

How Much Work Can I Do And Still Get My Disability?

By Eric Buchanan

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This is a common question we get from our clients and from other people asking questions about how Social Security works, and from other attorneys who are not as familiar with Social Security cases who are asked by their clients. Unfortunately, there are enough “ifs” and “buts” that it is hard to give general advice when a client asks, “how much work can I do and still get my disability?” This article will explain the basic rules that apply to a person who has done some work or wants to work while on disability.

The short answer to the question is that a person is not working too much if he or she is working below the level set forth by SSA as the measure for substantial gainful activity (“SGA”). The amount each person can earn per month are on a chart at <http://www.ssa.gov/OACT/COLA/sga.html>; for 2010 the amount is up to \$1000 per month.¹

If it were that simple, the answer to “how much work can I do and still get my disability?” should be that if someone is earning less than \$1000 per month in 2010, then they can still draw disability, but if over \$1000 they cannot. Unfortunately, it is actually more complicated than that.

I. The Substantial Gainful Activity analysis looks at the value of the work actually performed, not just the amount a person is paid.

Work activity which results in earnings above the regulatory guidelines defining substantial gainful activity creates a presumption that a claimant is engaged in substantial gainful activity. *Tyra v. Secretary of H.H.S.*, 896 F.2d 1024, 1029 (6th Cir. 1990). The presumption created by earnings over the regulatory guideline can be rebutted by proof establishing that the claimant’s earnings were subsidized or that the claimant received special considerations due to a handicap, but the claimant has the burden of proving that the presumption should not apply. *Dinkel v. Secretary of H.H.S.*, 910 F.2d 315, 319 (6th Cir. 1990).

The presumptions can be overcome in some cases, because there are exceptions for people getting paid over \$1000 per month who might still qualify for disability. Similarly, there are exceptions for people who get paid less than \$1000 per month, that but can still be found to be performing SGA. These regulations explaining how this works are found at 20 C.F.R. § 404.1574 (to determine what counts as SGA for employees), and at 20 C.F.R. § 404.1575 (calculating SGA for self employed people.)

Interestingly, earnings can be from regular employment or self-employment, and can even include illegal activities. In *Bell v. Commissioner*, 105 F.3d 244, 246 (6th Cir. 1996), the Court of Appeals held that unlawful activity, including a drug addict’s

¹For many years the level of income that counted as SGA was set at a fixed amount. From 1980 to 1989 it was \$300 per month. From 1990 to the middle of 1999 it was \$500 per month. In 1999 the level was raised to \$700 per month, then was set to raise automatically with the national average wage index. In 2009 it rose to \$980, and it is \$1000 in 2010.

prostitution, can constitute substantial gainful activity if it results in earnings above the regulatory guidelines.

II. Calculating SGA for employees

Under 20 C.F.R. § 404.1574, addressing work by “employees,” SSA will start by looking at the monthly income, but if a person earns over \$1000 per month, SSA can look at other factors such as whether the income is actually earned, or if instead it is subsidized or is paid for sheltered work (for example, a person is overpaid because they are working for a family member or in a sheltered workshop), so that a person receiving over \$1000 per month can still be disabled if the person can prove the amount they actually are earning based on their performance is less than \$1000.

On the other hand, a person getting paid less than \$1000 per month can still be found to be performing SGA if the work the person is doing is comparable to the work unimpaired people are doing in similar occupations or the work is “clearly worth” the pay that would be SGA. 20 C.F.R § 404.1574(b)(6)(iii). For example, despite earnings over the regulatory limit, a claimant’s work as a roadside rest area cleaner was not substantial gainful activity where the claimant produced less than half of the work produced by unimpaired workers, required special transportation to and from work, and required constant supervision. *Boyes v. Secretary of H.H.S.*, 46 F.3d 510, 512 (6th Cir. 1994).

