

NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)

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Executive Director
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March 24, 2010

Commissioner Michael J. Astrue
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-6401

Submitted on www.regulations.gov

Re: Request for Comments: Drug Addiction and Alcoholism, 75 Fed. Reg. 4900 (Jan. 29, 2010);
Docket No. SSA-2009-0081

Dear Commissioner Astrue:

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR).

Founded in 1979, NOSSCR is a professional association of attorneys and other advocates who represent individuals seeking Social Security disability or Supplemental Security Income (SSI) benefits. NOSSCR members represent these individuals with disabilities in legal proceedings before the Social Security Administration and in federal court. NOSSCR is a national organization with a current membership of more than 3,900 members from the private and public sectors and is committed to the highest quality legal representation for claimants. While our members represent claimants from the initial application through the Federal court appellate process, the majority of cases are hearings before Administrative Law Judges and appeals to the Appeals Council.

Since the current law regarding drug addiction and alcoholism (DAA) was enacted in 1996, SSA has not updated its regulations or codified its policies on this important disability issue. The agency's subregulatory policy statements, e.g., POMS, HALLEX, and EM-96200, provide guidance in making disability determinations involving DAA. In general, SSA's policies represent reasonable interpretations of the statute and should be retained. However, in many cases, adjudicators ignore or misapply these policies.

Based on their experiences with claimants they have represented, our members report that misapplication of SSA's current DAA policies occurs frequently and causes unnecessary delays for claimants:

- “The state agencies and the ALJs are reaching the conclusion that benefits are not payable if a claimant continues to use drugs or alcohol, regardless of whether that use is disabling. In the case we were arguing [in federal district court], my client had lifelong mental retardation, schizophrenia, and back problems, but had been turned down because he ‘might be’ using alcohol and/or cocaine.” (North Carolina)
- “MEs [medical examiners] and many ALJs do not understand the DAA rules. MEs generally believe that if a claimant with a mental impairment is using drugs or alcohol, then DAA is material. They will scour the record looking for indications of drug use. Any regulations should clearly state that DAA is not necessarily material just because a claimant is using drugs or alcohol.” (Connecticut)
- “[F]requently an ME shows up [at the ALJ hearing] and testifies that the claimant is clearly impacted by DAA without any evidence to support the conclusion ... I would like to see more rigorous requirements on the ALJ to find that there is objective evidence supporting the assertion that DAA is material before *ipso facto* reaching that conclusion in the absence of evidence of same, other than that the claimant has a history of DAA.” (Washington)

A review of federal court decisions supports these reports. The holdings in these decisions reflect the problem that ALJs often do not use the correct procedure or analysis when evaluating a claim where the claimant has both a substance abuse-related impairment and other impairments:

- ALJs deny benefits because the other impairments were caused by DAA, e.g., hepatitis and peripheral neuropathy. Such a finding is clearly inconsistent with the legislative history of the statutory provision, as described below.
- An ALJ determined that DAA was material only because the claimant never held a long-term job and had a criminal record.
- An ALJ decided that the claimant's substance abuse caused her bipolar disorder.
- Contrary to SSA's current policies, ALJs do not consider the DAA-related limitations when doing the first sequential evaluation process. For example, an ALJ determined that because the claimant's psychiatric hospitalizations were preceded by drinking alcohol and she experienced increased limitations when drinking, the claim should be denied.

RECOMMENDATION: SSA's current policies represent reasonable interpretations of the Social Security Act regarding drug addiction and alcoholism. However, these policies are often misapplied or ignored by adjudicators. To assure correct and uniform adjudication by all agency decisionmakers and to avoid unnecessary delays for claimants, we recommend that SSA update

the regulations to reflect the 1996 statutory change and issue formal substantive policy guidance for all adjudicators in Social Security Rulings (SSRs) that reflect the agency’s subregulatory instructions.

