

WORKING

Newsletter of the New York Makes Work Pay Initiative · Issue 9 · April 2012

SSDI, Substantial Gainful Activity and the Work CDR

How Work-Related Continuing Disability Reviews are Done How the Work Incentives and Other Protections are Applied

Most readers know about the medical continuing disability review (CDR). Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) beneficiaries are each subject to a periodic medical CDR to determine if their medical condition has improved and, if so, if it still meets the disability criteria to be eligible for continued benefits. We will not discuss medical CDRs in our lead article. (See box on page 4 briefly describing the medical CDR process and resources available on the topic).

There is a second kind of CDR known as the work CDR. This review will often occur independent of the medical CDR if the individual is working or has worked at earning levels that could lead to a finding that the person is performing or has performed substantial gainful activity (SGA).

Depending on the duration of work at the SGA level, this finding could lead to a short-term “suspension” of benefits or a “termination” of entitlement to SSDI.

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against immediate or permanent benefit terminations. We will then explain how the work CDR process is supposed to function and the important things that beneficiaries and their advocates can do to ensure that SSDI benefits are not wrongly suspended or terminated.

This article will not discuss SSI and work, since neither the SGA rule nor the work CDR requirement applies to SSI beneficiaries; it only applies to SSI applicants. When an SSI beneficiary works, SSI payments are gradually reduced based on a benefits calculation formula. (For more details on this topic, see *Supplemental Security Income and Work: A Review of SSI Rules Related to Work Activity*, available at www.nymakesworkpay.org/docs/MIG_Newsletter_4.pdf.)

The Role of Work and SGA at SSDI Application Stage; The Work Incentives for SSDI Beneficiaries

The work CDR is best understood if we first explain several **key concepts**:

-  When earnings equate to the performance of SGA;
-  The effect of SGA-level earnings at the application stage, typically resulting in a denial; and
-  The SSDI work rules and work incentives that can prevent a finding of SGA, protect the beneficiary from an immediate loss of benefits, or allow for reinstatement of benefits when earnings drop below the SGA level.

An SSDI Application is Denied When Countable Earnings are Above the SGA Level

The Social Security Administration (SSA) follows a five-step sequential evaluation process to determine if an individual meets the disability criteria for an award of benefits. The same criteria apply to all SSDI applicants and to SSI applicants over age 18 who are applying as adults. At steps two through five, the inquiry deals with medical issues or a combination of medical and vocational issues. However, at step one SSA looks at whether the individual is working and, if so, whether that work amounts to SGA. If the person has countable wages above the SGA level, a finding of not disabled is made and there is no further inquiry into the severity of the medical condition (the review of evidence stops at step one).

SGA is defined for calendar year 2012 as countable monthly earnings of more than \$1,010, or more than \$1,690 for those with statutory blindness. SSA always looks at gross wages when earned and will allow deductions for paid time off (vacation, holiday, personal and sick pay), impairment related work expenses, and subsidies. (Note: There is no SGA rule in the SSI program for individuals with statutory blindness. Also, some of the SSDI work rules and work incentives will operate differently for individuals with statutory blindness. See *Special SSDI and SSI Rules for Statutory Blindness: These Special Rules Create Extra Work Incentives for Individuals Who are Blind*, available at www.nymakesworkpay.org/docs/MIG_Newsletter_5.pdf).

Several SSDI Work Incentives Protect the Beneficiary From an Immediate and Permanent Loss of Benefits

An SSDI beneficiary who works or returns to work is given a nine-month **trial work period** (TWP). The TWP ends when the beneficiary has nine TWP months within any period of 60 consecutive months (i.e., the TWP months need not be consecutive). During the TWP the beneficiary can earn any amount of money and still qualify for an SSDI payment. After nine TWP months (in 2012, months with \$720 or more in gross earnings; for self-employed individuals, months with \$720 in gross earnings or 80 or more work hours regardless of earnings), the beneficiary enters into the next phase, a new 36-month period known as the **extended period of eligibility** (EPE).

