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Thursday
September 9, 1993

Federal Register

Part II

**Department of
Health and Human
Services**

Social Security Administration

**20 CFR Part 416
Supplemental Security Income;
Determining Disability for a Child Under
Age 18; Final Rule**

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 416

[Regulations No. 16]

RIN 0950-AD58

Supplemental Security Income; Determining Disability for a Child Under Age 18; Correction

AGENCY: Social Security Administration, HHS.

ACTION: Correction to final rule.

SUMMARY: This document contains corrections to the final rule published Thursday, September 9, 1993 (58 FR 47532). This rule revised the disability evaluation and determination process for Supplemental Security Income (SSI) claims of children based on disability.

EFFECTIVE DATE: September 9, 1993. The rules in §§ 416.924-416.924e, 416.926a, and 416.994a will no longer be effective September 9, 1997, unless extended by the Secretary, or revised and promulgated again.

FOR FURTHER INFORMATION CONTACT: Cassandra Bond, Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235, telephone (410) 965-1794.

SUPPLEMENTARY INFORMATION:

Background

The final rule that is the subject of these corrections amended the rules we published on February 11, 1991 (56 FR 5534), subsequent to the February 20, 1990, U.S. Supreme Court ruling in *Sullivan v. Zebley*, 493 U.S. 521, 110 S.Ct. 885 (1990). In *Zebley*, the Court invalidated the use of a medical "listings-only" approach to the denial of children's claims for SSI benefits based on disability, and required the use of an individualized functional assessment of children whose impairments did not meet or equal the severity of listed medical impairments. As did our prior final rules, the changes made in the rules incorporate into the disability determination process for these children concepts and criteria reflecting current knowledge in the field of childhood disability and functioning.

Need for Correction

The final rule, as published, did not contain the complete explanation we intended to provide concerning the reasons that we decided to establish a "sunset date" for the rules cited in

EFFECTIVE DATE above. In addition, we are making several editorial corrections.

Correction of Publication

Accordingly, the publication on September 9, 1993, of the final rule, which was the subject of FR Doc. 93-21600, is corrected as follows:

1. On page 47534, in the first column, the following material is inserted before the entry "Section 416.902—General Definitions and Terms for this Subpart":

Sunset Date

For several reasons, we are providing a sunset date for final §§ 416.924-416.924e, 416.926a, and 416.994a of 4 years from the date of publication. On that date, those rules will no longer be effective unless extended by the Secretary, or revised and promulgated again. We received one comment asking us to provide a 3-year sunset date. The commenter wanted us to include a sunset date to show our commitment to update the regulations to reflect advances in medicine and early intervention. The commenter's reason for the need for a sunset date is one reason for setting a date; however, we are adopting the comment for other compelling reasons.

The use of sunset dates is not new in our regulations. We have used sunset dates for other rules, including our listings in the Listing of Impairments in appendix 1 to subpart P of part 404. Sunset dates are a means of alerting the public that changes in the rules may be necessary, and, if they are, that we plan diligently to pursue those changes in the foreseeable future. Sunset dates do not require us to make changes in the rules, but they do require us to reexamine the rules, and if changes are not necessary, to publish a final rule in the *Federal Register* extending the effective date.

The most important reason for including a sunset date for §§ 416.924-416.924e, 416.926a, and 416.994a is that these rules represent a significant change in the way we evaluate disability in children from the way we evaluated disability in children prior to the Supreme Court's decision in *Zebley*. Even though we have had these rules in place for over two-and-one-half years and believe that they are functioning well and serving the children they are intended to serve, the rules we promulgated on February 11, 1991 and this final rule still establish some different disability evaluation criteria for children. The rules for which we are providing a sunset date do implement the statutory standard for evaluating disability in children (i.e., a child is disabled if he or she has an impairment(s) of "comparable severity"

to impairment(s) that disable adults). These rules also use as many familiar principles of disability evaluation as feasible; however, they are of necessity different from the adult rules in some respects and employ evaluation criteria that have not been used before in adjudicating childhood disability claims.

We are beginning to receive anecdotal evidence and concerns from Members of Congress and other individuals who believe that the rules—and even the entire program—should be changed. Some people question whether all children who are receiving SSI benefits under these rules do, in fact, have impairments of comparable severity to disabling impairments in adults. Some question the propriety of paying SSI benefits to children with certain kinds of impairments. Many of these allegations, opinions, and concerns come from individuals in the educational community who have the opportunity to see the children who file for and receive SSI benefits, but we have also heard the same concerns from other people.