One question I was recently asked was whether a person drawing benefits could do “charity work” or “volunteer work.” Assuming such a person is not paid \$1000 per month, the person might not be performing SGA, but if the work the person is doing is comparable to the work that would earn a person over \$1000 a month, then SSA can find it to be SGA under 20 C.F.R § 404.1574(b)(6)(iii). The key questions are, what would someone normally be paid to do that work activity in the local economy and whether the disabled person is doing the activity for enough hours that the equivalent pay would be over SGA. Thus, SSA can find someone to be performing SGA even if the person is making less than \$1000 per month if SSA finds that the work the person is performing would allow other people performing the same amount of work to be paid over \$1000 per month.

III. Calculating SGA for self-employed people.

The rules are even more complicated if the disabled person is self employed. Under 20 C.F.R. § 404.1575 (a), SSA will not look at the person’s income alone, because that income may not reflect earnings for work, but “may depend on a number of different factors, such as capital investment and profit sharing.” 20 C.F.R. § 404.1575(a).

Rather than looking at the amount that a self employed person is paid, SSA “will evaluate [the person’s] work activity based on the value of the services to the business regardless of whether [the person] receives an immediate income for [the] services.” *Id.* In order to determine if the value of a person’s services rise to the level of SGA, SSA applies a three part test. If the person considered to be earning SGA under test one, the

analysis ends, and the person is found to be working too much; if the person is not found to be performing SGA under test one, then SSA looks at test two and three.

A. Test one for self-employed people:

Under the “test one,” a self employed person is engaged in SGA if he or she “render[s] services that are significant to the business and receive[s] a substantial income from the business.” 20 C.F.R. § 404.1575(a)(1).

The regulations further explain that a person is performing “significant services” automatically if they operate the business alone. 20 C.F.R. § 404.1575(b)(1). If there are other people involved in the business, then the person is performing significant services if the person contributes more than half the time required to manage the business or spends more than 45 hours a month managing the business. *Id.*²

In order to determine if the self-employed person has “substantial income” the self-employed person is allowed to subtract normal business expenses. 20 C.F.R. § 404.1575(c). Not only that, but the self-employed person can deduct other things from his or her income, such as the reasonable value of any unpaid help provided to the business from family members or others. The self-employed person can also deduct impairment-related work expenses that have not already been deducted as business expenses, as well as impairment related expenses that were paid by another individual or agency. *Id.*

After all those deductions, SSA will average the self-employed person’s net earnings, and if the average is above SGA, or is comparable to what the self-employed person was paid before becoming disabled, then the earnings count SGA and the person is earning too much.

However, if the averaged net earnings are low enough, will then go on to the second and third parts of the three-part test.

B. Test Two: is the self-employed person’s work activity comparable to others who are not impaired?

Under the second test, the self-employed person is found to be working too much if the person’s work activity, “in terms of factors such as hours, skills, energy output, efficiency, duties and responsibilities, is comparable to that of unimpaired individuals” in the same community who are in the same or similar businesses. 20 C.F.R. § 404.1575(a)(2). If the person is not working too much under test one or two, then test three is considered.

² There is a different rule if the business being managed is a farm landlord business, in which case the person must be materially participating in the production or management of the production of the farm. *Id.*

C. Test Three: what is the actual value of the work?

A self-employed person is also found to be working too much if, under test three, the self-employed person's work activity is "clearly worth" the level of SGA (\$1000 in 2010) "in terms of its value to the business, or when compared to the salary that an owner would pay to an employee" to do the work the self-employed person is doing. 20 C.F.R. § 404.1575(a)(3).

If a person is found to be performing a level of self-employed work that does not establish SGA under all three tests, then the person is not performing SGA, and SSA can proceed to consider the other medical factors to determine if the person is or remains disabled.

IV. What happens if a person is found to be performing SGA?

This is a pretty serious matter, because if a person is found to be performing SGA, it does not matter how disabled the person is physically or mentally, because if the person is earning SGA, they lose at step one of the sequential evaluation process³; if the person loses at step one, then SSA never reaches any of the step measuring how limited the person is by his or her impairments. See, e.g., *Dinkel v. Secretary of H.H.S.*, 910 F.2d 315, 318 (6th Cir. 1990) (A claimant who is performing substantial gainful activity is not disabled no matter how severe the claimant's medical condition may be.)

