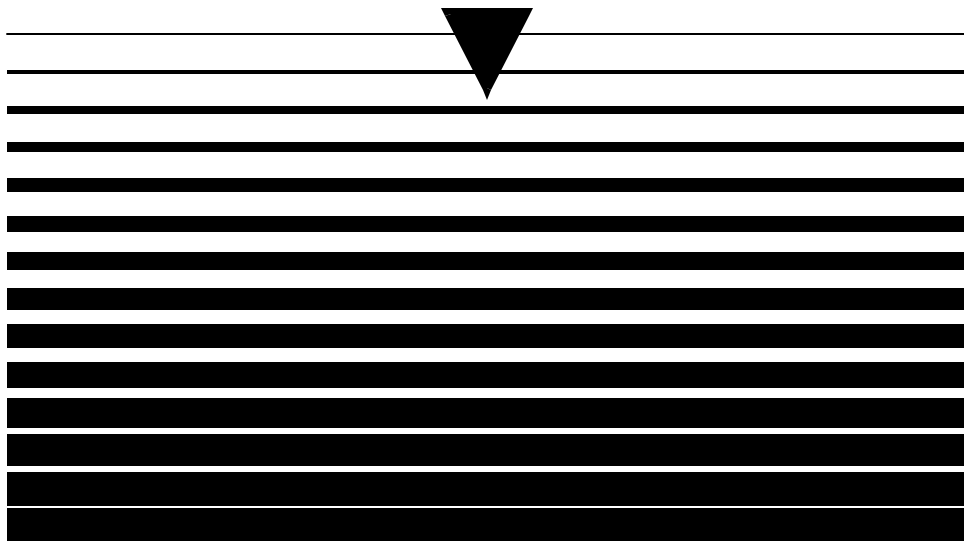


Work Incentives for Persons with Disabilities Under the Social Security and SSI Programs

National Assistive Technology Advocacy Project
Neighborhood Legal Services, Inc. - Buffalo, N.Y.

Second Edition - August 2002



Work Incentives for Persons with Disabilities Under the Social Security and SSI Programs

James R. Sheldon, Jr., Author

Supervising Attorney
National Assistive Technology Advocacy Project
Neighborhood Legal Services, Inc.
295 Main Street, Room 495
Buffalo, New York 14203
716.847.0650
FAX: 716.847.0227
TDD: 716.847.1322
Email: jsheldon@nls.org
www.nls.org

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Preface

This version of the publication, *Work Incentives for Persons with Disabilities Under the Social Security and SSI Programs*, is published through the National Assistive Technology (AT) Advocacy Project as part of its Funding of AT booklet series. Information about the AT Advocacy Project and the federal grant which supports it appears in the Publication Credits and Disclaimer on page iii, below.

The Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) work incentives are a means to retain both cash benefits, SSI and SSDI, and health insurance benefits, Medicaid and Medicare, when a person with a disability goes to work or increases his or her work activity. Readers may wonder why a publication on SSI and SSDI work incentives is included in our funding of AT booklet series. How do the work incentives play a role in ensuring that individuals with disabilities have access to a full range of AT devices and services? What can be done, by proactive use of the work incentives, to ensure that AT is available to SSI and SSDI beneficiaries as they are preparing for and going to work?

This preface seeks to emphasize why so many of these work incentives are important when trying to ensure funding for AT. The starting point for that discussion begins with Medicaid and Medicare. As most AT advocates know, Medicaid in most states pays for more AT than any other funding source. Both children and adults with disabilities regularly rely on Medicaid to fund such items as custom and power wheelchairs, augmentative and alternative communication (AAC) devices, specialized beds, bath equipment, high and low-tech lifting devices, and a range of the latest technology that allows individuals to overcome the severe effects of their disabling conditions. Medicare, though more limited than Medicaid and imposing a 20 percent copayment under its Part B payment scheme, will also pay for specialized wheelchairs, AAC devices, and many of the other items.

As we note in the booklet in section II, Medicaid is automatic for SSI beneficiaries in 39 states and the District of Columbia, and Medicare is automatic for all SSDI beneficiaries after 24 months of eligibility (with Part B optional and subject to a premium). For this reason, any work incentive that allows SSI to continue guarantees continued Medicaid in most states; a work incentive that allows SSDI to continue should guarantee continued Medicare in all cases. When Medicaid or Medicare continue for persons going to work, the individual with a disability is guaranteed a continued payment source for a wide range of AT devices. This is important since employer-funded health insurance, if available, will often not cover the more expensive AT.

Some of the work incentives have a much more specific connection to AT. For example, in the SSDI program, money from wages that is paid for impairment related work expenses can be deducted from gross monthly wages to bring them below the SSDI program's substantial gainful activity amount (\$780 per month in 2002) to ensure continuation of the benefit. In section IV.C.3, we provide examples of AT-related expenses that can be used in this manner. Similarly, impairment related work expenses for AT-related items can be used in the SSI program to reduce countable income when calculating the SSI payment amount. Illustrations of this are included in section V.A.2. For individuals who are legally blind, AT-related items can dramatically reduce countable earned income, in the SSI program, through a category called blind work expenses. Illustrations of the use of blind work expenses are included in section V.A.4.

The special rules that allow continuation of Medicaid and Medicare after SSI or SSDI have been terminated due to work activity are even more important. These provisions, by allowing for continued health insurance coverage at very high earnings levels, have the effect of encouraging individuals with disabilities to work up to their full potential. In fact, many individuals with disabilities have cited the high cost of AT-related items as a reason they would not be able to work to their potential if not for Medicaid work incentives like section 1619(b)(see section V.B.) or the optional Medicaid Buy-In (see section VI.). Likewise, the Extended Medicare provision, enhanced by the Ticket to Work and Work Incentives Improvement Act of 1999 (see section IV.H.), allows SSDI beneficiaries to plan their work goals knowing there will be a continued payment source for expensive AT-related items.

The use of work incentives to fund AT is just one of the important features of this body of SSI and SSDI rules. Since many persons with disabilities who use AT will also rely on Medicaid, for example, to pay for items like home health care services, prescription drugs, and physical therapy, the ability to retain Medicaid while working takes on even greater significance. This is true for some of the other work incentives, like impairment related work expenses or blind work expenses which can be used to help pay for a very wide range of disability related items. Finally, the general body of rules governing work and benefits will be important to all persons with disabilities who must look for ways to retain cash benefits or a portion of them as they move toward full financial independence.

Publication Credits and Disclaimer

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*The National AT Advocacy Project provides technical assistance, training, and a range of other support services, nationwide, to attorneys and advocates who work at Protection and Advocacy programs and specialize in assistive technology issues. For access to our many publications, you can go to our website at www.nls.org/natmain.htm.

A Listing of Acronyms and Abbreviations

209(b) State	State which uses its own eligibility criteria to determine if an SSI recipient is eligible for Medicaid
1619(a)	SSI rule that allows individual to remain qualified for SSI despite wages of more than the monthly substantial gainful activity amount
1619(b)	SSI rule that allows individual to remain qualified for Medicaid if budgeting of wages results in termination of SSI cash benefits
ADA	Americans with Disabilities Act
AT	Assistive technology
CDR	Continuing Disability Review
C.F.R.	Code of Federal Regulations
EPE	Extended Period of Eligibility
IRWE	Impairment Related Work Expense
PASS	Plan for Achieving Self Support
POMS	Social Security Program Operations Manual System
SGA	Substantial gainful activity
SSA	Social Security Administration
SSDI	Social Security Disability Insurance
SSI	Supplemental Security Income
SSR	Social Security Ruling
Ticket (or Ticket to Work)	Refers to the Ticket to Work and Self Sufficiency Program
TWP	Trial Work Period
U.S.C.	United States Code
VR	Vocational rehabilitation

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Work Incentives for Persons with Disabilities Under the Social Security and SSI Programs

I. Introduction

As we move into the early years of the 21st Century, work for persons with disabilities should be more of a reality than ever before. Recent amendments to federal vocational rehabilitation regulations,¹ more and better work-related assistive technology, and a decade of life under the Americans with Disabilities Act² should all contribute to a better employment picture for persons with disabilities.

Work has not been the reality for persons with disabilities who are beneficiaries under the Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) programs.³ Despite this better atmosphere for work, the number of beneficiaries who leave the SSDI or SSI rolls because of work activity has remained at less than one half of one percent of all beneficiaries.⁴ A major reason for this is a fear that work will result in the loss of cash benefits and health care coverage. Beneficiaries also fear that it will not be easy to reinstate cash benefits if a work attempt fails or they must reduce work hours because

of a disability. Congress and the Social Security Administration (SSA) have, during the past three years, addressed these fears through the Ticket to Work and Work Incentives Improvement Act of 1999⁵ and several key regulatory changes.

This article presents a detailed discussion of work incentives under the SSDI and SSI programs, including the newest statutory and regulatory changes.⁶ The term “work incentives” describes the body of SSDI, SSI, Medicare and Medicaid rules created by Congress and SSA to encourage work activity. These rules, in many cases, allow individuals to retain cash and health-related benefits for prolonged periods of time as they move toward greater levels of financial independence. One key incentive not covered is SSI’s Plan for Achieving Self Support (PASS), which allows individuals to exclude income and resources that would otherwise affect SSI eligibility or payment amounts, when the money is used to meet a vocational goal.⁷ Another key SSI incentive not covered is the rules which allow

¹See amendments to 34 C.F.R. Part 361, published as final regulations at 66 Fed. Reg. 4380 (Jan.17, 2001).

²42 U.S.C. §§ 12101 *et seq.*

³See *id.* §§ 402(d), (e), (f), 423 and 1381 *et seq.* SSDI will be used to refer to all Social Security disability categories, including disability insurance benefits, child’s insurance benefits, and widow’s/widower’s insurance benefits.

⁴*Id.* § 1320b-19(a)(8).

⁵Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860 (codified mostly in 42 U.S.C. §§ 1320b-19 *et seq.*; parts of the Act amended other preexisting statutory provisions in scattered sections of 42 U.S.C.).

⁶For a more comprehensive discussion of many of these issues, see EDWIN J. LOPEZ-SOTO ET AL., *BENEFITS MANAGEMENT FOR WORKING PEOPLE WITH DISABILITIES: AN ADVOCATE’S MANUAL* (Edwin J. Lopez-Soto & James R. Sheldon, Jr. eds.) (Greater Upstate Law Project 2002).

