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*883 THE WORN-OUT WORKER RULE REVISITED [FNa]

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20 C.F.R. § 404.1562 (1995), [FN1] commonly referred to as **"the worn-out worker rule,"** is one of the most frequently misinterpreted regulations governing disability entitlement. It provides as follows:

> If you have only a marginal education and work experience of 35 years or more during which you did arduous unskilled physical labor, and you are not working and are no longer able to do this kind of work because of a severe impairment(s), we will consider you unable to do lighter work, and therefore, disabled. However, if you are working or have worked despite your impairment(s) (except where the work is sporadic or is not medically advisable), we will review all the facts in your case, and we may find that you are not disabled. In addition, we will consider you are not disabled if the evidence shows that you have training or past work experience which enables you to do substantial gainful activity in another occupation with your impairment, either on a full-time or reasonably regular part-time basis.

This article analyzes the essential elements of this key regulatory provision and discusses the proper time for its application vis-a-vis the five-step sequential evaluation process provided by the regulations. [FN2] First, let us examine in sequential fashion the requirements for a finding of disability under § 404.1562.

MARGINAL EDUCATION

The guidelines for evaluating the claimant's educational achievement are contained at 20 C.F.R. § 404.1564 (1995). This regulation provides as follows:

(a) ***General. Education*** **is primarily used to mean formal schooling or other training which contributes to your ability to meet vocational requirements, for example, reasoning ability, communication skills, and arithmetical ability. However, if you do not have formal schooling, this does not necessarily mean that you are uneducated or lack these abilities. Past work experience and the kinds of responsibilities you had when you were working may show that you have intellectual abilities, although you may have little formal education. Your daily activities, hobbles, or the results of testing may also show that you have significant intellectual ability that can be used to work.**

(b) ***How we evaluate your education.*** **The importance of your educational background may depend upon how much time has passed between the completion of your formal education and the beginning of your physical or mental impairment(s) and by what you have done with your education in a work or other setting. Formal education that you *884 completed many years before your impairment began, or unused skills and knowledge that were a part of your formal education, may no longer be useful or meaningful in terms of your ability to work. Therefore, the numerical grade level that you completed in school may not represent your actual educational abilities. These may be higher or lower. However, if there is no other evidence to contradict**

it, we will use your numerical grade level to determine your educational abilities. The term *education* also includes how well you are able to communicate in English since this ability is often acquired or improved by education. In evaluating your educational level, we use the following categories:

(1) *Illiteracy.* Illiteracy means the inability to read or write. We consider someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name. Generally, an illiterate person has had little or no formal schooling.

(2) *Marginal education.* Marginal education means ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs. We generally consider that formal schooling at a 6th grade level or less is a marginal education.

(3) *Limited education.* Limited education means ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. We generally consider that a 7th grade through the 11th grade level of formal education is a limited education.

(4) *High school education and above.* High school education and above means abilities in reasoning, arithmetic, and language skills acquired through formal schooling at a 12th grade level or above. We generally consider that someone with these educational abilities can do semi-skilled through skilled work.

(5) *Inability to communicate in English.* Since the ability to speak, read and understand English is generally learned or increased at school, we may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who doesn't speak and understand English to do a job, regardless of the amount of education the person may have in another language. Therefore, we consider a person's ability to communicate in English when we evaluate what work, if any, he or she can do. It generally doesn't matter what other language a person may be fluent in.

(6) *Information about your education.* We will ask you how long you attended school and whether you are able to speak, understand, read and write in English and do at least simple calculations in arithmetic. We will also consider other information about how much formal or informal education you may have had through your previous work, community projects, hobbies, and any other activities which might help you to work.

