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## RAILROAD RETIREMENT BOARD

### 20 CFR Part 220

RIN 3220-AB62

### Removal of Listing of Impairments and Related Amendments

**AGENCY:** Railroad Retirement Board.

**ACTION:** Final rule.

**SUMMARY:** The Railroad Retirement Board removes the Listing of Impairments from its regulations. The Board's Listing of Impairments (the Listings) is out of date and no longer reflects advances in medical knowledge, treatments, and methods of evaluation. These amendments provide public notice as to how the Railroad Retirement Board will determine disability after removal of the Listings.

**DATES:** This rule will be effective December 4, 2009.

**ADDRESSES:** 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 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 have been 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 Will the Final 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 has been 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 has been 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 will be changed by these 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 that have been 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 has been 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 has been in two parts. Part A listed the criteria used to evaluate impairments of individuals age 18 or older. Part B listed the criteria used to evaluate the impairments of children under age 18. Each part of the listing was organized by body systems, and each body system had 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 was followed by a list of impairments and the specific medical criteria which had to be met or equaled for that impairment to be so severe that

it precluded the performance of any regular work.

#### How Was the Listing Used?

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

The listing was not used to deny a claim of disability. If a claimant's impairment(s) was severe, but did not meet or medically equal any of the impairments in the listing, the evaluation process continued on the basis of vocational factors such as the ability to perform past work, age, education, and past work experience. The listing also was not used to determine that disability had ended because an individual's impairment(s) no longer met or equaled a listed impairment, or because the listing or its medical criteria had changed. If a listing changed and entitlement was based on the individual's impairment(s) having met or equaled a listed impairment, the Board continued 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 was found to have improved to where his or her impairment(s) no longer medically met or equaled the prior listing, the Board determined whether the medical improvement was related to the individual's ability to work, and considered all circumstances of the case before deciding whether the individual was currently disabled.

#### What Problem Does This Final 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 Final Rule Address That Problem?

This final rule will 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, CFR Title 1, 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:

- 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:

- The reference is required by court order, statute, Executive order or reorganization plan.
- 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.

- The reference is informational or improves clarity rather than being regulatory.

- 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.

- 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 is 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 is 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 1 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, and 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 was 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 published the proposed rule on August 1, 2008. (73 FR 44946) and invited comments by September 30, 2008. No comments were received. After the Board submitted a draft final rule to the Office of Management and Budget (OMB), OMB solicited comments from the Social Security Administration (SSA), the Department of Justice, and the Veterans' Administration. SSA submitted two comments concerning the continuing disability review process. The first comment noted that the amendment changes the definition for "medical improvement related to the ability to work" when the comparison point decision (CPD) was made at step 3 of sequential evaluation. That comment stated that the substitution of the phrase "medically disabling" for "meets or equals" may not work for CPDs that were based on meeting or equaling a listing because it removes the need to compare the current severity with the standard used to find disability at the CPD. The second comment stated that the second sentence in section

220.178(c)(1) was unclear as to whether the severity level referred to the current severity or the severity established at the CPD. The Board has reviewed the comments and the amendments to section 220.178(c)(1) and agrees that the second sentence could be confusing. We have modified that sentence to make it clear that in a continuing disability review, the claimant's current severity will be compared to the standard that was used to make the original, or "comparison point", decision.

The remainder of the proposed rule is being published as a final rule without change.

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.

■ For the reasons set out in the preamble, the Railroad Retirement Board amends Title 20, Chapter II, Part 220, Determining Disability, as follows:

**PART 220—[AMENDED]**

■ 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 acuity 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 current severity of the prior impairment(s) is no longer medically disabling based on the standard [see § 220.100(b)(3)] applied at the time of that decision, 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 of "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 (1) through (3) of the definition to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

*Permanent impairment medical improvement not expected—\* \* \**

(1) Parkinsonian syndrome with significant rigidity, bradykinesia, 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.

Dated: November 20, 2009.

For the Board.

**Beatrice Ezerski,**

*Secretary to the Board.*

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**DEPARTMENT OF JUSTICE**

**Drug Enforcement Administration**

**21 CFR Part 1300**

[Docket No. DEA-285F]

**RIN 1117-AB17**

**Classification of Three Steroids as Schedule III Anabolic Steroids Under the Controlled Substances Act**

**AGENCY:** Drug Enforcement Administration (DEA), Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** With the issuance of this final rule, the Deputy Administrator of the Drug Enforcement Administration (DEA) classifies the following three steroids as "anabolic steroids" under the Controlled Substances Act (CSA): Boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione. These steroids and their salts, esters, and ethers are schedule III controlled substances subject to the regulatory control provisions of the CSA.

**DATES:** *Effective Date:* January 4, 2010.

**FOR FURTHER INFORMATION CONTACT:** Christine A. Sannerud, Ph.D., Chief, Drug and Chemical Evaluation Section, Drug Enforcement Administration, 8701 Morrisette Drive, Springfield, VA 22152, (202) 307-7183.

**SUPPLEMENTARY INFORMATION:**

**I. Background Information**

In a Notice of Proposed Rulemaking (NPRM) (73 FR 22294) published April 25, 2008, the DEA proposed the classification of three steroids as schedule III anabolic steroids under the CSA. These three steroids included boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione. With the publication of this Final Rule, DEA classifies these three steroids as schedule III anabolic steroids.

Background information in support of this Final Rule is provided below.

On November 29, 1990, the President signed into law the Anabolic Steroids Control Act of 1990 (Title XIX of Pub. L. 101-647), which became effective February 27, 1991. This law established and regulated anabolic steroids as a class of drugs under schedule III of the CSA. As a result, a new anabolic steroid is not scheduled according to the procedures set out in 21 U.S.C. 811, but can be administratively classified as an anabolic steroid through the rulemaking process by adding the steroid to the regulatory definition of an anabolic steroid in 21 CFR 1300.01(b)(4).

On October 22, 2004, the President signed into law the Anabolic Steroid Control Act of 2004 (Pub. L. 108-358), which became effective on January 20, 2005. Section 2(a) of the Anabolic Steroid Control Act of 2004 amended 21 U.S.C. 802(41)(A) by replacing the existing definition of "anabolic steroid." The Anabolic Steroid Control Act of 2004 classifies a drug or hormonal substance as an anabolic steroid if the following four criteria are met: (A) The substance is chemically related to testosterone; (B) the substance is pharmacologically related to testosterone; (C) the substance is not an estrogen, progestin, or a corticosteroid; and (D) the substance is not dehydroepiandrosterone (DHEA). Any substance that meets the criteria is considered an anabolic steroid and must be listed as a schedule III controlled substance. DEA finds that boldione, desoxymethyltestosterone, and 19-nor-4,9(10)-androstadienedione meet this definition of anabolic steroid and is adding them to the list of anabolic steroids in 21 CFR 1300.01(b)(4).

Anabolic steroids are a class of drugs with a basic steroid ring structure that produces anabolic and androgenic effects. The prototypical anabolic steroid is testosterone. Anabolic effects include promoting the growth of muscle. The androgenic effects consist of promoting the development of male secondary sexual characteristics such as facial hair, deepening of the voice, and thickening of the skin.

In the United States, only a small number of anabolic steroids are approved for either human or veterinary use. Approved medical uses for anabolic steroids include treatment of androgen deficiency in hypogonadal males, adjunctive therapy to offset protein catabolism associated with prolonged administration of corticosteroids, treatment of delayed puberty in boys, treatment of metastatic breast cancer in women, and treatment of anemia associated with specific diseases (*e.g.*,