⁷42 U.S.C. §§ 1382a(b)(4)(A)(iii) and (B)(iv), 1382b(a)(4); 20 C.F.R. §§ 416.1180 *et seq.*; SOCIAL SECURITY PROGRAM OPERATIONS MANUAL SYSTEM (POMS) SI 00870.001 *et seq.* For a more thorough discussion of the PASS, see EDWIN J. LOPEZ-SOTO ET AL. *supra* note 6, ch. 4; James R. Sheldon, Jr. & Edwin J. Lopez-Soto, *PASS: Supplemental Security Income’s Plan for Achieving Self Support*, 30 CLEARINGHOUSE REV. 1101 (Mar.-Apr. 1997).

for Property Essential for Self Support (PESS) to be excluded from counting as a resource when it is considered essential to an individual's means of self support.⁸ In light of the many changes to law and regulations discussed, this article should be viewed as replacing the author's previous publications on work incentives.⁹

Legal services and protection and advocacy attorneys and advocates will see work incentive issues arise in several contexts. Enforcement of these provisions may come up in the context of an appeal challenging the denial or termination of benefits based on a finding that the individual performed substantial gainful activity.¹⁰ Work incentives issues may also come up in appeals challenging work-related SSDI or SSI overpayments, in which the myriad of rules discussed in this article are often not properly implemented. Use of the work incentives, in an appeals context, is important to ensure initial and continuing eligibility for benefits.

Legal services and protection and advocacy staff should also be looking to help SSDI and SSI beneficiaries use the work incentives more proactively, to help pave the way to greater self sufficiency. Congress recognized this need when it enacted the Ticket to Work and Work Incentives Improvement of 1999, by creating the Benefits Planning, Assistance and Outreach and Protection and Advocacy for Beneficiaries of Social Security projects in every state.¹¹ In many parts of the country, legal services staff are now joining networks which include staff from these projects and SSA offices to work together to better inform beneficiaries and the agencies working with them, so that beneficiaries can best use

the work incentives as tools for successful employment. The author, along with colleagues from his office, is part of such a network in Western New York. The author hopes this article can be used as a reference by legal services programs, protection and advocacy programs, and others as they handle individual appeals and more proactively help beneficiaries eliminate or limit their dependence on benefits.

II. Background on Social Security and SSI, Medicare and Medicaid

Since the work incentives vary greatly between SSDI and SSI, it is important to distinguish the two programs. It is also important to distinguish Medicare and Medicaid.

SSDI is an insurance program. To qualify, one must meet an "insured status" test, i.e., a wage earner must have paid into the social security trust fund.¹² Both the wage earner and his or her dependents may be eligible for benefits.¹³ Current earnings will not affect the SSDI check amount, but may affect whether the person is considered disabled.¹⁴

Medicare¹⁵ is most frequently associated with social security. Adults with disabilities can establish eligibility in four ways: 1) after 24 months of SSDI eligibility; 2) after 24 months of eligibility for Railroad Retirement disability benefits; 3) if suffering from kidney disease and not receiving SSDI, upon entering end stage renal disease or developing an impairment

⁸See 20 C.F.R., §§ 416.1210(d), 416.1222 (regarding property of a trade or business) and 416.1210(e), 416.1224 (non business property). See also, POMS SI 01130.500.

⁹See James R. Sheldon, Jr., *Work Incentives for Persons with Disabilities Under the Social Security and SSI Programs*, 28 CLEARINGHOUSE REV. 236 (July 1994); James R. Sheldon, Jr., *WORK INCENTIVES FOR PERSONS WITH DISABILITIES UNDER THE SOCIAL SECURITY AND SSI PROGRAMS: USING THE WORK INCENTIVES TO FUND ASSISTIVE TECHNOLOGY AND MAKE WORK A REALITY* (Neighborhood Legal Services, Inc. 1999).

¹⁰See part III.A, *infra*.

¹¹See 42 U.S.C. §§ 1320b-20(a)(2) and 1320b-21.

¹²*Id.* § 423(c).

¹³See, e.g., *id.* § 402(d) (Child's Insurance Benefits).

¹⁴See part III.A, *infra*.

¹⁵42 U.S.C. §§ 1395 *et seq.*

that requires regular dialysis or kidney transplantation to maintain life¹⁶; or 4) as a Medicare-Qualified Federal Employee.¹⁷

A Medicare beneficiary qualifies automatically for Medicare Part A, known as hospital insurance benefits. It covers such things as inpatient care and skilled nursing facility care.¹⁸ Part B, supplemental medical insurance, is optional and requires payment of a monthly premium (\$54 per month in 2002). It covers community-based services, including physician services, durable medical equipment, prosthetic devices, and home health services.¹⁹

SSI is for individuals with limited income and resources. It can be a person's only source of income or, as its name suggests, supplement other income, such as SSDI. Because SSI is needs-based, income is always relevant in determining the amount of the monthly check. However, once approved for SSI, the amount of earnings will not affect the determination of whether a person continues to be disabled.²⁰

Medicaid,²¹ like SSI, is needs-based. In 39 states and the District of Columbia, a person who receives SSI automatically qualifies for Medicaid.²² In the 11 section 209(b) states, eligibility is not automatic for SSI beneficiaries. These states use their own Medicaid eligibility criteria, which differs from SSI criteria.²³ States which exercise the 209(b) option include: Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, and Virginia.²⁴

III. Major Work Disincentives

SSDI and SSI recipients, their advocates, and other professionals who work with them often approach the subject of competitive employment with great fear. They fear loss of cash benefits, loss of health insurance coverage, and — should a work attempt fail — the time-consuming reapplication process. For those heavily dependent on Medicaid to fund home health care services or expensive assistive technology devices, like power wheelchairs, the loss of health care coverage could keep them from leaving their home to go to work.

There is no foolproof way to allay every fear. But numerous work incentives, discussed below, allow one relief from the fears, either temporarily or, in some cases, permanently. First, however, we will review two major disincentives that cause these fears.

A. The Substantial Gainful Activity Rule

For persons who are not legally blind, the general rule is that average earnings of more than \$780 per month amount to substantial gainful activity (SGA) in 2002.²⁵ Absent application of the rules discussed in sections IV and V, below, a person averaging more than \$780 per month would be denied SSDI or SSI as an applicant, or SSDI would be terminated if already receiving benefits. Effective January 1, 2001, if average monthly earnings are equal to or less than the SGA amount for the year in question, SSA will generally not con-

¹⁶*Id.* §§ 426(b), 426-1, 1395c, 1395rr.

¹⁷POMS HI 00835.001 *et seq.*

¹⁸42 U.S.C. § 1395d.

¹⁹*Id.* §§ 1395j, 1395k.

²⁰*See* part V.B, *infra.*

²¹42 U.S.C. §§ 1396 *et seq.*

²²*Id.* § 1396a(a)(10)(A)(i).

²³*Id.* § 1396a(f).

²⁴POMS SI 01715.020.

²⁵20 C.F.R. §§ 404.1574, 416.974; Social Security Ruling (SSR) 83-33 ; POMS DI 10501.000 *et seq.* For self-employed persons, *see* 20 C.F.R. §§ 404.1575, 416.975; SSR 83-34; POMS DI 10510.001 *et seq.* The SGA amount was increased from \$500 to \$700 per month, effective July 1, 1999, and increased to \$740 for calendar year 2001. *Id.* DI 10501.015 A.

sider information other than a person's earnings to determine if he or she is performing SGA. Prior to 2001, if average earnings were between \$300 and the SGA amount for the year in question, SSA was required to individually evaluate the person's work to see if it indicated that he or she was performing SGA.²⁶

SSA annually adjusts the SGA amount for individuals who are not legally blind based on the National Wage Index. The SGA amount will increase if the previous year's index has increased. If the index stays the same or goes down, the SGA amount for the previous year will continue unchanged.²⁷

For the SSDI applicant or beneficiary who is legally blind, monthly earnings of more than \$1,300 are considered to be SGA in 2002.²⁸ That amount will also be adjusted annually, based on the National Wage Index.²⁹ There is no SGA rule for the blind in the SSI program.³⁰ The U.S. Court of Appeals for the Tenth Circuit has held that social security's statutes and regulations, allowing persons who are blind a higher SGA threshold than allowed for other disabilities, do not violate the U.S. Constitution's equal protection clause.³¹

B. Continuing Disability Reviews and the Medical Improvement Standard

Many fear that work increases the likelihood of a continuing disability review (CDR) and a resulting termination of benefits. Indeed, many advocates and rehabilitation professionals have discouraged work for this reason. Rather than discouraging work activity, advocates should ensure that the beneficiary understands the potential impact of work on benefits so that he or she can make informed choices about work and use of the work incentives. They must also en-

sure that beneficiaries are aware of new provisions that will eliminate CDRs in some circumstances.

A medical CDR will occur whether or not the person is working, based on three classifications:

- (1) Medical Improvement Not Expected: Reviewed every five to seven years.
- (2) Medical Improvement Possible: Reviewed every three years.
- (3) Medical Improvement Expected: Reviewed six to 18 months after initial entitlement.³²

Generally, benefits will be terminated, following a CDR, only if a medical improvement enables the person to engage in SGA. Several exceptions are noteworthy and allow termination of SSDI or SSI without medical improvement when:

- (1) there is no medical improvement, but the person is now able to engage in SGA because he or she is a beneficiary of advances in medical or vocational therapy or technology; or
- (2) new or improved diagnostic techniques or evaluations show that the impairment(s) are not considered as disabling as when the person's case was most recently reviewed; or
- (3) substantial evidence shows that a prior determination was in error.³³

If a beneficiary works, will improvement be implied? The only cases where it is clear the disability has not improved will

²⁶20 C.F.R. §§ 404.1574(b)(6)(i) & (ii), 416.974(b)(6)(i) & (ii).

²⁷*Id.* §§ 404.1574(b)(2)(ii), 416.974(b)(2)(ii).

²⁸*Id.* § 404.1584(d); POMS DI 10501.015 C.

²⁹20 C.F.R. § 404.1584(d)(3).

³⁰*Id.* § 416.984.

³¹*Spragens v. Shalala*, 36 F.3d 947 (10th Cir. 1994), *cert den.* 514 U.S. 1035 (1995).

³²42 U.S.C. § 421(i); 20 C.F.R. §§ 404.1590(d), 416.990(d).

³³42 U.S.C. §§ 423(f), 1382c(a)(4).

be those which continue to meet a “listing.” The Listing of Impairments contains 14 disability categories and criteria under each category which will support a finding of disability without further analysis of ability to work.³⁴ Since meeting a listing results in an automatic finding of disability, a medical improvement termination could not occur.³⁵ More challenging cases are those involving mental illness or pain. Since mental illness and pain symptoms are not easily quantified, work might be viewed as evidence of improvement. As explained in the next section, however, for many SSDI beneficiaries work activity can no longer be viewed as evidence of medical improvement.

