maximum feasible efficiency of water use across all sectors.

The Commission's Water Management Advisory Committee (WMAC), which has taken primary responsibility for reviewing the proposed audit methodology and developing these amendments, is composed of representatives from a wide range of public and private sector organizations. WMAC membership includes: Mr. Ferdows Ali, Environmental Scientist with the New Jersey Department of Agriculture; Ms. Janet L. Bowers, Executive Director of the Chester County Water Resources Authority; Mr. Gerald Esposito, President of Tidewater Utilities; Mr. David Froehlich, of the Wissahickon Valley Watershed Association; Mr. David Jostenski, Chief of the Water Use Assessment Section of the Pennsylvania Department of Environmental Protection; Mr. Mark Hartle, of the Pennsylvania Fish & Boat Commission, Division of Environmental Services; Mr. Stewart Lovell, Supervisor of Water Allocations of the Delaware Department of Natural Resources and Environmental Control; Mr. John Mello, of Region II of the U.S. Environmental Protection Agency; Mr. Bruno M. Mercuri, of Mercuri and Associates, Inc.; Dr. Joseph A. Miri, of the New Jersey Department of Environmental Protection, Water Supply Element; Mr. Robert Molzahn, of the Water Resources Association of the Delaware River Basin; Mr. Howard Neukrug, of the Philadelphia Water Department; Ms. Mary Ellen Noble, of the Delaware Riverkeeper Network; Ms. Senobar Safafar, of the New York City Department of Environmental Protection, Strategic Services Division, Bureau of Water Supply; Mr. Tom Simms, Director of the Institute of Soil and Environmental Quality of the University of Delaware DGS Annex; Mr. Ronald A. Sloto, of the U.S. Geological Survey, Water Resources Division; Ms. Edith Stevens, of the League of Women Voters; and Mr. Glen Stevens, of the U.S. Army Corps of Engineers.

On May 25, 2004, the WMAC established a subcommittee to investigate the issue of water loss and water accountability in light of new methods proposed by the American Water Works Association (AWWA) and the International Water Association (IWA). The subcommittee met on four occasions to review the Commission's current policies concerning water loss and water accountability and to discuss the new methods. The DRBC's current policies are based on the concept of ''unaccounted for water,'' which is no longer considered best practice. The new methods are based upon more precise definitions and more rational accounting procedures that will result in a clearer understanding on the part of utility managers and regulators of the causes of water loss. The new methods will thus facilitate targeted improvements that reduce system water demands, with region-wide benefits. DRBC staff participated in the development of water audit software based on the new accounting methods, in an effort led by the AWWA Water Loss Control Committee (WLCC).

On March 16, 2005, after listening to a presentation outlining the benefits of the new water accountability methods, the DRBC Commissioners asked DRBC staff and the WMAC to develop a position statement and policy recommendations for the Commission and to engage water purveyors in the Basin in a pilot study of the newly developed water audit software in order to test the software and solicit feedback.

Six water purveyors from the Delaware River Basin were identified to participate in the nationwide pilot study. The comments and feedback provided to AWWA led to improvements in the software. In March 2006, the software was approved by the AWWA WLCC and was posted on the AWWA Web site, where it is available at no charge to all users. Links to the software are posted on the water conservation page of the DRBC Web site: *http://www.state.nj.us/drbc/policy.htm.*

The WMAC and its subcommittee determined that the IWA/AWWA water audit methodology represents an improvement to the Commission's current practices and can lead to multiple benefits for water utilities and other stakeholders. It is anticipated that adoption of the IWA/AWWA approach will:

- Improve upon the traditional approach for identifying ''unaccounted for water,'' which lacks standardized terminology and a clearly defined water audit structure.
- Provide a rational water audit structure to help identify water losses and improve water supply system efficiency.
- Provide meaningful performance indicators to help identify systems with the greatest losses. These indicators allow water utility managers to make reliable comparisons of performance and to identify best practices to control water loss in an economical way.
- Identify ways to improve water supply efficiency and thereby reduce water withdrawals that have no beneficial end use.
- Help to target efforts to reduce the estimated 150 million gallons per day that is physically lost from public water supply distribution systems in the Basin.
- Enhance utility revenues by enabling utility managers to recover the significant revenue that is otherwise lost due to apparent losses such as theft of service, unbilled connections, meter discrepancies and data errors.
- Help utility managers and regulators identify real losses (such as leakage) that waste treated and pressurized water and increase operating costs. Significant real losses indicate opportunities for improved asset management that can reduce the vulnerability of utilities to disruptive water main breaks, other service disruptions and water quality upsets.

Because the water audit approach is relatively new in a regulatory context, the proposed amendments call for phased implementation. Until 2011, the DRBC will promote the voluntary use of the IWA/AWWA water audit program. During this period, information will be gathered from within the Basin and nationwide to assist in the establishment of performance indicators for water loss, which ultimately will replace the ''unaccounted for water'' targets. If approved, the proposed amendments will require water purveyors to perform an annual water audit conforming to the IWA/AWWA methodology, beginning in calendar year 2012.

