SUMMARY:

AGENCY: Social Security Administration.

ACTION: Final rules.

RESPONSE: We agree with the commenter that adjudicators who do not make findings at step 4 to state that they considered the potential application of the special profiles before they deny claims at step 5. To remind our adjudicators to consider the special profiles in this situation, we are including a reference to section 404.1562 in final sections 404.1520(h) and 404.1594(f)(9) and a reference to section 416.962 in final sections 416.920(h) and 416.994(b)(5)(viii). We are also including a reference to section 404.1562 in final section 404.1545(a)(5)(ii) to be consistent with the reference to section 416.962 we proposed and are adopting in final section 416.945(a)(5)(ii).

However, we are not adopting the suggestion to require adjudicators to state that they considered medical-vocational profiles in this situation because we can address the commenter’s concern in ways that we believe will be more effective.

First, we currently have an electronic claims analysis tool in widespread use at the initial level of our administrative review process that reminds adjudicators to consider these profiles before they evaluate claims at step 5. We will insert a similar reminder in this tool so that adjudicators will consider special profiles before determining whether to proceed to step 5 using the expedited process. As we indicated in the NPRM, if adjudicators use the


4 Medical-vocational profiles showing an inability to make an adjustment to other work.

5 Id.
expedited process, they will still consider whether claimants may be disabled based on the special medical-vocational profiles, the Medical-Vocational Guidelines (Guidelines), or an inability to meet the mental demands of unskilled work.7 We also explained that “[i]f any of these rules would indicate that the claimant be disabled or if the adjudicator has any doubt whether the claimant can perform other work existing in significant numbers in the economy, the adjudicator must return to step 4 to further develop the claimant’s vocational information and determine whether the claimant can perform his or her past relevant work.” 8 If there is insufficient evidence about a claimant’s past relevant work in the record to determine whether a special medical-vocational profile applies, the adjudicator must return to step 4 to further develop the vocational evidence because a special medical-vocational profile may apply.

Second, we plan to conduct training on these final rules for adjudicators at all levels of the disability determination process regarding use of the new expedited process. We will also monitor the use of the expedited process during quality reviews to ensure that we apply the process correctly.

Comment: One commenter doubted whether we could deny claims at step 5 using the expedited process because a step 5 analysis must include consideration of claimants’ past work histories. Another commenter stated we should always develop a complete past work history because evidence of past work can influence our finding at step 5 and can inform our assessment of the claimant’s residual functional capacity (RFC).9

Response: We disagree with these comments. There are a number of situations in which it would be appropriate to deny a claim without considering a claimant’s past work history. For example, if a claimant is 44 years old with a high school education and has the RFC to perform a full range of sedentary work, Rules 201.27, 201.28, and 201.29 of the Medical-Vocational Guidelines (Guidelines) direct that this claimant be found not disabled, regardless of the skill level of his or her past relevant work or the transferability of those skills.10 As we explained in the NPRM, adjudicators will only find that a claimant is not disabled without returning to step 4 when they can find at step 5 that a claimant is not disabled “based solely on age, education, and RFC, regardless of the claimant’s skill level and transferability of those skills.”11

We also disagree with the comment that we need evidence of past work history to determine a claimant’s RFC. As our current rules make clear, we determine a claimant’s RFC before we go to step 4.12 and we do not assess RFC in the context of a claimant’s past work history. Rather, we determine a claimant’s RFC based on his or her ability to meet the “physical, mental, sensory, and other requirements of work”13 on a “regular and continuous basis.”14 For example, the physical demands of work include activities such as sitting, standing, and walking.15 We do not assess RFC in the context of a claimant’s past work history; therefore, we can use the proposed expedited process regardless of past work history development.

Comment: One commenter questioned our view that the expedited process would not disadvantage any claimant16 and expressed several concerns. The commenter believed that adjudicators would have too much discretion to decide when to use the expedited process because we did not explain what we mean by “insufficient” evidence to make a finding at step 4. The commenter said that by not requiring our adjudicators to make even a “reasonable effort” to obtain additional evidence of past work history, we diminish their duty to develop the record, even if evidence is readily available. The commenter also said that if we adopted the expedited process we would adjudicate claims using different procedures and would incorrectly deny some claims without fully assessing some claimants’ abilities to perform their past relevant work. The commenter recognized that making the correct decision “as early in the process as possible is the key to a fair process,” but said that the expedited process might lead us to deny claims incorrectly due to insufficient development of past work.