Three observations must be made regarding the interplay of the provisions §§ 404.1562 and 404.1564. First, because a marginal education is "generally" considered to be formal schooling at the sixth grade level or less, claimants who are classified as illiterate under § 404.1564(b)(1) are deemed to have a "marginal" education for purposes of determining benefit entitlement under § 404.1562. Secondly, it is clear from the language of § 404.1564 that the claimant's level of formal schooling will not determine the educational classification into which he or she falls where the evidence demonstrates that the claimant functions at a higher or lower level as evidenced by the duties performed in past work, activities of daily living, results of formal testing and any other relevant factors. [FN3] Finally, the reader must be careful to note that § 404.1564(b)(2) simply states that a marginal education, in and of itself, does not provide an individual with the capacity to perform more than unskilled labor. The point to be made here is that § 404.1564(b)(2) neither expressly nor implicitly states that a marginally educated claimant is conclusively deemed to be incapable of engaging in work activity more advanced or complex than unskilled labor. [FN4]

*885 35 YEARS OF QUALIFIED [FN5] WORK ACTIVITY

Many practitioners and adjudicators operate under the assumption that the 35 years of qualified work activity required by § 404.1562 must be continuous and therefore uninterrupted. This, however, is not the case. § 404.1562 does not impose such a requirement and there are no rulings or cases stating otherwise. [FN6] It is therefore possible to

establish disability under this regulation where periods of qualified work activity are interspersed with periods of employment which do not satisfy the requirements of § 404.1562.

ARDUOUS PHYSICAL LABOR

There is a seemingly widely held belief that the term "arduous" refers to work activity that qualifies as heavy or very heavy work under the guidelines established by 20 C.F.R. § 404.1567 (1995). [FN7] This, however, is clearly not the case. S.S.R. 82-63 [FN8] provides the following definition of the term "arduous."

> Arduous work is primarily physical work requiring a high level of strength or endurance. No specific physical action or exertional level denotes arduous work. While arduous work will usually entail physical demands that are classified as heavy, the work need not be described as heavy to be considered arduous. For example, work involving lighter objects may be arduous if it demands a great deal of stamina or activity such as repetitive bending and lifting at a very fast pace. [FN9]

Thus, work activity may qualify as "arduous" even though it is classified as medium or light work under § 404.1567 [FN10] as the adjudicator must take into account far more ***886** than the lifting requirements of the job in making such determination. More to the point, in order to properly resolve this issue, consideration must be given to all exertional and endurance requirements of the claimant's work, including the pace and frequency of activities such as walking, pushing, pulling, reaching, bending and climbing. [FN11]

UNSKILLED WORK

This requirement of "the worn-out worker rule" would at first glance seem decidedly unambiguous. However, when § 404.1562 is read in connection with 20 C.F.R. § 404.1565(a) (1995) and S.S.R. 82-63, it becomes manifestly clear that in some instances semi-skilled or even skilled work [FN12] will not preclude a finding of disability thereunder. § 404.1565(a) tells us that where the skills acquired from past work are not transferable to other work consistent with the claimant's residual functional capacity, the individual's past work shall be considered "the same as unskilled." [FN13] Consistent therewith, S.S.R. 82-63 provides that the performance of semi-skilled or skilled work will not preclude a finding of disability under § 404.1562 in either of the following circumstances:

> 1. The individual's skilled or semi-skilled work was "[i]solated, brief, or remote … and did not result in skills which enhance the person's present ability to do lighter work"; [FN14]
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> 2. The skills obtained from past work are not "readily transferable" to any form of lighter work and make no "meaningful contribution" to the claimant's ability to perform any other work within his or her residual functional capacity. [FN15]