The proposed amendments also require changes in the way data pertaining to water loss are collected by the state agencies and shared with DRBC.

The text of the proposed *Water Code* amendments is available on the DRBC Web site, *drbc.net.* A copy can also be obtained by contacting Paula Schmitt at 609–883–9500, ext. 224.

Dated: July 28, 2008.

Pamela M. Bush,

Commission Secretary.

[FR Doc. E8–17661 Filed 7–31–08; 8:45 am]

BILLING CODE 6360–01–P

RAILROAD RETIREMENT BOARD

20 CFR Part 220

RIN 3220–AB62

Removal of Listing of Impairments and Related Amendments

AGENCY: Railroad Retirement Board

ACTION: Proposed rule.

SUMMARY: The Railroad Retirement Board proposes to remove the Listing of Impairments within our regulations. The Board's Listing of Impairments (the

Listings) are out of date and no longer reflect advances in medical knowledge, treatments, and methods of evaluation. The proposed amendments will provide public notice as to how the Railroad Retirement Board will determine disability after removal of the Listings.

DATES: Comments should be submitted on or before September 30, 2008.

ADDRESSES: You may submit comments identified by RIN number 3220–AB62, by any of the following methods:

Federal eRulemaking Portal: http://www.regulation.gov. Follow the instructions for submitting comments.

Fax: (312) 751–3336. *Mail:* Beatrice Ezerski, Secretary to the Board, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611. *Hand Delivery/Courier:* Beatrice Ezerski, Secretary to the Board, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

FOR FURTHER INFORMATION CONTACT: Marguerite P. Dadabo, Assistant General Counsel, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611, (312) 751–4945, TDD (312) 751–4701.

SUPPLEMENTARY INFORMATION: We propose to remove and reserve the entire Part A and Part B that comprise the Listing of Impairments (the Listings), as well as the introductory paragraphs, in Appendix 1 of part 220, Title 20, of the Board's regulations. The Listings are used to evaluate disability under the Railroad Retirement Act (RRA). When the Listings were originally published on March 28, 1991 (56 FR 12980), they conformed to the criteria used to evaluate disability under the Social Security Act. The basis for this conformity is that disability for any ''regular work'' under the RRA is defined by reference as an inability to engage in any ''substantial gainful activity'' as that term is used in the Social Security Act, and courts have held that disability for ''regular employment'' as that term is used in the RRA has the same meaning as disability for ''substantial gainful activity'' as that term is used in the Social Security Act. *See,* for example, *Peppers* v. *Railroad Retirement Board,* 728 F.2d 404 (7th Cir. 1984). For this reason, many of the Board's regulations used to determine disability parallel the regulations of the Social Security Administration in subpart P, part 404 of title 20 [Determining Disability and Blindness].

What Programs Would the Proposed Rule Affect?

The Board pays benefits based on disability for any regular work to insured employees, surviving spouses and surviving children disabled prior to age 22, as well as benefits based on disability for one's regular railroad occupation to insured employees who meet additional service requirements. The Listing of Impairments is used in the evaluation of claims based on disability for benefits under the RRA.

How Is Disability Defined?

Disability under the RRA means that an otherwise qualified claimant is unable either to do his or her past regular railroad occupation, or to do any other regular work, as a result of a medically determinable physical or mental impairment, or combination of impairments, expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months. The difference in eligibility for an ''occupational'' disability or a disability for any ''regular work'' is based on the employee's years of service or age and his or her current connection to the railroad industry.

How Is Disability Determined?

The Board, in general, follows a sequential method of evaluating disability which takes into consideration the claimant's current work activity, if any, and then considers all medical evidence. If a claimant cannot be found to be disabled based on medical factors alone, the Board then considers vocational factors such as age, education and work experience.

The five steps used to evaluate disability for any regular employment under the Act, set out in section 220.100 of the Board's regulations, parallel the steps in section 404.1520 of the regulations of the Social Security Administration used to determine disability for a period of disability, disability insurance benefits, child's insurance benefits based on disability and widow(er)'s insurance benefits based on disability for months after 1990.

The first step of that sequence is to determine if the claimant is working and if so, if that work is substantial gainful activity (SGA). If it is, then the claimant is not disabled, regardless of his or her impairments. If the claimant is not working in SGA, the second step is to evaluate the medical severity of the impairment or combined impairments. If the impairment(s) is not so severe that it significantly limits the claimant's ability to do basic work activities, the claim is denied. If it does, and the impairment(s) has lasted or is expected to last for at least 12 months, or is expected to result in death, the third step is to determine whether the impairment(s) meets or is medically equal to an impairment listed in appendix 1 of that part. If so, the claimant is disabled. It is this step that would be changed by these proposed amendments. If the claimant is not disabled based on medical factors alone, the fourth step is to determine the claimant's residual functional capacity and whether his or her impairment(s) prevents the performance of the physical and mental demands of his or her past relevant work. If the claimant can still perform that work, then he or she is not disabled. If he or she cannot, then the Board determines, at the fifth step, whether there exists other work in the national economy which an individual of the claimant's age, education, work experience and residual functional capacity can be expected to perform. If such work exists, disability is denied. Otherwise disability is allowed.

