

The economic injury number for Tennessee is 9B1600 and for Georgia the number is 9B1700.

(Catalog of Federal Domestic Assistance Program No. 59002.)

Dated: March 1, 1999.

**Aida Alvarez,**  
*Administrator.*

[FR Doc. 99-6009 Filed 3-10-99; 8:45 am]

BILLING CODE 8025-01-U

**SMALL BUSINESS ADMINISTRATION**

[Declaration of Economic Injury Disaster #9B23]

**Commonwealth of Massachusetts (And a Contiguous County in the State of New Hampshire)**

Middlesex County and the contiguous counties of Essex, Norfolk, Suffolk, and Worcester in the Commonwealth of Massachusetts, and Hillsborough County in the State of New Hampshire constitute an economic injury disaster loan area as a result of a fire that occurred on February 20, 1999 in the City of Waltham. Eligible small businesses and small agricultural cooperatives without credit available elsewhere may file applications for economic injury assistance as a result of this disaster until the close of business on December 1, 1999 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 1 Office, 360 Rainbow Blvd, South 3rd Floor, Niagara Falls, NY 14303.

The interest rate for eligible small businesses and small agricultural cooperatives is 4 percent.

The numbers assigned for economic injury for this disaster are 9B2300 for Massachusetts and 9B2400 for New Hampshire.

(Catalog of Federal Domestic Assistance Program No. 59002.)

Dated: March 1, 1999.

**Aida Alvarez,**  
*Administrator.*

[FR Doc. 99-6008 Filed 3-10-99; 8:45 am]

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**SMALL BUSINESS ADMINISTRATION**

[Declaration of Disaster #3161]

**Texas (And Contiguous Parishes in Louisiana)**

Newton County and the contiguous Counties of Jasper, Orange, and Sabine in the State of Texas, and Beauregard, Calcasieu, and Vernon Parishes in the State of Louisiana constitute a disaster area as a result of damages caused by

severe storms and flooding that occurred January 30 through February 10, 1999. Applications for loans for physical damages as a result of this disaster may be filed until the close of business on May 3, 1999 and for economic injury until the close of business on Dec. 2, 1999 at the address listed below or other locally announced locations: U.S. Small Business Administration, Disaster Area 3 Office, 4400 Amon Carter Blvd., Suite 102, Ft. Worth, TX 76155.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners with credit available elsewhere .....	6.375
Homeowners without credit available elsewhere .....	3.188
Businesses with credit available elsewhere .....	8.000
Businesses and non-profit organizations without credit available elsewhere .....	4.000
Others (including non-profit organizations) with credit available elsewhere .....	7.000
For Economic Injury:	
Businesses and Small Agricultural Cooperatives without credit available elsewhere .....	4.000

The numbers assigned to this disaster for physical damages are 316106 for Texas and 316206 for Louisiana. For economic injury the numbers are 9B2600 for Texas and 9B2700 for Louisiana.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: March 2, 1999.

**Aida Alvarez,**  
*Administrator.*

[FR Doc. 99-6007 Filed 3-10-99; 8:45 am]

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**SOCIAL SECURITY ADMINISTRATION**

[Social Security Acquiescence Ruling 99-2 (8)]

**Kerns v. Apfel; Definition of Highly Marketable Skills for Individuals Close to Retirement Age—Titles II and XVI of the Social Security Act**

**AGENCY:** Social Security Administration.

**ACTION:** Notice of Social Security Acquiescence Ruling.

**SUMMARY:** In accordance with 20 CFR 402.35(b)(2), the Commissioner of Social Security gives notice of Social Security Acquiescence Ruling 99-2 (8).

**EFFECTIVE DATE:** March 11, 1999.

**FOR FURTHER INFORMATION CONTACT:**

Wanda D. Mason, Litigation Staff, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 966-5044.

**SUPPLEMENTARY INFORMATION:** Although not required to do so pursuant to 5 U.S.C. 552(a)(1) and (a)(2), we are publishing this Social Security Acquiescence Ruling in accordance with 20 CFR 402.35(b)(2).

A Social Security Acquiescence Ruling explains how we will apply a holding in a decision of a United States Court of Appeals that we determine conflicts with our interpretation of a provision of the Social Security Act (the Act) or regulations when the Government has decided not to seek further review of that decision or is unsuccessful on further review.