However, there are further exceptions if a person is performing above SGA for short periods of time. If a person stops working or has an earnings level below SGA for at least 30 days, then returns to work activity above the SGA level for six months or less, that work can be found to be an unsuccessful work attempt. See, 20 C.F.R. § 404.1574(c) for employees and 20 C.F.R. § 404.1575(d) for self-employed people.

If a claimant seeks to show that work less than three months was an unsuccessful work attempt, the must show that their impairment stopped them from working or to reduce the amount of work below SGA levels, or that the person was only able to work under special conditions that were removed. 20 C.F.R. § 404.1575(c)(3).

³ In evaluating a claim for disability, the Secretary first determines whether the claimant is actually engaging in substantial gainful activity. If so, the claim is denied. If not, the Secretary next determines whether the claimant has a severe impairment. If not, the claim is denied. If so, the Secretary determines whether the claimant has an impairment which meets or equals a listed impairment. If so, the claim is allowed. If not, the Secretary determines whether the claimant has the residual functional capacity to perform past relevant work. If so, the claim is denied. If not, the Secretary determines whether or not the claimant has the residual functional capacity to perform a significant number of other jobs taking into consideration the claimant's age, education, and work experience. If so, the claim is denied. If not, the claim is allowed. *Young v. Secretary of H.H.S.*, 925 F.2d 146, 147-148 (6th Cir. 1990); *Born v. Secretary of H.H.S.*, 923 F.2d 1168, 1173 (6th Cir. 1990); *Mullins v. Secretary of H.H.S.*, 836 F.2d 980, 983 fn.5 (6th Cir. 1987); *Wyatt v. Secretary of H.H.S.*, 974 F.2d 680 (6th Cir. 1992).

If the person wants to show that a work period of between three and six months was an unsuccessful work attempt, the person must also show that the person was frequently absent from work due to the impairment, the work was unsatisfactory due to the impairment, the person worked during temporary remission of his or her impairment, or the person worked under special conditions that were essential to the performance of the job, and those conditions were removed. 20 C.F.R. § 404.1575(c)(4).

About the author:

Eric Buchanan is founding partner of the firm of Eric Buchanan and Associates, PLLC, a firm that represents disabled people in claims for disability insurance and Social Security Disability, as well as individuals and policyholders who have been denied ERISA benefits and other insurance benefits. In 2007 Eric Buchanan was certified as a specialist in Social Security Disability law by the Tennessee Commission on Continuing Legal Education and Specialization.

Eric Buchanan is past President of the Chattanooga Trial Lawyers. He is also past-chair of the Tennessee Bar Association Disability Law Section. He was also elected to two positions within the American Association of Justice (AAJ) (Formerly the Association of Trial Lawyers of America (ATLA)); Mr. Buchanan is past chair of the AAJ ERISA Health Care and Disability Litigation Group and past chair of the AAJ Social Security Disability Section. Eric Buchanan is a sustaining member of NOSSCR. He is Secretary of the Tennessee Association for Justice (TAJ) (formerly the Tennessee Trial Lawyers Association (TTLA)), as well as a lifetime member of TAJ.

Eric Buchanan, along with co-author John Wood, has written numerous articles on ERISA law. He is also a frequent speaker on ERISA law, Subrogation, and disability law at both the state and national levels.

Eric Lane Buchanan is a 1989 graduate of The Virginia Military Institute, and a 1997 *magna cum laude* graduate of the Washington and Lee School of Law. In law school, he was inducted in the ODK honorary leadership fraternity in January 1997 and inducted into Order of the Coif upon graduation.

Prior to attending law school, Eric Buchanan served as an officer and naval aviator in the United States Navy, serving as a pilot of P3-C "Orion" aircraft. He served in the East Coast of the U.S., in the Atlantic, Mediterranean, and Arctic Oceans, and was deployed throughout Europe, including eleven months spent in Iceland.