1. Work-Triggered CDR Eliminated

Prior law authorized a CDR after an SSDI beneficiary completed nine trial work months.³⁶ This work-triggered CDR was eliminated effective January 1, 2002 for persons who have been entitled to SSDI for at least 24 months. For them, no CDR may be scheduled solely as a result of work activity. Work activity may not be used as evidence that a person is no longer disabled and cessation of work may not give rise to a presumption that a person is unable to work. Persons affected by this section are still subject to regularly scheduled CDRs that are not triggered by work and will be subject to termination of benefits if they perform SGA.³⁷

2. No CDR While Using a “Ticket”

In most cases, during the period in which an SSDI or SSI beneficiary is using a “ticket,” or voucher for rehabilitation services under the new Ticket to Work and Self-Sufficiency Program, SSA may not initiate a CDR to determine if the individual is no longer disabled.³⁸ The final ticket regulations were published on December 28, 2001 and were effective on January 28, 2002.³⁹ The ticket program will be implemented in 13 states in early 2002; in 20 more states and the District of Columbia later in 2002; and in the remaining 17 states and five territories in 2003.⁴⁰

3. Continuation of Benefits for Persons in Vocational Rehabilitation Programs

A special rule protects persons who medically improve after beginning a vocational rehabilitation program approved by SSA.⁴¹ This is often referred to as “section 301” because it was enacted as section 301 of the Social Security Amendments of 1980.⁴² It protects persons who participate in any vocational rehabilitation program which SSA approves, not just those developed by a state vocational rehabilitation agency.⁴³ Typically, it applies to persons who medically improve while attending a college or other training program.

³⁴20 C.F.R. Part 404, Subpart P, App. 1. See, e.g., Listings 2.02, 2.03 (legal blindness), 2.08 (hearing impairments), 11.07 (cerebral palsy), and 12.05 (mental retardation) in appendix, *id.*

³⁵Benefits can still be terminated, without medical improvement, if an SSDI beneficiary performs SGA following a trial work period. See parts III.A, *supra*, and IV, *infra*.

³⁶See former 20 C.F.R. § 404.1590(b)(4). The trial work period is discussed in part IV.D, *infra*.

³⁷Ticket to Work and Work Incentives Improvement Act of 1999, § 111, 42 U.S.C. § 421(m)(1); SSA Emergency Message, EM-0129 (Dec. 20, 2001).

³⁸Ticket to Work and Work Incentives Improvement Act of 1999, § 101(b)(1), 42 U.S.C. §§ 421(i)(5), 1320b-19(i).

³⁹20 C.F.R. Part 411, 66 Fed. Reg. 67370-67442 (Dec. 28, 2001). See 20 C.F.R. § 411.125(a)(3)(ii), providing that individuals classified as medical improvement expected are not eligible for the ticket program (and cannot benefit from this protection against CDRs) until they are found to still be disabled after at least one CDR.

⁴⁰66 Fed. Reg. 67372.

⁴¹42 U.S.C. §§ 425(b), 1383(a)(6); 20 C.F.R. §§ 404.316(c), 416.1338; POMS DI 13515.001 *et seq.*

⁴²Social Security Amendments of 1980, Pub. L. No. 96-265, § 301(b), 94 Stat. 441.

⁴³See 1990 Social Security Act amendments, Pub. L. No. 101-508, § 5113, 104 Stat. 1388-273. The current law protects any beneficiary “participating in a program consisting of the [Ticket] Program . . . or another program of [VR] services, employment services, or other support services, approved by [SSA].” 42 U.S.C. §§ 425(b)(1), 1383(a)(6)(A). See POMS DI 60050.003 concerning SSA’s policy for approving non-state VR programs.

The law provides two requirements for continued SSDI or SSI eligibility: (1) participation must be in the Ticket to Work program or another SSA-approved vocational rehabilitation program, and (2) participation must increase the likelihood of permanent removal from the disability rolls. SSA's regulations add the requirement that the program must have started before the disability ceased.⁴⁴

This protection extends to child SSI beneficiaries who, at age 18, will have their claims reviewed for eligibility under adult disability criteria. Although age 18 redeterminations are to be based on adult criteria, the SSI beneficiary under review must be afforded the same right to continued benefits as are other persons being reviewed for medical improvement under a traditional CDR.⁴⁵

IV. Work Incentives and SSDI

Since the work incentives vary greatly between SSDI and SSI, the two programs are discussed separately. With SSDI, the SGA rule applies to both applicants and beneficiaries. When it applies, it results in either a denial or termination of benefits. Under the sequential process for evaluating SSDI eligibility, a person who is performing SGA is not considered disabled.⁴⁶ All examples in this section use the 2002 monthly SGA amount of \$780 for persons who are not legally blind.

There are six ways to avoid or limit the application of the SGA rule. First, wages of more than \$780 create a presumption of SGA which may be rebutted by evidence concerning how well the person performs the work. Second, the rule does not apply, in many instances, when the

average monthly wage is \$780 or less. Third, the rule does not apply if the person is not earning more than \$780 per month in "countable wages." Fourth, earnings of more than \$780 can be disregarded under trial work period rules. Fifth, a person who loses SSDI by performing SGA after a trial work period can return to benefits status during the extended period of eligibility when countable wages for a month are at or below the SGA level. Sixth, the new expedited reinstatement provisions allow SSDI to be reinstated in many cases, after the extended period of eligibility, if countable earnings are reduced below the SGA level.

All of the work incentives, with the exception of section 301,⁴⁷ assume the beneficiary continues to be disabled. If a person medically improves and regains the capacity for SGA, benefits can be terminated even if countable earnings are equal to or less than the SGA amount.

A. "Rebuttable Presumption" of SGA When Earnings Exceed \$780.

The SSDI regulations state that earnings above \$780 per month "will ordinarily show that [the claimant has] engaged in substantial gainful activity."⁴⁸ In addition to looking at wages, SSA must look at the nature of work performed, the adequacy of performance, any special employment conditions, and the amount of time spent working.⁴⁹ Several courts have held that wages above \$780 create only a rebuttable presumption of SGA.⁵⁰

⁴⁴20 C.F.R. §§ 404.316(c), 416.1338.

⁴⁵SSA Emergency Message, EM-99079 (Aug. 10, 1999)

⁴⁶20 C.F.R. §§ 404.1520(a), (b), 416.920(a), (b).

⁴⁷See part III.B.5, *supra*.

⁴⁸20 C.F.R. § 404.1574(b)(2)(emphasis added).

⁴⁹*Id.* § 404.1573.

⁵⁰See, e.g., *Boyes v. Secretary of HHS*, 46 F.3d 510, 512 (6th Cir. 1995); *Corrao v. Shalala*, 20 F.3d 943, 948 (9th Cir. 1994); *Payne v. Sullivan*, 946 F.2d 1081, 1083 (4th Cir. 1991); *Thompson v. Sullivan*, 928 F.2d 276, 277 (8th Cir. 1991); *White v. Heckler*, 740 F.2d 390, 394 (5th Cir. 1984); *Nazarro v. Callahan*, 978 F.Supp. 452 (W.D.N.Y. 1997); *Case v. Sullivan*, 810 F. Supp. 52, 56-57 (W.D.N.Y. 1992); *Goldstein v. Harris*, 517 F. Supp. 1314, 1317 (S.D.N.Y. 1981).

B. Income Averaging

If earnings are not constant, an SSDI applicant must sustain earnings averaging more than \$780 before earnings are equated with SGA. If work is steady and continuous, wages are averaged over the entire work period; if seasonal or sporadic, only the work months are counted in determining the average.⁵¹ When wages being averaged span a period during which the SGA levels change, SSA will average separately for each period in which a different level applies.⁵²

Two examples illustrate these rules.

Bill applies for SSDI in November 2002. He claims he became disabled in January 2002, the month he reduced his work hours because of his disability. When he applies, Bill's earnings for the 10-month period, January through October 2002, averaged \$750 (i.e., below the 2002 SGA amount of \$780). He is not performing SGA and his application will not be denied on that basis. He can establish disability as of January 2002 if he was medically disabled in January.

Now let's assume Bill applies in June 2002 and has wages for the 10-month period, August 2001 through May 2002, as follows:

8/01 - \$700	1/02 - \$840
9/01 - \$820	2/02 - \$680
10/01 - \$760	3/02 - \$820
11/01 - \$680	4/02 - \$760
12/01 - \$840	5/02 - \$700

Average earnings through December 2001 were \$760 (i.e., more than the 2001 SGA level of \$740). Average earnings for January through May 2002 were \$760 (i.e., less than the 2002 SGA level of \$780). Based on these facts, Bill's application will likely be denied for the period through December 2001, as he was performing SGA. For the period begin-

ning January 2002, since average earnings were below the SGA level, Bill's application for that period will not be denied on the basis of SGA.

1. Not Applicable During SSDI's Trial Work Period

During the nine-month trial work period, income averaging will not apply. The SSDI beneficiary is entitled to keep the benefit check each month no matter how high earnings are.⁵³

2. Applicable During the Extended Period of Eligibility to Determine the Benefit Cessation Month.

During the 36-month period immediately following the TWP, the extended period of eligibility, the person will be entitled to an SSDI check for each month that wages are at or below the SGA level.⁵⁴ The first month during the extended period of eligibility that gross earnings are above the SGA level will be considered the "cessation month." The person will receive benefits for that month and the following two months (i.e., during a three-month "grace period"). Thereafter, the person qualifies for a check only if countable earnings are at or below the SGA amount. Averaging rules will apply to determine the first time SGA occurs within the extended period of eligibility, but will not apply following the three-month grace period.⁵⁵

3. Not Applicable After the Extended Period of Eligibility

SSA will only average earnings in deciding an application and during the extended period of eligibility to determine the benefit cessation month. Following the extended period of eligibility, one month of countable earnings above the SGA level will be enough to terminate benefits.⁵⁶

⁵¹SSR 83-33, SSR 83-35; POMS DI 10505.015.

⁵²20 C.F.R. §§ 404.1574a(b), 404.974a(b).

⁵³See part IV.D, *infra*.

⁵⁴See part IV.E., *infra*.

⁵⁵POMS DI 13010.210.

⁵⁶20 C.F.R. § 404.1574a(d).

This policy was a matter of controversy for many years and led to litigation. In *Conley v. Bowen*, the U.S. Court of Appeals for the Second Circuit ruled that SSA may not terminate benefits unless average monthly wages exceeded the SGA amount following the end of the extended period of eligibility.⁵⁷ This resulted in a separate averaging rule in the Second Circuit states of New York, Connecticut and Vermont pursuant to an SSA “acquiescence ruling.”⁵⁸

This controversy seems to be eliminated by the new expedited reinstatement provisions that were effective on January 1, 2001.⁵⁹ Now, even though benefits can be terminated after one month of SGA, benefits can be quickly reinstated if earnings drop below the SGA level and other EXR criteria are met. In light of the new expedited reinstatement provisions, the *Conley* acquiescence ruling was rescinded.⁶⁰

4. Unsuccessful Work Attempt

Even if average earnings are above the SGA level, this may be considered an unsuccessful work attempt if work is discontinued or reduced to the non-SGA level after less than six months.⁶¹ Unsuccessful work attempt criteria differ depending on whether the work effort was for three months or less or for three to six months. The work is considered to be an unsuccessful work attempt if it ended or was reduced to the non-SGA level within three months due to the impairment or to the removal of special conditions related to the impairment that are essential for the further performance of work. If the work lasted between three and six months, SSA also requires one or more of the following: frequent absences due to the impairment; unsatisfactory

work due to the impairment; performance of work during a period of temporary re-mission; or performance of work under special conditions.⁶²

C. Establishing That “Countable Wages” Are Equal to or Less Than SGA Amount of \$780

To calculate countable wages, subsidies, business related expenses, and impairment related work expenses are deducted from a person’s gross wages.