The individual who performs SGA, after the ninth TWP month, by earning more than \$1,010 gross per month in 2012 (\$1,690 if statutorily blind) is said to have a “benefit cessation month.” He or she will receive benefits for three more months, the cessation month and the two subsequent months (called the three-month “grace period”). During the remainder of the EPE, the right to an SSDI check will depend, monthly, on whether the beneficiary’s countable earnings are more than the SGA level (**no** SSDI benefits paid) or at the SGA level or below (SSDI benefits are paid).

The beneficiary who has SGA-level earnings after the EPE will face a “termination” of benefits. Absent a successful appeal, there are only two ways for SSDI benefits to be restored following a termination: through a new applica-

tion that is approved; or through the expedited reinstatement provisions discussed next.

The **expedited reinstatement** provisions, first available to SSDI beneficiaries in 2001, allow for reinstatement of benefits that were terminated if: the termination was based on SGA-level earnings after the 36-month EPE; the beneficiary has either stopped working or now has earnings at or below the SGA level; the beneficiary applies for reinstatement within 60 months of the last EPE month or the last SSDI eligibility month, whichever occurs later; and other criteria is met. (For more information on these rules, see our *Working* newsletter, *Social Security Disability Insurance and Work: A Review of SSDI Rules Related to Work Activity*; *A Discussion of the SSDI Work Incentives Available to Maximize Independence through Work*; and our policy-to-practice brief, *Social Security Disability Insurance, Medicare and Work: A Review of the SSDI and Medicare Rules Related to Work Activity. Guidelines for Proactively Using the SSDI and Medicare Work Incentives to Help Individuals with Disabilities Maximize Independence through Work*. Both documents are available at www.nymakesworkpay.org (follow links for “Resources,” then scroll down to “newsletter” or “policy-to-practice briefs”).



The Work CDR, How Reviews are Processed, Tips for Beneficiaries and their Advocates

This section is written based on SSA policy, on the experience of the authors, and on our conversations with dozens of benefits planners and other advocates over a period of many years.

An Underlying Principle: Beneficiaries Must Timely Report Work and Wages

An SSDI beneficiary must report their wages to SSA, at a minimum, when they start a new job and when their earnings increase or decrease. We would go a step further and tell beneficiaries, unless SSA tells them otherwise, to report their wages monthly. They can submit wage stubs (originals or photocopies) either in-person or through the mail. If pay stubs are mailed we recommend certified mail, signed receipt requested. Many SSA offices are willing to provide beneficiaries with postage-paid envelopes to send in their wage stubs.

When a beneficiary submits pay stubs to SSA, either in person or by mail, SSA is required to provide a written receipt that verifies that wages were reported. SSA's receipt will usually note the pay date(s), the employer(s), the total wages, and the date received. If pay stubs are submitted in person, SSA must generate an immediate receipt and give it/mail it to the beneficiary or individual who reports for the beneficiary. The receipt must be generated within five days if the pay stubs are submitted by mail or fax. We understand that SSA may not always provide receipts as required. Benefits planners and advocates are encouraged to contact both the local SSA office manager and the Area Work Incentives Coordinator if the failure to provide receipts is a persistent problem.

Monthly submission of wage stubs can be important even if there is little or no fluctuation in earnings. First, it provides proof of timely reporting and could show that the beneficiary was not at fault for any later overpayment determination. Second, the documentation of



All SSDI and SSI Beneficiaries will be Subject to a Periodic Medical Continuing Disability Review

The medical CDR will be scheduled based on one or three categories:

- Medical Improvement Not Expected (MINE): SSA will review once every 5 to 7 years.
- Medical Improvement Possible (MIP): SSA will review once every 3 years.
- Medical Improvement Expected (MIE): SSA will review 6 to 18 months following finding of disability.

The purpose of a medical CDR is to determine if the individual's medical condition continues or has improved to the point where he or she no longer meets SSA's disability criteria.