Unfortunately, S.S.R. 82-63 fails to define the terms "isolated," "brief" and "remote." Hence, we must look elsewhere to ascertain the meaning of such terms. The word "isolated" appears in the regulations at 20 C.F.R. § 404.1568(d)(3) (1995). This provision states that where work skills "are so specialized or have been acquired in such an isolated vocational setting (like many jobs in mining, agriculture, or fishing) that they are not readily usable in other industries, jobs, and work settings, we consider that they are not transferable." (emphasis added). Additional guidance can be obtained from S.S.R. 82-41. This ruling tells us that the adjudicator must "recognize that transferability of skills is not likely for persons whose past ***887** work is unusual or isolated. Some examples are miners, beekeepers, or spear fishermen. However, [vocational expert] assistance may be required for less obviously unusual occupations in isolated vocational settings." (emphasis added). [FN16] In view of the language of § 404.1568(d)(3) as well as that of S.S.R. 82-41, one must conclude that "isolated" work experience refers to work experience that is so unusual or specialized that the skills derived therefrom have little or no application in other types of employment. The term "brief" appears in § 404.1565(a). This important regulatory provision provides that if the claimant has "worked only 'off-and-on' or for brief periods of time," the work will not be deemed vocationally significant or, stated another way, will not be considered past relevant work for purposes of determining entitlement to disability benefits. § 404.1565(a) also states that in order for employment to be considered past relevant work, it must be performed "long enough for you to learn it [the job]." The language of § 404.1565(a) therefore leads one to conclude that "brief" work experience refers to work

activity that does not qualify as past relevant work because it was not performed long enough for the individual to master the requirements of the job. Finally, § 404.1565(a) also provides us with a somewhat open-ended definition of the term "remote":

> We do not usually consider that work you did 15 years or more before the time we are deciding whether you are disabled (or when the disability insured status requirement was last met, if earlier) applies. A gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply. The 15-year guide is intended to insure that remote work experience is not currently applied. (emphasis added).

In keeping with the language of § 404.1565(a), for purposes of assessing benefit entitlement under § 404.1562, work performed more than 15 years prior to the date of adjudication of the claim (or, if earlier, the claimant's date last insured) shall be considered "remote" work experience unless the evidence demonstrates that the skills derived from such employment are somehow not obsolete in today's world of work.

The circumstances under which the claimant's skilled or semi-skilled work will preclude a finding of disability under § 404.1562 is an issue that has seldom reached the courts. In *Tobias v. Heckler*, [FN17] the claimant's vocational history consisted of work as a heavy truck driver and as a part-time assistant supervisor in the custodial industry. The administrative law judge determined that the claimant retained the residual functional capacity to perform the full range of light work and denied his application for disability benefits at step 5 of the sequential evaluation process. On appeal to the district court following the Appeals Council's denial of his request for review, Tobias contended that the administrative law judge erred in failing to award disability benefits under § 404.1562. The district court disagreed, based in part on its determination that Tobias' past work "demonstrated skills to do paperwork and supervise other workers and could have been held to be transferable." [FN18]

While the court properly held that skilled or semi-skilled work offering transferable skills precludes the application of § 404.1562, the factual basis for such determination is clearly erroneous as the court later acknowledged that the administrative law judge denied the claimant's application for benefits based on his conclusion that the claimant was capable of "entry level unskilled light work." [FN19] ***888** Hence, the administrative law judge did not find that the claimant had transferable skills.

In *Stewart v. Heckler*, [FN20] the claimant contended the administrative law judge erred in refusing to admit testimony offered to establish that his vocational history satisfied the requirements of § 404.1562. The district found that even if the administrative law judge's refusal to admit the proffered evidence was erroneous, it did not constitute reversible error:

> The hearing record does not reveal the ALJ's reason for excluding the evidence. Whatever the reason, if the ALJ did err, the error is harmless. Plaintiff does not qualify for the 35-year rule because his work experience is semi-skilled, as found by the ALJ and supported by substantial evidence, and not unskilled, as required by the 35-year rule. [FN21]

Clearly, the court committed legal error in failing to recognize that the existence of skilled or semi-skilled work does not ipso facto preclude a finding of disability under § 404.1562. This erroneous conclusion of law can be attributed to the court's failure to read § 404.1562's requirement of "unskilled" work in connection with § 404.1565(a) and S.S.R. 82-63.