What Is the Listing?

The Listing of Impairments sets out the medical criteria used to determine whether a claimant's impairment(s) is so severe that he or she is disabled based on medical factors alone. The listing is currently considered at the first step of the sequence followed when evaluating a claimant's disability for work in his or her regular railroad occupation, as set out in section 220.13 of the Board's regulations, and at the third step of the sequence followed when evaluating disability for any regular work, as set out in section 220.100. The listing is in two parts. Part A lists the criteria used to evaluate impairments of individuals age 18 or older. Part B lists the criteria used to evaluate the impairments of children under age 18. Each part of the listing is organized by body systems, and each body system has an introductory text explaining types of evidence and other factors to be considered when evaluating the medical documentation of impairments of that body system for disability. The introductory text is followed by a list of impairments and the specific medical criteria which must be met or equaled for that impairment to be so severe that it precludes the performance of any regular work.

How Is the Listing Used?

The Board currently uses the listing to decide whether an individual is disabled or is still disabled. A claimant who is not working for an employer covered under the Act and who is not doing work that is substantial gainful activity, will be found to be disabled if his or her impairment(s) meets or equals the medical criteria of a listed impairment.

The listing is not used to deny a claim of disability. If a claimant's

impairment(s) is severe, but does not meet or medically equal any of the impairments in the listing, the evaluation process continues on the basis of vocational factors such as the ability to perform past work, age, education, and past work experience. The listing is also not used to determine that disability has ended because an individual's impairment(s) no longer meets or equals a listed impairment, or because the listing or its medical criteria has changed. If a listing changes and entitlement was based on the individual's impairment(s) having met or equaled a listed impairment, the Board will continue to use the criteria of the listing in effect at the time of the last favorable decision when conducting a review for continuing disability. If the individual's condition is found to have improved to where his or her impairment(s) no longer medically meets or equals the prior listing, the Board must determine whether the medical improvement is related to the individual's ability to work, and will consider all circumstances of the case before deciding whether the individual is currently disabled.

What Problem Does This Proposed Rule Address?

When the Board last published final rules for the listing on March 28, 1991 (56 FR 12980), it contained the same medical criteria as were then in the regulations of the Social Security Administration at Parts A and B of the Listing of Impairments in Appendix 1 to Subpart P, Part 404 of Title 20. This is because disability for ''regular employment'' as that term is used in the RRA, has been held to have the same meaning as disability for ''substantial gainful activity'' as that term is used in the Social Security Act. As such, the criteria used by the Board to determine whether a claimant's impairment(s) is medically so severe that it prevents any regular work at the third step of evaluation for disability under the RRA, should essentially be the same as the standards used at the third step of evaluating disability for any substantial gainful activity under Title II of the Social Security Act. Since 1991, however, SSA has amended its Listing of Impairments to reflect advances in medical knowledge, treatments and methods of evaluation. Amendments include the addition of a 14th body system; the renaming of body systems; the expansion of introductory texts; the removal or addition of listed impairments from body systems; and changes in the specific medical criteria needed to meet some impairments. As a result, the impairments and criteria listed in the Board's regulations for use in determining disability based on medical factors alone no longer conform with the criteria followed by SSA.

How Does This Proposed Rule Address That Problem?

This proposed rule would re-establish consistency in the evaluation of impairments of individuals under both Acts. The Board has determined that even regular updating of its Listings would result in only temporary conformity with the criteria in SSA's Listing of Impairments. This is because SSA's medical listing rules for each body system contains a sunset provision of four to eight years in length, to ensure that the criteria used to determine disability reflects changes brought about by continual advancements in medical knowledge, treatments and methods of evaluation.

Furthermore, the Board is prohibited by regulation from incorporating by reference the regulations of the Social Security Administration or any other agency. Section 21.21 of the regulations issued by the Administrative Committee of the **Federal Register** (composed of the Archivist of the United States, an officer of the Department of Justice designated by the Attorney General, the Public Printer, and the Director of the Federal Register) provides that:

(c) Each agency shall publish its own regulations in full text. Cross-references to the regulations of another agency may not be used as a substitute for publication in full text, unless the Office of the Federal Register finds that the regulation meets any of the following exceptions:

(1) The reference is required by court order, statute, Executive order or reorganization plan.