Response: We disagree with these comments. First, in response to the commenter’s concern about the definition of “insufficient,” we explained in the NPRM that we would consider evidence to be insufficient when a claimant does not provide us with enough information about each of his or her jobs within the relevant 15-year period on Form SSA–3368, Disability Report-Adult, (or the Internet version of this form)17 and, when necessary, Form SSA–3369, Work History Report,18 for us to make a finding at step 4.19 Our adjudicators are familiar with the concept of “insufficient evidence” in this context, and we are confident that they understand reference to “insufficient evidence” of a claimant’s ability to do his or her past work. We also have not revised these rules to require adjudicators to make a reasonable effort to collect additional work history before going to step 5 in all cases. Imposing such a requirement would delay adjudication in those cases in which the claimant’s past relevant work history has no effect on the ultimate finding of disability.

Although use of the expedited process may change whether we deny a claim at step 5 versus step 4, we expect that it will not change the ultimate determination of whether the claimant is disabled. We will only deny a claim at step 5 using the expedited process if the claimant’s age, education, and RFC indicate that he or she is not disabled regardless of what an inquiry into past relevant work would reveal. As we noted in the NPRM, our experience using a similar expedient in the ten “prototype” States supports the conclusion that the expedited process does not change our ultimate decision as to whether or not a claimant is disabled.20

Other Changes

We are correcting a cross-reference in §404.1527 and 416.927 to reflect renumbering changes in a final rule published on February 23, 2012 at 77 FR 10651.

6 See 20 CFR 404.1569 and 416.969.
7 See 76 FR at 56359.
8 Id. (emphasis added).
9 See 20 CFR 404.1545 and 416.945. An RFC assessment is a finding about the most a claimant can still do despite his or her physical and mental limitations.
10 See Appendix 2 to Subpart P of Part 404—Medical-Vocational Guidelines. In this example, none of the special profiles would potentially apply, and we assume that the claimant can meet the mental demands of unskilled work.
11 76 FR at 56359 (emphasis added).
12 20 CFR 404.1520(a)(4) and 416.920(a)(4).
13 20 CFR 404.1545(c)(4) and 416.945(c)(4).
14 20 CFR 404.1545(b) and (c) and 416.945(b) and (c).
15 20 CFR 404.1545(b) and 416.945(b).
16 76 FR at 56357.
17 Currently available at https://secure.ssa.gov/apps6z/radr/radr-fi.
19 76 FR at 56359.
20 76 FR at 56359.
Regulatory Procedures

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Thus, OMB reviewed them.

Regulatory Flexibility Act

We certify that these final rules will not have a significant economic impact on a substantial number of small entities because they only affect individuals. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Paperwork Reduction Act

These final rules do not create any new or affect any existing collections; therefore, they do not require OMB approval under the Paperwork Reduction Act.

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).

Michael J. Astrue,
Commissioner of Social Security.

For the reasons set out in the preamble, we are amending title 20 of the Code of Federal Regulations part 404 subpart P and part 416 subpart I as set forth below:

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

Subpart P—[Amended]

1. The authority citation for subpart P of part 404 is revised to read as follows:

Authority: Secs. 202, 205(a)–(b) and (d)–(h), 216(i), 221(a), (i), and (j), 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), (i), and (j), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

2. Amend §404.1505 by revising the sixth sentence of paragraph (a) to read as follows:

§404.1505 Basic definition of disability.

(a) If you cannot do your past relevant work, we will use the same residual functional capacity assessment and your vocational factors of age, education, and work experience to determine if you can do other work. (See §404.1520(h) for an exception to this rule.) * * *

* * * * *

§404.1505 Basic definition of disability.

(a) * * *

(4) * * * See paragraph (h) of this section for an exception to this rule.

* * *

(iv) * * * See paragraphs (f) and (h) of this section and §404.1560(b).

(v) * * * See paragraphs (g) and (h) of this section and §404.1560(c).

* * * * *

(f) * * * See paragraph (h) of this section and §404.1560(b).