1. Subsidies Deducted from Gross Wages

Any part of wages that can be attributed to a subsidy will not count when measuring wages against the SGA rule. SSA will only count that part of wages that can be fairly attributed to a worker’s productivity.⁶³ Always consider a subsidy possible if the person is working in a sheltered, supported, or special environment.⁶⁴ In competitive employment, a wage may contain a hidden subsidy, as the employer may pay more than productivity would justify. This may be a reward for a long-term employee who is now disabled; the employee may be a friend; or this may be an act of charity.⁶⁵ Whatever the motive, it is crucial to establish the real worth of the person’s labors.

Many government-sponsored training and job placement programs exist for persons with disabilities. If part of a wage is paid by a government agency, and is not related to productivity, there is a strong ar-

⁵⁷*Conley v. Bowen*, 859 F.2d 261 (2d Cir. 1988).

⁵⁸SSA Acquiescence Ruling 93-2(2), Second Circuit (May 17, 1993) (rescinded Aug. 10, 2000).

⁵⁹See part IV.E, *infra*.

⁶⁰See note 58, *supra*.

⁶¹20 C.F.R. §§ 404.1574(c), 1576(d), 416.974(c), 416.976(d); POMS DI 11010.210; SSR 84-25.

⁶²20 C.F.R. §§ 404.1574(c)(3) & (4), 416.974(c)(3) & (4); POMS DI 11010.215 C.

⁶³20 C.F.R. §§ 404.1574(a)(2), 416.974(a)(2); SSR 83-33; POMS DI 10505.010 A.

⁶⁴20 C.F.R. §§ 404.1574(a)(3), 416.974(a)(3).

⁶⁵See, e.g., *Scott v. Commissioner of Social Security*, 899 F. Supp. 275, 279 (S.D. W.Va. 1995) (where job was created by family members and only job requirement was to answer the telephone for 12 hours per week).

gument that the worker has not earned that part of the wage. For example, a person placed in a job may be paid \$7 per hour, but a state rehabilitation agency may be paying \$3.50 per hour toward the wage. Under these circumstances, it may be possible to establish that only the amount paid by the employer, i.e., \$3.50 per hour, will count as earnings under the SGA rule.

Supported employment is a work option in which the person usually works a traditional job, but receives special assistance, often from a job coach. The job coach is typically provided by an agency other than the employer. SSA has recognized that while “special conditions on the job,” like job coaching, “are not technically ‘subsidies,’” the job coach’s services should be factored in when SSA determines how much earnings are based on the person’s own productivity.⁶⁶ In effect, SSA’s policy authorizes a subsidy calculation.

SSA’s regulations do not address how to calculate this subsidy. SSA’s POMS states that certain of the job coach’s hours should be multiplied by the hourly rate of the person with a disability to determine the subsidy. The policy specifically cautions not to consider the job coach’s salary to determine countable earnings.⁶⁷ The examples used in the policy both involve a job coach who actually performs part of the person’s work. The example counts only the job coach hours spent doing the person’s work as relevant to the subsidy calculation, with hours spent observing and verifying quality of work not counted. The policy and examples do not address whether job coach services or any other support services performed away from the job or during breaks are to be used in determining the subsidy.

In the author’s opinion, this policy is flawed in two respects. First, it fails to recognize that a concept sometimes called “modeling” (doing the job while the person with a dis-

ability observes) is just one method of providing job coach services. A job coach may provide a myriad of special services, on site and off site, that will help the person move toward greater vocational independence. As long as the person could not perform the job without those extra services, all job coach hours should be relevant to the subsidy calculation. Second, the policy fails to recognize that it is the extra cost for job coach services, generally government funded, that makes it possible for the person to work. With this in mind, a more appropriate measure of the subsidy would be to determine the cost of the job coach services to the providing agency (including salary, fringe benefits, and agency overhead) and deduct that amount from gross wages to determine countable wages. If the worker receives additional services in connection with the job, such as case management, that cost might also be considered as a subsidy. This is the way SSA would treat job coach services paid for by the worker if the worker is claiming the amount as an impairment related work expense (IRWE).⁶⁸

Example: Consider Gerald, who is mentally retarded, works as a dishwasher making \$7 per hour, and earns \$950 monthly. Agency X provides him with 20 hours of job coach services each month. These services cost agency X \$20 per hour (including salary, fringe benefits, and overhead).

If we use SSA’s formula for calculating the subsidy (and count all job coach hours), Gerald’s countable wages will be \$810 per month [\$950 - 140 (20 job coach hours multiplied by Gerald’s \$7 hourly wage)] and SSA would find Gerald to be performing SGA based on the 2002 SGA level of \$780. If we calculate the subsidy by using the actual extra cost of helping him to work, Gerald’s countable wages will be \$550 [\$950 - 400 (20 job coach hours multiplied by agency’s \$20 hourly cost)], re-

⁶⁶POMS DI 24001.025 E.3.e.

⁶⁷*Id.*

⁶⁸SSA Regional Program Circular, New York Region, 90-3 (1990). IRWEs are discussed in part IV.C.3, *infra*.

ducing his wages below the \$780 SGA level.⁶⁹

When SSA policy seems to dictate a more limited job coach subsidy that will not reduce wages below the SGA level, advocates may want to return to the fundamental principle that wages above the SGA level create a “rebuttable presumption” of SGA.⁷⁰ In *Nazzaro v. Callahan*, although the court rejected plaintiff’s position that job coach services could be considered a subsidy, the court remanded the case back to the ALJ to determine whether the “special conditions” under which Mr. Nazzaro worked were sufficient to overcome the “rebuttable presumption of ability to engage in [SGA]” created by earnings above the SGA level.⁷¹ The court cited several other courts which had held that applicants for disability benefits were not performing SGA despite earnings above the SGA level.⁷² Applying these principles to Gerald above, an advocate may be able to overcome the presumption of SGA by showing the “special circumstances” of his supported employment position, and offering evidence that he could not perform as a dishwasher without the 20 hours of job coach help per month.

Some employers may provide accommodations to employees under the mandates of the Americans With Disabilities Act,⁷³ or section 504 of the Federal Rehabilitation Act.⁷⁴ For example, an office worker who is blind may be entitled to

services from a reader to allow him or her to perform a job.⁷⁵ A paralegal who is blind may be provided with specialized computer equipment to allow him or her to work. To the extent that one can attach an extra cost to these accommodations, compared to what is provided to sighted employees, can these extra costs be considered subsidies to reduce countable monthly wages to \$1,300 (i.e., the 2002 SGA amount for the legally blind) or less? Current policy does not specifically address this issue. However, it would appear that the same rationale for finding a subsidy with job coach services, or rebutting the presumption of SGA based on special circumstances, would apply here.

2. Business-Related Expenses Deducted

A person who is self-employed can deduct reasonable business expenses such as rent, utilities, car expenses, supplies, or a telephone bill. SSA will also deduct the reasonable value of any unpaid help furnished by a spouse, children or others; and unincurred business expenses paid by another individual or agency. If the business is run out of the home, consider allocating a portion of household expenses to the business. If the person has filed a tax return, SSA should ordinarily look at annual net

⁶⁹In *Nazzaro v. Callahan*, *supra* note 50, the court held that there is no regulatory authority to find that job coach services can amount to a subsidy. 978 F.Supp. at 460-61. In settling the case on appeal, however, SSA agreed to apply Regional Program Circular 90-3 (*see* note 68, *supra*) to determine whether a subsidy exists and its value. Thereafter, the administrative law judge (ALJ) issued a decision finding that “[t]he claimant is unable to engage in [SGA] on a sustained basis without the assistance and support of a job coach.” Without going through the math for each month, the ALJ reasoned: “The cost of the claimant’s job coach, if deducted from his wages, would have reduced his earnings to less than [an SGA] level.” In the Case of D.N, Social Security Administration, Office of Hearings & Appeals (Buffalo, NY, Sept. 27, 1999.)

⁷⁰*See* part IV.A, *supra*.

⁷¹*See supra* notes 50 and 69, *Nazarro*, 978 F. Supp. at 461-63 (quoting *Koss v. Schweiker*, 582 F.Supp. 518, 521 (S.D.N.Y. 1984)).

⁷²*Id.* *See Boyes*, 46 F.3d at 510, *Case*, 810 F. Supp. at 52, and *Goldstein*, 517 F. Supp. at 1314, *supra* note 50; *Chicager v. Califano*, 574 F.2d 161 (3rd Cir. 1978) (claimant not engaged in SGA where he encountered numerous difficulties in performing even simple tasks, including use of the telephone, and substantial assistance was required from co-workers).

⁷³Americans with Disabilities Act, 42 U.S.C. §§ 12112 *et seq.*

⁷⁴Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

⁷⁵*See Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983), *aff’d without opinion*, 732 F.2d 146 (3rd Cir. 1984), *cert denied*, 469 U.S. 1188 (1985).

income, after business-related deductions, and divide by 12 to determine what amount of monthly income is measured against the SGA rule.⁷⁶

3. Impairment-Related Work Expenses Deducted

IRWEs are the reasonable cost of items and services that, because of an impairment, one needs and uses in order to work.⁷⁷ This includes items such as attendant care, medical or prosthetic devices, drugs, medical services, residential modifications, and special transportation.

To be deductible, the expense must meet a three-part test:

1. It must be paid by the worker and not paid or reimbursed by another source;
2. It must relate to the individual's disability; and
3. Without it, the person must be unable to work.⁷⁸

A medical expense can be deducted as an IRWE even if it would be incurred in the absence of employment. The test is whether the person could work without paying the expense. For example, a person can deduct the cost of anticonvulsant medication as an IRWE, even though this medication would be required in any event to prevent seizures.⁷⁹

Many assistive technology expenses could qualify as IRWEs. These include:

- transportation expenses for persons who are mobility impaired (e.g., hand controls or a hydraulic lift for a vehicle);

- construction of ramps or lifts to allow a person to leave the home;
- purchase of a telecommunication device for a person who is deaf to perform work in an office or from home; and
- specialized or modified office equipment (e.g., desks, phones, or computers) to work in an office or from home.