(2) The reference is to regulations promulgated by an agency with the exclusive legal authority to regulate in a subject matter area, but the referencing agency needs to apply those regulations in its own programs.

(3) The reference is informational or improves clarity rather than being regulatory.

(4) The reference is to test methods or consensus standards produced by a Federal agency that have replaced or preempted private or voluntary test methods or consensus standards in a subject matter area.

(5) The reference is to the Department level from a subagency. (1 CFR 21.21(c)).

The Listing of Impairments does not fall within any of the exceptions listed in section 21.21(c).

The Board has therefore decided that the most efficient and cost effective approach would be to remove and reserve the entire Appendix 1 to Part 220—Listing of Impairments, parts A and B, and to replace references in Part 220 of the Board's regulations to disability based on an impairment listed in the Listing of Impairments with rules that describe when the Board will find that a claimant is ''medically disabled.'' A definition of the term ''medically disabled'' to mean disability based solely on impairment(s), which are considered to be so medically severe as to prevent a person from doing any substantial gainful activity, will be set out in amended § 220.110(a), with § 220.110 also discussing the evidence that will be used by the Board in making that determination.

It is not the Board's intent in removing Appendix I to change or nullify any administrative ruling or opinion of the Board's General Counsel presently applicable in determining whether an impairment is medically disabling. Section 220.100(b)(3), the third step in evaluating a claim for disability for any regular employment, is amended to *Impairment(s) medically disabling,* and will be based, in part, on ''whether the severity of the impairment(s) would fall within any of the impairments included in the Listing of Impairments as issued by the Social Security Administration and as amended from time to time (20 CFR part 404, Subpart P, Appendix 1) or whether the impairment(s) meet such other criteria which the agency by administrative ruling of general applicability has determined to be medically disabling.'' Reference to the guidelines in § 220.100(b)(3) have been added to § 220.13(a), the first step when evaluating a claim for occupational disability. Section 220.61(c)(4) has been revised to explain that the elements of a complete examining physician's report will be based in part on the results of testing performed as stated in the Board's directions. Section 220.111, which had discussed medical equivalence, when a listed impairment did not meet the requirements set forth in the Listing of Impairments, has been removed and reserved as no longer relevant to the determination of disability under the Railroad Retirement Act. Reference to that section has been removed from § 220.114(d)(3). The Board will continue to follow the guidelines on medical equivalence set forth in the regulations of the Social Security Administration at 20 CFR 404.1526 when determining if a claimant is disabled under the Social Security Act for Medicare entitlement. References to impairment(s), which

medically meet and/or equal the severity of impairments in the Listing of Impairments, have been revised to refer to impairment(s) that is medically disabling in §§ 220.100(b)(4); 220.101(c)(2); 220.101(c)(3); 220.112(e); 220.114(d)(2); 220.120(e); 220.177(c); 220.177(d)(1); 220.178(c)(1); 220.178(c)(3); 220.179(a)(4)(iii); 220.180(b); and 220.180(c). Reference to the Listing as the source of information on new or improved medical techniques considered when determining whether an annuitant is still disabled has been removed, as if an annuitant is found to be no longer disabled for that reason, that finding will be explained to the annuitant when such a determination is made. Reference to the Listings has been removed from § 220.179(a)(4)(i). A spelling error is corrected in § 220.181, and the criteria in examples of permanent impairments where medical improvement is not expected have been clarified in § 220.186.

The Board, with the concurrence of the Office of Management and Budget, has determined that this rule is not a significant regulatory action within the meaning of Executive Order 12866. Therefore, no regulatory impact analysis is required.

List of Subjects in 20 CFR Part 220

Railroad retirement, Disability benefits.

PART 220—[AMENDED]

For the reasons set out in the preamble, the Railroad Retirement Board proposes to amend Title 20, Chapter II, part 220, Determining Disability, as follows:

1. The authority citation for part 220 continues to read as follows:

Authority: 45 U.S.C. 231a; 45 U.S.C. 231f.

2. In § 220.13, revise paragraph (a) to read as follows:

§ 220.13 Establishment of permanent disability for work in regular railroad occupation.

* * * * *

(a) The Board evaluates the employee's medically documented physical and mental impairment(s) to determine if the employee is medically disabled. In order to be found medically disabled, the employee's impairments must be severe enough to prevent a person from doing any substantial gainful activity. The Board makes this determination based on the guidelines set out in § 220.100(b)(3). If the Board finds that an employee has an impairment which is medically disabling, it will find the employee disabled for work in his or her regular occupation without considering the duties of his or her regular occupation.

* * * * *

3. In § 220.61, revise paragraph (c)(4) to read as follows:

§ 220.61 Informing the examining physician or psychologist of examination scheduling, report content and signature requirements.

* * * * *

(c) * * *

(4) The results of laboratory and other tests (e.g., x-rays) performed according to the requirements stated in the Board's directions to the examining physician or psychologist.