* * * * *

(h) Expedited process. If we do not find you disabled at the third step, and we do not have sufficient evidence about your past relevant work to make a finding at the fourth step, we may proceed to the fifth step of the sequential evaluation process. If we find that you can adjust to other work based solely on your age, education, and the same residual functional capacity assessment we made under paragraph (e) of this section, we will find that you are not disabled and will not make a finding about whether you can do your past relevant work at the fourth step. If we find that you may be unable to adjust to other work or if §404.1562 may apply, we will assess your claim at the fourth step and make a finding about whether you can perform your past relevant work. See paragraph (g) of this section and §404.1560(c).

4. In §404.1527(o)(1)(i), remove “paragraph (f)(1)(i) of this section” and add in its place “paragraph (o)(1)(i) of this section”.

5. Amend §404.1545 by revising the first sentence of paragraph (a)(5)(ii) to read as follows:

§404.1545 Your residual functional capacity.

(a) * * *

(5) * * *

(ii) If we find that you cannot do your past relevant work, you do not have any past relevant work, or if we use the procedures in §404.1520(h) and §404.1562 does not apply, we will use the same assessment of your residual functional capacity at step five of the sequential evaluation process to decide if you can adjust to any other work that exists in the national economy. * * *

* * * * *

§404.1545 Your residual functional capacity.

(a) * * *

(5) * * *

(ii) If we find that you cannot do your past relevant work, you do not have any past relevant work, or if we use the procedures in §404.1520(h) and §404.1562 does not apply, we will use the same assessment of your residual functional capacity at step five of the sequential evaluation process to decide if you can adjust to any other work that exists in the national economy. * * *

* * * * *

6. Amend §404.1560 by adding a second sentence to paragraph (b) and revising the first two sentences of paragraph (c)(1) to read as follows:

§404.1560 When we will consider your vocational background.

(b) * * * See §404.1520(h) for an exception to this rule.

* * * * *

(c) Other work. (1) If we find that your residual functional capacity does not enable you to do any of your past relevant work or if we use the procedures in §404.1520(h), we will use the same residual functional capacity assessment when we decide if you can adjust to any other work. We will look at your ability to adjust to other work by considering your residual functional capacity and the vocational factors of age, education, and work experience, as appropriate in your case. (See §404.1520(h) for an exception to this rule.) * * *

* * * * *

§404.1560 When we will consider your vocational background.

(b) * * * See §404.1520(h) for an exception to this rule.

* * * * *

(1) If we find that your

§404.1565 Your work experience as a vocational factor.

* * * * *

(b) * * * If you cannot give us all of the information we need, we may try, with your permission, to get it from your employer or other person who knows about your work, such as a member of your family or a co-worker.

* * * *

§404.1565 Your work experience as a vocational factor.

* * * * *

(b) * * * If you cannot give us all of the information we need, we may try, with your permission, to get it from your employer or other person who knows about your work, such as a member of your family or a co-worker.

* * * * *

7. Amend §404.1565 by revising the second sentence of paragraph (b) to read as follows:

§404.1565 Your work experience as a vocational factor.

* * * * *

(b) * * * If you cannot give us all of the information we need, we may try, with your permission, to get it from your employer or other person who knows about your work, such as a member of your family or a co-worker.

* * * *

§404.1565 Your work experience as a vocational factor.

* * * * *

(b) * * * If you cannot give us all of the information we need, we may try, with your permission, to get it from your employer or other person who knows about your work, such as a member of your family or a co-worker.

* * * * *

§404.1569 Listing of Medical-Vocational Guidelines in appendix 2.

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§404.1569 Listing of Medical-Vocational Guidelines in appendix 2.

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§404.1569 Listing of Medical-Vocational Guidelines in appendix 2.

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§404.1569 Listing of Medical-Vocational Guidelines in appendix 2.

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§404.1569 Listing of Medical-Vocational Guidelines in appendix 2.

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§404.1569 Listing of Medical-Vocational Guidelines in appendix 2.

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§404.1569 Listing of Medical-Vocational Guidelines in appendix 2.

* * * * *
impaired from doing vocationally relevant past work. (See § 404.1520(h)
for an exception to this rule.) * * *

§ 404.1594 How we will determine whether
your disability continues or ends.

(f) * * *

(8) If you are not able to do work you
have done in the past, we will consider
whether you can do other work given
the residual functional capacity
assessment made under paragraph (f)(7)
of this section and your age, education,
and past work experience (see
paragraph (f)(9) of this section for an
exception to this rule). If you can, we
will find that your disability has ended.
If you cannot, we will find that your
disability continues.

