specified in the particular listing,

(ii) We will find that your impairment is medically equivalent to that listing if you have other findings related to your impairment that are at least of equal medical significance to the required criteria.

(2) If you have an impairment(s) that is not described in appendix 1, we will compare your findings with those for closely analogous listed impairments. If the findings related to your impairment(s) are at least of equal medical significance to those of a listed impairment, we will find that your impairment(s) is medically equivalent to the analogous listing.

(3) If you have a combination of impairments, no one of which meets a listing (see § 404.1525(c)(3)), we will compare your findings with those for closely analogous listed impairments. If the findings related to your impairments are at least of equal medical significance to those of a listed impairment, we will find that your combination of impairments is medically equivalent to that listing.

(4) Section 404.1529(d)(3) explains how we consider your symptoms, such as pain, when we make findings about medical equivalence.

(c) *What evidence do we consider when we determine if your impairment(s) medically equals a listing?* When we determine if your impairment medically equals a listing, we consider all evidence in your case

record about your impairment(s) and its effects on you that is relevant to this finding. We do not consider your vocational factors of age, education, and work experience (*see*, for example, § 404.1560(c)(1)). We also consider the opinion given by one or more medical or psychological consultants designated by the Commissioner. (*See* § 404.1616.)

(d) *Who is a designated medical or psychological consultant?* * * *

(e) *Who is responsible for determining medical equivalence?* In cases where the State agency or other designee of the Commissioner makes the initial or reconsideration disability determination, a State agency medical or psychological consultant or other designee of the Commissioner (*see* § 404.1616) has the overall responsibility for determining medical equivalence. For cases in the disability hearing process or otherwise decided by a disability hearing officer, the responsibility for determining medical equivalence rests with either the disability hearing officer or, if the disability hearing officer's reconsideration determination is changed under § 404.918, with the Associate Commissioner for Disability Determinations or his or her delegate. For cases at the Administrative Law Judge or Appeals Council level, the responsibility for deciding medical equivalence rests with the Administrative Law Judge or Appeals Council.

§ 404.1528 [Amended]

9. Section 404.1528 is amended by removing the introductory text before paragraph (a).

10. Section 404.1529 is amended by revising the third, fourth, and fifth sentences in paragraph (a), the fifth sentence in paragraph (b), the second sentence in paragraph (c)(1), the second, third, and fourth sentences in paragraph (c)(3), the third sentence in paragraph (c)(4), paragraph (d)(2), and the heading and the third sentence in paragraph (d)(3), to read as follows:

§ 404.1529 How we evaluate symptoms, including pain.

(a) *General.* * * * By other evidence, we mean the kinds of evidence described in §§ 404.1512(b)(2) through (6) and 404.1513(b)(1), (4), and (5), and (d). These include statements or reports from you, your treating or nontreating source, and others about your medical history, diagnosis, prescribed treatment, daily activities, efforts to work, and any other evidence showing how your impairment(s) and any related symptoms affect your ability to work. We will consider all of your statements about your symptoms, such as pain, and any description you, your treating source or nontreating source, or other persons may provide about how the symptoms affect your activities of daily living and your ability to work. * * *

(b) *Need for medically determinable impairment that could reasonably be expected to produce your symptoms, such as pain.* * * * At the administrative law judge hearing or Appeals Council level, the administrative law judge or the Appeals Council may ask for and consider the opinion of a medical expert concerning whether your impairment(s) could reasonably be expected to produce your alleged symptoms. * * *

(c) *Evaluating the intensity and persistence of your symptoms, such as pain, and determining the extent to which your symptoms limit your capacity for work*—(1) *General.* * * * In evaluating the intensity and persistence of your symptoms, we consider all of the available evidence, including your history, the signs and laboratory findings, and statements from you, your treating or nontreating source, or other persons about how your symptoms affect you. * * *

* * * * *

(3) *Consideration of other evidence.* * * * The information that you, your treating or nontreating source, or other persons provide about your pain or other symptoms (*e.g.*, what may precipitate or aggravate your symptoms, what medications, treatments or other methods you use to alleviate them, and how the symptoms may affect your pattern of daily living) is also an important indicator of the intensity and persistence of your symptoms. Because symptoms, such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions which you, your treating or nontreating source, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account as explained in paragraph (c)(4) of this section in reaching a conclusion as to whether you are disabled. We will consider all of the evidence presented, including information about your prior work record, your statements about your symptoms, evidence submitted by your treating or nontreating source, and observations by our employees and other persons. * * *

