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Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits.

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UNDERSTANDING WORK OBSTACLES FOR SOCIAL SECURITY RECIPIENTS: THE TRIAL WORK PERIOD, THE REENTITLEMENT PERIOD, AND THE EXPEDITED REINSTATEMENT PERIOD BY: JULIE E. MOYA

As any practitioner that handles Long Term Disability cases knows, he/she needs a good, working understanding of Social Security. This article will cover a very important, but much overlooked, Social Security topic: what work a Social Security recipient can do and still receive Social Security benefits.

TITLE II

What do the Regulations Say?

Under Title II, Claimants who work while receiving benefits are automatically subject to the parameters of 20 C.F.R. §§ 404.1592-404.1592f. These rules cover distinct sets of rules. The first set of rules is commonly known as the "trial work period." This set of rules is prone to misconceptions. For example, the "trial work period" is not really a "period" but a set of rules that contain varying time limits. Also, the Regulations define "trial work period" as "a period during which you may test your ability to work and still be considered disabled." 20 C.F.R. § 404.1592(a). This definition makes the "trial work period" rules sound voluntary. However, "trial work period" rules "begin[] with the month in which you become entitled to disability benefits," or on the Claimant's application date, whichever is later. 20 C.F.R. § 404.1592(e).

Further, the "trial work period" can be confused with the "Ticket to Work" program, which is a distinct program, separate from "trial work period" rules, and is defined in a completely separate set of Regulations, 20 C.F.R. § 411. "Ticket to Work" is a voluntary program. 20 C.F.R. § 411.135. So, what are the "trial work period" rules? They limit a Claimant to 9 months (consecutive or not) of "services" in a consecutive 60 month (5 year) period. 20 C.F.R. § 404.1592 (e)(2). Each Claimant gets one 9 month allowance per "period of entitlement to cash benefits." 20 C.F.R. § 404.1592 (c).

The caveat is that Social Security left a loophole that is subjective enough to justify benefit termination at any time, regardless of the 9 month limit. Under 20 C.F.R. § 404.1592 (d)(2)(ii)-(iii), Social Security can deny benefits sooner than 9 months if they feel that a Claimant's below-SGA work "demonstrate[s] the ability" to perform SGA ("SGA" stands for "Substantial Gainful Activity," as defined by 20 C.F.R. § 404.1572. It is presumptively $1000 in 2011, but can change year to year, and can be defined as work that is "substantial" or "gainful" even if below the $1000 presumptive limit). The applicable timeframe is surprisingly broad as well: anytime within 12 months of the Claimant's onset up to the end of "any required waiting period for benefits." Further, Social Security "may find that your disability has ended at any time during the trial work period if the medical *or other* [a/k/a non-medical] evidence shows that you are no longer disabled." 20 C.F.R. § 404.1592(e)(3).

What kind of work can a Claimant do in light of the "trial work period" rules? If the Claimant wants to avoid using any of his/her 9 months at all, the Claimant should know that he/she cannot perform "services" as defined by 20 C.F.R. § 404.1592(b). "Services" are "any activity" done in employment or self-employment that is "the kind normally done for pay or profit." Like SGA, earnings are considered, and earnings over certain limits create presumptive "services." 20 C.F.R. § 404.1592(b)(1)-(2). Self-employed Claimants also have to be especially wary of how many hours they work. 20 C.F.R. § 404.1592(b)(2)(ii).

For employees after January 1, 2002, earnings are considered services if they are equal or greater than $530 x (X/Y) rounded to the next higher multiple of 10 where such amount

is a multiple of $5 but not of $10 and to the nearest multiple of $10 in any other case. X is the national average wage index for the year 2 calendar years before the year for which the amount is being calculated. This number cannot "go down." If it does, you use the national wage index from the year prior. Y is the national average wage index for 1999.

For example, if you are trying to find out if 2011 earnings are equal to "service" earnings, you would multiply $530 times the ratio of $40,711.61 (2009 national wage index) to $30,469.84 (the national wage index for 1999), and then round accordingly to get $710. However, the number for 2010 was $720, so "service" earnings for 2011 are **$720**.