Consider Sharon, an SSDI beneficiary who uses a wheelchair. She works part-time, earns \$950 per month, and must pay a driver \$300 per month to take her to and from work. This expense is deductible as an IRWE because it meets the three-part test: she pays the driver; the service is related to her disability; and she could not work if she did not pay this expense. Sharon's countable wages will be \$650 per month (\$950 - 300). Since her wages after IRWE deductions are less than \$780 monthly, she is not performing SGA.

D. The Trial Work Period

The trial work period is any nine months, within a rolling 60-month period, during which SSDI beneficiaries may test their ability to work, without losing benefits.⁸⁰ During the trial work period, the SGA rule will not apply. The beneficiary can keep both paycheck and disability check, no matter how high the paycheck is.⁸¹

The work itself, when performed during the trial work period, cannot be used to show medical improvement.⁸² Effective January 1, 2002, the work activity of an SSDI beneficiary, who has received benefits for at least 24

⁷⁶20 C.F.R. §§ 404.1575(c), 416.975(c).

⁷⁷*Id.* §§ 404.1576, 416.976; SSR 84-26; POMS DI 10520.001 *et seq.*, SI 00820.540 B.5.

⁷⁸20 C.F.R. §§ 404.1576(b), 416.976(b). If the expense was paid by the employer or some third party, it may qualify as a subsidy in some circumstances. See part IV.B.1, *supra*.

⁷⁹ 20 C.F.R. §§ 404.1576(c)(5)(ii), 416.976(c)(5)(ii).

⁸⁰42 U.S.C. § 422(c); 20 C.F.R. § 404.1592; POMS DI 13010.035 *et seq.* See 20 C.F.R. § 404.1585, concerning the trial work period for persons age 55 or older who are legally blind.

⁸¹There is no trial work period in the SSI program, as the SGA rule does not apply to SSI beneficiaries. See part V.B, *supra*.

⁸²42 U.S.C. § 404.1592(a).

months, cannot be used as evidence that the person is no longer disabled even if the work occurs after the trial work period.⁸³

The nine months of the trial work period need not be consecutive. Any month in which the person earns at least \$560 in 2002 will be a trial work period “services” month. For the self-employed, a trial work period month in 2002 is a month with either net earnings of more than \$560 or more than 80 work hours, regardless of the amount of earnings.⁸⁴ The amount needed for a trial work period month was \$200 for calendar years 1990 through 2000 and \$530 for 2001. For the self-employed, it was net earnings of the same amounts, or work in the business of more than 40 hours per month for 1990 through 2000 and more than 80 hours for 2001.⁸⁵ SSA will now annually index the amount needed for a trial work period month based on the National Wage Index. The amount will increase if the index for the previous year has increased. If the index stays the same or goes down, the trial work period amount will continue unchanged. For the self-employed, the future trial work period amount will be either net earnings based on the indexed amount or work in the business of more than 80 hours per month.⁸⁶

The trial work period will be computed under a 60-month rolling period.⁸⁷ When a person works enough to be credited with a trial work period month, SSA will count back 60 months (including the present month) to see if nine trial work period months have been worked during that period. If not, SSA will wait until the next trial work period month is worked to see if nine trial work period months were completed during the rolling 60-month period.

An SSDI beneficiary is allowed one trial work period during a period of entitlement to cash benefits.⁸⁸ The rules allow more than nine

trial work period months so long as the person does not have nine within any period of 60 months. However, once the person works nine trial work period months within a 60-month period, the trial work period is completed and a second trial work period will not be allowed during that period of entitlement to cash benefits. Effective January 1, 2002, the new expedited reinstatement rules allow for a new trial work period after the person receives reinstated benefits for 24 months.⁸⁹

Example. This example illustrates how the trial work period rules operate:

Mary began collecting SSDI benefits in 1994. She worked two trial work period months in January and February 1996; worked four trial work period months in April through July 2000; and worked three more in October through December 2001.

Mary has not used up her trial work period. As of July 2000, she had worked six trial work period months. When she works again in October 2001, we look to see if she now has worked nine trial work period months within a 60-month period — in this case covering November 1996 through October 2001. Since the only other months in that period are the four she worked in 2000, October 2001 is her fifth trial work period month. After working in November and December 2001, Mary has used up seven trial work period months and would have two months left.

What if Mary doesn’t work again until late 2002 and then works (and earns at least \$560) in November and December 2002? Now Mary has worked nine trial work period months within a 60-month period and her trial work period will be completed.

⁸³See part III.B.3, *supra*.

⁸⁴20 C.F.R. § 404.1592(b).

⁸⁵*Id.* § 404.1592, tables 1 and 2.

⁸⁶*Id.* § 404.1592(b)(1)(ii), (b)(2)(ii).

⁸⁷42 U.S.C. § 422(c).

⁸⁸20 C.F.R. § 404.1592(c).

⁸⁹See part IV.E, *infra*.

Table I illustrates Mary's TWP within the rolling 60-month period:

Year	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1996	TWP Month	TWP Month	---	---	---	---	---	---	---	---	---	---
1997	----- No TWP Months During the year -----											
1998	----- No TWP Months During the year -----											
1999	----- No TWP Months During the year -----											
2000	---	---	---	TWP Month	TWP Month	TWP Month	TWP* Month	---	---	---	---	---
2001	---	---	---	---	---	---	---	---	---	TWP Month	TWP Month	TWP** Month
2002	---	---	---	---	---	---	---	---	---	---	TWP Month	TWP*** Month

Comments:

* Sixth TWP month within 60-month period ending 7/00 (i.e., 8/95-7/00). TWP continues.

** A 9th TWP month, but only 7th TWP month within 60-month period ending 12/01 (i.e., 1/97-12/01). TWP continues.

*** The 9th TWP month within 60-month period ending 12/02 (i.e., 1/98-12/02). TWP is completed.

How long will benefits continue if Mary finishes her trial work period in December 2002 and is earning more than the SGA amount in January 2003? In that case, entitlement ends three months after the ninth trial work period month. The first time the person performs SGA following the trial work period, the person will be eligible for three more months of benefits, i.e., the “cessation month” plus two additional months (i.e., the “three-month grace period”). In Mary’s case, these happen to be the first three months of the extended period of eligibility. An SSDI beneficiary who goes to work for the first time and earns more than the monthly SGA amount can receive both an SSDI check and a paycheck

for 12 consecutive months.⁹⁰

E. The Extended Period of Eligibility

The 36-month extended period of eligibility, or reentitlement period, allows the person to reestablish SSDI eligibility without either a new application for benefits or an application for expedited reinstatement, if work activity ceases or is significantly diminished during the 36 months following the trial work period.⁹¹ The 36 months run consecutively, immediately following the ninth trial work period month, whether or not the person is performing SGA at the time.

⁹⁰20 C.F.R. §§ 404.1592(e), 404.1592a(a); POMS DI 13010.210.

⁹¹20 C.F.R. § 1592a; POMS DI 13010.210 *et seq.*

That's why the first month of SGA during the extended period of eligibility is called the "cessation month." The person will be eligible for SSDI benefits for that month and the following two months. This is true whether the month of SGA is the first month of the extended period of eligibility or some later month of that 36-month period. Thereafter, during the remainder of the extended period of eligibility, the person will not receive benefits for any month in which he or she performs SGA. The person will receive benefits for any month in which he or she does not perform SGA (i.e., earns \$780 or less in 2002).

F. Illustrations of Trial Work Period and Extended Period of Eligibility

The following example illustrates the trial work period and extended period of eligibility rules when impairment related work expenses (IRWEs) are involved:

Jennifer, who has a spinal cord injury and uses a wheelchair, receives \$850 in monthly SSDI. It is September 2002 and she has worked the past eight months earning \$1,050 gross per month as a part-time paralegal, her first work as an SSDI beneficiary. She must pay a driver \$200 per month to take her to and from work. To allow her to safely leave the home for work without assistance, she has two doorways widened and a ramp constructed at her home at a cost of \$4,800 which she will pay in 24 monthly payments of \$200 starting in October 2002.

Jennifer has been able to keep SSDI the past eight months because she is still within her nine-month trial work period. Will she be able to keep her SSDI checks as she moves into her extended period of eligibility?

The answer is yes. Her extended period of eligibility will start in October 2002 and run through September 2005. Since the home improvement and transportation payments will qualify as IRWEs, this combined \$400 expense will allow Jennifer to reduce her countable earn-

ings from \$1,050 to \$650 effective the first month of her extended period of eligibility.⁹² Assuming her wages do not increase, her countable wages will remain well below the SGA level through September 2004.

Let us assume the SGA level stands at \$810 in 2003, \$840 in 2004, and \$870 in 2005, based on future indexing.⁹³ After she finishes paying for the home improvements, Jennifer's IRWEs, effective October 2004, will be reduced to \$200 per month for transportation-related expenses and her countable earnings will be \$850 per month. At that point, Jennifer will perform her first month of SGA during the extended period of eligibility (i.e., countable earnings would be more than the projected 2004 level of \$840). As her first month of SGA, Jennifer will be entitled to SSDI checks for that month (i.e., her "cessation month") and the two following months. Thus, she would be eligible for benefits during an October through December 2004 grace period.

If Jennifer's wages do not increase during 2005, and her IRWEs remain at \$200, she will continue to be eligible for SSDI throughout the year as her countable wages (\$850) will be at or below the new, 2005 SGA level of \$870. Through September 2005, she will be eligible under extended period of eligibility rules, as her countable income would be below the SGA level. Since her countable earned income remains at or below the SGA level as her extended period of eligibility ends, she remains eligible for SSDI at least through December 2005.

G. Expedited Reinstatement of SSDI

Under pre-2001 law, a person who performed SGA after the extended period of eligibility would lose SSDI benefits. If the person later lost a job or had wages reduced below the SGA level, he or she would have to reapply to re-establish eligibility. This prospect of a new application, with the un-

⁹²Under IRWE policy, installment payments can be deducted each month during the term of the loan or installment contract. 20 C.F.R. § 404.1576(e)(1).

⁹³See *id.* § 404.1574(b)(2)(ii).

certainty of whether a new decision maker would find the person disabled, made many beneficiaries pause at the notion of taking a chance at work that might not be successful in the long term. The new expedited reinstatement program, which was effective January 2001, should make more beneficiaries willing to try working, knowing they may reestablish eligibility if their work is not sustained because of their disability.