* * * * *

4. In § 220.100, revise paragraphs (b)(3) and (b)(4) to read as follows:

§ 220.100 Evaluation of disability for any regular employment.

* * * * *

(b) * * *

(3) *Impairment(s) is medically disabling.* If the claimant has an impairment or a combination of impairments which meets the duration requirement and which the Board finds is medically disabling, the Board will find the claimant disabled without considering his or her age, education or work experience. In determining whether an impairment or combination of impairments is medically disabling, the Board will consider factors such as the nature and limiting effects of the impairment(s); the effects of the treatment the claimant has undergone, is undergoing, and/or will continue to undergo; the prognosis for the claimant; medical records furnished in support of the claimant's claim; whether the severity of the impairment(s) would fall within any of the impairments included in the Listing of Impairments as issued by the Social Security Administration and as amended from time to time (20 CFR part 404, Subpart P, Appendix 1); or whether the impairment(s) meet such other criteria which the agency by administrative ruling of general applicability has determined to be medically disabling.

(4) Impairment(s) must prevent past relevant work. If the claimant's impairment or combination of impairments is not medically disabling, the Board will then review the claimant's residual functional capacity (see § 220.120) and the physical and mental demands of past relevant work (see § 220.130). If the Board determines that the claimant is still able to do his or her past relevant work, the Board will find that he or she is not disabled. If the claimant is unable to do his or her past relevant work, the Board will follow paragraph (b)(5) of this section.

* * * * *

5. In § 220.101, revise paragraphs (c)(2) and (c)(3) to read as follows:

§ 220.101 Evaluation of mental impairments.

* * * * *

(c) * * *

(2) If the claimant's mental impairment(s) is severe, the Board must then determine if it is medically disabling using the Board's prior conclusions based on this procedure (i.e., the presence of certain medical findings considered by the Board as especially relevant to a claimant's ability to work and the Board's rating of functional loss resulting from the mental impairment(s)).

(3) If the claimant has a severe impairment(s), but the impairment(s) is not medically disabling, the Board will then do a residual functional capacity assessment for those claimants (employees, widow(er)s, and children) whose applications are based on disability for any regular employment under the Railroad Retirement Act.

* * * * *

6. Revise § 220.110 to read as follows:

§ 220.110 Medically Disabled

(a)''*Medically disabled.*'' The term ''medically disabled'' refers to disability based solely on impairment(s) which are considered to be so medically severe as to prevent a person from doing any substantial gainful activity. The Board will base its decision about whether the claimant's impairment(s) is medically disabling on medical evidence only, without consideration of the claimant's residual functional capacity, age, education or work experience. The Board will also consider the medical opinion given by one or more physicians employed or engaged by the Board or the Social Security Administration to make medical judgments. The medical evidence used to establish a diagnosis or confirm the existence of an impairment, and to establish the severity of the impairment includes medical findings consisting of signs, symptoms and laboratory findings. The medical findings must be based on medically acceptable clinical and laboratory diagnostic techniques. If the claimant has more than one impairment, but none of the impairments, by themselves, is medically disabling, the Board will review the signs, symptoms, and laboratory findings of all of the impairments to determine whether the combination of impairments is medically disabling. In general,

impairments that the Board considers to be medically disabling are:

(1) Permanent;

(2) Expected to result in death; or

(3) Have a specific length of duration.

(b) *Diagnosis of impairments.* A diagnosis of a particular impairment is not sufficient for a finding of medical disability, unless the diagnosis is supported by medical findings that are based on medically acceptable clinical and laboratory techniques.

(c) *Addiction to alcohol or drugs.* If a claimant has a condition diagnosed as addiction to alcohol or drugs, this condition will not, by itself, be a basis for determining whether the claimant is, or is not, disabled. As with any other medical condition, the Board will decide whether the claimant is disabled based on symptoms, signs, and laboratory findings.

§ 220.111 [Removed and Reserved]

7. Remove and reserve § 220.111.

8. In § 220.112, revise paragraph (e) introductory text and Example 1 to read as follows:

§ 220.112 Conclusions by physicians concerning the claimant's disability.

* * * * *

(e) *Medical opinions that will not be considered conclusive nor given extra weight.* The Board will not consider as conclusive nor give extra weight to medical opinions which are not in accord with the statutory or regulatory standards for establishing disability. Thus, opinions that the individual's impairments are medically disabling where the medical findings which are the basis for that conclusion would not support an impairment so severe as to preclude any substantial gainful activity will not be conclusive nor given extra weight. Likewise, an opinion(s) as to the individual's residual functional capacity which is not in accord with regulatory requirements set forth in §§ 220.120 and 220.121 will not be conclusive nor given extra weight.

Example 1: A medical opinion states that a claimant is disabled based on blindness, but findings show functional visual accuity in the better eye, after best correction, of 20/100. That medical opinion would not be conclusive or given extra weight.