Self-employed beneficiaries can create a presumption of services in two ways, rather than one. 20 C.F.R. § 404.1592 (b)(2)(ii). They can earn over the limit that is set for employees (in net, not gross earnings), or they can work too many hours – 80 in one month (an average of 20 hours a week).

A client wants to know, "What happens if I use my 9 months?" At this point, the "trial work period" rules are put to rest, and the "reentitlement period" rules come into play. 20 C.F.R. § 404.1592a (not to be confused with 1592(a)). Social Security defines this period as "an additional period after 9 months of trial work during which you may continue to test your ability to work if you have a disabling impairment."

Under 20 C.F.R. § 404.1592a(b) and (b)(1)-(2), the reentitlement period starts the first month after the "trial work period," or after you have performed "services" (as defined by trial work period rules) for 9 of 60 months. In other words, a Claimant's 10th month of services begins his/her "reentitlement period."

The reentitlement period ends "on the last day of the 36th month (3rd year) following the end of your trial work period" (if you were entitled to benefits as of December 1987 or your 9 months were not used as of January 1988). 20 C.F.R. § 404.1592a(b)(2)(ii). So, in all, if the Claimant works the entire 9 months under the trial work rules and all of the 36 month reentitlement period, the Claimant has at least performed "services" for 45 months or 3 years and 9 months.

Of course, because the "trial work period" is not a period at all, this process may have taken place over 8 years (since the 9 months under the trial work period must be used in 60 months, or five years). Because the 9 months under the trial work period do not have to be utilized in any particular 60 month period, the 9 month limit may be reached decades after the original finding of entitlement (especially if they were young when they became entitled). Therefore, the Claimant never gets to stop worrying about the reentitlement period, either.

What happens during the reentitlement period? The first actual "period" starts with the month after a Claimant exhausts his/her 9 months under the "trial work period" rules. 20 C.F.R. § 404.1592(a)(1). It ends when Social Security finds that the Claimant's disability has "ceased," if ever. During this period, the Claimant may work below SGA. If the Claimant gets too close to SGA, Social Security will apply all rules that are applicable to SGA (such as considering whether the Claimant's work is an unsuccessful work attempt).

The second actual "period" begins when Social Security finds that the Claimant's "disability ceased." 20 C.F.R. § 404.1592a (a)(2). The Claimant can work the rest of the month after the finding of "disability ceased," and then two more months (a three-month "grace period"). Then, the Claimant's benefits are terminated for every month he/she works at SGA. Once the Claimant stops working at SGA for a month, the Claimant's benefits are restored for that month, and any subsequent month the Claimant does not work at SGA – without a new application or determination.

Social Security will find that your disability has "ceased" if a Claimant works at SGA. 20 C.F.R. §404.1592a(a)(1). SGA will be determined the same way it was at the hearing; in other words, Social Security will consider whether earnings should be averaged, whether the work was an unsuccessful work attempt, etc. Id. However, if a Claimant's benefits are reinstated, but again jeopardized by SGA, SGA will be determined without consideration of whether it was an unsuccessful work attempt, whether earnings should be averaged, etc. 20 C.F.R. § 404.1592a(a)(2)(i). A finding of "ceased" has consequences that carry-over past the reentitlement period, as well (which will be discussed later).

A big warning here: If Social Security also finds that the Claimant's "impairment no longer exists" or is "not medically disabling," a finding of "ceased" is the least of the Claimant's worries – his/her reentitlement period will end automatically (36 months or no). 20 C.F. R. § 404.1592a(b)(1).

A Client makes it to the end of his/her reentitlement period. What is next? At this point, the third actual "period" discussed under the heading "reentitlement period" in 20 C.F.R. § 404.1592a begins. 20 C.F.R. § 404.1592a(a)(3). This period is actually *after* the end of the reentitlement period (the 36 months). According to Social Security, what happens during this period depends on the Claimant's decisions before the reentitlement period. Social Security puts Claimants into two categories: 1) "ceased," and 2) "not ceased."