We are committed to ensuring that the SSI benefits we pay do go to children who are disabled and that the benefits are used for the benefit of the children. For this reason, we will do whatever we determine is necessary and within our authority to improve our process. The sunset date for these rules is one aspect of our commitment. If we find that it is necessary to revise the rules to further minimize the risk of incorrect payments, we will take appropriate action to revise them.

2. On page 47542, in the first column, last paragraph, first line, "one-and-one-half" is corrected to read "two-and-one-half."

3. On page 47543, in the third column, last paragraph, line four, "one-and-one-half" is corrected to read "two-and-one-half."

4. On page 47544, in the second column, second paragraph under the first "Response," line sixteen, "a year-and-a-half" is corrected to read "two-and-a-half years."

5. On page 47545, in the third column, the paragraph titled "Response" is corrected to read as follows:

Response: We have not adopted these comments. We are in the process of revising the listings for both children and adults; however, these revisions go far beyond the ambit of the present rules and will be proposed through normal Administrative Procedure Act (APA) rulemaking procedures. We have published final revisions of both the multiple body system listings, which

includes Down syndrome, FAS, and other such disorders, and the childhood mental listings (55 FR 51204 and 51208, December 12, 1990). We have published further final revisions to the multiple body system listings and revisions to the endocrine system listings, and added rules for the evaluation of immune system disorders, including human immunodeficiency virus (HIV) infection (58 FR 36008, July 2, 1993). We have also published NPRMs proposing to update the listings for adult mental disorders, which may be applicable to children in certain circumstances (56 FR 33130, July 18, 1991), the respiratory listings, including the childhood asthma listing (56 FR 52231, October 18, 1991), and the cardiovascular listings, including the childhood listings (56 FR 31266, July 9, 1991).

6. On page 47570, in the first column, first full paragraph, line three, "one-and-one-half" is corrected to read "two-and-one-half."

7. On page 47570, in the second column, both paragraphs under "Response" are corrected to read as follows:

Response: We adopted the comment, but for different reasons than the commenter gave. The commenter's reasons are the same reasons we provide sunset dates for our medical listings. The medical listings in the Listing of Impairments contain specific medical criteria; as such, they do require updating from time to time.

However, these childhood rules are not analogous to the Listing of Impairments. They are grounded on a requirement for an individualized assessment of each child's ability to function, an assessment that we believe will always be relevant regardless of any future advances in screening, diagnosis, and early intervention. Thus, the fact that there may be such changes should have little or no impact on these rules because our ultimate concern will still be to determine how a given child is able to function and how that ability comports with our definition of disability. The kinds of advances described by the commenter will surely assist us in making this determination (in an evidentiary way and perhaps by providing greater insight into the effects of children's impairments), but we do not think that they will affect the rules themselves.

However, for reasons we have already given earlier in this preamble, the rules may need updating in the future. Therefore, we are providing a 4-year sunset date for §§ 416.924-416.924e, 416.926a, and 416.994a. We chose 4 years instead of the 3 recommended by

the commenter because it is more reasonable and practicable.

8. On page 47576, in the second column, in the paragraph titled "Cost Considerations," line 18, "saved" is corrected to read "prevented."

9. On page 47576, in the third column, in the first paragraph titled "Cost Considerations," line 10, "saved" is corrected to read "prevented."

10. On page 47577, in the second column, in the Words of Issuance, add the following sentence: "The rules in §§ 416.924-416.924e, 416.926a, and 416.994a will no longer be effective on September 9, 1997 unless extended by the Secretary or revised and promulgated again."

Fred Wirth,

Acting Deputy Assistant Secretary for Information Resources Management.

[FR Doc. 93-23267 Filed 9-22-93; 8:45 am]

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. 921118-3184]

RIN 0651-AA63

Patent Interference Practice Burden of Proof

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The Patent and Trademark Office (PTO) is amending its rules of practice in patent interference cases. The amended rules specify that a party filing a motion has the burden of proof for that motion. The amended rules also more clearly state the nature of expert-witness and fact-witness evidence that must accompany a preliminary motion. Moreover, a definition of "interlocutory order," as contrasted with a final decision, is added to clarify the meaning of "interlocutory order."

EFFECTIVE DATE: October 25, 1993. These rules will apply to all papers filed with the PTO on or after the effective date.

FOR FURTHER INFORMATION CONTACT: Fred E. McKelvey by telephone at (703) 305-9035 or by mail marked to his attention and addressed to Box 8, Commissioner of Patents and Trademarks, Washington, DC 20231.