* * * * *

9. In § 220.114, remove paragraph (d)(2), redesignate paragraphs (d)(3) and (d)(4) as paragraphs (d)(2) and (d)(3), and revise the newly redesignated paragraphs (d)(2) and (d)(3) to read as follows:

§ 220.114 Evaluation of symptoms, including pain.

* * * * *

(d) * * *

(2) *Decision of whether impairment(s) is medically disabling.* The Board will not substitute the claimant's allegations of pain or other symptoms for a missing or deficient sign or laboratory finding to raise the severity of the claimant's impairment(s) to that of being medically disabling. If the symptoms, signs, and laboratory findings of the claimant's impairment(s) are found by the Board to be so severe as to prevent any substantial gainful activity, the Board will find the claimant disabled. If it does not, the Board will consider the impact of the claimant's symptoms on the claimant's residual functional capacity. (*See* paragraph (d)(3) of this section.)

(3) *Impact of symptoms (including pain) on residual functional capacity.* If the claimant has a medically determinable severe physical or mental impairment(s), but the claimant's impairment(s) is not medically disabling, the Board will consider the impact of the claimant's impairment(s) and any related symptoms, including pain, on the claimant's residual functional capacity. (*See* § 220.120 of this part.)

10. In § 220.120, revise paragraph (e) to read as follows:

§ 220.120 The claimant's residual functional capacity.

* * * * *

(e) *Total limiting effects.* When the claimant has a severe impairment(s), but the claimant's symptoms, signs, and laboratory findings are not medically disabling, the Board will consider the limiting effects of all of the claimant's impairment(s), even those that are not severe, in determining the claimant's residual functional capacity. Pain or other symptoms may cause a limitation of function beyond that which can be determined on the basis of the anatomical, physiological or psychological abnormalities considered alone; e.g., someone with a low back disorder may be fully capable of the physical demands consistent with those of sustained medium work activity, but another person with the same disorder, because of pain, may not be capable of more than the physical demands consistent with those of light work activity on a sustained basis. In assessing the total limiting effects of the claimant's impairment(s) and any related symptoms, the Board will consider all of the medical and non-medical evidence, including the information described in § 220.114 of this part.

11. In § 220.177:

a. Amend paragraph (c) by revising the second paragraph of Example 2; and

b. Revise paragraph (d)(1)

The revisions read as follows:

§ 220.177 Terms and definitions.

* * * * *

(c) * * *

Example 2: * * *

Medical improvement has occurred because there has been a decrease in the severity of the annuitant's impairments as shown by x-ray and clinical evidence of solid union and his return to full weight-bearing. This medical improvement is related to his ability to work because these findings no longer support an impairment of the severity of the impairment on which the finding that he was medically disabled was based (see § 220.178(c)(1)). Whether or not the annuitant's disability is found to have ended will depend on the Board's determination as to whether he can currently engage in substantial gainful activity.

(d) * * *

(1) Under the law, disability is defined, in part, as the inability to do any regular employment by reason of a physical or mental impairment(s). ''Regular employment'' is defined in this part as ''substantial gainful activity.'' In determining whether the annuitant is disabled under the law, the Board will measure, therefore, how and to what extent the annuitant's impairment(s) has affected his or her ability to do work. The Board does this by looking at how the annuitant's functional capacity for doing basic work activities has been affected. Basic work activities means the abilities and aptitudes necessary to do most jobs. Included are exertional abilities such as walking, standing, pushing, pulling, reaching and carrying, and non-exertional abilities and aptitudes such as seeing, hearing, speaking, remembering, using judgment, dealing with changes in a work setting and dealing with both supervisors and fellow workers. The annuitant who has no impairment(s) would be able to do all basic work activities at normal levels; he or she would have an unlimited functional capacity to do basic work activities. Depending on its nature and severity, an impairment(s) will result in some limitation to the functional capacity to do one or more of these basic work activities. Diabetes, for example, can result in circulatory problems which could limit the length of time the annuitant could stand or walk and can result in damage to his or her eyes as well, so that the annuitant also had limited vision. What the annuitant can still do, despite his or her impairment(s), is called his or her residual functional capacity. How the residual functional capacity is assessed

is discussed in more detail in § 220.120. Unless an impairment is so severe that it is deemed to prevent the annuitant from doing substantial gainful activity (i.e., the impairment(s) is medically disabling), it is this residual functional capacity that is used to determine whether the annuitant can still do his or her past work or, in conjunction with his or her age, education and work experience, do any other work.

* * * * *

12. In § 220.178, revise paragraphs (c)(1) and (c)(3) to read as follows:

§ 220.178 Determining medical improvement and its relationship to the annuitant's ability to do work.