A medical CDR is distinct from a work CDR. The two reviews could occur at the same time or may occur at different times. For more information about medical CDRs, see Medical Continuing Disability Reviews At-a-Glance, available at www.nls.org/ssassi/cdrs.pdf. Ordinarily, when SSA finds that an individual's medical condition has improved and no longer meets the SSDI/SSI disability criteria, benefits will stop. An exception to this is what is known as the section 301 protection, allowing benefits to continue in some cases for the duration of a vocational rehabilitation program that is likely to permanently remove a person from the disability rolls if completed. See The "Section 301" Rule At-a-Glance, available at www.nls.org/ssassi/301%20rule.pdf. **Note:** Section 301 will allow benefits to continue despite medical improvement but will not allow benefits to continue if they are terminated due to performance of SGA.

paid time off on a wage stub (most commercially prepared wage stubs will have it) will allow SSA to precisely calculate what gets deducted from gross wages to determine countable wages. Third, since SGA determinations consider wages “as earned” rather than “as paid,” the pay period ending dates should also help SSA make an accurate determination of the amount earned for each calendar month. (See additional suggestions for beneficiaries in the box, Tips for Tracking Wages, on page 10).



What is a Work CDR?

The work CDR is best described as a review of a beneficiary’s work and wages to determine whether he or she is still eligible for benefits. SSA staff will first look to confirm whether the individual has completed nine TWP months (i.e., in 2012 months with \$720 in gross earnings) and then proceed to determine whether post-TWP earnings amounted to SGA. We explained above that a finding of SGA-level work will result in a temporary “benefits cessation” if it occurs after the TWP but within the 36-month EPE, or will result in a permanent benefits “termination” if SGA occurs after the EPE.



When will SSA Conduct a Work CDR?

SSA policy states that certain “events ... may prompt a work CDR.” Those events include the completion of a trial work period or the receipt of work reports from any number of places, including: a voluntary report from the beneficiary; a report from a state vocational rehabilitation agency (in New York, ACCESS-VR or the Commission for the Blind) typically

submitted to request reimbursement for rehabilitation costs in connection with the Ticket to Work program; a report from an employment network (EN) seeking to justify EN payments under the Ticket to Work program; and a report from any third party notifying SSA that a beneficiary is working. SSA may also be prompted to begin a work CDR when it learns of work activity through data in the Internal Revenue Service (IRS) computer files that are shared with SSA (wage data generally a year or more old), in connection with a new claim that is filed (e.g., SSDI beneficiary now claims eligibility as a disabled widow), through an SSI redetermination, or during a medical continuing disability review.

The Work CDR Process: What to Expect

SSA will initiate the work CDR by sending the beneficiary a “Work Activity Report” form to be completed. The form, SSA-821-BK, is available on SSA’s website at www.ssa.gov/online/ssa-821.pdf. Self-employed beneficiaries will be asked to complete a version of this form for the self-employed, form SSA-820-BK, available at www.ssa.gov/online/ssa-820.pdf. Our discussion focuses on form 821-BK that will be filled out by the majority of beneficiaries who work or worked as employees.

The Work Activity Report form is designed to be completed by the beneficiary, but SSA’s Field Office must assist the beneficiary with completion when asked to do so. If the SSDI beneficiary is being served by a benefits planner (i.e., a work incentives counselor) or other staff from a service provider, that individual may assist with completion of this form. The

Work Activity Report seeks information related to recent employment and will specify a beginning date for the information sought going back one or more years. The form also asks about out-of-pocket costs that may qualify as impairment related work expenses, special conditions on a job that may establish a subsidy, and circumstances related to job loss/reduction in wages that may support a finding of unsuccessful work attempt (see box at p. ..., explaining unsuccessful work attempt criteria). The cover letter requests that the form be completed and returned to SSA within 15 days. It is important that the form is completely filled out and returned timely so that any decision about continued eligibility is made on complete information.

Completing the Work Activity Report Form

Past Employment: The Work Activity Report form requests information on all past jobs within the reporting period, including the name of the employer, mailing address, phone and fax numbers, job title/type of work, starting and ending dates, rate of pay, and average weekly hours. It also asks that pay stubs or gross wage print outs be submitted for each job. For any month where pay stubs or wage print outs are not available, the form asks the beneficiary to indicate gross pay for the month.