What happens to Claimants who were "not ceased" during their reentitlement period? Claimants who were "not ceased" during their entitlement period have essentially partially preserved their "grace period." The first time Social Security believes that the Claimant has worked at SGA, Social Security will make a determination based on the standard regulations concerning SGA (was the work an unsuccessful attempt, etc.). If Social Security finds that the work is, in fact, SGA, they will pay the Claimant for that month, and two months after. Then, the Claimant's benefits terminate (unlike during the "reentitlement period," when the Claimant only needs to stop working SGA to restart benefits).

What happens to Claimants who were "ceased" during their reentitlement period? If Social Security believes that the Claimant has worked SGA, Social Security will terminate benefits, starting with the month the SGA began. Whether or not the work is SGA will not be made based on the standard rules governing SGA (whether it was an unsuccessful work attempt, etc.), but will be based solely on that month's

earnings and work.

If your Client's benefits are terminated under the trial work rules or the reentitlement rules, your Client can apply for "expedited reinstatement," and receive "provisional benefits" for 6 months which can be as high as the last amount he/she was paid under his/her previous entitlement plus a cost of living adjustment (and Medicare!). 20 C.F.R. §§ 404.1592b – c, 404.1592e. This will allow him/her to have his/her benefits "reinstated" instead of having to reapply.

"Reinstatement" occurs after 24 "payable" months (the "initial reinstatement period") and entitles you to start over at the beginning of the "trial work period" if you work again. 20 C.F.R. § 404.1592f. "Reinstatement" benefits are paid up to 12 months before the filing of the request for reinstatement. 20 C.F.R. § 404.1592f (a). "Payable" months are months when the beneficiary does not work SGA; and standard SGA rules (unsuccessful work attempt, etc.) do not apply. C.F.R. § 404.1592f(d). The requirements are:

- Stop SGA within 60 months of a previous termination.
- Submit a written request within 60 months of previous termination. A time extension can be given for "good cause." 20 C.F.R. § 404.1592d(d)(2).
- This request must "certify" that you meet each requirement of § 404.1592b. 20 C.F.R. § 404.1592d.
- Current impairment must be the same and/or related to your prior impairment.
- The Claimant must be disabled under the "medical improvement review standard" under 20 C.F.R. § 404.1594. This is the standard used in continuing disability reviews. 20 C.F.R. § 404.1592b.

Under POMS DI 13010.185 "Due Process in Work Issue Cases," benefit reviewers (in general) must send a "due process" notice before terminating benefits under any of the previously described rules.

TITLE XVI (SSI)

Only a few programs exist to assist SSI Claimants, and these programs do not provide any protection from a reduction in benefits unless the Claimant knows to apply for them, actually applies for them correctly, and fits into one of the few categories of beneficiaries that qualify. Therefore, most Claimants will not be able to take advantage of these protections. However, it is good to know what the programs are, just in case you do run across a Claimant that might benefit.

Claimant to watch for #1: He/she cannot work now, but she/he may be able to eventually earn more than $674 as long as he or she can get treatment via Medicaid benefits. This type of Claimant may be able to keep his/her Medicaid under 20 C.F.R. 416.1619b.

Claimant to watch for #2: The Claimant who wants to do some work, and he/she requires assistive devices to do this work. For example, a seeing-eye dog, personal attendant, special transportation, assistive technology, etc. 20 C.F.R. § 416.976.

Claimant to watch for #3: The Claimant is otherwise disabled, but wants to try to save for school, to start a business, or another occupational goal. He/she can have a bank account with more than $2000 called a "PASS" account under a "PASS" plan for the purposes of achieving the occupational goal. 20 C.F.R. §416.1181.

Claimant to watch for #4: A Claimant who is a student, and wants to participate in summer internships or similar programs that pay. This Claimant can get protections under the "Student Earned Income Exclusion," which allows him/her to keep all of his or her benefits and still earn $1640 a month or $6,600 a year. 20 C.F.R. §§ 416.1112(3) and 416.1861.

In conclusion, for Social Security recipients, the only safe work is no work. However, if they must work, Title II beneficiaries need to watch how much they earn and how long they work, and Title XVI (SSI) beneficiaries need to make sure not to miss out on special programs that can help them keep their benefits while they work.

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