I. SSA SHOULD CODIFY CURRENT SSA POLICIES IN SOCIAL SECURITY RULINGS

Since 1996, the primary guidance providing substantive instructions for determining DAA available to the public include the following:

- Emergency Message EM-96200, issued on August 30, 1996: “Questions and Answers Concerning DAA from the 07/02/96 Teleconference—Medical Adjudicators—ACTION”
- POMS section DI 90070.050: “DAA Material Determinations” (issued in July 1996, updated July 1997)
- HALLEX I-5-3-14A: “Drug Addiction or Alcoholism” (issued November 14, 1997, revised August 24, 2000)¹
- Various policy clarifications available to agency adjudicators

While these policy statements are similar, they are not identical and do not apply to adjudicators at all levels. In fact, the HALLEX provisions no longer appear on the SSA public website. As a result, we do not know if there are any policy statements that specifically apply to ALJs and the Appeals Council. A NOSSCR member in Pennsylvania reported:

In my experience, ALJs fail to perform a proper DAA analysis and/or ignore the Emergency Teletype. One ALJ went so far as to say the Teletype did not apply to ALJs, so she could ignore it. This needs clarity, which is sorely missing.

It is essential that all policies be consolidated and unified into one or more SSRs that must be followed by all SSA adjudicators and will provide guidance to the courts. Social Security Rulings (SSRs) can provide this type of precedential guidance. They are published in the Federal Register and, according to SSA’s regulations:

They are binding on all components of the Social Security Administration. These rulings represent precedent final opinions and orders and statements of policy and interpretations that we have adopted.

20 C.F.R. § 402.35(b)(1).

Specific examples demonstrate that SSRs provide formal and detailed adjudicative instructions for agency decisionmakers and the courts. For example, the nine SSRs issued in 1996 (SSR 96-1p through SSR 96-9p) offer more detailed guidance on a number of significant issues in the disability determination process. Over the years, these SSRs have been incorporated into

¹ The HALLEX no longer appear on the public SSA policy website. However, our comments will still refer to the prior version since the HALLEX sections provided guidance to ALJs and the Appeals Council.

decisions at both the administrative and judicial levels. Failure to follow the SSRs constitutes legal error by the adjudicator.

More recently, in February 2009, SSA issued a series of SSRs for evaluating SSI childhood disability claims, SSR 09-1p through SSR 09-8p. As we are recommending with DAA issues, the SSI childhood disability SSRs consolidated a variety of SSA policy statements, e.g., training materials, Questions and Answers. These SSRs provide much more detail than exists in the regulations for evaluating these often difficult to decide claims. Since the policies are now stated in SSRs and were published in the Federal Register, they must be followed at all administrative levels and will provide guidance to the courts.

The importance of formally promulgating SSA's DAA policies was underscored in *Parra v. Astrue*, 481 F.3d 742 (9th Cir. 2007), *cert. denied*, 552 U.S. 1141 (2008). In *Parra*, the claimant had relied on the HALLEX and EM-96200 regarding the "materiality" determination in DAA cases. Without deciding whether they applied in this case or addressing that they reflected agency policy, the court stated that "internal agency documents such as these do not carry the force of law and are not binding upon the agency ... Therefore, they do not create judicially enforceable duties, and we will not review allegations of noncompliance with their provisions (citations omitted)." 481 F.3d at 749.

II. MEDICAL EVIDENCE OF DAA

SSA's current policies provide strong statements about the role of medical evidence in DAA cases. As described below, these statements need to be codified as guidance for all adjudicators.

The DAA POMS cautions adjudicators to:

Apply the guidelines in [POMS] DI 24515.001 ["Evaluating the Evidence – General"] with care because a finding of "material" will result in a determination that the individual cannot be considered to be disabled.

POMS DI 90070.050 E. It goes on to state that:

If the evidence in file is sufficient and consistent to establish that the individual is disabled but it does not establish that the individual has DAA, do no additional development of the DAA. Make the favorable disability determination based on the evidence in file.

Id. at E.1. The various SSA policy statements provide guidance in determining whether an individual "has DAA." For instance, the POMS defines "Medical Evidence of DAA" as evidence that (1) Is from an "acceptable medical source"; and (2) Is sufficient and appropriate to establish that the individual has a medically determinable "substance use disorder" as described in the "Diagnostic and Statistical Manual of Mental Disorder," Fourth Edition (DSM-IV). *Id.* at C.1 and 2. When asked what constitutes "sufficient and appropriate evidence to establish the existence of a substance use disorder," SSA emphasized that the medical evidence shows that the DSM-IV criteria are met. EM-96200, Q. 24.