Beneficiaries should be encouraged to make a very diligent effort to find as many



Unsuccessful Work Attempts



An unsuccessful work attempt (UWA) is an effort to do substantial work in employment or self-employment which is discontinued or reduced to the non-SGA level after a short time (no more than 6 months) because of the individual's impairment or the removal of special conditions related to the impairment that are essential to the continued performance of work.

The criteria for a work attempt to be considered unsuccessful include:

- A significant break in continuity of work – either not working or work below SGA levels
- Break caused by the disability or removal of “special conditions”
- SGA level work lasting more than 6 months is not UWA.

Work from 1-3 months and work from 4-6 months are viewed differently in UWA determinations.

For one to three month unsuccessful work attempts, the work must have ended or have been reduced to non-SGA level within 3 months due to the impairment or to the removal of special conditions related to the impairment that are essential to the further performance of work. If the work effort did not exceed 3 months and the alleged reason work ended or was reduced has a reasonable relationship to the impairment, then verification of the reason work ended or was reduced is not required.

For four to six month unsuccessful work attempts, the work must have ended or have been reduced to the non-SGA level due to the impairment or to the removal of special conditions and there must have been frequent absences due to the impairment; or the work must have been unsatisfactory due to the impairment; or the work must have been done during a period of temporary remission of the impairment; or the work must have been done under special conditions.

pay stubs as possible for the reporting period. The pay stub is the best source for all the information SSA seeks and should help to establish the actual dollars earned each month and the paid time off for a month (a deduction from gross earnings). If pay stubs are not available for some months, a separate part of the form allows the beneficiary to state the amount of paid time off during those months. Of course, if the beneficiary had earlier established a routine for reporting wages to SSA, retaining pay stubs, and documenting actual days and hours worked, this task would be much easier. For all parts of the Work Activity Report, the beneficiary can expand on information by putting it in the spaces allowed for extra remarks or by submitting supplemental pages.

Impairment Related Work Expenses (IRWEs): IRWEs are expenses paid by the beneficiary and related to their disability or a medical condition for which they receive treatment. To qualify as an IRWE deduction from countable income, the individual must show that he or she could not work without obtaining the item or service. Common IRWEs include copayments for doctor/therapy visits, copayments for prescription drugs, and payments for paratransit transportation to get to and from work. (See Impairment Related Work Expenses At-a-Glance for more detailed information on IRWEs, available at www.nls.org/ssassi/irwes.pdf). The form indicates that the beneficiary may be asked to provide proof of payment for these expenses.

Special Conditions and Subsidies: A subsidy can also be used to reduce countable wages

The Supreme Court's *Walton* Decision: The Effect of Returning to Work Within One Year of Onset of Disability



In the 2002 case of *Barnhart v. Walton*, the Supreme Court held that a claimant who returned to work at the substantial gainful activity (SGA) level within 12 months of onset of disability would not be found disabled, nor be able to take advantage of any trial work or other work incentive provision.

SSA has implemented policies in accordance with the *Walton* decision. Readers must note that similarly situated individuals may face a different outcome depending on whether SSDI or SSI is involved and depending on whether SSA issues a prompt favorable decision or issues the favorable decision only following a long delay or appeal.

Practically speaking, with the long delays for hearings to be scheduled and the ever-increasing pressure from local welfare agencies for claimants to enroll in work programs, applicants may feel forced to attempt work prior to their hearings. Thus, unless you are confident of establishing an onset date prior to the 12 months before the work attempt, you may be well-advised to warn consumers of the dangers of attempting to return to work at the SGA level either before their claims are finally adjudicated or shortly after a favorable decision. Keep in mind, however, that one can always argue when applicable that work attempts were not SGA because they were subsidized, were unsuccessful work attempts, or due to impairment related work expenses.

when measuring them against the SGA level. The form asks the beneficiary about a range of special conditions on the job that could support a finding of subsidy, including: extra help, ex-

Work CDRs and Overpayments

In our lead article, we noted that a work CDR might result in a beneficiary receiving a notice that they had been overpaid as their benefits should have been ceased when they began to perform SGA some time after the trial work period and the three month grace period.

The beneficiary has the right to appeal SSA's overpayment determination and the amount of the overpayment. This can be done by requesting a reconsideration. Requesting a reconsideration challenges the existence of or the amount of the overpayment. Denials, or adverse determinations, of a reconsideration request are appealable and will follow the traditional administrative appeal process.