These provisions protect a person who performs SGA after the extended period of eligibility and later has wages reduced below the SGA level because of his or her disability. The expedited reinstatement provisions allow SSDI to be reinstated, without a new application, if the person:

- a) was eligible for SSDI;
- b) lost SSDI due to performance of SGA;
- c) requests reinstatement within 60 months of the last month of entitlement, or, if the request is filed after 60 months, establishes good cause for missing the deadline;
- d) has a disability that is the same as (or related to) the physical or mental disability that was the basis for their original claim; and
- e) that disability renders him or her incapable of SGA based on application of the medical improvement standard.⁹⁴

If a person believes he or she meets this criteria, the person should contact SSA to request reinstatement. SSA has issued policy instructions, outlining the expedited reinstatement criteria and procedures to be followed by local offices.⁹⁵ The instructions also include an expedited reinstatement request form.⁹⁶

If the beneficiary satisfies the expedited reinstatement criteria, both his or her benefits and the benefits of dependents can be reinstated. Dependent's benefits, including benefits for children and spouses, can be reinstated if a dependent satisfies all eligibility criteria as a dependent (this includes having a new medical determination if the dependent's entitlement is based on being disabled). Both previously entitled dependents and new dependents will have to file an application to qualify for reinstated benefits.

1. Provisional Benefits Pending Expedited Reinstatement Decision

While the expedited reinstatement request is pending, a person is eligible for up to six consecutive months of provisional benefits, which are payable when expedited reinstatement is requested.⁹⁷ The person may also be eligible for Medicare while receiving provisional benefits, if not already covered for such benefits. Performing SGA will terminate provisional benefits.

What happens if SSA pays provisional benefits and later determines the person was not entitled to reinstatement? Must the person repay the provisional benefits? SSA's POMS state that any resulting overpayment cannot be recovered unless SSA determines that the person knew or should have known he or she did not meet the expedited reinstatement criteria.⁹⁸

2. New Trial Work Period and Extended Period of Eligibility

For years, SSDI beneficiaries were told they would get one trial work period and one extended period of eligibility, which could be exhausted at very low levels of earnings. In

⁹⁴Ticket to Work and Work Incentives Improvement Act of 1999, § 112, 42 U.S.C. § 423(i).

⁹⁵POMS DI 13050.001 *et seq.*

⁹⁶*Id.* DI 13050.105.

⁹⁷42 U.S.C. § 423(i)(7).

⁹⁸See POMS DI 13050.080 A.1.a ; 42 U.S.C. § 423(i)(7)(D).

fact, the extended period of eligibility could be exhausted whether the person was working or not. This has changed under the new expedited reinstatement program.

After being paid 24 months of reinstated benefits which need not be consecutive (including any months for which provisional and retroactive payments were actually received), the beneficiary gets: a new trial work period; a new extended period of eligibility; and another 60 month period in which to request expedited reinstatement if benefits are terminated again due to SGA.⁹⁹

3. Application of Expedited Reinstatement with Second Trial Work Period and Extended Period of Eligibility

Under the new expedited reinstatement program, a person may be reinstated well after exhausting the trial work period and extended period of eligibility, and even if the person has performed SGA for many months or even years. The following example illustrates this change:

Tom performed SGA throughout his trial work period and extended period of eligibility. He completed his trial work period in December 1998 and completed his extended period of eligibility in December 2001. He continues to perform SGA, earning \$900 monthly January through December 2002 and his SSDI benefits are terminated. He stops working in early January 2003 because his disability worsens. Tom's disability is the same or worse than at the time of his original claim for SSDI and renders him incapable of SGA under SSA's medical improvement criteria.

Since these last events occurred after the effective date of the expedited reinstatement provisions (i.e., after January 1, 2001), Tom can apply for reinstatement as early as January 2003 or within 60 months of the last month he was entitled to benefits. While his expedited reinstatement application is pending, Tom is eligible for up to six months of "provisional ben-

efits." Based on the facts presented, he would appear to be eligible for reinstatement effective January 2003.

Now let's assume that Tom is awarded reinstated benefits, retroactive to January 2003, and receives SSDI checks through the remainder of 2003 and 2004 (i.e., for at least 24 months). He returns to work in January 2005 and earns more than \$1,200 gross monthly throughout 2005, with no deductions for IRWEs or subsidies.

Under expedited reinstatement rules, Tom will be entitled to a new trial work period, starting January 2005, as he has received at least 24 months of reinstated benefits. This means Tom is entitled to both his paycheck and his SSDI check for the nine-month period, January through September 2005. His new extended period of eligibility will start in October 2005 and run through September 2008. Tom will be entitled to SSDI checks during the first three months of the extended period of eligibility, October through December 2005 (i.e., the benefit cessation month plus the next two months).

H. Continuing Medicare Eligibility While Individual is Working

If the SSDI beneficiary works despite a continuing disability, Medicare eligibility will continue throughout the nine-month trial work period as the person continues to receive SSDI benefits. Medicare Part A eligibility will continue to be automatic; Part B will be optional and subject to the same premium payment.

After the end of the trial work period, if the person's disability continues, Medicare coverage can be extended for at least 93 months. Effective October 1, 2000, section 202 of Ticket to Work and Work Incentives Improvement Act of 1999 increased the duration of the Extended Period of Medi-

⁹⁹See POMS DI 13050.035 C.4.; 42 U.S.C. § 423(i)(6).

care Coverage from its previous duration of 39 months.¹⁰⁰ During this extended period, Part A will continue to be automatic and Part B will continue to be optional, subject to a premium payment.¹⁰¹

An individual who exhausts the trial work period and Extended Period of Medicare Coverage may be able to continue Medicare eligibility through a “buy-in” program. He or she must continue to be disabled and the loss of SSDI must be due solely to earnings that exceed the SGA amount. Medicare eligibility can continue indefinitely so long as the individual continues to be disabled and pays the enrollment premiums.¹⁰²

V. Work Incentives And SSI

The SGA rule applies to SSI applicants but not SSI beneficiaries. If an SSI applicant is performing SGA, i.e., earning more than \$780 monthly in 2002, his or her application will ordinarily be denied.¹⁰³ All analysis that applies to the SSDI applicant will also apply to the SSI applicant.¹⁰⁴ The SGA rule does not apply to persons who are eligible for SSI based on blindness.¹⁰⁵

The SGA rule will not apply when countable wages are equal to or less than \$780. Earnings can be reduced below this level by establishing a subsidy, business-related expenses, or impairment-related work expenses.¹⁰⁶ An SSI applicant can also avoid the

SGA rule by showing that countable earnings did not average more than \$780.¹⁰⁷

The Employment Opportunities for Disabled Americans Act, effective July 1987, made sections 1619(a) and (b) of the Social Security Act permanent in every state.¹⁰⁸ Section 1619(a) allows an SSI beneficiary to continue receiving benefits when wages are more than the monthly SGA amount.¹⁰⁹ Because they are no longer necessary, the trial work period and the extended period of eligibility were eliminated from the SSI program in 1987 when the section 1619 provisions became permanent.¹¹⁰

To be eligible under 1619(a) one must continue to be disabled; meet all nondisability criteria for SSI; and meet the “prior month” requirements.¹¹¹ SSA policy provides that the person must have been eligible for SSI during a prior month within the current period of eligibility, i.e., within the past 12 months. Once a person is eligible for SSI, eligibility is terminated only if there is medical improvement or if the person is ineligible for any SSI benefit (including 1619(b) Medicaid) for 12 consecutive months.¹¹² This means a beneficiary with a continuing disability can earn well in excess of \$780 monthly and retain SSI. The earnings would simply be budgeted, following SSI’s criteria for disregarding a percentage of earned income.

¹⁰⁰42 U.S.C. § 426(b); POMS HI 00820.025. Because of the way that 42 U.S.C. § 426(b) is written, the extended Medicare period could continue far beyond the 93-month period following the trial work period. SSA has informally acknowledged this but has not, to date, provided any guidance in its regulations or POMS provisions to effectuate these changes.

¹⁰¹POMS DI 280055.001 B.

¹⁰²42 U.S.C. § 1395i-2a; POMS HI 00801.170.

¹⁰³20 C.F.R. § 416.920(a), (b); POMS SI 02302.010 A.2.a.

¹⁰⁴See part IV, *supra*.

¹⁰⁵20 C.F.R. § 416.984.

¹⁰⁶*Id.* §§ 416.974(a)(2), 416.975(c), 416.976.

¹⁰⁷See part IV.B, *supra*; 20 C.F.R. § 416.974(b)(2).

¹⁰⁸Employment Opportunities for Disabled Americans Act, Pub. L. No. 99-643, §§ 2-7, 100 Stat. 3575. (1986).

¹⁰⁹42 U.S.C. § 1382h. Continued Medicaid eligibility under section 1619(b) is discussed in part V.B.

¹¹⁰See POMS SI 02302.001 A.

¹¹¹20 C.F.R. § 416.262.

¹¹²POMS SI 02302.006 B.2.f., 02303.010 A.2.c. & B.3.

A. The Earned Income Exclusions as Work Incentives

The earned income exclusions can be a powerful work incentive for many SSI beneficiaries. Because more than 50 percent of gross wages will be disregarded in the SSI check calculation, the person is frequently better off by going to work.¹¹³

The SSI program determines the monthly check by deducting countable income from an SSI base rate. SSI rates vary from state to state, as states supplement the SSI federal benefit rate at their option. For 2002, SSI's federal benefit rate is \$545 per month for an individual. All budgeting examples, below, will use the 2002 federal benefit rate with no state supplement.

1. First \$65 Plus 50 Percent of Remaining Gross Wages Excluded

The SSI program distinguishes between unearned and earned income. Unearned income is anything other than wages and includes SSDI payments. Earned income includes wages received from employment or net income from self-employment.¹¹⁴ In calculating the SSI check, the first \$20 of unearned income is disregarded.¹¹⁵ The first \$65 plus 50 percent of the remaining gross wages is also deducted. If the person has no unearned income, the \$20 will be added to the \$65 and the first \$85 of gross wages will be disregarded.¹¹⁶

Let's look at an example:

Sam receives \$545 in monthly SSI. He is offered a part-time job earning \$385 in gross pay per month.

Since Sam has no unearned income, the SSI program will disregard the first \$85 of his wages

(\$385 - 85 = \$300). An additional 50 percent will then be disregarded (\$300 - 150 = \$150). Subtracting the countable income from the SSI base rate, Sam will be entitled to an SSI check of \$395 (\$545 - 150 = \$395). If Sam lives in one of the 39 states in which SSI beneficiaries receive Medicaid automatically, he will continue getting Medicaid. His net gain from going to work is the amount of the disregards (\$235) less any amounts taken out of his paycheck for taxes and other payroll deductions.¹¹⁷

Let's take this one step further:

Sam is offered increased work hours. He would now make \$785 per month, but is concerned because he heard something about the \$780 SGA rule. Sam's disability continues and his resources are within SSI limits.