An April 2009 SSA policy statement reminds adjudicators that:

The person must have a “medically determinable substance abuse disorder. If he or she does not, we do not consider whether there is DAA material to the determination of disability

Our instructions provide that, even if the record contains reports of substance use, the adjudicator should not make a materiality determination unless there is objective medical evidence from an acceptable medical source establishing the existence of a substance use disorder defined in the DSM. See, e.g., [POMS] DI 090070.050B2.

Statements by the individual about his/her own condition **do not** constitute “medical evidence” of DAA since SSA’s regulations, 20 C.F.R. §§ 404.1508 and 416.908, require that an “impairment” be established by **medical** evidence “consisting of signs, symptoms, and laboratory findings, not just an individual’s statement of symptoms.” EM-96200, Q. 23; *see also* POMS DI 90070.050C.1.b and HALLEX I-5-3-14A, § C.2.

It is important that SSA policy formally require medical evidence of a substance use disorder that rises to the level of a “medically determinable impairment.” Our members have reported cases where ALJs find that DAA is material based on the mere mention of drug/alcohol use in the past or occasional current use. This is clearly inconsistent with SSA policy. A recent (March 2010) “Question and Answer” SSA policy statement emphasizes that:

The DAA materiality analysis will still apply to “medically determinable” substance use disorders (substance dependence and substance abuse). Therefore, you will still need to determine whether there is a medically determinable substance use disorder with medical evidence consisting of appropriate symptoms, signs, and laboratory findings from an acceptable medical source. **Evidence that merely shows that the person uses drugs or alcohol does not in itself establish the existence of a medically determinable substance use disorder. (emphasis added).**

These current policy statements stress the importance of obtaining medical evidence to establish the existence of DAA. We recommend that they be incorporated into formal agency policy.

III. THE “MATERIALITY” DETERMINATION: EVALUATION OF DAA AND ANOTHER PHYSICAL AND/OR MENTAL IMPAIRMENT

The current law enacted in 1996 provides that an individual “shall not be considered to be disabled . . . if alcoholism or drug addiction would . . . be a contributing factor material to the Commissioner’s determination that the individual is disabled.”² Consistent with this definition, Congress intended that individuals with impairments other than drug or alcohol use, which are independently disabling, will continue to be found disabled, even if the other impairments were caused by drug or alcohol use: “Individuals with drug addiction and/or alcoholism who have

² 42 U.S.C. §§ 423(d)(2)(C), 1382c(a)(3)(J).

another severe disabling condition (such as AIDS, cancer, cirrhosis) can qualify for benefits based on that disabling condition.”³

Under the current regulations, DAA is “material” to the disability determination when the claimant would not be found disabled if use of drugs or alcohol stopped. 20 C.F.R. §§ 404.1535(b)(1), 416.935(b)(1). The “materiality” determination is a three-step process. This process is set out, not in the regulations, but in POMS DI 90070.050B and HALLEX I-5-3-14A, § V.B. The three-step process is:

Step 1: Determine whether the claimant is disabled, using the general sequential evaluation of disability and considering the effects of DAA.

Step 2: If the claimant is disabled, determine whether there is medical evidence of DAA. See discussion above re “medical” evidence of DAA.

Step 3: If the claimant is disabled and medical evidence of DAA exists, determine whether DAA is “material” to the disability determination.

The key factor in the “materiality” determination is whether the claimant would be disabled if he or she stopped using drugs or alcohol. 20 C.F.R. §§ 404.1535(b)(1) and 416.935(b)(1). The adjudicator must determine whether (a) Any of the claimant’s mental and/or physical limitations, upon which the Step 1 disability determination is based, would remain if the claimant stopped using drugs or alcohol; and (b) Whether any or all of the claimant’s remaining limitations would be disabling. POMS DI 90070.050D.2. If the remaining limitations are disabling, then DAA is *not* material to the disability determination.