* * * * *

(c) * * *

(1) *Previous impairment was medically disabling.* If the Board's most recent favorable decision was based on the fact that the annuitant's impairment(s) at that time was medically disabling, an assessment of his or her residual functional capacity would not have been made. If medical improvement has occurred and the severity of the prior impairment(s) is supported by current medical findings, the Board will find that the medical improvement was related to the annuitant's ability to work. If the medical findings support impairment(s) that is currently so severe as to be medically disabling, the annuitant is deemed, in the absence of evidence to the contrary, to be unable to engage in substantial gainful activity. If there has been medical improvement to the degree that the impairment(s) is not currently medically disabling, then there has been medical improvement related to the annuitant's ability to work. The Board must, of course, also establish that the annuitant can currently engage in gainful activity before finding that his or her disability has ended.

* * * * *

(3) *Prior residual functional capacity assessment should have been made, but was not.* If the most recent favorable medical decision should have contained an assessment of the annuitant's residual functional capacity (i.e., his or her impairment(s) was not medically disabling) but does not, either because this assessment is missing from the annuitant's file or because it was not done, the Board will reconstruct the residual functional capacity. This reconstructed residual functional capacity will accurately and objectively assess the annuitant's functional capacity to do basic work activities. The Board will assign the maximum functional capacity consistent with an allowance.

Example: The annuitant was previously found to be disabled on the basis that while his impairment was not medically disabling, it did prevent him from doing his past or any other work. The prior adjudicator did not, however, include a residual functional capacity assessment in the rationale of that decision and a review of the prior evidence does not show that such an assessment was ever made. If a decrease in medical severity, i.e., medical improvement, has occurred, the residual functional capacity based on the current level of severity of the annuitant's impairment will have to be compared with his residual functional capacity based on its prior severity in order to determine if the medical improvement is related to his ability to do work. In order to make this comparison, the Board will review the prior evidence and make an objective assessment of the annuitant's residual functional capacity at the time of its most recent favorable medical determination, based on the symptoms, signs and laboratory findings as they then existed.

* * * * *

13. In § 220.179, revise paragraphs (a)(3)(ii) introductory text, (a)(4)(i) introductory text, and the example following paragraph (a)(4)(iii) to read as follows:

§ 220.179 Exceptions to medical improvement.

(a) * * *

(3) * * *

(ii) *How the annuitant will know which methods are new or improved techniques and when they become generally available.* The Board will let annuitants know which methods it considers to be new or improved techniques and when they become available.

* * * * *

(4) * * *

(i) Substantial evidence shows on its face that the decision in question should not have been made (e.g., the evidence in file such as pulmonary function study values was misread or an adjudicative standard such as a medical/vocational rule in appendix 2 of this part was misapplied).

* * * * *

(iii) * * *

Example: The annuitant was previously found entitled to a disability annuity on the basis of diabetes mellitus which the prior adjudicator believed was medically disabling. The prior record shows that the annuitant has ''brittle'' diabetes for which he was taking insulin. The annuitant's urine was 3+ for sugar, and he alleged occasional hypoglycemic attacks caused by exertion. His doctor felt the diabetes was never really controlled because he was not following his diet or taking his medication regularly. On review, symptoms, signs and laboratory findings are unchanged. The current adjudicator feels, however, that the annuitant's impairment clearly is not medically disabling. Error cannot be found because it would represent a substitution of current judgment for that of the prior adjudicator that the annuitant's impairment was medically disabling. The exception for error will not be applied retroactively under the conditions set out above unless the conditions for reopening the prior decision are met.

* * * * *

14. In § 220.180, revise paragraphs (b) and (c) to read as follows:

§ 220.180 Determining continuation or cessation of disability.

* * * * *

(b) If the annuitant is not engaging in substantial gainful activity, does he or she have an impairment or combination of impairments which is medically disabling? If the annuitant's impairment(s) is medically disabling, his or her disability will be found to continue;

(c) If the annuitant's impairment(s) is not medically disabling, has there been medical improvement as defined in § 220.177(a)? If there has been medical improvement as shown by a decrease in medical severity, see step (d). If there has been no decrease in medical severity, then there has been no medical improvement; (See step (e));

* * * * *

§ 220.181 [Amended]

15. In § 220.181 amend paragraph (i) by removing the word ''not'' and adding in its place the word ''no''.

16. In § 220.186(c) amend the definition for ''Permanent impairment, medical improvement not expected'' by removing the phrase ''§ 220.178(c)(4)'' and adding in its place the phrase ''§ 220.178(c)(3)'' and revise paragraphs (c)(1) through (c)(3) to read as follows:

§ 220.186 When and how often the Board will conduct a continuing disability review.

* * * * *

(c) *Definitions.* As used in this section—* * *

Permanent impairment medical improvement not expected—* * *

(1) Parkinsonian syndrome with significant rigidity, brady kinesia, or tremor in two extremities, which, singly or in combination, result in sustained disturbance of gross and dexterous movements, or gait and station.