Finally, in *Walston v. Sullivan*, [FN22] the issue before the Eighth Circuit was Walston's entitlement to disability insurance benefits under § 404.1562. The record revealed that Walston's past work consisted of skilled work as a stereotyper and photoengraving etcher as well as semi-skilled work as a heavy truck driver. Applying the two-test approach adopted by S.S.R. 82-63, the court concluded that Walston's work as a photoengraving etcher and stereotyper satisfied the requirements of the ruling's first test and therefore such employment, though skilled in nature, did not preclude a finding of disability under § 404.1562:

Walston worked as a photoengraving etcher for six months in 1971 and 1972. His experience in that job thus was both brief and remote. According to vocational expert testimony, any skills he acquired in that position are now obsolete and not transferable to other work.

> Similarly, because Walston worked as a stereotyper from 1952 through 1971, more than twenty years have elapsed since Walston held that position. Although stereotyping ordinarily involves skilled work, Walston stated that he never mastered many of the skills involved. In any event, both vocational experts agreed that stereotyping is now an obsolete printing process, and that any skills acquired would not be transferable to work presently existing in the national economy. Thus, Walston's experience in photoengraving and stereotyping did not result in skills which enhance his present ability to do lighter work. [FN23]

The court also found that Walston's work as a semi-skilled heavy truck driver satisfied the requirements of S.S.R. 82-63's second test and therefore did not bar a finding of disability under § 404.1562 as the skills derived from such employment were not readily transferable to "lighter work" and made no "meaningful contribution" to the claimant's ability to perform any work within his residual functional capacity. [FN24] In so holding, the court relied upon the vocational expert's determination that "Walston's skills as a truck driver were not transferable to any work within Walston's present residual functional capacity." [FN25] The court then went on to discuss ***889** the remaining requirements for a finding of disability under § 404.1562 and, finding all elements of entitlement to be present, concluded that the Commissioner had erred in denying Walston's claim for benefits:

> Substantial evidence in the record as a whole indicates that Walston has only a marginal education and thirty-six years of work experience doing arduous, primarily unskilled, physical labor. Because of a severe impairment, Walston cannot return to his previous or similar work. Although his past experience included the performance of some skilled or semi-skilled work, any skills he acquired through such work are either obsolete or not transferable to other jobs within his present residual functional capacity. Walston therefore meets the requirements for a finding of disability under 20 C.F.R. § 404.1562. [FN26]

While the Eighth Circuit in Walston properly held that Walston's skilled and semi-skilled work history was to be considered as unskilled work under § 404.1562, the court's determination that Walston's work as a photoengraving etcher for six months constituted a "brief" period of work experience is of questionable validity. As noted previously, § 404.1565(a) states, in essence, that work activity is considered "brief" when not performed for a sufficient period of time for the individual to learn the requirements of the job. While Walston's work as a photoengraving etcher was found to be skilled employment, it is doubtful that he had not mastered the work requirements after six months on the job. In any event, this issue could only be resolved after eliciting testimony from the claimant as to the extent to which he understood and had mastered the principles and processes of his trade. Vocational expert testimony addressing the period of time normally required to learn and adequately perform the duties of such job would also be of help to the adjudicator. [FN27]

NOT WORKING

A finding of disability may not be made under § 404.1562 unless the evidence demonstrates that the claimant is "not working." This requirement, however, must be read in connection with § 404.1520(b) (1995) which provides that work activity shall only serve as the basis for denying the claimant's application for benefits where the work is found to be substantial gainful activity. [FN28] Nonetheless, this writer suggests that in order to avoid the obvious interpretative issues arising from its present language, § 404.1562 should be amended to unambiguously state that *only* work activity rising to the level of substantial gainful activity shall preclude a finding of disability thereunder.

UNABLE TO PERFORM 35 YEARS OF QUALIFIED EMPLOYMENT

§ 404.1562 also stipulates that the claimant's residual functional capacity must preclude the performance of at least 35 years of qualified employment. Note, however, that S.S.R. 82-63 states that, unlike the inquiry arising at step

four of the sequential evaluation process, the evidence need only demonstrate that the claimant is unable to perform such work as he or she performed it and the adjudicator therefore need not inquire into the claimant's ability to carry out the exertional and ***890** nonexertional requirements of the work as it is generally performed in the national economy: [FN29]