The beneficiary may also ask that SSA waive its right to recover the overpayment. Requesting a waiver of the overpayment tells SSA, with or without agreeing they were overpaid, that the beneficiary meets the waiver criteria. SSA will waive recovery of an overpayment only if the beneficiary successfully meets a two-part test: the individual must be without fault; and, either the individual would face undue hardship if they had to pay back the overpaid funds or recovery of the overpaid funds would be against equity and good conscience. If the beneficiary requests waiver and SSA denies the waiver request, he or she can appeal the denial by filing a request for reconsideration and then following the traditional appeal process.

A third option for SSDI beneficiaries, even where there is a clear overpayment and no right to a waiver, is to request a reduction of the monthly repayment amount. The beneficiary will use the same form as used for seeking a waiver, SSA-632-BK (available at www.socialsecurity.gov/online/ssa-632.pdf) and document their income and expenses to show an inability to repay at more than a certain rate. In some cases, SSA can reduce to monthly repayment rate to as low as \$10.



tra supervision, or job coach assistance; extra rest periods compared to other workers; fewer and easier duties; and a tolerance for less production than other workers.

Readers should note that this section of the Work Activity Report form does not provide for putting a dollar subsidy value on the special conditions. We, therefore, encourage using SSA's "Work Activity Questionnaire" (form SSA-3033, available at www.ssa.gov/online/ssa-3033.pdf) for the employer to make a statement about the special conditions. If the employer uses this form or a separate letter to indicate the percentage of wages that are subsidized, SSA is ordinarily required to accept this statement as proof of the subsidy. If the beneficiary's position is considered supported employment, including the services of a job coach, a statement from the agency providing the job coach will also be very important.

Unsuccessful Work Attempt (UWA)

A finding that work activity is a UWA will negate a finding of SGA even if earnings were above the SGA level for the period in question. The questions on this section of the Work Activity Report are aimed at the criteria for finding a UWA: that work stopped or wages were reduced below the SGA level; and that this change in earnings was related to the disability or resulted when special conditions that allowed the person to work were removed. It is very important to use the extra space below the questions to explain beneficiary answers (e.g., work stopped/work hours reduced on recommendation of psychiatrist/counselor to reduce work-related

stress; lay off for poor performance following reduction or elimination of job coach services). Here again, the beneficiary is encouraged to have the employer complete SSA's Work Activity Questionnaire, form SSA-3033. Since the UWA section of that form asks only three yes/no questions, we would encourage attaching additional pages to be specific about why the work was stopped or hours reduced. A supplemental letter from a doctor, psychiatrist, or other health professional would also be helpful.

SSA's Possible Determinations –Appeal Rights and Related Topics

Upon completing the work CDR, SSA will make one or more of the following determinations:

- *No SGA, right to SSDI continues.* SSA may determine that there is no SGA, that the beneficiary continues to meet the disability criteria, and that SSDI benefits will continue. What can be confusing for the beneficiary or others working with him or her is that the notice will only say that the person is not performing SGA and will rarely specify whether SSA found certain deductions existed (e.g., paid time off, IRWE) or found the existence of an unsuccessful work attempt.
- *Notice of Proposed Decision.* If SSA believes that the right to SSDI ended or should have been suspended, due to earnings above the SGA level, it will explain this in a proposed decision. The notice will detail: when it appears that the disability ended because of SGA; the past months of ineligibility; the information they are relying upon, including signed Work Activity Report, SSA earnings records, and wage information from the

employer; and the employers and employment dates. The notice will then tell the beneficiary what it plans to do (e.g., suspend or terminate benefits as of a certain date) and will inform the beneficiary that they have 10 days within which to provide SSA new or additional information to suggest that the proposed decision is wrong.

This is the beneficiary's opportunity to provide information that might change the proposed decision, including information to: challenge the accuracy of wage records or job history; support the existence of deductions from gross earnings (i.e., paid time off, IRWEs, subsidies); or provide information to support a finding of unsuccessful work attempt. If the beneficiary submits nothing within the 10-day period, it is almost guaranteed that he or she will get a notice of cessation or termination.