SUPPLEMENTARY INFORMATION: A Notice of Proposed Rulemaking was published in the Federal Register (58 FR 528) on January 6, 1993, and in the Official Gazette of the PTO (1147 Off. Gaz. 11) on February 2, 1993. Comments were

due March 8, 1993. Four comments were received.

The PTO proposed moving the presumption of correctness of an interlocutory order, which is presently in 37 CFR 1.655(a), to a proposed new subsection 1.601(q). The PTO also proposed to make explicit in 37 CFR 1.637(a) that a party filing a motion has the burden of proving why it is entitled to the relief sought in the motion.

The PTO proposed to amend 37 CFR 1.639 to incorporate guidance provided in *Hanagan v. Kimura*, 16 USPQ2d 1791, 1794 (Comm'r Pat. 1990). Subsection (c) of § 1.639 was proposed to be amended to refer to "additional evidence in the form of testimony" so as to distinguish the evidence needed under subsection (c) from evidence submitted under subsections (a) and (b). Subsection (d) to 37 CFR 1.639 was proposed to be added to specify the nature of evidence that must be submitted when an opinion of an expert is needed. Subsection (e) was proposed to be added to specify the nature of evidence that must be submitted when a statement of a fact witness is to be relied upon. Subsection (f) was proposed to be added to specify the nature of a showing that should be made when a statement of an opponent is needed or evidence in possession of an opponent is needed. Subsection (g) was proposed to be added to specify the nature of evidence that must be supplied if inter partes tests are to be conducted.

Present 37 CFR 1.655(a) was proposed to be amended by deleting the last sentence, which would be moved to and be included in the proposed definition of interlocutory order in proposed subsection 1.601(q).

The PTO received one comment that endorsed the proposed rulemaking, but was otherwise directed to an earlier rulemaking.

The PTO received two comments regarding proposed subsection 1.601(q). One comment suggested that procedural rules should not be placed in a definition. The comment suggested that the last two sentences of proposed subsection 1.601(q), which deal with the presumed correctness of interlocutory orders, be in a new subsection of section 1.655. This suggestion is adopted in part. The last two sentences of subsection 1.601(q) will be moved to the end of subsection 1.655(a).

A second comment challenged the sufficiency of the notice in the proposed rulemaking. The comment noted that the word "manifest" was omitted from the portion of existing subsection 1.655(a) that was moved to new subsection 1.601(q) and that the word