(4) *How we determine the extent to which symptoms, such as pain, affect your capacity to perform basic work activities.* * * * We will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between your statements and the rest of the evidence, including your history, the signs and laboratory findings, and statements by your treating or nontreating source or other persons about how your symptoms affect you. * * *

(d) *Consideration of symptoms in the disability determination process.*

* * * * *

(2) *Decision whether the Listing of Impairments is met.* Some listed impairments include symptoms usually associated with those impairments as criteria. Generally, when a symptom is one of the criteria in a listing, it is only necessary that the symptom be present in combination with the other criteria. It is not necessary, unless the listing specifically states otherwise, to provide information about the intensity, persistence, or limiting effects of the symptom as long as all other findings required by the specific listing are present.

(3) *Decision whether the Listing of Impairments is medically equaled.* * * * Under § 404.1526(b), we will consider medical equivalence based on all evidence in your case record about your impairment(s) and its effects on you that is relevant to this finding. * * *

* * * * *

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart I—[Amended]

11. The authority citation for subpart I of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1611, 1614, 1619, 1631(a), (c), and (d)(1), and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), and (d)(1), and 1383(b); secs. 4(c) and 5, 6(c)–(e), 14(a), and 15, Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, 1382h note).

12. Section 416.925 is revised to read as follows:

§ 416.925 Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter.

(a) *What is the purpose of the Listing of Impairments?* The Listing of Impairments (the listings) is in appendix 1 of subpart P of part 404 of this chapter. For adults, it describes for each of the major body systems impairments that we consider to be severe enough to prevent an individual from doing any gainful activity, regardless of his or her age, education,

or work experience. For children, it describes impairments that cause marked and severe functional limitations.

(b) *How is appendix 1 organized?* There are two parts in appendix 1:

(1) *Part A* contains criteria that apply to individuals age 18 and over. We may also use part A for individuals who are under age 18 if the disease processes have a similar effect on adults and children.

(2)(i) *Part B* contains criteria that apply only to individuals who are under age 18; we never use the listings in part B to evaluate individuals who are age 18 or older. In evaluating disability for a person under age 18, we use part B first. If the criteria in part B do not apply, we may use the criteria in part A when those criteria give appropriate consideration to the effects of the impairment(s) in children. To the extent possible, we number the provisions in part B to maintain a relationship with their counterparts in part A.

(ii) Although the severity criteria in part B of the listings are expressed in different ways for different impairments, ''listing-level severity'' generally means the level of severity described in § 416.926a(a); that is, ''marked'' limitations in two domains of functioning or an ''extreme'' limitation in one domain. (See § 416.926a(e) for the definitions of the terms *marked* and *extreme* as they apply to children.) Therefore, in general, a child's impairment(s) is of ''listing-level severity'' if it causes marked limitations in two domains of functioning or an extreme limitation in one. However, when we decide whether your impairment(s) meets the requirements of a listing, we will decide that your impairment is of ''listing-level severity'' even if it does not result in marked limitations in two domains of functioning, or an extreme limitation in one, if the listing that we apply does not require such limitations to establish that an impairment(s) is disabling.

(c) *How do we use the listings?* (1) Each body system section in parts A and B of appendix 1 of subpart P of part 404 of this chapter is in two parts: an introduction, followed by the specific listings.

(2) The introduction to each body system contains information relevant to the use of the listings in that body system; for example, examples of common impairments in the body system and definitions used in the listings for that body system. We may also include specific criteria for establishing a diagnosis, confirming the existence of an impairment, or establishing that your impairment(s) satisfies the criteria of a particular listing in the body system. Even if we do not include specific criteria for establishing a diagnosis or confirming the existence of your impairment, you must still show that you have a severe medically determinable impairment(s), as defined in §§ 416.908, 416.920(c), and 416.924(c).

(3) The specific listings follow the introduction in each body system, after the heading, *Category of Impairments.* Within each listing, we specify the objective medical and other findings needed to satisfy the criteria of that listing. We will find that your impairment(s) *meets* the requirements of a listing when it satisfies all of the criteria of that listing, including any relevant criteria in the introduction, and meets the duration requirement (see § 416.909).