- *Notice of Cessation or Termination.* This notice generally uses the terminology "your disability has ended" to describe either a "benefits cessation" with SGA occurring within the extended period of eligibility, or a "benefits termination" with SGA occurring after the EPE. This language totally confuses beneficiaries who will note that their disability has not ended; they just happen to be working despite their disability. It will provide the same detail as the Notice of Proposed Decision, but this time in a final decision. Importantly, the notice advises the beneficiary of the right to request a hearing within 60 days to challenge the decision if he or she chooses to challenge any part of the decision.





Additional Tips for Beneficiary Tracking of Wages

Both SSDI and SSI beneficiaries are required to report wages to SSA. To meet this requirement, beneficiaries should develop a routine for collecting pay stubs, submitting them to SSA, and then storing them for later retrieval when necessary. One tool for doing this is the "Work and Wages Calendar" developed by Neighborhood Legal Services in Buffalo. This calendar was developed several years ago to help beneficiaries keep track of their wages and work hours.

Each month, the calendar is set up to prompt the individual to track the number of hours they work each day, whether their rate of pay has changed, the existence of overtime or bonuses, and any paid time off. The back of the calendar has a pocket for inserting monthly wage stubs. Also, instead of having pictures of mountain scenery or golden retrievers, each month has a key summary of an important issue related to benefits and work or related issues.

We have a very small number of extra 2012 calendars that we can make available to readers (one per agency or beneficiary while extra supplies last). Call our toll-free number, 1-888-224-3272, if you would like a copy of the calendar. We know that this calendar has been individualized and reproduced by other agencies from New York and throughout the country.

- *Notice of Overpayment.* This will be a separate notice that will usually be sent to the beneficiary weeks or even months after the cessation/termination decision if the beneficiary received benefits for any months in the past when he or she was not eligible. This notice will inform the beneficiary of: the right to challenge all or part of the overpayment determination by filing a request for reconsideration within 60 days; and the right to request a waiver of SSA's right to recover the overpayment or a reduction in repayment amount (no time limit for requesting waiver or reduction in payment amount). (See box on page 8 for a very brief discussion of rights related to overpayments. We will not discuss rights related to overpayments in more detail, but refer the reader to other key resources: *Overpayments and the Return to Work: A Practical Guide to Benefits Planners and Advocates*, available at www.nymakes-workpay.org/docs/OverpaymentRay09.pdf; *Seeking a Waiver of a Social Security or SSI Overpayment: A Practical Guide to Advocates and Beneficiaries*, available at www.nls.org/planner/winter-05-06.pdf).



For more information on this topic see **Work and Reporting obligations At-a-Glance**, available at www.nls.org/ssassi/work%20reporting.pdf.





**TOLL-FREE Work Incentives Hotline
available statewide!**

1-888-224-3272



Conclusion

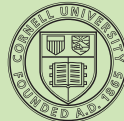
SSDI beneficiaries will face many challenges as they attempt to move from full dependence on benefits to greater levels of independence and financial self-support through working. Many beneficiaries will successfully transition through work from receiving SSDI benefits to no longer needing SSDI benefits. These successful beneficiaries will have SSDI benefits

terminated following a work CDR. A key challenge for beneficiaries, along this road to self-support, is the need to understand the SSDI work rules, work incentives, and how the work CDR will affect them as they move toward these goals.

The goal of this article is to maximize the knowledge of the beneficiary and those who work with the beneficiary during the key periods such as the trial work period and extended period of eligibility. Armed with this important knowledge and, we hope, the ongoing support of a benefits planner, the beneficiary can approach these situations knowing what they can expect to happen to their benefits and armed with the information needed to proactively assert their rights under the work incentives discussed in this and other publications of the NY Makes Work Pay Project. The complexity of these issues makes the ongoing support of a benefits planner a key to the beneficiary's success in most cases.

New York Makes Work Pay Partnering Organizations

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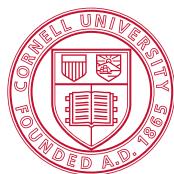
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