We will apply the holding of the Court of Appeals' decision as explained in this Social Security Acquiescence Ruling to claims at all levels of administrative adjudication within the Eighth Circuit. This Social Security Acquiescence Ruling will apply to all determinations or decisions made on or after March 11, 1999. If we made a determination or decision on your application for benefits between November 16, 1998, the date of the Court of Appeals' decision, and March 11, 1999, the effective date of this Social Security Acquiescence Ruling, you may request application of the Social Security Acquiescence Ruling to the prior determination or decision. You must demonstrate, pursuant to 20 CFR 404.985(b)(2) or 416.1485(b)(2), that application of the Ruling could change our prior determination or decision in your case.

Additionally, when we received this precedential Court of Appeals' decision and determined that a Social Security Acquiescence Ruling might be required, we began to identify those claims that were pending before us within the circuit and that might be subject to readjudication if an Acquiescence Ruling were subsequently issued. Because we determined that an Acquiescence Ruling is required and are publishing this Social Security Acquiescence Ruling, we will send a notice to those individuals whose claims we have identified which may be affected by this Social Security Acquiescence Ruling. The notice will provide information about the Acquiescence Ruling and the right to request readjudication under the Ruling. It is not necessary for an individual to receive a notice in order to request application of this Social Security Acquiescence Ruling to the prior determination or decision on his or her

claim as provided in 20 CFR 404.985(b)(2) or 416.1485(b)(2), discussed above.

If this Social Security Acquiescence Ruling is later rescinded as obsolete, we will publish a notice in the **Federal Register** to that effect as provided for in 20 CFR 404.985(e) or 416.1485(e). If we decide to relitigate the issue covered by this Social Security Acquiescence Ruling as provided for by 20 CFR 404.985(c) or 416.1485(c), we will publish a notice in the **Federal Register** stating that we will apply our interpretation of the Act or regulations involved and explaining why we have decided to relitigate the issue.

(Catalog of Federal Domestic Assistance Program Nos. 96.001 Social Security - Disability Insurance; 96.002 Social Security - Retirement Insurance; 96.004 Social Security - Survivors Insurance; 96.005 - Special Benefits for Disabled Coal Miners; 96.006 - Supplemental Security Income.)

Dated: February 26, 1999.

**Kenneth S. Apfel,**

*Commissioner of Social Security.*

#### **Acquiescence Ruling 99-2 (8)**

*Kerns v. Apfel*, 160 F.3d 464 (8th Cir. 1998)—Definition of Highly Marketable Skills for Individuals Close to Retirement Age—Titles II and XVI of the Social Security Act.<sup>1</sup>

**Issue:** Whether the Social Security Administration (SSA) is required to find that a claimant close to retirement age (60-64) and limited to sedentary or light work has "highly marketable" skills before determining that the claimant has transferable skills and, therefore, is not disabled.

**Statute/Regulation/Ruling Citation:** Sections 223(d)(2)(A) and 1614(a)(3)(B) of the Social Security Act (42 U.S.C. 423(d)(2)(A) and 1382c(a)(3)(B)); 20 CFR 404.1520(f)(1), 404.1563(d), 404.1566(c), 416.920(f)(1), 416.963(d), 416.966(c); 20 CFR Part 404, Subpart P, Appendix 2, sections 201.00(f) and 202.00(f); Social Security Ruling 82-41.

**Circuit:** Eighth (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota).

*Kerns v. Apfel*, 160 F.3d 464 (8th Cir. 1998).

**Applicability of Ruling:** This Ruling applies to determinations or decisions at all administrative levels (i.e., initial, reconsideration, Administrative Law Judge (ALJ) hearing and Appeals Council).

<sup>1</sup> Although the court of appeals' decision in *Kerns* concerned the interpretation of certain provisions of the title II disability program regulations, the title XVI disability program regulations contain provisions identical to those at issue in *Kerns*. Therefore, this Ruling extends to both title II and title XVI disability claims.

**Description of Case:** In February 1994, the claimant, Danny C. Kerns, applied for disability insurance benefits claiming he became disabled because he suffered from Paget's disease of the right hip. Following the denial of his application for benefits at both the initial and reconsideration steps of the administrative review process, the claimant requested and received a hearing before an ALJ. Mr. Kerns, who was 61 years old at the time of the hearing, testified that he had a high school education plus two years of college and had worked as an embalmer and funeral director for the last 15 to 30 years. He testified that since 1985 he worked at a funeral home where he conducted funerals, lifted caskets, and handled accounts payable and accounts receivable. He also stated that his only formal bookkeeping training was from an accounting class he took in high school. Mr. Kerns alleged that the disease rendered him unable to work because it caused constant pain, interfered with sleep and his ability to concentrate, caused irritability, and prevented him from sitting or standing for long periods of time.