(4) Most of the listed impairments are permanent or expected to result in death. For some listings, we state a specific period of time for which your impairment(s) will meet the listing. For all others, the evidence must show that your impairment(s) has lasted or can be expected to last for a continuous period of at least 12 months.

(5) If your impairment(s) does not meet the criteria of a listing, it can *medically equal* the criteria of a listing. We explain our rules for medical equivalence in § 416.926. We use the listings only to find that you are disabled or still disabled. If your impairment(s) does not meet or medically equal the criteria of a listing, we may find that you are disabled or still disabled at a later step in the sequential evaluation process.

(d) *Can your impairment(s) meet a listing based only on a diagnosis?* No. Your impairment(s) cannot meet the criteria of a listing based only on a diagnosis. To meet the requirements of a listing, you must have a medically determinable impairment(s) that satisfies all of the criteria of the listing.

(e) *How do we consider your symptoms when we determine whether your impairment(s) meets a listing?* Some listed impairments include symptoms, such as pain, as criteria. Section 416.929(d)(2) explains how we consider your symptoms when your symptoms are included as criteria in a listing.

13. Section 416.926 is amended by revising paragraphs (a) and (b), revising the heading of paragraph (c), revising the heading and the second sentence of paragraph (d), redesignating paragraphs (c) and (d) as paragraphs (d) and (e), and adding a new paragraph (c) to read as follows:

§ 416.926 Medical equivalence for adults and children.

(a) *What is medical equivalence?* Your impairment(s) is medically equivalent to a listed impairment in appendix 1 of subpart P of part 404 of this chapter if it is at least equal in severity and duration to the criteria of any listed impairment.

(b) *How do we determine medical equivalence?* We can find medical equivalence in three ways.

(1)(i) If you have an impairment that is described in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, but—

(A) You do not exhibit one or more of the findings specified in the particular listing, or

(B) You exhibit all of the findings, but one or more of the findings is not as severe as specified in the particular listing,

(ii) We will find that your impairment is medically equivalent to that listing if you have other findings related to your impairment that are at least of equal medical significance to the required criteria.

(2) If you have an impairment(s) that is not described in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, we will compare your findings with those for closely analogous listed impairments. If the findings related to your impairment(s) are at least of equal medical significance to those of a listed impairment, we will find that your impairment(s) is medically equivalent to the analogous listing.

(3) If you have a combination of impairments, no one of which meets a listing described in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter (see § 416.925(c)(3)), we will compare your findings with those for closely analogous listed impairments. If the findings related to your impairments are at least of equal medical significance to those of a listed impairment, we will find that your combination of impairments is medically equivalent to that listing.

(4) Section 416.929(d)(3) explains how we consider your symptoms, such as pain, when we make findings about medical equivalence.

(c) *What evidence do we consider when we determine if your impairment(s) medically equals a listing?* When we determine if your impairment medically equals a listing, we consider all evidence in your case record about your impairment(s) and its effects on you that is relevant to this finding. We do not consider your vocational factors of age, education, and

work experience (see, for example, § 416.960(c)(1)). We also consider the opinion given by one or more medical or psychological consultants designated by the Commissioner. (See § 416.1016.)

(d) *Who is a designated medical or psychological consultant?* * * *

(e) *Who is responsible for determining medical equivalence?* * * * For cases in the disability hearing process or otherwise decided by a disability hearing officer, the responsibility for determining medical equivalence rests with either the disability hearing officer or, if the disability hearing officer's reconsideration determination is changed under § 416.1418, with the Associate Commissioner for Disability Determinations or his or her delegate. * * *

§ 416.928 [Amended]

14. Section 416.928 is amended by removing the introductory sentence before paragraph (a).

15. Section 416.929 is amended by revising the third, fourth, and fifth sentences in paragraph (a), the fifth sentence in paragraph (b), the second sentence in paragraph (c)(1), the second, third, and fourth sentences in paragraph (c)(3), the third sentence in paragraph (c)(4), paragraph (d)(2), and the third sentence in paragraph (d)(3), to read as follows:

§ 416.929 How we evaluate symptoms, including pain.

