

Understanding Substantial Gainful Activity - Questions and Answers

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QUESTION: I hear a lot about substantial gainful activity or SGA. What does this phrase mean exactly and why is it important?

The Social Security Administration defines “substantial gainful activity” or SGA as the performance of significant physical and/or mental activities in work for pay or profit, or in work of a type generally performed for pay or profit, regardless of the legality of the work. Within the context of this definition, each of the following words or phrases has a specific meaning:

- ♦ “Significant activities” are useful in the accomplishment of a job or the operation of a business, and have economic value.
- ♦ Work may be considered “substantial” even if it is performed on a part-time basis, or even if the individual does less, is paid less, or has less responsibility than in previous work.
- ♦ Work activity is “gainful” if it is the kind of work usually done for pay, whether in cash or in kind, or for profit, whether or not a profit is realized.

Activities involving self-care, household tasks, unpaid training, hobbies, therapy, school attendance, clubs, social programs, etc., are not generally considered to be SGA. Income that is not wages or net earnings from self-employment (NESE) would also not be considered in SGA determinations.

SGA is a critical concept because a person’s ability to work at a substantial level is directly related to whether or not SSA considers them to be “disabled”. Social Security defines disability as “the inability to engage in any SGA by reason of any medically determinable physical and/or mental impairment which can be expected to result in death, or has lasted or can be expected to last for a continuous period of not less than 12 months”. To meet the definition of disability, an individual must have a physical or mental impairment or impairments of such severity that the individual is not only unable to do his or her previous work but cannot, considering his or her age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.

SSA considers an individual’s ability to engage in SGA at the time of initial application for both SSI and DI applicants. Substantial gainful activity remains relevant for a title II disability beneficiary as long as an individual continues to be on disability benefits. When a DI

beneficiary demonstrates the ability to engage in SGA, SSA considers the person to no longer be disabled and benefits are generally terminated.

Citation: POMS DI 10501.000 General- SGA Table of Contents

QUESTION: What are SGA determinations, who performs them and when are they made?

SGA determinations are best described as evaluations, assessments or decisions that Claims Representatives make about whether or not a beneficiary's work represents Substantial Gainful Activity as it is defined by SSA. Many people think that SGA is simply a number – an objective concrete dollar figure that SSA establishes each year which is the upper limit that a beneficiary can earn before benefits are ceased. In fact, SGA is far more than just a number and the SGA determination process is often far from being a simple “black or white” decision. Like all assessments or evaluations, SGA determinations require that SSA personnel gather the applicable facts, apply the appropriate rules and procedures and use their best judgment to make a final decision. Because SGA determinations involve the interpretation of complex regulations as they may apply to a unique set of circumstances, some degree of subjectivity always is at play. This flexibility is necessary and positive, but can be difficult for beneficiaries to understand or feel comfortable with.

SGA determinations are generally made during work Continuing Disability Reviews (CDRs) and they are typically made by SSA personnel within the local Field Office. A work CDR is a specific type of review that is performed when SSA is aware that a beneficiary is working and after the Trial Work Period (TWP) has ended. These reviews focus on evaluating work effort, not medical condition, so the State Disability Determination Service is generally not involved. In some cases, the presence of earned income is first noticed during a medical CDR being conducted by DDS. In these cases, the work issues are referred back to SSA for development.

Work CDRs may happen at various points in time, depending on the circumstances. In many cases, the Claims Representative is able to simply “eye-ball” the verified earnings to see that SGA is not in evidence. If the individual is clearly averaging UNDER the current SGA guidelines, and there is no evidence indicating that the individual may actually be engaging in SGA, or that the individual is in the position to defer or suppress earnings, then no further development may be called for or necessary – the work is clearly not SGA. SSA's internal regulations state that work CDRs are to be conducted immediately after the conclusion of the TWP, and in some cases this does happen. In other cases, for a variety of reasons, the work CDR is delayed. This usually is a result of failure to report earnings, or difficulty in verifying earnings. When work CDRs are not performed in a timely fashion there is a risk that the beneficiary will be overpaid by SSA.