The evidence provided at the hearing also included the testimony of a vocational expert who testified that Mr. Kerns' skills in accounts receivable and accounts payable were transferable to a variety of sedentary accounting clerk positions. The vocational expert stated that Mr. Kerns' skills could be transferred to such positions without significant vocational adjustment because the work settings, tools and processes involved in accounting clerk positions would be similar to those of his former position.

The ALJ issued a decision finding that Mr. Kerns was not disabled and denied his claim for disability benefits. The ALJ found that, although Mr. Kerns was unable to return to his past relevant work as a funeral director, he possessed transferable skills and retained the residual functional capacity to perform sedentary work.

Mr. Kerns requested Appeals Council review of the ALJ's decision and the Appeals Council issued a decision finding that Mr. Kerns retained the residual functional capacity for sedentary work. In addressing the transferability of Mr. Kerns' skills, the Appeals Council rejected the need to determine whether Mr. Kerns' accounting skills were "highly marketable," stating that Mr. Kerns' skills were transferable because "no significant vocational adjustment would be required" for Mr. Kerns to perform accounting clerk positions. After finding that the claimant's skills were

transferable, the Appeals Council applied Rule 201.07 of 20 CFR Part 404, Subpart P, Appendix 2, Table No. 1, which directed a finding that Mr. Kerns was not disabled.

The claimant sought judicial review of SSA's decision in district court. The district court found substantial evidence on the record as a whole to support the finding by SSA that Mr. Kerns had the residual functional capacity to perform sedentary positions and affirmed SSA's denial of disability benefits. Mr. Kerns appealed to the Court of Appeals for the Eighth Circuit. On appeal, the claimant contended, among other things, that SSA was required under its regulations to determine whether his accounting skills were "highly marketable" before deciding that they were transferable and that he was not disabled.

**Holding:** The Eighth Circuit noted that Mr. Kerns had satisfied his burden of proving at step four of the five-step sequential analysis that his impairment prevented him from performing his past work as a funeral director, and the burden thus shifted to SSA at step five to show the existence of other work in the national economy that the claimant could perform, considering the claimant's residual functional capacity, age, education and work experience. The court observed that the way in which a claimant's age affects the determination at this step is set forth in 20 CFR 404.1563 of the regulations. The court stated that, as claimants become older, this regulation "imposes a progressively more stringent burden" on SSA before disability benefits can be denied.<sup>2</sup> Section 404.1563(d) states that if a claimant is of advanced age (55 and over), has a severe impairment, and cannot do medium work, such claimant may not be able to work unless he or she has skills that can be transferred to less demanding jobs which exist in significant numbers in the national economy. In addition, section 404.1563(d) states that "[i]f you are close to retirement age (60-64) and have a severe impairment, we will not consider you able to adjust to sedentary or light work unless you have skills which are highly marketable."

The court of appeals found that in determining that Mr. Kerns was not disabled, SSA considered the transferability of his accounting skills

<sup>2</sup> Section 404.1563 and the corresponding title XVI regulation, section 416.963, are entitled "Your age as a vocational factor." Sections 404.1563(b)-(d) and 416.963(b)-(d) specify three age categories: "Younger person" (under age 50); "Person approaching advanced age" (age 50-54); and "Person of advanced age" (age 55 or over). The last category includes a subcategory—a person close to retirement age (age 60-64).

by applying the standard set forth in section 201.00(f) of 20 CFR Part 404, Subpart P, Appendix 2. That section provides:

In order to find transferability of skills to skilled sedentary work for individuals who are of advanced age (55 and over), there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry.

The court of appeals indicated that section 404.1563(d) of the regulations "requires something more than a mere determination of transferability" for a claimant close to retirement age. Although the court of appeals noted that section 223(d)(2)(A) of the Act and section 404.1566(c) of the regulations provide that disability is to be evaluated in terms of a claimant's ability to perform jobs rather than on his or her ability to obtain them, the court found that "the regulations [section 404.1563(a)] also recognize the effect that age has on a person's ability to compete with other job applicants." Section 404.1563(a) states:

Age refers to how old you are (your chronological age) and the extent to which your age affects your ability to adapt to a new work situation and to do work in competition with others.

The Eighth Circuit determined that the language of section 404.1563(d) places a higher burden on SSA to show that a claimant with a severe impairment who is close to retirement age (age 60-64) can perform other work that exists in the national economy. The court indicated that under the regulations, "[s]uch claimants will not be considered 'able to adjust to sedentary or light work unless [they] have skills which are highly marketable.'" The court held that "[i]n the absence of a finding that the skills of a claimant close to retirement age are highly marketable, those skills cannot be found transferable."