Current instructions state that a finding that DAA is material “will be made *only* when the evidence establishes that the individual would not be disabled if he/she stopped using drugs or alcohol.” (emphasis added). POMS DI 90070.050D.1. *See also* EM-96200, Q. 27; HALLEX I-5-3-14A, § D (“Make a finding that DAA is material only when the evidence establishes that the individual would not be disabled if he/she stopped using drugs or alcohol.”). If the evidence in the file supports a finding of disability but no sufficient and appropriate evidence establishes the existence of a substance use disorder, a determination will be made based on the evidence in the file. POMS DI 90070.050E.1.

Both the POMS and HALLEX provide examples of when DAA is material:

- The only impairment is a substance use disorder.
- The individual's other impairment(s) is by itself not disabling; e.g., a hearing impairment that is “not severe.”
- The individual's other impairment(s) is exacerbated by DAA and the evidence documents that, after a drug-free period of 1 month, the other impairment(s) is by itself not disabling.

3 H. Rep. No. 379, 104th Cong., 1st Sess. 16 (1995)(Committee Report for H.R. 2684), p. 16.

POMS DI 90070.050D.3; HALLEX I-5-3-14A, § D.⁴ However, examples of when DAA is not material appear **only** in the HALLEX, not in the POMS or EM-96-200. The HALLEX provides that DAA is not material if:

- The individual has another non-DAA impairment(s) that meets or equals a listing, i.e., the other impairment(s) is by itself, disabling and none of the limitations resulting from it are caused or increased by drug or alcohol use.
- The individual is limited to sedentary work by an orthopaedic impairment and based on his/her age, education, and work history, the Medical-Vocational Guidelines in Appendix 2, Subpart P, of Regulations 4, direct a finding of “disabled.”

HALLEX I-5-3-14A, § V.D.

As noted in EM-96200, Q. 29, the “materiality” question is particularly difficult in cases involving a mental impairment. Based on reports from our members, it seems that this is a very frequent issue on appeal, with some ALJs ignoring or misapplying the policy in EM-96200. Question 27 addresses the situation when the adjudicator cannot disentangle the limitations caused by drugs or alcohol from those caused by the mental impairment(s):

Since a finding that DAA is material will be made **only** when the evidence establishes that the individual would not be disabled if he/she stopped using drugs/alcohol, the DE [Disability Examiner] will find that DAA is not a contributing factor material to the determination of disability. (emphasis added).

A district court case handled by a NOSSCR member in Pennsylvania is instructive regarding the appropriate analysis in cases involving DAA and a mental impairment.⁵ The individual had a long-standing, serious alcoholism problem. He also was diagnosed with a significant panic disorder of agoraphobia that prevented him from working. His treating psychiatrist had implemented a very aggressive anti-depressant drug regimen, which resulted in “no great improvement,” and he opined that “overall functioning [was] tenuous.” He described the individual as “highly motivated to get better.” The claim was denied by the ALJ and a second hearing was held after the Appeals Council remanded.

For the second hearing, the same treating psychiatrist stated that the individual continued to be diagnosed with panic disorder, which had not improved despite medication. A third hearing was held so that the treating psychiatrist could testify. He stood by his earlier diagnosis of panic disorder with agoraphobia and that it was independent of the alcohol abuse. In contrast to the medical examiner at the hearing who stated that the panic disorder worsened when the individual drank, the treating psychiatrist testified that the panic disorder actually worsened when the individual stopped drinking. He concluded that the panic disorder was on its own disabling and that the individual’s limitations would be the same if he stopped drinking alcohol. The ALJ denied the claim but the Appeals Council again remanded.

⁴Note that the HALLEX says “of at least 1 month.”

⁵To protect the individual’s privacy, only the case number is provided: Civil Action No.03-3109, 2005 U.S. Dist. LEXIS 12312, 104 Soc. Sec. Rep. Service 475 (E.D.Pa. June 22, 2005).