> To meet the criteria of these sections, the person must have a marginal education and long work experience (i.e., 35 years or more) limited to the performance of arduous unskilled physical labor which can no longer be performed because of a severe impairment(s). Careful examination of the evidence, including a description of all jobs the individual has held (with sufficient details about job content to show any skills involved and the level of physical exertion required) is necessary to establish whether the individual meets each criterion.
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> For the purpose of evaluation under sections 404.1562/416.962 of the regulations, an impairment must be severe and prevent the performance of arduous physical labor. *It is necessary to assess the person's RFC and to relate it to the physical and mental demands of his or her arduous work background.* (emphasis added). [FN30]

It should also be noted that where the evidence establishes the existence of more than 35 years of qualified employment, the fact that the claimant is capable of performing one or more of such jobs does not *ipso facto* preclude a finding of disability under § 404.1562. Let us assume, for example, that we have a 58 year old claimant whose vocational history, in reverse chronological order, includes 32 years of employment as a farm laborer, five years of employment as a roustabout in the oil field, and three years of employment as a general laborer in the construction industry. Let us further assume that all of these jobs are found to be arduous, unskilled labor. If the evidence demonstrates that the claimant retains the residual functional capacity to perform the work of a roustabout but not the other two jobs noted above, entitlement to benefits is established under § 404.1562 (assuming all other elements of entitlement are satisfied) as there exists at least 35 years of qualified employment which the claimant is unable to perform.

SEVERE IMPAIRMENT

Another common misconception noted by this writer is that a claimant cannot qualify for benefits under § 404.1562 if his or her residual functional capacity is for medium work or beyond. Nowhere does § 404.1562 state that the claimant's residual functional capacity must fall at or below a certain exertional level. In fact, § 404.1562 only requires proof of the existence of an impairment or combination of impairments considered severe under the regulations. [FN31] Thus, the fact that the claimant has a residual functional capacity for medium work, heavy work or more does not preclude a finding of disability thereunder. This can prove to be quite significant in that, in many instances, disability will be established under § 404.1562 where the Medical-Vocational Guidelines contained at Appendix 2 to Subpart P direct, or when used as a framework for decision making, call for a finding of not disabled.

*891 § 404.1562 AND THE SEQUENTIAL EVALUATION PROCESS

S.S.R. 82-63 provides that when the adjudicator has reached the fifth step of the sequential evaluation process, the issue of claimant's entitlement to benefits under § 404.1562 must be resolved "before considering the numbered rules in Appendix 2 of the regulations." [FN32] Judicial expediency, however, is not served by such approach in that, in most cases, the decision maker must embark upon substantial and time consuming evidentiary development in order to determine the claimant's entitlement to benefits under § 404.1562, including sufficiently detailed information as to the duration of employment, earnings, and exertional and nonexertional requirements of at least 35 years of work activity. It is therefore suggested by this writer that in the interest of judicial efficiency, the decision maker should only adjudicate the claimant's entitlement to benefits under § 404.1562 when the Medical-Vocational Guide-lines at Appendix 2 do not direct or call for a determination fully favorable to the claimant. Such approach will frequently obviate the need for substantial case development while in no way prejudicing the rights of claimants or the interest of the Commissioner in decisional accuracy.