(9) We may proceed to the final step,
described in paragraph (f)(8) of this
section, if the evidence in your file
about your past relevant work is not
sufficient for us to make a finding under
paragraph (f)(7) of this section about
whether you can perform your past
relevant work. If we find that you can
adjust to other work based solely on
your age, education, and residual
functional capacity, we will find that
you are no longer disabled, and we will
not make a finding about whether you can
do your past relevant work under
paragraph (f)(7) of this section. If we
find that you may be unable to adjust to
other work or if § 404.1562 may apply,
we will assess your claim under
paragraph (f)(7) of this section and make
a finding about whether you can
perform your past relevant work.

* * * * *

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

Subpart I—[Amended]

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

Authority: Secs. 221(m), 702(a)(5), 1611,
1614, 1619, 1631(a), (c), (d)(1), and (p), and
1633 of the Social Security Act (42 U.S.C.
421(m), 902(a)(5), 1382, 1382c, 1382h,
1383(a), (c), (d)(1), and (p), and 1383b); secs.
4(c) and 5, 6(c)–(e), 14(a), and 15, Pub. L. 98–
460, 98 Stat. 1794, 1801, 1802, and 1808 (42

■ 11. Amend § 416.905 by revising the
last sentence of paragraph (a) to read as follows:

§ 416.905 Basic definition of disability for
adults.

(a) * * * If we find that you cannot
do your past relevant work, we will use
the same residual functional capacity
assessment and your vocational factors
of age, education, and work experience
to determine if you can do other work.
(See § 416.920(h) for an exception to
this rule.) * * *

■ 12. Amend § 416.920 by adding a new
second sentence to paragraph (a)(4), by
revising the last sentence of paragraph
(a)(4)(iv), the last sentence of paragraph
(a)(4)(v), the second sentence of
paragraph (f), and by adding a new
paragraph (h), to read as follows:

§ 416.920 Evaluation of disability of adults,
in general.

(a) * * *

(4) * * * See paragraph (h) of this
section for an exception to this rule.

(iv) * * * See paragraphs (f) and (h)
of this section and § 416.960(b).

(v) * * * See paragraphs (g) and (h)
of this section and § 416.960(c).

* * * * *

(h) Expedited process. If we do not
find you disabled at the third step, and
we do not have sufficient evidence
about your past relevant work to make
a finding at the fourth step, we may
proceed to the fifth step of the
sequential evaluation process. If we
find that you can adjust to other work
based solely on your age, education,
and the same residual functional capacity
assessment we made under paragraph
(e) of this section, we will find that
you are not disabled and will not make a
finding about whether you can do your
past relevant work at the fourth step. If
we find that you may be unable to
adjust to other work or if § 416.962 may apply,
we will assess your claim at the
fourth step and make a finding about
whether you can perform your past
relevant work.

* * * * *

§ 416.927 Social Security Act.

(a) * * *

(b) * * * See § 416.920(h) for an
exception to this rule.

(c) Other work. (1) If we find that your
residual functional capacity does not
enable you to do any of your past
relevant work or if we use the
procedures in § 416.920(h), we will use
the same residual functional capacity
assessment when we decide if you can
adjust to any other work. We will look
at your ability to adjust to other work by
considering your residual functional
capacity and the vocational factors of
age, education, and work experience, as
appropriate in your case. (See
§ 416.920(h) for an exception to this
rule.) * * *

* * * * *

§ 416.965 Your work experience as a
vocational factor.

(b) * * * If you cannot give us all of
the information we need, we may try,
with your permission, to get it from
your employer or other person who
knows about your work, such as a
member of your family or a co-worker.

* * *

§ 416.969 applies these rules in cases
where a person is not doing substantial
gainful activity and is prevented by a
severe medically determinable
impairment from doing vocationally
relevant past work. (See § 416.920(h)
for an exception to this rule.) * * *

■ 15. Amend § 416.969 by adding a
second sentence to paragraph (b) and
revising the first two sentences of
paragraph (c)(1) to read as follows:

§ 416.960 When we will consider your
vocational background.

* * * * *

(b) * * * See § 416.920(h) for an
exception to this rule.