*Citations: POMS DI 10505.001- General- Evaluation and Development of Employment
POMS DI 13010.010- Events that Initiate a Work CDR*

QUESTION: What income does SSA look at when performing SGA determinations?

Anything a beneficiary receives in exchange for work performed may count during an SGA determinations, whether it is received as cash or in-kind. Payments in-kind would include things such as room and board which are made for the performance of work in lieu of, or addition to, cash. SSA only counts wages or net earnings from self-employment (NESE) which represent work effort, so things like travel expense reimbursement, sick leave, etc., would not be counted during an SGA determination. Some income such as bonuses, incentive payments, commissions, and royalties can be difficult to deal with in SGA determinations since they may or may not relate to work performance. For a detailed list of the various forms of remuneration a person could receive and how SSA views each one, (i.e.: does it count as wages or not) see POMS RS 02505.240. When in doubt, submit the question to your local Field Office (FO) and ask for a determination. Only SSA can decide what counts as wages for a SGA determinations!

A common mistake Benefits Specialists make is in trying to apply the SSI income rules to the title II disability programs. The rules for these two programs are not always the same. In addition, unlike the SSI program, the Title II disability program counts wages when they were EARNED, not when they were PAID. This may seem like an obscure distinction, but it matters and it can have an impact upon SGA determinations. A common example would be teachers who are paid on a 12 month basis, even though they only teach for 9-10 months out of the year. SSA would take the annual salary of the teacher and divide it over the number of months the teacher actually worked to determine the monthly earnings during an SGA determination.

*Citations: POMS RS 02505.240- Summary of How Major Types of Remuneration are Treated
POMS DI 10505.010- Determining Countable Earnings*

QUESTION: Does SSA count ALL of a person's income when making SGA determination?

SGA determinations are based upon "countable" wages or net earnings from self-employment (NESE). The SSA begins the process by looking at gross wages. When determining countable earnings, SSA does NOT deduct from gross earnings standard payroll deductions such as Federal and State withholding taxes, insurance premiums, Federal Insurance Contributions Act (FICA) taxes, pension payments, union dues, etc. These amounts are not deductible because they are attributable to a person's work activity.

For people who are self-employed, SSA is only interested in their "net earnings from self-employment" or NESE instead of gross income. This is completely different from the way SSA treats earned income from wage employment in which gross income is counted. *Net income* is the amount of profit that the business makes. Profit is derived by taking the gross sales and subtracting any legitimate expenses that the business incurred. It is this figure that a business owner reports to the IRS in order for business taxes to be assessed. In addition, SSA takes the profit reported to the IRS and multiplies it by a factor of .9235, which is equal to the employer portion of the FICA contribution for a person in wage employment. SSA does this so as not to

penalize the individual for that portion of the self-employment taxes that an employer would pay for a person in wage employment. Self-employment tax is a Social Security and Medicare tax primarily for individuals who work for themselves. It is similar to the Social Security and Medicare taxes withheld from the pay of most wage earners.

Once SSA determines what a person has earned in a month, deductions are made for available work incentives. Deductions are made for the amount of any subsidized earnings provided by the employer, “special condition” subsidies, and certain impairment related work expenses paid by the employee. Developing the actual value of subsidies and/or IRWEs is not necessary in situations such as when monthly gross earnings are under the SGA limit without IRWE or subsidy development, and there is no indication the earnings are understated. Further development of the subsidy and/or IRWE is not necessary if the evidence is clear that the IRWE or subsidy would not reduce earnings below the SGA level.

In addition, any vacation or sick leave pay is also subtracted from wages and not considered countable income. This is because SSA is only interested in the actual value of work performed, as opposed to money received for other reasons.

After all applicable deductions have been subtracted SSA is left with “countable income” or CI. These are the figures that Claims Representatives use to assess whether or not SGA is in evidence.