CONCLUSION

In *Schweiker v. Gray Panthers*, [FN33] Justice Powell observed that the Social Security Act was among the most complex bodies of legislation ever adopted by Congress, noting that the Act's byzantine construction rendered it virtually incomprehensible to those untrained in its use. [FN34] Those of us who adjudicate claims arising under the Social Security Act and practitioners who handle such cases with regularity can appreciate the wisdom of Justice Powell's comments and many have perhaps concluded that these observations apply with equal if not greater force to the Commissioner's regulations--at least where entitlement to disability benefits is concerned. However, while the regulations governing disability entitlement generally present a number of difficult interpretive issues, § 404.1562 has proven to be one of the more troublesome regulatory provisions from an interpretive standpoint as evidenced by the frequency at which this regulation has been misconstrued at both the administrative and judicial levels. Why has § 404.1562 been the subject of so much confusion? Two reasons are assigned by this writer. First, there is a frequent failure of both practitioners and adjudicators to read § 404.1562 in connection with other pertinent regulations. As noted previously, many of the terms appearing in § 404.1562 derive their meaning from other regulatory provisions. One must therefore look to these provisions for guidance when construing the language of § 404.1562. Secondly, while S.S.R. 82-63 for the most part is a commendable effort by the Commissioner to clarify some of the interpretive issues raised by § 404.1562, it does a decidedly poor job of delineating the circumstances under which the existence of skilled or semi-skilled work will not preclude a finding of disability under this regulation. In fact, for the most part, S.S.R. 82-63's multi-factored two test analysis obscures rather than elucidates what is an uncommonly simple rule of law. Simply stated, skilled or semi-skilled work qualifies under § 404.1562 if the skills obtained from such employment are not transferable to other work the claimant is capable of performing given his or her residual functional capacity. This becomes manifestly clear when § 404.1562's requirement of "unskilled" work is read in connection with § 404.1565(a) which provides that skilled or semi-skilled employment is considered the same as unskilled work under such circumstances. Turning now to the two-test analysis discussed in S.S.R. 82-63, skilled or semi-skilled work satisfies the requirements of the ruling's first test, and is therefore deemed vocationally equivalent to unskilled work under § 404.1562, when the work is found ***892** to be an "isolated, brief or remote" period of work experience and the skills derived therefrom do not "enhance the person's present ability to do lighter work." (emphasis added). This standard, however, is inconsistent with the language of § 404.1565(a) which provides, as noted previously, that skilled or semi-skilled work is considered the same as unskilled work where the skills obtained do not transfer into work consistent with the claimant's residual functional capacity--not some unspecified "lighter work." Moreover, "isolated, brief, or remote" periods of work experience do not in any case give rise to transferable skills [FN35] and therefore cannot, under any circumstances, "enhance the person's present ability to do lighter work." Hence, the latter quoted language is entirely superfluous and its presence only serves to increase the risk of interpretive error.

Under the second test discussed in S.S.R. 82-63, skilled or semi-skilled employment is deemed vocationally equivalent to unskilled work, and therefore qualifies under § 404.1562, where "it is clear that the skill acquired is not readily transferable to lighter work and makes no meaningful contribution to the person's ability to do any work within his or her present functional capacity." (emphasis added). While this test comes closer to identifying the correct legal standard for determining whether skilled or semi-skilled work qualifies under § 404.1562, the stipulation that the skills obtained from past work must not be transferable into "lighter work" is, to reiterate, uncommonly vague, without regulatory basis, and should therefore be disregarded by the reader.

To conclude, in view of the many interpretive pitfalls associated with its present language, § 404.1562 should be amended to clarify the circumstances under which entitlement to benefits is established thereunder. In the meantime, it is hoped that this article will provide a measure of guidance to practitioners and adjudicators when faced with the difficult task of interpreting this key regulatory provision and perhaps serve as the impetus for much needed regulatory change.

[FNa]. The views are those of the author and do not necessarily reflect the views of the publisher.

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[FN1]. The regulations governing entitlement to disability benefits are promulgated by the Social Security Administration. While this could very well be the subject of a separate article, regulations issued by the Social Security Administration are generally binding upon the courts. See *Schisler v. Sullivan*, 3 F.3d 563, 567 (2nd Cir.1993) ("Judicial review of regulations promulgated pursuant to § 405(a) is narrow and limited to determining whether they are arbitrary, capricious or in excess of the [Social Security Administration's] statutory grant of authority.") Once a regulation survives this rather limited scrutiny, it is binding on the courts even where it represents a departure from established case law. 3 F.3d at 568-69.

> The Social Security Administration will also from time to time adopt interpretive rulings. These rulings "represent precedent final opinions and orders and statements of policy and interpretations that have been adopted" and are binding on the Social Security Administration's adjudicative components. 20 C.F.R. § 422.406(b)(1) (1995). Social Security Rulings do not have the force and effect of law and thus are not binding on the courts. *Lauer v. Bowen*, 818 F.2d 636, 640, note nine (7th Cir.1987) (per curiam).