* * * * *

(c) Other work. (1) If we find that your
residual functional capacity does not
enable you to do any of your past
relevant work or if we use the
procedures in § 416.920(h), we will use
the same residual functional capacity
assessment when we decide if you can
adjust to any other work. We will look
at your ability to adjust to other work by
considering your residual functional
capacity and the vocational factors of
age, education, and work experience, as
appropriate in your case. (See
§ 416.920(h) for an exception to this
rule.) * * *

* * * * *

■ 16. Amend § 416.965 by revising the
second sentence of paragraph (b) to read as
follows:

§ 416.965 Your work experience as a
vocational factor.

(b) * * * If you cannot give us all of
the information we need, we may try,
with your permission, to get it from
your employer or other person who
knows about your work, such as a
member of your family or a co-worker.

* * *

■ 17. Amend § 416.969 by revising the
third sentence to read as follows:

§ 416.969 Listing of Medical-Vocational
Guidelines in appendix 2 of subpart P of
part 404 of this chapter.

* * * We apply these rules in cases
where a person is not doing substantial
gainful activity and is prevented by a
severe medically determinable
impairment from doing vocationally
relevant past work. (See § 416.920(h)
for an exception to this rule.) * * *

■ 18. Amend § 416.967 by revising the
first sentence of paragraph (a)(5)(ii) to read as follows:
§ 416.987 Disability redeterminations for individuals who attain age 18.

§ 416.994 How we will determine whether your disability continues or ends, disabled adults.

(vii) Step 7. If you are not able to do work you have done in the past, we will consider whether you can do other work based solely on your age, education, and past work experience (see paragraph (b)(5)(viii) of this section for an exception to this rule). If you can, we will find that your disability has ended. If you cannot, we will find that your disability continues.

(viii) Step 8. We may proceed to the final step, described in paragraph (b)(5)(vii) of this section, if the evidence in your file about your past relevant work is not sufficient for us to make a finding under paragraph (b)(5)(vi) of this section about whether you can perform your past relevant work. If we find that you can adjust to other work based solely on your age, education, and residual functional capacity, we will find that you are no longer disabled, and we will not make a finding about whether you can do your past relevant work under paragraph (b)(5)(vi) of this section. If we find that you may be unable to adjust to other work or if § 416.962 may apply, we will assess your claim under paragraph (b)(5)(vi) of this section and make a finding about whether you can perform your past relevant work.

PUBLIC COMMENT:

Comment:

Response:

We considered the concerns expressed in these comments, and did not make any changes to the interim final rule. We have summarized the commenters’ views and have responded to the significant comments that are within the scope of the interim final rule.

FOR FURTHER INFORMATION CONTACT:


SUPPLEMENTARY INFORMATION:

Background

As we discussed in the interim final rule, in March 2010 Congress passed the Affordable Care Act, which established an income-related adjustment to Medicare prescription drug coverage premiums. The interim final rule added a new subpart C, Income-Related Monthly Adjustments to Medicare Prescription Drug Coverage Premiums, to part 418 of our rules. Subpart C contains the rules that we use to determine when you will be required to pay an income-related monthly adjustment amount in addition to your Medicare prescription drug coverage monthly premium.

The interim final rule also amended our rules on the Medicare Part B (supplementary medical insurance) income-related monthly adjustment amounts to add section 418.1322. This section explains that if we make an income-related monthly adjustment amount determination for you for the effective year for purposes of the Medicare prescription drug coverage program, we will apply the same income-related monthly adjustment amount determination to your Medicare Part B premium for the same effective year.

PUBLIC COMMENTS

On December 7, 2010, we published an interim final rule with request for comments in the Federal Register at 75 FR 75884 and provided a 60-day comment period. We received one comment from a member of the public, comments from one organization, and joint comments from four other organizations. We carefully considered the concerns expressed in these comments, but did not make any changes to the interim final rule. We have summarized the commenters’ views and have responded to the significant comments that are within the scope of the interim final rule.

Response: We have not adopted this comment because the reduction of Federal premium subsidies was legislated by Congress, and our regulations must conform to the provisions of the law.

Comment: One organization suggested that we provide notices to beneficiaries affected by the income-related monthly adjustment as early as possible, for example, by October 31 for premium adjustments beginning the following January. The commenter stated that early notice would give enrollees time...