*Citations: POMS DI 10505.010- Determining Countable Earnings
POMS DI 10510.012- Determining Countable Income
POMS RS 01803.001- Net Earnings from SE- General*

QUESTION: Is it true that a single month of earnings over SGA will cause someone to be terminated from benefits?

No, fortunately, SGA determinations are rarely, if ever, made based upon a single month in which earnings exceeded the SGA guideline. SSA uses several tools in order to determine the true value of the individual’s work activity.

One of the most useful tools applied by Claims Representatives to assess whether work above the SGA guideline is in fact “substantial gainful activity” is a provision known as an unsuccessful work attempt or UWA. An unsuccessful work attempt (UWA) is an effort to do substantial work in employment or self-employment which is discontinued or reduced to the non-SGA level after a short time (no more than 6 months) because of the individual’s impairment or the removal of special conditions related to the impairment that are essential to the further performance of work.

SSA recognizes that in some cases a beneficiary may try very hard to return to work and may be successful for a short period of time. SSA does not want to needlessly punish a beneficiary who tries to work at a substantial level, only to find that he/she is unable to sustain that effort over

time because of the disability. The UWA provision can be a bit complex to understand and apply. For more information, see the VCU briefing paper entitled “Unsuccessful Work Attempt”.

Citation- POMS DI10501.055- Unsuccessful Work Attempt

QUESTION: What happens when a beneficiary has variable earnings in which some months the SGA guideline is exceeded, but in other months, earnings are under the SGA guideline? How does SSA deal with this situation?

This situation is extremely common, especially for beneficiaries earning an hourly wage who may work a different number of hours each month. Individuals employed in the service industry such as restaurants, hotels, or retail stores often experience this monthly earnings variance. SSA personnel deal with this type of fluctuation by averaging earnings out over multiple months. This helps them identify a pattern of SGA level work in a more accurate manner. Averaging is applied when earnings after TWP fluctuate above and below the SGA guideline and UWA criteria do not apply. Averaging is unnecessary and should NOT be applied when work is consistently above or below SGA or when work is determined to meet UWA criteria. Some of the most important rules for averaging are as follows:

- ◆ SSA does not average income not across time periods when the SGA levels changed.
- ◆ SSA does not average together periods of work activity that are significantly different in terms of earnings or work activity (2 or more periods of averaging may be considered separately)
- ◆ Averaging is not performed on an annual basis, but from the point at which a work effort begins to where it ends or changes
- ◆ Work performed in TWP may be averaged with work after the TWP if it is all part of the same work effort. Averaging is not used NOT used to determine TWP or service months.
- ◆ If gross wages may be reduced by the value of Impairment Related Work Expenses, or Subsidy, the earnings are averaged after these deductions are applied. Averaging is performed on “countable” earnings, not gross earnings.
- ◆ Averaging is NOT used during the EPE after the cessation month has been established in order to determine whether a payment is due or not. The sole purpose of income averaging is to determine if work effort represents SGA.
- ◆ SSA does not include months in the averaging period where there is no income, or where partial-month income represents a significant change in work activity.

The rules governing when and how income averaging is used are complex and confusing. When in doubt, always refer the case to the local SSA field office for a formal SGA determination.

Citation: POMS DI 10505.015- Averaging Countable Earnings

QUESTION: What else does SSA look at beside just monthly earnings?

In deciding whether work is SGA, all pertinent facts about the individual's work are considered, such as the nature of the duties, hours worked, productivity, pay, and any other factors related to the value of the services. Usually, the best gauge of a person's ability to work is the amount of pay received. In deciding whether the person is performing SGA, only the pay that has been earned through a person's own effort is counted. If, for example, it is necessary for an employer to provide special help for an individual to work, the value of such special assistance may be considered a subsidy. As such, only these earnings that are based on the individual's own productivity is used in determining total earnings. Additionally, impairment-related work expenses (IRWEs) incurred by a disabled individual will be deducted from earnings before determining whether the SGA level is met.