Chart 1. Sequential Disability Determination Process

| Adults | Children: Pre-Zebley | Children: Post-Zebley | | | | |
|---|--|--|---|--|--|---|
| <p>1. Are you working? (Y = Deny)</p> <p>2. Do you have a severe impairment? (N = Deny)</p> <p><i>Compare impairment to medical listings</i></p> <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; border-right: 1px solid black; padding: 5px;"> <p><i>Mental</i></p> <p>3a. Meet both diagnostic (A) and functional (B) criteria? (Y = Allow)</p> <p>3b. Equal? Meet (B) and some of (A) (Y = Allow)</p> </td> <td style="width: 50%; padding: 5px;"> <p><i>Other</i></p> <p>3a. Meet criteria in medical listings? (Y = Allow)</p> <p>3b. Medically equal medical listings? (Y = Allow)</p> </td> </tr> </table> <p><i>Assess residual functional capacity (RFC)</i></p> <p>4. Can you do past work? (Y = Deny)</p> <p><i>Consider age, education and work experience</i></p> <p>5. Can you do any other work? (N = Allow; Y = Deny)</p> | <p><i>Mental</i></p> <p>3a. Meet both diagnostic (A) and functional (B) criteria? (Y = Allow)</p> <p>3b. Equal? Meet (B) and some of (A) (Y = Allow)</p> | <p><i>Other</i></p> <p>3a. Meet criteria in medical listings? (Y = Allow)</p> <p>3b. Medically equal medical listings? (Y = Allow)</p> | <p>1. Are you working? (Y = Deny)</p> <p>2. Do you have a severe impairment? (N = Deny)</p> <p><i>Compare impairment to medical listings</i></p> <p>3a. Meet criteria in medical listings? (Y = Allow)</p> <p>3b. Medically equal medical listings * (Y = Allow; N = Deny)</p> | <p>1. Are you working? (Y = Deny)</p> <p>2. Do you have a severe impairment? (N = Deny)</p> <p><i>Compare impairment to medical listings</i> [†]</p> <table border="0" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; border-right: 1px solid black; padding: 5px;"> <p><i>Mental **</i></p> <p>3a. Meet both diagnostic (A) and functional (B) criteria? (Y = Allow)</p> <p>3b. Equal? Meet (B) and some of (A)? (Y = Allow)</p> </td> <td style="width: 50%; padding: 5px;"> <p><i>Other</i></p> <p>3a. Meet medical criteria in the listings? (Y = Allow) [^]</p> <p>3b. Medically equal medical listings? (Y = Allow)</p> </td> </tr> </table> <p>3c. Functionally equal medical listings? (Y = Allow)</p> <p><i>Do individualized functional assessment</i></p> <p>4. Given IFA, is impairment(s) of comparable severity to that which would disabled an adult? (Y = Allow; N = Deny)</p> | <p><i>Mental **</i></p> <p>3a. Meet both diagnostic (A) and functional (B) criteria? (Y = Allow)</p> <p>3b. Equal? Meet (B) and some of (A)? (Y = Allow)</p> | <p><i>Other</i></p> <p>3a. Meet medical criteria in the listings? (Y = Allow) [^]</p> <p>3b. Medically equal medical listings? (Y = Allow)</p> |
| <p><i>Mental</i></p> <p>3a. Meet both diagnostic (A) and functional (B) criteria? (Y = Allow)</p> <p>3b. Equal? Meet (B) and some of (A) (Y = Allow)</p> | <p><i>Other</i></p> <p>3a. Meet criteria in medical listings? (Y = Allow)</p> <p>3b. Medically equal medical listings? (Y = Allow)</p> | | | | | |
| <p><i>Mental **</i></p> <p>3a. Meet both diagnostic (A) and functional (B) criteria? (Y = Allow)</p> <p>3b. Equal? Meet (B) and some of (A)? (Y = Allow)</p> | <p><i>Other</i></p> <p>3a. Meet medical criteria in the listings? (Y = Allow) [^]</p> <p>3b. Medically equal medical listings? (Y = Allow)</p> | | | | | |

* Before 1990, SSA policy in SS Ruling 83-19 explicitly prohibited using an overall functional assessment to find that a claimant's impairment equalled the medical listings. A claimant with multiple impairments could meet or equal the listings only if at least one impairment, alone, met or medically equalled a specified listing.

** The childhood mental disorders listings were modified in 1990 to include functional criteria similar to those put in the adult listings in 1985.



National Commission on Childhood Disability

Chair:

The Honorable Jim Slattery

February 13, 1995

MEMORANDUM

Members:

Polly Arango
Family Voices

Adrienne Asch, Ph.D.
Wellesley College

Dolores Berkovsky, M.S.N.,
L.M.S.W.
St. Teresa's Home, Catholic Charities

Wade F. Horn, Ph.D.
National Fatherhood Initiative

Jennifer Howse, Ph.D.
March of Dimes Birth Defects Foundation

Sharman Davis Jamison
Parent Advocacy Coalition Educational
Rights Center

Dan Johnson
Wisconsin Department of Health & Social
Services

Paul Marchand
The Arc

James M. Perrin, M.D.
Massachusetts General Hospital

M. Carmen S. Ramirez
Schools Are For Everyone

Carol Rank
Kansas Disability Determination &
Referral Service

H. Rutherford Turnbull III
Beach Center on Families & Disabilities,
University of Kansas

Barbara Wolfe, Ph.D.
University of Wisconsin

Staff Director:

Elaine Fultz, Ph.D.

TO: Members of the Commission on Childhood
Disability

FROM: Elaine Fultz *EF*
Staff Director

REGARDING: Materials Requested at February 3rd
Meeting

This packet contains the remaining materials that were
requested at the Commission's February 3rd meeting.
These include:

- * Baltimore Sun article, "America's Most Wanted
Welfare Plan"
- * Questions Concerning a Voucher Program for
Disabled Children
- * Disability Digest articles
- * Questions and Answers from Childhood Disability
Hotline
- * Excerpts from Inspector General's Reviews of
the Participation of Children with Mental
Disabilities in the Supplemental Security
Income Program
- * State-by-state data on SSI award rates
- * State-by-state description of optional Medicaid
services

Enclosures (7)

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SPECIAL REPORT



THE BALTIMORE SUN

*Reprint of a four-part series that appeared in
The Baltimore Sun January 22-25, 1995*

America's most wanted welfare plan