A fourth hearing took place. The same medical examiner testified and he reiterated that he would not diagnose panic disorder until substance abuse was eliminated as the cause, with a period of at least six months' sobriety required. [Note that, as discussed below, nowhere in SSA policy is any length of nonuse required, let alone a period of six months.] Updated evidence from the treating psychiatrist again stated that the individual would be disabled even if he stopped using alcohol. In October 2002, a psychiatric consultative examiner saw the individual and concluded, like the treating psychiatrist, that the alcohol abuse was "not the sole cause" of a "pre-existing panic disorder with agoraphobia" and that there would continue to be some degree of impairment if he stopped drinking. The ALJ denied the claim for the third time and the case was eventually appealed to federal district court.

The court stressed that an "alcoholism is material" finding can be made only if the individual would not be disabled if he stopped using alcohol. That finding however can only be made after the ALJ identifies which of the limitations would remain if the claimant stopped using alcohol.

Relying on EM-96200, the court noted that the ALJ must again perform the 5-step sequential evaluation but this time considering only those limitations that remain if alcohol use stops. If the remaining limitations would still be disabling, a finding of disability should be made. The court did note that pursuant to EM-96200, Q. 27, if the ALJ cannot identify which limitations would remain if alcohol use stops, "SSA policy requires the ALJ to 'find that [alcoholism] is not a contributing factor material to the determination of disability.'" In other words, the ALJ must find that the claimant is disabled."

In this case, the ALJ found that the individual met listing 12.06 for Anxiety Related Disorders but then failed to identify what limitations would have remained if the individual stopped drinking. The ALJ assumed that if he stopped drinking, he would recover completely, even though there was no evidence to support that assumption. The court found that the evidence did not establish that the individual's remaining limitations, if he stopped drinking, would not be disabling. Relying on the SSA policy in EM-96200, Q. 27, the court held that the ALJ should have found that the claimant's alcoholism was not a contributing factor material to the disability determination. The court reversed and awarded benefits as of the date that the application was filed, nearly nine years earlier.

This case provides an instructive example of a proper DAA analysis to determine materiality, using SSA's existing policies. It also shows the unnecessary delays caused due to the lack of a uniform agency policy that is binding on all adjudicators.

IV. CIGARETTES AND OTHER TOBACCO PRODUCTS SHOULD NOT BE INCLUDED IN DAA POLICY

The Federal Register Request for Comments asks whether SSA should include using cigarettes and other tobacco products in the agency's instructions. **SSA should not include these products in its policy statements regarding DAA analysis.**

A. Including cigarettes and tobacco products is inconsistent with statutory intent

Including cigarettes and tobacco use in the DAA analysis would be inconsistent with Congressional intent and the legislative history of the current statutory provisions:

The intent of this proposal is to eliminate payment of cash Social Security and SSI disability benefits to drug addicts and alcoholics, to ensure that beneficiaries with other severe disabilities who are also addicts or alcoholics are paid benefits through a representative payee and referred for treatment, and to provide additional funding to States to enable recipients to continue to be referred to treatment sources.⁶

There is nothing in the Congressional Report language that points to inclusion of tobacco and cigarette use. For instance, a claimant who qualifies for benefits based on another disability but also is determined to be an alcohol or drug addict must have a representative payee. Why would this be meant to apply to someone who uses tobacco products? Funding was provided for drug and alcohol treatment programs. What evidence exists that any funding went to federally funded programs regarding the use of tobacco products?

Tobacco products are very different from alcohol and other addictive drugs intended to be covered by the statute. On their own, tobacco products do not cause mind-altering limitations and do not have a vocational impact. Those who advocate for the inclusion of tobacco use in the DAA analysis point to the fact that tobacco use exacerbates or causes other impairments such as lung diseases, asthma, cancer, hypertension, etc. However, under the statute and legislative history, individuals with drug addiction or alcoholism who have another impairment that is disabling on its own, even if caused by alcohol or drugs, are "disabled."

Including cigarettes and other tobacco products would put the agency on a "slippery slope" of causation, injecting a factor of "fault," a consideration that the agency has never considered unless required by statute. A NOSSCR member succinctly summarized this problem:

It starts to inject an issue of fault in the disability evaluation process and then the issue becomes where does one draw the line? It would not be a big leap to start including other issues, such as diet or exercise in the mix to use as a determinative issue as to a finding of disability. There are too many areas where lifestyle can be unhealthy and to inject that into the decision making process is to risk abuse by [adjudicators].

