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TO: Jo Anne B. Barnhart, Commissioner of Social Security FAX: 410/966-2830

FROM: Joseph W. Shull

RE: COMMENTS IN RESPONSE TO NOTICE OF PROPOSED RULE-MAKING
IN THE FEDERAL REGISTER OF JUNE 11, 2002 (Volume 67, No. 112)

DATE: August 12, 2002

Among other things the proposed changes in the regulations attempt to clarify the definition of "other work." How to determine whether or not an individual can perform "other work" at Step 5 of the sequential evaluation analysis has been one of the most controversial and confusing issues in the disability determination process. Moreover, it is an issue that comes up in a high percentage of Social Security disability adjudications. Unfortunately, I must conclude that your proposed clarification probably will not shed any light on the issue. Thus, I would strongly suggest that you add detailed examples to the regulations to better clarify the issue.

For example, assume that we have a claimant who is 52 years old, has a high school education, and an unskilled work experience. Furthermore, assume that this individual has exertional limitations that permit him to do the entire range of light unskilled work but no more. However, in addition he has non-exertional limitations which limit his ability to handle, finger, and perform certain mental functions.

At a hearing the Vocational Expert (VE) testifies that such an individual can perform only three sedentary and three light unskilled occupations that exist in the national economy. Furthermore, he testifies that in the region where the claimant lives, there are 5,000 unskilled sedentary jobs and 45,000 light unskilled jobs. In this region the three light unskilled occupations that this claimant can perform amounts to a total of 1,800 jobs, and the three sedentary unskilled occupations that he can perform amounts to 1,000 jobs in the region. Furthermore, the VE testifies that there a million unskilled sedentary jobs in the national economy and 9 million light unskilled jobs in the national economy, and the jobs in the occupations that the claimant can perform occur in the national economy in the same proportion as they do in the region where he lives. Thus, in the national economy, he can perform about 200,000 sedentary unskilled jobs and 360,000 unskilled light jobs.

However, many ALJs will find this claimant to be "not disabled" using the grids as a framework for decision-making, as he can perform 1,800 light unskilled jobs which is a significant number of jobs. Furthermore, such a finding will be supported by the courts. For example, see Lee v. Sullivan, 988 F.2d 789, 794 (7th Cir. 1993).

Jo Anne B. Barnhart

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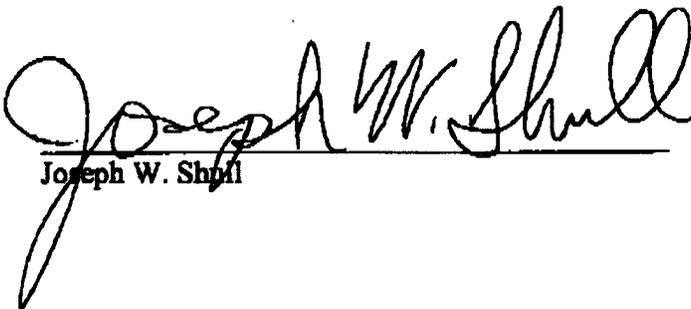
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However, if you total all of the sedentary and light unskilled jobs that this claimant can perform, he can perform just over half of the number of jobs that an individual of the same age, education, and work experience and perform who would be found disabled under the grids.

However, it is my contention that this is an incorrect application of the law. In regard to the definition of "make an adjustment to other work," you refer to portions of the proposed medical/vocational guidelines and the published final rules. Almost identical language is contained elsewhere, including Social Security Ruling 86-8. There are two separate sentences to explain what is required under the medical/vocational guidelines to show that an individual is "not disabled" and what is required to show that he or she is "disabled." The language states that to be found "not disabled," an individual's work capability should permit him to perform a significant number of jobs in the national economy and he must have the vocational capability to make a work adjustment. The use of the conjunction "and" is very significant. Its use indicates that two things must be shown to establish that an individual is "not disabled." Those things are a significant number of jobs and the ability to make a work adjustment. The sentence that follows states that an individual is "disabled" if he cannot make a work adjustment. It is notable that this sentence says nothing about a significant number of jobs; thus, it is clear that all that needs to be shown to prove disability is that an individual cannot make a work adjustment.

However, the law as applied by the hypothetical ALJ and the Seventh Circuit simply determine whether or not the claimant can perform a significant number of jobs and does not deal with the work adjustment issues.

It seems to me that the hypothetical ALJ in this case has ignored the issue of work adjustment which requires the determination of the remaining occupational base and a comparison of that occupational base to the appropriate grid rule. Your Social Security Ruling 83-10 states, "the issue of work adjustment is determined based on interaction of the work capability represented by RFC (the remaining occupational base) with the other factors affecting capability for adjustment—age, education, and work experience." Unfortunately, it appears to me that all too often the issue of work adjustment and how it is determined based upon the erosion of the occupational base has often been completely ignored. It would be greatly appreciated if you could clarify that issue.



Joseph W. Shull