(2) Amyotrophic lateral sclerosis, based on documentation of a clinically appropriate medical history, neurological findings consistent with the diagnosis of ALS, and the results of any electrophysiological and neuroimaging testing.

(3) Diffuse pulmonary fibrosis in an individual age 55 or older which

reduces FEV1 to 1.45 to 2.05 (L, BTPS) or less depending on the individual's height.

* * * * *

Appendix 1 to Part 220—[Removed and Reserved]

17. Remove and reserve Appendix 1 to part 220—Listing of Impairments.

Dated: July 23, 2008.

For The Board.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. E8–17333 Filed 7–31–08; 8:45 am]

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DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 19

[Notice No. 86; Re: Notice No. 83; Docket No. TTB–2008–0004]

RIN 1513–AA23

Proposed Revision of Distilled Spirits Plant Regulations (2001R–194P)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: In response to an industry member request, the Alcohol and Tobacco Tax and Trade Bureau extends the comment period for Notice No. 83, Proposed Revision of Distilled Spirits Plant Regulations, a notice of proposed rulemaking published in the **Federal Register** on May 8, 2008, for an additional 90 days.

DATES: Written comments on Notice No. 83 must now be received on or before November 5, 2008.

ADDRESSES: You may send comments on Notice No. 83 to one of the following addresses:

- *http://www.regulations.gov* (via the online comment form for this notice as posted within Docket No. TTB–2008–0004 on Regulations.gov, the Federal e-rulemaking portal); or
- *Mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or
- *Hand Delivery/Courier in lieu of Mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20005.

See the Public Participation section of this notice for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this notice, Notice No. 83, and any comments we receive about Notice No. 83 at *http://www.regulations.gov*. A direct link to the appropriate Regulations.gov docket is available under Notice No. 83 on the TTB Web site at *http://www.ttb.gov/spirits/spirits_rulemaking.shtml*. You also may view copies of this notice, Notice No. 83, and any comments we receive about Notice No. 83 by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. To make an appointment, call 202–927–2400.

FOR FURTHER INFORMATION CONTACT: Daniel J. Hiland, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200–E, Washington, DC 20220; telephone 202–927–8176.

SUPPLEMENTARY INFORMATION: On May 8, 2008, the Alcohol and Tobacco Tax and Trade Bureau (TTB) published Notice No. 83, Proposed Revision of Distilled Spirits Plant Regulations, in the **Federal Register** (73 FR 26200). In that notice of proposed rulemaking, TTB requested public comment on its proposed comprehensive revision of the regulations governing distilled spirits plants. The 90-day comment period for Notice No. 83, when published, was scheduled to close on August 6, 2008.

After publication of Notice No. 83, TTB received a request from E. & J. Gallo Winery to extend the comment period for Notice No. 83 for an additional 120 days. Gallo, which operates three distilled spirits plants in California in addition to its wineries, noted in support of its request that it is preparing for the upcoming harvest season, ''the busiest and most important months of the year for our company.'' As a result, Gallo noted that it would be difficult for the company to focus its attention on the complexities of the proposed rule.

In response to this request, TTB extends the comment period for Notice No. 83 for an additional 90 days, which together with the original 90-day comment period will leave Notice No. 83 open to public comment for 6 months. We believe this time period will allow industry members and the public to fully consider the proposals outlined in Notice No. 83. Therefore, comments on Notice No. 83 are now due on or before November 5, 2008.

Drafting Information: Michael D. Hoover of the Regulations and Rulings Division drafted this notice.

Signed: July 29, 2008.

John J. Manfreda,

Administrator.

[FR Doc. E8–17676 Filed 7–31–08; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405, 409, 410, 411, 414, 415, 424, 485, and 486

[CMS–1403–CN]

RIN 0938–AP18

Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2009; and Revisions to the Amendment of the E-Prescribing Exemption for Computer Generated Facsimile Transmissions; Correction

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule; correction.

SUMMARY: This document corrects several technical and typographical errors in the proposed rule that was issued on June 30, 2008 and appeared in the July 7, 2008 **Federal Register** (73 FR 38502). The proposed rule addressed Medicare Part B payment policy, including the physician fee schedule (PFS) that is applicable for calendar year (CY) 2009. The proposed rule also addressed refinements to relative value units (RVUs) and physician self-referral issues. Specifically, the errors pertain to the following provisions: Practice expense, telehealth services, competitive acquisition program (CAP), anti-markup provisions, and the Physician Quality Reporting Initiative.

FOR FURTHER INFORMATION CONTACT: Diane Milstead, (410) 786–3355.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. E8–14949 (73 FR 38502), the proposed rule entitled ''Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2009; and Revisions to the Amendment of the E-Prescribing Exemption for Computer Generated Facsimile Transmissions'' (hereinafter referred to as the CY 2009 PFS proposed rule), there were technical and typographical errors that are identified and corrected in this correction notice.