Evaluation of work activity for SGA purposes is concerned only with those earnings that represent a person's own productivity. Therefore, before the earnings guidelines are applied, it is necessary to ascertain what portion of the individual's earnings represents the actual value of the work he/she performed. This portion, which is counted for purposes of determining the issue of SGA and is, therefore, compared to the SGA guidelines, is called "countable earnings" in the case of an employee and "countable income" in the case of a self-employed person.

For example, in the case of employees, earnings may have to be reduced because they include a subsidy from the employer, whether a sheltered work center or other type of employer; earnings may have to be reduced because they include payments that the disabled person makes for certain items and services that he/she needs in order to work (IRWE); or work may be in a military service work therapy program with continuation of full salary but the services that are performed are worth much less.

In the case of self-employed persons, net income may have to be reduced by deducting such things as the value of any significant amount of unpaid help furnished the individual, impairment-related work expenses (if not already deducted as a business expense), un-incurred business expenses paid by someone other than the self-employed individual (as well as the value of things provided), and soil bank payments if they were included as farm income.

*Citations: POMS DI 10505.010- Determining Countable Earnings
POMS DI 10510.012- Determining Countable Income*

QUESTION: I have heard that when a beneficiary consistently earns just under the current SGA guideline that SSA can decide the person COULD engage in SGA, but is simply choosing not to and just terminate the person. Is this true?

Effective January of 2001, SSA will ordinarily consider an employee, whose earnings are equal to or less than the primary SGA amount, not to be engaging in SGA. Prior to this date, there were "primary" or upper SGA guidelines and lower "secondary" SGA guidelines. Before January of 2001, it was possible that a beneficiary whose earnings averaged under the primary SGA amount could have been determined as engaging in SGA under the "secondary" SGA rules. The Ticket to Work and Work Incentives Improvement Act (TTWWIIA) of 1999 did away with the secondary SGA provisions.

In certain situations, Claims Representatives may perform additional development when countable earnings are below the SGA level, and there is evidence that the person may be in a position to defer or suppress earnings. An example of this might be an individual who is working for a relative or friend. This is known as, “comparability or worth of work activity”. SSA has defined times when additional development is warranted, and when the individual would qualify for the “exemption of work activity” provision. Basically, if an individual has been receiving benefits (ie: in cash payment status) for more than 24 months, and if cessation has not been determined in a prior SGA decision, then the person is not subject to the “comparability or worth of work activity” provision and the countable earnings test would be used.

Countable earnings averaging more than the current SGA level or more than the Statutorily blind SGA level, are generally deemed to demonstrate the ability to engage in SGA, in the absence of evidence to the contrary (such as the inclusion of sufficient subsidy to reduce earnings below the SGA level).

*Citation: POMS DI 10505.001- General- Evaluation and Development of Employment
POMS DI 10505.020- Evaluation Guides*

QUESTION: How does SSA get information about a beneficiary’s earnings? What happens if a beneficiary can’t remember exactly what employer they worked for or how much they earned?

SSA learns that a beneficiary is working through a number of mechanisms. The most common one is voluntary reports from beneficiaries and/or their representative payees through the mail or by a phone call to local SSA offices or to the national toll free number. In some instances, SSA is alerted that a beneficiary is working by other means such as:

- ♦ A TWP “diary” is completed and a flag is sent to the local field office indicating that a CDR needs to be performed. These “diaries” can be maintained either by local filed office staff or by the PSC/ODO.
- ♦ Earnings posted to the Social Security record or found in IRS or Unemployment Insurance data system interfaces
- ♦ VR notices or vocational diaries
- ♦ Third party reports
- ♦ SSI re-determination leads
- ♦ Diaried medical CDR indicates employment