Section 1619(a) will protect Sam and the \$780 SGA rule will not apply. For every additional \$2 in gross wages his SSI check will go down by \$1. Thus, after disregarding the first \$85 (\$785 - 85 = \$700) and 50 percent of the remaining wages (\$700 - 350 = \$350), Sam will have \$350 in countable income. Subtracting this from the SSI base rate of \$545, Sam winds up with a \$195 SSI check and his Medicaid continues.

2. Impairment Related Work Expenses

IRWEs were discussed in the SSDI section, above, as a way to reduce countable income below the SGA limit.¹¹⁸ Any item or items that the SSI beneficiary pays for and that would meet the SSDI criteria for an IRWE, would also qualify as an IRWE for SSI purposes and reduce the countable in-

¹¹³The benefit of these exclusions may be offset by other expenses, such as costs related to transportation or child care. The benefit of the exclusion can also be offset by a loss of other government benefits which are affected by changes in income. Federal housing subsidies, food stamps, and welfare benefits for the SSI beneficiary's family are just some examples of benefits that could be affected.

¹¹⁴20 C.F.R. §§ 416.1110, 416.1120.

¹¹⁵*Id.* § 416.1124(c)(12).

¹¹⁶*Id.* § 416.1112(c)(4), (5) and (7).

¹¹⁷See note 113, *supra*, explaining that the beneficiary's net gain could be affected by individual circumstances.

¹¹⁸See part IV.C.3, *supra*.

come to be applied in calculating the SSI check.¹¹⁹

Consider the following example:

Ronald, age 57, had polio as a child. He lives alone in a home which he owns. Recently, his mobility problems worsened. Ronald receives \$220 in SSDI and earns \$835 in gross wages per month. The combined income makes him ineligible for SSI. He is eligible for Medicare, but is not eligible for automatic Medicaid since he is not an SSI beneficiary. He is not eligible for Medicaid under section 1619(b) because he never received SSI in the past.¹²⁰

Ronald obtains a loan to modify a spare bedroom to make it a home office that will accommodate his disability, with a widened doorway and a special work station to allow him to work from his wheelchair. The home office will allow Ronald to telecommute as an employee despite his worsening disability. After obtaining the loan and having the work done, Ronald will pay \$200 per month for the next three years. These payments would qualify as IRWEs and reduce countable wages below the 2002 SGA amount of \$780. The IRWEs will also reduce his countable income for calculating the SSI check.

This will be Ronald's budget if he applies for SSI after taking out the loan:

Step 1	Unearned income	\$220
		<u>- 20</u>
	Counted	\$200
Step 2	Earned income	\$835
	IRWE deduction	<u>- 200</u>
		635
	Earned income exclusion	<u>- 65</u>
		570
	Additional 50% exclusion	<u>- 285</u>
	Counted	\$285

Step 3	Counted unearned income	\$200
	Counted earned income	<u>285</u>
	Total counted income	\$485
Step 4	Base SSI rate	\$545
	Counted income	<u>- 485</u>
	SSI benefit	\$ 60

Ronald will now be eligible for SSI, but will need to file an SSI application. For every additional \$2 in IRWEs, his SSI check will increase by \$1. For example, if Ronald has difficulty typing, due to arthritis and purchases a special keyboard for \$100, he will have an additional IRWE of \$100. Under the formula above, his earned income would only be decreased by \$50 and his SSI check would increase by \$50 to \$110 per month.

Eligibility for this minimal SSI check makes Ronald automatically eligible for Medicaid in 39 states and the District of Columbia. This is important, since Medicaid may pay for many items which Medicare will not cover, including prescription drugs and more extensive home health care in many states. Also, since Medicare will pay no more than 80 percent of the cost of durable medical equipment, Medicaid should be available to pay the co-payment.

3. Student Earned Income Exclusion

To qualify for this special exclusion, the student must be under age 22, not married or a head of household, and regularly attending a school, college, university, or course of vocational training. During calendar year 2002, the first \$1,320 of monthly earnings are excluded, up to a maximum of \$5,320 per year.¹²¹ Prior to calendar year 2001, the student earned income exclusion was \$400 up to a

¹¹⁹20 C.F.R. § 416.1112(c)(6).

¹²⁰See part V.D, *infra*.

¹²¹20 C.F.R. § 416.1112(c)(3); POMS SI 00820.510.

maximum of \$1,620 per year. In January 2001, it was increased to \$1,290 per month up to a maximum of \$5,200 per year. For 2003 and later years, the student earned income exclusion's monthly and yearly maximum amounts will be adjusted based on a cost-of-living index.¹²²

This example illustrates application of the student earned income exclusion:

Jose, age 20, is deaf and receives SSI. He attends college full time and does not work during the school year. During June, July, and August, he works and earns \$1,705 gross each month.

This will be Jose's SSI budget with the student earned income exclusion:

Step 1	Unearned income	\$ 0
Step 2	Earned income	\$1705
	Student earned income exclusion	- 1320
		<u>385</u>
	Unearned income exclusion (not otherwise used)	- 20
	Earned income exclusion	- 65
		<u>300</u>
	Additional 50% exclusion	- 150
	Counted	\$ 150
Step 3	Counted unearned income	\$ 0
	Counted earned income	<u>150</u>
	Total counted income	\$ 150
Step 4	Base SSI rate	\$ 545
	Counted income	- 150
	SSI benefit	<u>\$ 395</u>

4. Blind Work Expenses as Earned Income Exclusion

Persons who are legally blind are allowed many deductions from earned income which are not allowed for any other disability.¹²³ The most common blind work expenses include:

- 1) Federal, state and local income taxes;
- 2) Social Security taxes;

- 3) Mandatory pension contributions;
- 4) Meals consumed during work hours;
- 5) Training to use an impairment-related item or an item which is reasonably attributable to work (e.g., cane travel, Braille, computer course for computer operator);
- 6) A guide dog (cost of purchase and all associated expenses, including food, licenses and veterinary services);
- 7) Transportation to and from work;
- 8) Attendant care services (in the work setting, to get a person to and from work, and, in some cases, in the home);
- 9) Structural modifications to get a person to and from work;
- 10) Medical devices, medical supplies and physical therapy.¹²⁴

Many blind work expenses might also qualify as IRWEs.¹²⁵ When an item can be used as either, it is always best to use the blind work expense. This is because the blind work expense is deducted from earned income after using the 50 percent earned income exclusion; the IRWE is deducted before using the 50 percent exclusion. The practical effect is that the person can see a dollar for dollar increase in the SSI check for blind work expense expenditures. For IRWE expenditures, there is no more than a 50 cent increase in the SSI check for every one dollar spent.

The following is an example of an SSI budget using blind work expenses:

Chuck is legally blind, works as a social worker, and earns \$22,620 per year or \$1,885 per month. He has the following

¹²²20 C.F.R. § 416.1112(c)(3), Table 1.

¹²³20 C.F.R. § 416.1112(c)(8); POMS SI 00820.535 *et seq.*

¹²⁴POMS SI 00820.535 B.4.

¹²⁵See POMS SI 00820.555.

monthly expenses that meet SSI's criteria as blind work expenses:

income taxes (federal, state & local)	\$ 80
Social Security tax	120
union dues	10
transportation	85
guide dog	20
lunches (\$5 per day)	110
readers	120
braille paper	10
cassette tapes	25
computer disks	<u>10</u>
Total	\$590

Calculation of SSI check:

\$1,885	
- 85	(\$65 + \$20 exclusions)
1,800	
- 900	additional 50 % exclusion
900	
- 590	blind work expenses
\$ 310	countable income
\$ 545	Base SSI rate
- 310	countable income
\$ 235	Monthly SSI check

Blind work expenses offer a tremendous opportunity to fund a wide range of work-related assistive technology:

Consider Tanya, an attorney who is blind and receives \$545 in monthly SSI. She is setting up a practice in a home office. A firm is willing to pay her \$2,500 per month, as an independent contractor, to prepare the written arguments or briefs in up to 10 Social Security appeals. After deducting the usual business-related expenses, Tanya's self-employment income is reduced to \$24,000 per year or \$2,000 per month.

Tanya did this type of work before using paid readers and a traditional dictation machine. Knowing these methods slowed down her productivity, she seeks to invest in state-of-the-art technology that will help her boost the quality of her work and her efficiency. She plans to purchase: a personal computer with voice activation, voice output, and a raised

braille sub-screen; a high quality Braille printer; and a high quality scanner. She will purchase these items through a small business loan at a total cost of \$6,600. With finance charges, Tanya will pay \$200 per month on this loan for 36 months. The full \$200 payment will qualify as a blind work expense.

The following would be Tanya's SSI budget using blind work expenses:

income taxes (federal, state & local)	\$ 85
Social Security tax (as self-employed)	240
transportation	85
guide dog	20
readers	100
braille paper	30
cassette tapes	25
computer disks	10
payments, new equipment	<u>200</u>
Total	\$ 795

Calculation of SSI check:

\$ 2,000.00	
- 85.00	(\$65 + \$20 exclusions)
1,915.00	
- 957.50	additional 50 % exclusion
957.50	
- 795.00	blind work expenses
\$ 162.50	countable income
\$ 545.00	Base SSI rate
- 162.50	countable income
\$ 382.50	Monthly SSI check

Despite \$2,500 in revenue, Tanya is able to reduce her countable monthly income, for SSI purposes, below \$200. She has done this by using traditional business deductions, the usual SSI earned income exclusions, and blind work expenses. This allows her to generate an extra \$382.50 per month plus automatic Medicaid eligibility (in most states) during that critical three-year start up period for her private law practice.

B. Extended Medicaid Coverage Under Section 1619(b)

Continued Medicaid coverage, through section 1619(b), may be the most important

incentive that currently exists within the SSDI and SSI programs.¹²⁶ Medicaid often pays for very expensive items or services, such as home health care, prescription drugs, psychiatric counseling, custom and power wheelchairs, augmentative communication devices, and a range of other services that will depend, in part, on whether your state has included various optional services in its Medicaid Plan.

Section 1619(b) provides Medicaid to persons who lose cash SSI because countable earnings equal or exceed the SSI payment rate. For example, in states which pay the \$545 federal benefit rate, with no state supplement, gross monthly wages of \$1,175 will result in \$545 in countable income, reducing the SSI check to \$0.