6 H. Rep. No. 379, 104th Cong., 1st Sess. 16 (1995), p. 17

B. SSA policy on “failure to follow prescribed treatment”

Those who espouse inclusion of cigarettes and tobacco are confusing the agency’s long-established policy regarding failure to follow prescribed treatment and are trying to incorporate it into the separate and distinct DAA policy. We know that there are some ALJs who include tobacco use in the DAA analysis.⁷ They are not only acting inconsistently with the statute, as discussed above, but also with SSA policy regarding failure to follow prescribed treatment. In cases where tobacco use causes or exacerbates other impairments that do have a vocational impact, the actual issue should be whether the claimant failed to follow prescribed treatment as clearly set out in SSA’s regulations and policies.

The regulations state: “In order to get benefits, you must follow treatment prescribed by your physician if this treatment can restore your ability to work.” 20 C.F.R. §§ 404.1530(a) and 416.930(a). The regulations also set SSA’s “Acceptable reasons for failure to follow prescribed treatment.” 20 C.F.R. §§ 404.1530(c) and 416.930(c). SSR 82-59 provides further detail for the analysis to follow if this is an issue and for the “acceptable reasons for failure to follow.” This is an area of the law and agency policy that is long-standing and well-developed. An adjudicator who believes there is evidence that a treating physician has “prescribed” that a claimant stop smoking should resort to these rules, and not to the DAA rules.

V. THERE SHOULD BE NO SET PERIOD OF ABSTINENCE OR NONUSE

SSA should clarify and codify its current policy regarding abstinence or nonuse in considering whether DAA is material to the disability determination.

The statute does not require a period of abstinence to make this determination. Nor is there any requirement mentioned in the legislative history. The only reason abstinence is suggested to be a factor in the DAA analysis is because of SSA’s subregulatory policies regarding which limitations would remain if the individual stopped using drugs or alcohol. However, SSA’s own policies make clear that there is no such requirement.

POMS DI 90070.050D.3 provides the following example of when DAA is material: “The individual's other impairment(s) is exacerbated by DAA and the evidence documents that, after a drug-free period of 1 month, the other impairment(s) is by itself not disabling.” EM-96200 clarifies that there is no requirement for a period of nonuse. EM-96200, Q. 30, asks whether the example in the POMS is just an example “or is it to be used as an adjudicative rule?” The Answer clarifies that:

It was intended only as an example. The time period of at least 1 month was not intended to imply that drug-free periods of less than 1 month should not be considered when determining whether DAA is material. To clarify this point, we deleted the words “at least” when we placed the example in [POMS] DI 90070.050D.3.

⁷ A draft version of the “2007 Draft Decision Writers Guide” includes caffeine and nicotine in the list of “drug addictions” to be considered. See p. 5. If these references appear in the final version of this Guide, we urge SSA to delete these references.

A “Medical Policy Clarification” from the SSA Boston Region’s Center for Disability Programs addresses “Evaluating DAA Materiality When There is a Co-existing Mental Impairment.”⁸ It deals with a number of issues involving co-occurring DAA and mental impairments. However, it also deals with periods of abstinence. While noting that a period of nonuse can provide useful information as to what limitations would remain after drug or alcohol use stops, the policy statement provides the following instruction to DDS adjudicators:

However, the existence of a period of abstinence in and of itself is not determinative either way as to remaining limitations. The controlling issue is not whether there has been a substance-free period, but whether there is evidence to permit the MC/PC [medical consultant/psychological consultant] to project what limitations would remain if the claimant stopped using drugs or alcohol.

When evaluating evidence of sobriety, consideration must be given to the length of the period of abstinence, how recently it occurred and whether there may have been any increase or decrease in the limitations imposed by the other mental impairment(s) since the last period of abstinence. Care should be exercised in assessing the circumstances under which a period of sobriety takes place. For example, if it occurs in a detox or rehab setting, consideration should be given to whether the structure and support provided in this setting attenuate other symptoms of the co-existing mental impairment(s).

