

People With Disabilities Foundation's Comments on Revising the Unsuccessful Work Attempts and Expedited Reinstatement Eligibility Program Rules, in Response to Notice of Proposed Rulemaking, Docket No. SSA-2014-0016

People With Disabilities Foundation (PWDF) is a § 501(c)(3) nonprofit agency with expertise in medical (psychiatric and/or developmental)-legal issues and bases these comments on its 16-year history of providing legal representation for Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) issues for people with psychiatric and/or developmental disabilities.

PWDF strongly advocates for clarity, simplification, and reducing hardships on beneficiaries in regard to revising the Unsuccessful Work Attempt (UWA) and Expedited Reinstatement (EXR) rules and restrictions. Aspects of the current regulations may be confusing, difficult for some individuals to understand, and result in beneficiaries going without benefits because of delays in the SSA process. Improving communications and reducing or eliminating complications and delays in the process of obtaining or maintaining benefits will put beneficiaries at less risk of disruption in meeting the necessities of life and increased independence. For these reasons, PWDF has several comments on the rules for UWA and the rules for EXR related to the application process, provisional benefits, and length of retroactive reinstatement.

UWA Revisions

As to the proposed revisions to the UWA rules, PWDF agrees that it is a good idea to simplify the rules by using one set of criteria instead of two: one for 3 months and another for 3 to 6 months, as long as the SSA does not use the more restrictive of the two. The current rules are confusing. PWDF agrees with the revisions that the SSA proposes, which use the less restrictive and simpler of the two sets of criteria.

EXR Application Process and Appeal

As to the EXR application process, the SSA sometimes refuses to accept an EXR application and does not explain the reason clearly to the beneficiary and/or the beneficiary may not understand why the SSA will not accept it. Alternatively, when the SSA denies an EXR application, they do not necessarily notify beneficiaries that they may appeal the decision. The SSA may have made an error in its decision for a variety of reasons, e.g., counted earnings that were not countable or counted a UWA as substantial gainful employment (SGA) because of a delay in receiving employment data.

Both of these circumstances (refusing to accept an EXR application or denying one) can result in hardship for beneficiaries who are unable to work, especially those who do not have access to provisional benefits. For beneficiaries of the SSI program or who are concurrently on both the SSI and SSDI programs, who by definition are low income with few resources, this can lead to extreme hardships such that they are not able to buy food or pay rent, thus ending up homeless.

Provisional Benefits

As to the rules related to provisional benefits, the primary problem is that the SSA does not necessarily make the disability determination within the 6-month period in which provisional benefits are provided, in spite of the SSA's assertions to the contrary. As a result, provisional benefits stop after 6 months even when the SSA has not yet made its decision on the EXR application. PWDF has had clients whose EXR determinations have taken 11 months.

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Beneficiaries are likely to experience hardship when they are unable to work and without benefits for an indefinite period. This also results in the extreme hardship related to the application process for people in the SSI program or concurrent in both programs as noted above, just delayed by 6 months.

Hardship Due to Inconsistency in Rules for Retroactivity

The EXR regulations allow a beneficiary to apply for EXR within 60 months from the date benefits were terminated, however, if the EXR application is successful, benefits will only be paid retroactively for a maximum of 12 months. Thus, the beneficiary may receive a determination that s/he is still disabled, but still face an overpayment, which will reduce the beneficiary's subsequent benefits.

For example, the SSA may cease a beneficiary retroactively for a period of 4 years (48 months), allow an EXR application because the cessation was within 60 months of termination, then reinstate the beneficiary retroactively via EXR for 12 months. This would result in the SSA seeking repayment from the beneficiary for an overpayment of 36 months' (48 months - 12 months) worth of benefits.

This is a terrible hardship for individuals on SSI benefits or concurrent on SSDI and SSI, who by definition live in poverty and cannot work. The SSA's response is that the beneficiary can then appeal the overpayment, but the appeal process is a further burden on the beneficiary.

These policies may sound reasonable if the beneficiary was able to do SGA during the cessation period, however, it is only reasonable in actuality if the beneficiary really is able to do SGA, is able to communicate his/her work circumstances correctly to the SSA, and if the SSA applies the work incentive rules correctly. The work incentive rules may not be applied correctly, especially when beneficiaries have impairments that affect communication, e.g., people with psychiatric, intellectual, and/or developmental disabilities. See, for example, *Davis v. Astrue*, Case 3:06-cv-06108 EMC (N.D. Cal. 2012) and *Doe v. Astrue*, Case No. 3:09-CV-980 EMC (N.D. Cal. 2012), in which the SSA settled cases with PWDF clients who were ceased based on working when the SSA applied the work incentive rules incorrectly based on disability.

PWDF's Recommendations

PWDF has several recommendations to mitigate these hardships to beneficiaries:

- 1) The SSA should be required to inform EXR applicants of their right to appeal for each circumstance and for each level, i.e., SSA should be required to notify claimants of their right to appeal to the next level if their application is not accepted or if it is denied.
- 2) To prevent hardship due to SSA delay, the SSA should automatically extend provisional benefits until the EXR decision is reached.
- 3) Because the extension of provisional benefits is not currently automatic when the SSA does not reach a decision on the EXR application within 6 months, the provisional benefits should automatically be extended another 6 months to 12 months.
- 4) The SSA should expedite appeals at all stages of the EXR application process. Appeals are not usually resolved within a month or two. As noted above, losing benefits

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while waiting for a determination often puts individuals into financially dire conditions. For this reason, the SSA should be required to make each decision no later than 10 days from the current application or appeal date. Without this protection or an automatic additional 6 months of provisional benefits, claimants may go without benefits for more than 6 months. Lack of income for these populations can lead to lack of access to basic necessities such as food, housing, healthcare, etc.

Some of these recommendations would also decrease the administrative burden on the SSA. The number of activities and amount of time spent by both SSA and beneficiaries can be burdensome for both parties. Simpler, expedited processes would provide fewer occurrences of hardship on beneficiaries and less administration burden on the SSA.