Once SSA is aware that a beneficiary is working, they will send the beneficiary a Work Activity report, or SSA Form 821 to complete and mail back. SSA personnel also need verified wage information in order to develop the earnings history and make an SGA determination. The preferred methods for verifying wages are:

- a. Pay stubs - SSA may use pay stubs presented by a beneficiary to determine earnings for trial work period (TWP) service month and for SGA purposes. When all pay stubs

are not provided, SSA may be able to determine intervening pay period amounts by using the year-to-date earnings figures. Normally, SSA personnel can use pay stubs, along with the individual's statement regarding work, to determine monthly earnings unless they have a reason to question their accuracy. Photocopies of pay stub are acceptable as long as the information is legible and unaltered and it appears to be an actual photocopy of the pay stub, and there is no reason to question the accuracy of the copy.

- b. Wages posted to the SSR - Wages can also be verified by looking at the Supplemental Security Income Record (SSR) for beneficiaries who also get SSA. It is important to recognize that the SSR earnings are posted when the income is received, not when it is earned. The Claims representative can use SSR verified earned income as preferred verification if it is possible to determine when the earnings were actually earned. This is done to ensure SGA months are determined appropriately.
- c. Employer wage information - Another way SSA verifies wages is by contacting employers directly. This may be done by mail or phone contact. It is important for beneficiaries to understand that SSA does not need to seek permission from the beneficiary to obtain this information.

When the primary sources of verified wages are not available, SSA turns to other "secondary" methods. Secondary verifications are those records that are reported on a basis other than a monthly basis, or if maintained on a monthly basis, are neither records maintained by SSA nor direct reports from an employer. Secondary verification sources include:

- ♦ A TWP -- the Detailed Earnings Query (DEQY) which lists yearly earnings by employer;
- ♦ W-2 Forms;
- ♦ Last pay stubs for a year from employers that list year to date earnings;
- ♦ Disability Control File (DCF) unverified monthly postings;
- ♦ Online Child Support Enforcement postings;
- ♦ State Unemployment Insurance Postings;
- ♦ Earnings report from reliable governmental sources (for example, worker's compensation, unemployment insurance, vocational rehabilitation, etc.); and
- ♦ Earnings reports from any other reliable source (such as earnings information maintained by private rehabilitation organizations, etc.).

In some situations it is not possible for the beneficiary or the CR to determine exact monthly breakdown of earnings. In these situations SSA personnel try to reconstruct the monthly earnings. The Claims Representative is required to make a reasonable determination of earnings for a month based upon the information and evidence that is available. The CR will get as much pertinent information as possible from the individual about the employment (hourly or weekly wage rate, average hours of work per day/week, start and stop work dates, etc.) and will combine this with any data available from Work Activity Reports (SSA Form 821) on file to determine monthly earnings. From this point forward, various averaging and extrapolating formulas are applied to come up with the closest estimates possible.

QUESTION: How does SSA determine if someone who is self-employed is engaging in SGA?

SSA recognizes that SGA determinations for self-employed persons may sometimes be more complex than those for people in wage employment. In determining whether a self-employed individual is engaging in SGA, consideration must be given to the individual's activities and their value to the business. Self-employment income alone is not a reliable factor in determining SGA, since it is influenced not only by the individual's services but also by such things as market conditions, capital investments, the services of other people, and agreements on distribution of profits. (POMS DI 10510.001). This means that SSA cannot always simply look at net earnings from self employment (NESE) to make SGA determinations for beneficiaries who are self-employed. Even when a self-employed person has NESE averaging under the current SGA guidelines, SSA may sometimes need to investigate further by applying three specific tests, explained below, all of which must be considered before it can be established that the individual's work is NOT SGA:

- a. **SIGNIFICANT SERVICES AND SUBSTANTIAL INCOME** - The individual's work activity is SGA if he or she renders services that are significant (as defined in DI 10510.015 A.) to the operation of the business, **and** if he or she receives from it a substantial income (as defined in DI 10510.015 B); or
- b. **COMPARABILITY OF WORK ACTIVITY** - The individual's work activity is SGA if, in terms of all relevant factors such as hours, skills, energy output, efficiency, duties, and responsibilities, it is comparable to that of unimpaired individuals in the same community engaged in the same or similar businesses as their means of livelihood; or
- c. **WORTH OF WORK ACTIVITY**- The individual's work activity is SGA if, although not comparable to that of unimpaired individuals, it is, nevertheless, clearly worth more than the primary amount of the SGA Earnings Guidelines (see DI 10501.015) when considered in terms of its effect on the business, or when compared to the salary an owner would pay to an employee for such duties in that business setting.

There is an exception to this rule. When a beneficiary has received title II disability benefits (in cash payment status) for 24 months, and SSA has not determined that the beneficiary's disability has ceased due to SGA, in the past, then the countable income test would be used in lieu of the tests outlined above . (see DI 10510.001A).

In determining "countable income" from self-employment, SSA deducts from the individual's net income any business expenses which were incurred and paid by another person or agency. This deduction is made even though no actual expense was incurred by the beneficiary. The item or service must meet the IRS definition of legitimate business expense. A variety of

methods are used to determine the value of these expenses. In addition, SSA will deduct from NESE the reasonable monetary value of any significant amount of unpaid help furnished by a spouse, children, or others. In estimating the value of unpaid help, SSA considers the prevailing wage rate in the community for similar services. Only the pro rata value attributable to the services actually performed (as compared with those that a full-time employee would perform) is deducted.

SGA determinations for beneficiaries who are self employed can be complex and multi-faceted.

Citations- POMS DI 10510.000 – DI 10510.040

QUESTION: What happens when a beneficiary has more than one job, or is involved in both wage employment and self-employment?

When more than one work effort exists at the same time, each is considered separately during an SGA determination. If any one endeavor is found to represent SGA, the case is decided on that basis. If no single work effort equals SGA, then the income from all work efforts is combined. Total earnings would never be reduced by any self-employment loss. The self employment income would simply be represented as zero.

Citation- POMS DI 10505.01 D.3- Averaging Countable Earnings

QUESTION: What can WIPA personnel do to help beneficiaries with SGA determinations?

WIPA personnel can be of tremendous assistance to both SSA and the beneficiary during the work CDR process. There is a great deal of misunderstanding among beneficiaries and their families about how SGA determinations are made. Perhaps the greatest contribution a Benefits Specialist can make is providing accurate information about what SGA is and is NOT, and helping the beneficiary have realistic expectations about the work CDR process.

- ◆ Provide accurate & timely info to SSA during work CDRs – help the CR use the SGA tools!
- ◆ Prepare beneficiaries to provide accurate and relevant information to SSA, including necessary documentation
- ◆ Help beneficiaries complete the SSA Work Activity Report properly
- ◆ Inform beneficiaries of SSA Appeals process
- ◆ Request that prior SGA decision be “reopened” if necessary after the appeals deadline has passed.
- ◆ Don’t focus solely on the SGA earnings guideline – SGA is NOT just a number!
- ◆ Educate beneficiaries on the SGA tools and how to report use of work incentives to SSA
- ◆ Invest time counseling self-employed persons in advance about SGA rules
- ◆ Don’t make premature assurances – help clients assess risks and make choices accordingly.

- ♦ Help beneficiaries understand reporting requirements and how to report employment data.

QUESTION: What can a beneficiary do if he/she disagrees with an SGA determination?

An SGA determination is subject to regular SSA appeal rules in the same manner as any other determination. It is important to understand, however, that SSA unlikely to award an appeal if the reason for the request is that beneficiary didn't understand their reporting responsibilities. Also, remember that continued payments during the appeal are only provided for medical terminations, not terminations due to SGA level work, and then only if request is made within 10 days of termination notice.

Citation- POMS DI 12000.000- Appeals Processing- Table of Contents

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