The policy clarification further states: “While the claimant’s functioning during a period of sobriety is usually the best evidence for projecting functioning without DAA, **it is not mandatory to have a period of sobriety** in order to make this projection.” (emphasis added). In fact, “[i]n some instances, withdrawal of the substance(s) may actually result in a worsening of the symptoms attributable to the other [non-DAA] impairment(s).”

A July 7, 2004, “Disability Program Notes” issuance from the SSA New York Region, appropriately titled “DAA Materiality and the 30-Day Abstention Myth,”⁹ unequivocally states: “[T]here is no 30-day standard.” (emphasis in original). The policy statement further explains:

There is no standard for the length of the substance-free period because the length of time for the acute effects of intoxication and withdrawal to abate will vary by substance and individual. The key is whether the evidence establishes that an individual is disabled, or not disabled, absent the effects of substance use. (emphasis in original).

A recent internal SSA policy statement, dated April 30, 2009, reiterates the agency’s policy. The question was whether a materiality determination can be made even when there is no period of abstinence. The response was “Yes, in many, but not all, cases.” This policy statement provides useful and instructive guidance to adjudicators and we recommend that it be included in a Social Security Ruling regarding DAA analysis.

8 Identical Letter 024-02 to All DDS Administrators, Boston Region (Oct. 23, 2002).

9 DPN No. 04-004, New York Region (July 7, 2004).

The 4/30/09 policy statement directly addresses the issue of “[t]he most difficult cases in which a person has an apparently disabling mental disorder co-occurring with DAA.” Relying on EM-96200, it emphasizes that SSA’s policy “provides that there must be evidence in the case record establishing whether the DAA is material.” Some of the key statements regarding periods of nonuse include:

- If there is no evidence from a period of nonuse, it is sometimes possible to determine whether the person would be disabled if the DAA were to stop; for example, based on medical evidence that shows a worsening of a co-occurring impairment(s) only during periods of acute intoxication, and evidence showing what impairment-related limitations remain after the acute effects of intoxication subside. However, note that in this case the determination is still based on evidence in the particular person's case record establishing that the DAA is material.
- We also caution that adjudicators should be careful not to overlook the common situation in which an individual with a serious mental disorder (such as bipolar disorder or schizophrenia) is “self-medicating.” Evidence showing worsening of a co-occurring mental disorder during periods of intoxication may not be demonstrating that DAA is material; rather, it may be demonstrating the frequency with which the person is experiencing exacerbations of the co-occurring mental disorder. There is no clearcut guidance we can give for making this determination.
- It is most likely that you will need evidence from a period of nonuse in cases involving co-occurring mental disorders in which the separate effects of the mental disorders are not clear. **We do not prescribe or require a specific length of time for a period of abstinence because the periods will vary based on the type of substance and the particular effects on the person.** We intended the example of the 1-month period of abstinence in EM-96200 to illustrate the fact that, in some situations, it may not be possible to separate the effects of drug or alcohol use from the effects of the other impairment(s) until the individual has been abstinent for a length of time sufficient to allow the acute effects of intoxication and withdrawal to abate. As we explained in Question 29 of EM-96200, we know of no research data upon which to reliably predict the expected improvement in a coexisting mental impairment(s) should drug or alcohol use stop. (emphasis added)

Limited or no access to treatment. In addition to our recommendation that there be no required period of nonuse, consistent with current SSA policy, it is critical to consider the lack of access or limited access to treatment programs that would possibly provide a period of abstinence. If a requirement were imposed, how would claimants pay for treatment? How would they pay for testing? And most importantly, how could they be required to obtain treatment when no treatment is even available? A NOSSCR member in Washington State pointed out that:

For many who are unemployed, access to good medical care is impossible. Even for those who have access to medical care through the state welfare agencies, medical care is minimal due to the low reimbursement rates. There is no incentive for medical practitioners who care

for those on welfare to do more than the minimal amount of treatment to maintain the status quo.

He also noted that one general assistance program in Washington provides limited access to mental health services.

* * *

Thank you for considering our comments on this issue that is very important to disability claimants and beneficiaries. We would be glad to discuss our comments further, in particular, our request to consolidate SSA's policies in one or more Social Security Rulings.

Sincerely,

Nancy G. Shor
Executive Director

Ethel Zelenske
Director of Government Affairs