Because Mr. Kerns was close to retirement age at the time of the ALJ hearing, the court of appeals concluded that SSA was required to find that Mr. Kerns' skills were "highly marketable" before it could find that Mr. Kerns had transferable skills and deny disability benefits. The Eighth Circuit thereupon reversed the judgment of the district court with instructions to remand the case to SSA to determine whether Mr. Kerns' skills were "highly marketable."

#### *Statement as to How Kerns Differs From SSA's Interpretation of the Regulations*

At step five of the sequential evaluation process, SSA considers a claimant's chronological age in conjunction with residual functional

capacity, education and work experience to determine whether a claimant can do work other than past relevant work. SSA takes into account how age affects a claimant's ability to adapt to new work situations and do work in competition with others in the workplace.

To that end, SSA's regulations provide that in order to find that a claimant whose sustained work capability is limited to light work or less and who is close to retirement age (60-64) possesses skills that can be used in (transferred to) other work, "there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry." 20 CFR Part 404, Subpart P, Appendix 2, section 202.00(f). SSA's regulations provide the same rule for a claimant whose sustained work capability is limited to sedentary work and who is of advanced age (55 and over). 20 CFR Part 404, Subpart P, Appendix 2, section 201.00(f). If the claimant's skills are transferable to other work under this standard, SSA will consider such skills "highly marketable" under 20 CFR 404.1563(d) and 416.963(d). SSA's regulations do not require a specific, separate and distinct finding that a claimant's skills are "highly marketable" in reaching a conclusion that the claimant has transferable skills.

The Eighth Circuit interpreted 20 CFR 404.1563(d) to require SSA to make an additional finding regarding the marketability of a claimant's skills in order to determine whether the skills of a claimant close to retirement age are transferable to sedentary or light work. The court held that in the absence of a finding by SSA that the skills of such a claimant are "highly marketable," SSA may not conclude that the claimant possesses transferable skills.

#### *Explanation of How SSA Will Apply The Kerns Decision Within the Circuit*

This Ruling applies only to cases in which the claimant resides in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota or South Dakota at the time of the determination or decision at any level of administrative review, i.e., initial, reconsideration, ALJ hearing or Appeals Council review.

In the case of a claimant whose sustained work capability is limited to sedentary or light work as a result of a severe impairment, who is close to retirement age (age 60-64), and who has skills, an adjudicator will make a separate finding regarding the marketability of the claimant's skills when determining whether the claimant's skills are transferable to other

work under the standard specified in section 201.00(f) or 202.00(f) of 20 CFR Part 404, Subpart P, Appendix 2. Unless the adjudicator finds that the claimant's skills are "highly marketable," the adjudicator will conclude that the claimant's skills are not transferable to other work even if the standard for finding transferability of skills specified in section 201.00(f) or 202.00(f) is otherwise met. For purposes of this Ruling, an adjudicator will consider the claimant's skills to be "highly marketable" only if the skills are sufficiently specialized and coveted by employers as to make the claimant's age irrelevant in the hiring process and enable the claimant to obtain employment with little difficulty. In determining whether a claimant's skills meet this definition of "highly marketable," an adjudicator will consider:

(1) whether the skills were acquired through specialized or extensive education, training or experience; and

(2) whether the skills give the claimant a competitive edge over other, younger, potential employees with whom the claimant would compete for jobs requiring those skills, giving consideration to the number of such jobs available and the number of individuals competing for such jobs.<sup>3</sup>

SSA intends to clarify the regulations at issue in this case, 20 CFR 404.1563 and 416.963, through the rule making process and may rescind this Ruling once such clarification is made.

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<sup>3</sup> Although rejecting SSA's interpretation of "highly marketable" skills, the Eighth Circuit in *Kerns* did not set forth specific, alternative criteria for determining when a claimant's skills may be considered "highly marketable." Therefore, in the absence of a statement by the Eighth Circuit of a specific definition, we have adopted, for purposes of this Ruling, the standard articulated in *Preslar v. Secretary of Health and Human Services*, 14 F.3d 1107 (6th Cir. 1994), for which we published Acquiescence Ruling 95-1(6), for determining when the skills of a claimant close to retirement age may be considered "highly marketable." Although this standard was not specifically adopted or discussed by the court in *Kerns*, the court did cite portions of the *Preslar* decision in support of its holding in *Kerns*.