(a) *General.* * * * By other evidence, we mean the kinds of evidence described in §§ 416.912(b)(2) through (6) and 416.913(b)(1), (4), and (5), and (d). These include statements or reports from you, your treating or nontreating source, and others about your medical history, diagnosis, prescribed treatment, daily activities, efforts to work, and any other evidence showing how your impairment(s) and any related symptoms affect your ability to work (or, if you are a child, your functioning). We will consider all of your statements about your symptoms, such as pain, and any description you, your treating source or nontreating source, or other persons may provide about how the symptoms affect your activities of daily living and your ability to work (or, if you are a child, your functioning). * * *

(b) *Need for medically determinable impairment that could reasonably be expected to produce your symptoms, such as pain.* * * * At the administrative law judge hearing or Appeals Council level, the administrative law judge or the Appeals Council may ask for and consider the opinion of a medical expert concerning whether your impairment(s) could reasonably be expected to produce your alleged symptoms. * * *

(c) *Evaluating the intensity and persistence of your symptoms, such as pain, and determining the extent to which your symptoms limit your capacity for work or, if you are a child, your functioning*—(1) *General.* * * * In evaluating the intensity and persistence of your symptoms, we consider all of the available evidence, including your history, the signs and laboratory findings, and statements from you, your treating or nontreating source, or other persons about how your symptoms affect you. * * *

(3) *Consideration of other evidence.* * * * The information that you, your treating or nontreating source, or other persons provide about your pain or other symptoms (*e.g.*, what may precipitate or aggravate your symptoms, what medications, treatments or other methods you use to alleviate them, and how the symptoms may affect your pattern of daily living) is also an important indicator of the intensity and persistence of your symptoms. Because symptoms, such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions which you, your treating or nontreating source, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account as explained in paragraph (c)(4) of this section in reaching a conclusion as to whether you are disabled. We will consider all of the evidence presented, including information about your prior work record, your statements about your symptoms, evidence submitted by your treating or nontreating source, and observations by our employees and other persons. * * *

(4) *How we determine the extent to which symptoms, such as pain, affect your capacity to perform basic work activities, or if you are a child, your functioning.* * * * We will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between your statements and the rest of the evidence, including your history, the signs and laboratory findings, and statements by your treating or nontreating source or other persons about how your symptoms affect you. * * *

* * * * *

(d) *Consideration of symptoms in the disability determination process.*

* * * * *

(2) *Decision whether the Listing of Impairments is met.* Some listed impairments include symptoms usually associated with those impairments as criteria. Generally, when a symptom is one of the criteria in a listing, it is only necessary that the symptom be present in combination with the other criteria. It is not necessary, unless the listing specifically states otherwise, to provide information about the intensity, persistence, or limiting effects of the symptom as long as all other findings required by the specific listing are present.

(3) *Decision whether the Listing of Impairments is medically equaled.* * * * Under § 416.926(b), we will consider medical equivalence based on all evidence in your case record about your impairment(s) and its effects on you that is relevant to this finding. * * *

* * * * *

Subpart N—[Amended]

16. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b).

17. Section 416.1414 is amended by revising the first sentence of paragraph (c)(1) to read as follows:

§ 416.1414 Disability hearing—general.

* * * * *

(c) *Time and place*—(1) *General.* Either the State agency or the Associate Commissioner for Disability Determinations or his or her delegate, as appropriate, will set the time and place of your disability hearing. * * *

* * * * *

18. Section 416.1415 is amended by revising the second sentence of paragraph (a) and paragraph (c) introductory text to read as follows:

§ 416.1415 Disability hearing—disability hearing officers.

(a) *General.* * * * The disability hearing officer will be an experienced disability examiner, regardless of whether he or she is appointed by a State agency or by the Associate Commissioner for Disability Determinations or his or her delegate, as described in paragraphs (b) and (c) of this section.

* * * * *

(c) *Federal hearing officers.* The disability hearing officer who conducts your disability hearing will be appointed by the Associate Commissioner for Disability Determinations or his or her delegate if:

* * * * *

19. Section 416.1417 is amended by revising paragraph (d) to read as follows:

§ 416.1417 Disability hearing—disability hearing officer's reconsidered determination.

* * * * *

(d) *Effect.* The disability hearing officer's reconsidered determination, or, if it is changed under § 416.1418, the reconsidered determination that is issued by the Associate Commissioner for Disability Determinations or his or her delegate, is binding in accordance with § 416.1421, subject to the exceptions specified in that section.

20. Section 416.1418 is revised to read as follows:

§ 416.1418 Disability hearing—review of the disability hearing officer's reconsidered determination before it is issued.