[FN2]. 20 C.F.R. § 404.1520 (1995) establishes a five-step sequential evaluation process for evaluating adult disability claims.

[FN3]. *See Smith v. Shalala*, 46 F.3d 45, 46-47 (8th Cir.1995) (claimant's allegation that despite his eighth grade education, he qualified for benefits under § 404.1562 rejected by the court as the record revealed that the claimant had the ability to read and do simple calculations and was otherwise devoid of any evidence that the claimant "does not have the skills expected from a limited education…."); *Dollar v. Bowen*, 821 F.2d 530, 535 (10th Cir.1987) (despite having eighth grade education, claimant did not have a limited education under established regulatory criteria where evidence established that claimant could not read or write and was capable of engaging in only simple financial transactions); *Cook on Behalf of Cook v. Sullivan*, 812 F.Supp. 893, 899 (C.D.Ill.1993) (claimant found to have at most a marginal education despite formal schooling through the eighth grade as record established that school attendance was poor, claimant was incapable of using decimals, figuring percentages, had extreme difficulty reading a newspaper and possessed reading and comprehension skills below that of his son who functioned at a 3.8 grade level).

[FN4]. *But see Miller v. Shalala*, 825 F.Supp. 776, 780 (N.D.Tex.1993) (it is "obviously inconsistent" for the administrative law judge to conclude that the claimant had no more than a marginal education but was capable of performing semi-skilled work activity). The district court's determination in this regard finds no support in the Commissioner's regulations or rulings and is based on a clear misinterpretation of § 404.1564(b).

[FN5]. "Qualified" work activity or employment refers to employment satisfying the skill and exertional requirements set forth in § 404.1562.

[FN6]. In fact, this writer was unable to find any district or appellate court decisions addressing this issue nor has it been discussed in any of the Commissioner's rulings.

[FN7]. § 404.1567 provides as follows:

> To determine the physical exertion requirements of work in the national economy, we classify jobs as *sedentary, light, medium, heavy,* and *very heavy.* These terms have the same meaning as they have in the *Dictionary of Occupational Titles,* published by the Department of Labor. In making disability determinations under this subpart, we use the following definitions:
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> (a) *Sedentary work.* Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.
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> (b) *Light work.* Light work involves lifting no more than 20 pounds at a time with frequent lifting or

carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

(c) *Medium work.* Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work.

(d) *Heavy work.* Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds. If someone can do heavy work, we determine that he or she can also do medium, light, and sedentary work.

(e) *Very heavy work.* Very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more. If someone can do very heavy work, we determine that he or she can also do heavy, medium, light and sedentary work.

[FN8]. (Cum.Ed.1981-1985).

[FN9]. S.S.R. 82-63, at 450.

[FN10]. It would hardly seem possible for work to be considered "arduous" when it is classified as sedentary under § 404.1567.

[FN11]. *See* *Miller v. Shalala*, 825 F.Supp. 776, 782 (N.D.Tex.1993) (work as a stock clerk and janitor at a super-market considered "arduous" but exertional and endurance requirements of jobs not discussed); *Tobias v. Heckler*, 605 F.Supp. 233, 237 (N.D.Cal.1985) (work as a heavy truck driver combined with part-time work as an assistant custodial supervisor not "exclusively arduous" and therefore claimant did not qualify for benefits under § 404.1562); *Walston v. Sullivan*, 956 F.2d 768, 773, note three (8th Cir.1992) (work as a warehouseman, truck driver, photoengraving etcher, stereotyper and plate boy considered "arduous" as these jobs required frequent lifting or moving of weights from 60 to 2000 pounds and were classified as heavy or very heavy work under applicable regulatory guidelines.)