Under 1619(b) criteria, a person must:

- 1) continue to be blind or disabled (A person age 65 or older may qualify if he or she is also blind or disabled.);
- 2) have unearned income less than the SSI limit;
- 3) have resources within SSI limits;
- 4) meet a prior month requirement;
- 5) meet a Medicaid use test; and
- 6) meet an income “threshold” test.¹²⁷

Items (2) through (6) require some discussion. If a person would be ineligible for SSI, based on unearned income alone, he or she cannot be eligible for 1619(b). For example, in a state which does not supplement the 2002 federal benefit rate of \$545, a private disability pension of \$700 per month would make a person ineligible for SSI, without regard to any additional earnings. This person, then, would be ineligible for 1619(b), even if he or she met the rest of the 1619(b) criteria. Similarly, an individual whose resources, after exclusions, exceed \$2,000 would be ineli-

gible for 1619(b) Medicaid.¹²⁸

The prior month analysis is the same as discussed in the context of 1619(a).¹²⁹ To be initially eligible, a person must have been eligible to receive an SSI check during the past 12 months. A person would lose prior month status for 1619(b) only if he or she went through a period of 12 consecutive months without any entitlement to an SSI check or 1619(b) benefits.¹³⁰

The Medicaid use test should be easy to meet in most cases. This test is met if the person (1) used Medicaid within the past 12 months; (2) expects to use Medicaid in the next 12 months; or (3) would be unable to pay unexpected medical bills in the next 12 months without Medicaid.¹³¹ The criteria in (1) and (2) are straightforward. Most people who really need Medicaid will fit into one of the categories. Furthermore, only the rare individual with superior medical insurance and great job security will be outside the scope of criterion (3).

The final 1619(b) criterion is the “income threshold” test. To meet this test, one must have annual gross earnings below a certain “threshold.” The purpose is to measure whether an individual has sufficient earnings to provide the equivalent of SSI benefits, Medicaid, and publicly funded attendant care.¹³² The 1619(b) eligibility thresholds vary greatly from state to state, as the threshold is based on a combination of the state’s SSI rate and its annual per capita Medicaid expenditures.

There is both a “general threshold,” which applies to all individuals in a state, and an “individualized threshold,” which will be specific to an individual. A person who meets the other 1619(b) criteria will

¹²⁶42 U.S.C. § 1382h(b)

¹²⁷POMS SI 02302.010 B.

¹²⁸20 C.F.R. § 416.1205(c).

¹²⁹See part V. (introductory language), *supra*.

¹³⁰POMS SI 02302.010 D.

¹³¹*Id.* SI 02302.040 A.1.

¹³²*Id.* SI 02302.045 A.

be eligible for Medicaid if annual earnings are below the general threshold. If the person's income is above that threshold, he or she may still be eligible if individual expenses are high enough.

The general threshold is a dollar amount, calculated by adding together a base amount and a Title XIX (Medicaid) amount.¹³³ In New York, this 2002 threshold is \$33,294 (base of \$16,188 + Title XIX of \$17,106). In other states, the threshold may be higher or lower.¹³⁴

If the general threshold is exceeded, 1619(b) eligibility is determined by totaling the following: Medicaid amount from the threshold chart, or actual Medicaid expenses, whichever is higher; blind work expenses; IRWEs; expenditures under an approved plan for achieving self-support (PASS)¹³⁵; and publicly funded personal/attendant care that would be lost if the individual lost SSI. These expenses are then added to the base amount. The sum is the individualized threshold.¹³⁶ For example, Ms. A has gross earnings of \$35,000 and actual Medicaid expenses of \$22,000 but no additional expenses in the categories listed above. In New York, since her individualized threshold of \$38,188 (\$16,188 + \$22,000) is greater than her gross earnings (\$35,000), Ms. A would be eligible for 1619(b) Medicaid in 2002.

In what are commonly referred to as section 209(b) states, the state determines Medicaid eligibility for persons who are aged, blind, or disabled using state criteria rather than SSI's criteria. Section 209(b) states are not required to provide automatic Medicaid for SSI beneficiaries.¹³⁷

The law governing section 1619(b) mandates Medicaid coverage in 209(b) states to

those who were eligible for Medicaid, under a state's criteria, "provided they were eligible for Medicaid in the month prior to becoming eligible for 1619."¹³⁸ So long as a person was eligible for both SSI and Medicaid in the month prior to losing SSI, 1619(b)'s prior month requirement would be met. Otherwise, the remainder of the 1619(b) criteria, as discussed above, will apply in 209(b) states.

C. Expedited Reinstatement of SSI Benefits

These provisions, like SSDI's expedited reinstatement provisions,¹³⁹ were effective January 1, 2001. Under certain circumstances, they allow for reinstatement of SSI even if the person has been ineligible for benefits for 12 or more consecutive months. These provisions allow reinstatement, without a new application, if the person:

- a) was eligible for SSI;
- b) lost SSI due to earned income (or combined earned and unearned income) for 12 or more consecutive months;
- c) requests reinstatement within 60 months of the last month of entitlement, or, if the request is filed after 60 months, good cause is established for missing the deadline;
- d) has a disability that is the same as (or related to) the physical or mental disability that was the basis for their original claim;
- e) that disability renders the person incapable of SGA; and
- f) the person satisfies SSI's non-medical requirements (i.e., SSI's income and resource rules).¹⁴⁰

¹³³*Id.* SI 02302.045 B.1.

¹³⁴The thresholds for each state are published in POMS SI 02302.200.

¹³⁵In the 39 states in which an SSI beneficiary automatically qualifies for Medicaid, an approved PASS would ensure SSI eligibility and, with it, automatic Medicaid eligibility. See note 7, *supra*.

¹³⁶POMS SI 02302.050 C. An individualized threshold calculation worksheet can be found at POMS SI 02302.300.

¹³⁷42 U.S.C. § 1396a(f). See part II.D, *supra*, for a listing of the section 209(b) states.

¹³⁸42 U.S.C. § 1382h(b)(3); POMS SI 02302.010 C.

¹³⁹See part IV.G, *supra*.

¹⁴⁰Ticket to Work and Work Incentives Improvement Act of 1999, § 112, 42 U.S.C. § 1383(p).

While the expedited reinstatement application is pending, the person is eligible for up to six months of “provisional benefits.”¹⁴¹ These provisions will allow a person to be reinstated well after he or she has exhausted the right to return to the SSI program following a period of non-eligibility due to earned income.

SSI’s expedited reinstatement provisions should be far less important than the parallel SSDI provisions. This is because expedited reinstatement will never be needed if the person retained 1619(b) Medicaid status during the period of ineligibility for cash benefits.¹⁴² The person who has been eligible for 1619(b) Medicaid can reestablish eligibility for cash benefits when earnings are reduced without the need to access the expedited reinstatement provisions.

VI. The Optional Medicaid Buy-In

The optional Medicaid buy-in program is a new way for individuals with disabilities to obtain or retain Medicaid when they are working.¹⁴³ It is designed to provide health insurance to working people with disabilities who, because of relatively high earnings, cannot qualify for Medicaid under another provision. The buy-in was originally part of the Balanced Budget Act of 1997.¹⁴⁴ The enhancements to this optional program have been touted as some of the more important provisions of the 1999 Ticket to Work and Work Incentives Improvement Act. As this document is written, 20 states had adopted and were implementing buy-in programs, with an additional 13 states at various stages of pre-implementation (including two that had been adopted and were awaiting federal approval, and 11 already passed by state legislatures, but not yet submitted for federal approval).¹⁴⁵

The buy-in program is most important to those persons with disabilities who have significant health care needs that cannot be met through employer-sponsored health benefit plans and have no ability to obtain or retain Medicaid when working for significant wages. Most often, the group that will benefit most will be SSDI beneficiaries, who were not simultaneously eligible for SSI and, thus, cannot qualify for section 1619(b) Medicaid. Many of these individuals currently receive Medicaid through medically needy programs¹⁴⁶ and could not afford to work if it meant giving up Medicaid as the source of payment for expensive items like prescription drugs, personal assistance services, and durable medical equipment. In those states that have implemented buy-in programs, Medicaid eligibility can continue in many cases at annual wage levels exceeding \$40,000.

Subject to federal criteria, a state can structure the buy-in as it sees fit. Largely due to fears of rising Medicaid costs, very few states had initiated programs when the Ticket to Work and Work Incentives Improvement Act was signed into law in December 1999. This Act sought to make the program more attractive to states.¹⁴⁷

Key federal eligibility criteria for the original, 1997 buy-in include:

- Eligible individuals must be in a family whose net income is less than 250 percent of the federal poverty level. A single individual is in a family of one.
- Except for earnings, the person

¹⁴¹42 U.S.C. § 1383(p)(7).

¹⁴²See section V.D, *supra*.

¹⁴³Ticket to Work and Work Incentives Improvement Act of 1999, § 202. These provisions are primarily codified as amendments to 42 U.S.C. §§ 1396a(a)(10)(A)(ii) and 1396o.

¹⁴⁴Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 506.

¹⁴⁵Website of SSA’s Office of Employment Support Programs, www.ssa.gov/work/ResourcesToolkit/Health/states.html (visited August 2, 2002).

¹⁴⁶See 42 U.S.C. § 1396a(a)(10)(C).

¹⁴⁷See, e.g., Ticket to Work and Work Incentives Improvement Act of 1999, § 203, 42 U.S.C. § 1320-22, authorizing grants to develop state infrastructures to support working individuals with disabilities.

with a disability would be considered eligible for SSI.

- Each state determines its own definition of a “family.”
- All SSI exclusions apply to determine family income, including the earned income exclusions.
- Individuals are not required to have been on SSI.
- The state must make a disability determination if an individual was not an SSI beneficiary.
- SGA is not a consideration.
- States can increase resource limits to as high as \$14,000.
- States can charge premiums or other cost-sharing charges.¹⁴⁸

The 1999 amendments built on the 1997 legislation, adding these provisions:

- States may offer a buy-in to persons with disabilities who work and have earnings between 250 and 450 percent of the federal poverty level.¹⁴⁹
- Participating states can set income limits and require cost-sharing and premiums, based on income, on a sliding scale. A state could require some individuals to pay the full premium as long as the premiums do not exceed 7.5 percent of the individual’s total income.¹⁵⁰

- States must require a 100 percent premium payment for individuals with adjusted gross incomes greater than \$75,000 unless states choose to subsidize the premium using their own funds.¹⁵¹

VII. Conclusion

This article provides a comprehensive overview of the wide range of work incentives available through SSDI, SSI, Medicare, and Medicaid, including those established or improved within the last three years. It has also emphasized use of the work incentives to fund specialized services and assistive technology to allow persons with disabilities to work.

The reader must be cautioned that both the newer and longstanding work incentives are still not well understood by many of SSA’s staff. This problem is sometimes made more challenging because SSA has often been slow to publish new or revised regulations or POMS provisions to implement changes in federal law. For this reason, advocates may need to take steps to ensure that these provisions are applied and interpreted accurately. With the aggressive work of community-based advocates, including those working in the newly-funded Benefits Planning, Assistance and Outreach and Protection and Advocacy for Beneficiaries of Social Security projects, SSDI and SSI beneficiaries will be able to use these work incentives to move toward greater financial independence.

¹⁴⁸See note 144, *supra*.

¹⁴⁹42 U.S.C. § 1396o(1)(A).

¹⁵⁰*Id.*

¹⁵¹*Id.* § 1396o(1)(B).