(a) *General.* The Associate Commissioner for Disability Determinations or his or her delegate may select a sample of disability hearing officers' reconsidered determinations, before they are issued, and review any such case to determine its correctness on any grounds he or she deems appropriate. The Associate Commissioner or his or her delegate shall review any case within the sample if:

(1) There appears to be an abuse of discretion by the hearing officer;

(2) There is an error of law; or

(3) The action, findings or conclusions of the disability hearing officer are not supported by substantial evidence.

Note to paragraph (a): If the review indicates that the reconsidered determination prepared by the disability hearing officer is correct, it will be dated and issued immediately upon completion of the review. If the reconsidered determination prepared by the disability hearing officer is found by the Associate Commissioner or his or her delegate to be deficient, it will be changed as described in paragraph (b) of this section.

(b) *Methods of correcting deficiencies in the disability hearing officer's reconsidered determination.* If the reconsidered determination prepared by the disability hearing officer is found by the Associate Commissioner for Disability Determinations or his or her delegate to be deficient, the Associate Commissioner or his or her delegate will take appropriate action to assure that the deficiency is corrected before a reconsidered determination is issued. The action taken by the Associate Commissioner or his or her delegate will take one of two forms:

(1) The Associate Commissioner or his or her delegate may return the case file either to the component responsible for preparing the case for hearing or to the disability hearing officer, for appropriate further action; or

(2) The Associate Commissioner or his or her delegate may issue a written reconsidered determination which corrects the deficiency.

(c) *Further action on your case if it is sent back by the Associate Commissioner for Disability Determinations or his or her delegate either to the component that prepared your case for hearing or to the disability hearing officer.* If the Associate Commissioner for Disability Determinations or his or her delegate sends your case back either to the component responsible for preparing the case for hearing or to the disability hearing officer for appropriate further action, as provided in paragraph (b)(1) of this section, any additional proceedings in your case will be governed by the disability hearing procedures described in § 416.1416(f) or if your case is returned to the disability hearing officer and an unfavorable determination is indicated, a supplementary hearing may be scheduled for you before a reconsidered determination is reached in your case.

(d) *Opportunity to comment before the Associate Commissioner for Disability Determinations or his or her delegate issues a reconsidered determination that is unfavorable to you.* If the Associate Commissioner for Disability Determinations or his or her delegate proposes to issue a reconsidered determination as described in paragraph (b)(2) of this section, and that reconsidered determination is unfavorable to you, he or she will send you a copy of the proposed reconsidered determination with an explanation of the reasons for it, and will give you an opportunity to submit written comments before it is issued. At your request, you will also be given an opportunity to inspect the pertinent materials in your case file, including the reconsidered determination prepared by the disability hearing officer, before submitting your comments. You will be given 10 days from the date you receive the Associate Commissioner's notice of proposed action to submit your written comments, unless additional time is necessary to provide access to the pertinent file materials or there is good cause for providing more time, as illustrated by the examples in § 416.1411(b). The Associate Commissioner or his or her delegate will consider your comments before taking any further action on your case.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 946

[VA–122–FOR]

Virginia Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We are announcing receipt of a proposed amendment to the Virginia regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). The program amendment revises the Virginia Coal Surface Mining Reclamation Regulations. The amendment reflects changes in renumbering of the Virginia Code section references of the Virginia Administrative Process Act; clarifies the filing of requests for formal hearing and judicial review; revisions of the Virginia rules to be consistent with amendments to the Federal rules; revisions to allow approval of natural stream restoration channel design; regulation changes to implement requirements of Virginia HB 2573 (enacted as emergency legislation); and corrections of typographical errors.

DATES: We will accept written comments on this amendment until 4 p.m. (local time), on July 18, 2005. If requested, we will hold a public hearing on the amendment on July 12, 2005. We will accept requests to speak at the hearing until 4 p.m. (local time), on July 5, 2005.

ADDRESSES: You may submit comments, identified by VA–122–FOR, by any of the following methods:

- E-mail: *rpenn@osmre.gov*. Include VA–122–FOR in the subject line of the message.
- Mail/Hand Delivery: Mr. Robert A. Penn, Director, Big Stone Gap Field Office, Office of Surface Mining Reclamation and Enforcement, 1941 Neeley Road, Suite 201, Compartment 116, Big Stone Gap, Virginia 24219.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Comment Procedures'' heading in the **SUPPLEMENTARY INFORMATION** section of