[FN12]. In determining whether or not skilled or semi-skilled work qualifies under § 404.1562, it is important to distinguish skills from aptitudes. S.S.R. 82-41 provides as follows:

A skill is knowledge of a work activity which requires the exercise of significant judgment that goes beyond the carrying out of simple job duties and is acquired through performance of an occupation which is above the unskilled level (requires more than thirty days to learn). It is practical and familiar knowledge of the principles and processes of an art, science or trade, combined with the ability to apply them in practice in a proper and approved manner. S.S.R. 82-41, at 439-40 (Cum.Ed.1981-1985).

A skill is a learned ability while an aptitude is an innate ability or quality. *Weaver v. Secretary of Health and Human Services*, 722 F.2d 310, 311 (6th Cir.1983); *Cole v. Secretary of Health and Human Services*, 820 F.2d 768, 773 (6th Cir.1987).

[FN13]. § 404.1565(a) states that the transferability of skills is only meaningful where the skills obtained from the claimant's work are transferable to other work "you can now do." This, of course, refers to other work the claimant is capable of performing given his or her residual functional capacity.

[FN14]. S.S.R. 82-63, at 450.

[FN15]. *Id.*

[FN16]. S.S.R. 82-41, at 445.

[FN17]. 605 F.Supp. 233 (N.D.Cal.1985).

[FN18]. 605 F.Supp. at 237.

[FN19]. *Id.*

[FN20]. 594 F.Supp. 590 (D.Me.1984).

[FN21]. 594 F.Supp. at 593.

[FN22]. 956 F.2d 768 (8th Cir.1992).

[FN23]. 956 F.2d at 772.

[FN24]. 956 F.2d at 773.

[FN25]. *Id.*

[FN26]. *Id.*

[FN27]. It should be noted that the failure to adequately resolve this issue is harmless error as the court correctly determined that Walston's work as a photoengraving etcher was a "remote" period of work experience under S.S.R. 82-63. Note in this regard that under S.S.R. 82-63's first test the work activity must be "[i]solated, brief, *or* remote." (emphasis added).

[FN28]. The guidelines for determining whether or not work constitutes substantial gainful activity are contained at 20 C.F.R. §§ 404.1572-76 (1995). *See also* S.S.R. 83-33 (Cum.Ed.1981-1985) (determining substantial gainful activity for employees); S.S.R. 83-34 (Cum.Ed.1981-1985) (determining substantial gainful activity for self-employed individuals); S.S.R. 83-35 (Cum.Ed.1981-1985) (averaging of earnings for purposes of determining substantial gainful activity).

[FN29]. Because the claimant's entitlement to benefits under § 404.1562 is an issue arising at step five of the sequential evaluation process, the adjudicator will have already determined at step four that the claimant is unable to perform all jobs found to be past relevant work both as he or she performed such jobs and as the work is generally performed in the national economy. Thus, the claimant's inability to perform qualified employment occurring within 15 years of adjudication of the claim or, if earlier, the claimant's date last insured, will have already been established.

[FN30]. S.S.R. 82-63, at 449-50.

[FN31]. 20 C.F.R. § 404.1520(c) (1995) defines a severe impairment as an impairment or combination of impairments "which significantly limits your physical or mental ability to do basic work activities…." *See also* 20 C.F.R. § 404.1521 (1995).

[FN32]. S.S.R. 82-63, at 449.

[FN33]. 453 U.S. 34, 101 S.Ct. 2633 (1981).

[FN34]. 453 U.S. at 43.

[FN35]. Recall that § 404.1568(d)(3) and S.S.R. 82-41 essentially state that "isolated" work experience offers no transferable skills because the skills obtained are so unusual and/or specialized that they cannot be used in other types of employment. Similarly, § 404.1565(a) states that transferable skills do not flow from "brief" periods of work experience as the work is not performed long enough for the individual to master the requirements of the job. Finally, § 404.1565(a) further provides that skills acquired through remote periods of work experience are deemed obsolete and therefore not transferable to other work. It follows, then, that transferable skills cannot, under any circumstances, arise from periods of work experience that are found to be "[i] solated, brief, or remote."

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