CITY BAR JUSTICE CENTER

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RE: 2900-AQ82-Proposed Rule - Schedule for Rating Disabilities: Mental Disorders

Dear Ms. Vvedenskaya,

The City Bar Justice Center ("CBJC") submits this comment in response to the 2900-AQ82-Proposed Rule to amend the portion of the rating schedule dealing with mental disorders. CBJC is the pro bono legal services affiliate of the New York City Bar Association. Benefiting roughly 25,000 New Yorkers in need each year, CBJC's mission is to increase access to justice for disadvantaged New Yorkers at or below the federal poverty line across a broad range of civil legal services by leveraging the volunteered time and expertise of New York City's legal community. CBJC's Veterans Assistance Project provides services such as discharge upgrades and disability benefits advocacy to veterans in the New York area.

CBJC applauds the Department of Veteran Affairs (VA) for acknowledging the need for modifications to the current rating schedule dealing with mental health disorders. The revisions of the 2900-AQ82-Proposed Rule are a valiant first attempt. We are encouraged by your efforts and would like to highlight the proposal's strong points, but we have additional recommendations for areas where there is room for further improvement.

I. The 2900-AQ82 Proposed Rule's Objectives Are Salutary But Require Additional Improvement

We agree that switching to the DSM-5 for evaluative purposes not only was necessary but long overdue. As noted in the proposal, the VA changed the nomenclature it used in 2015 upon publishing RIN 2900-AO96.[1] While the VA should have adjusted its rating criteria then, adjusting the evaluations accordingly now is welcome and should be finalized. The 2900-AQ82 Proposed Rule has other benefits, but also requires some further improvement.

[1] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=2900-AO96 (Last visited April 18, 2022). In this update, the VA replaced all references to the DSM-IV to the DSM-5. No changes to the evaluation criteria were made in this rule. The DSM-5 is the Diagnostic and Statistical Manual of Mental Disorders. It is a diagnostic tool used for mental disorders published by the American Psychiatric Association.

On the benefits side, the Rule not only seeks to update the rating schedule to be in accordance with the DSM-5 but also seeks to incorporate eating disorders (a mental illness that has previously been rated separately) as well as adopt the broad framework associated with the World Health Organization (WHO), International Classification of Functioning, Disability, and Health (ICF), and International Classification of Diseases (ICD).

Although the proposal intends to create less ambiguity and more uniformity in ratings based on the level of impairment, and claims to produce higher disability ratings (according to the VA's proof-of-concept study[2]), the proposal does not quite achieve these goals. Instead, the 2900-AQ82 Proposed Rule uses a frequency interval that can disadvantage veterans by creating a higher burden for those seeking disability compensation for eating disorders, and establishes a framework that gives too much discretion to examiners. The proposal does so by adopting the WHO Disability Assessment Schedule 2.0's (WHODAS 2.0) five domains of functioning: (1) Cognition, (2) Interpersonal Interactions and Relationships, (3) Task Completion and Life Activities, (4) Navigating Environments, and (5) Self-Care.[3] In addition to adopting these domains, the framework enumerates a level of impairment for each domain (*i.e.*, none, mild, moderate, severe, or total). Based on the number of domains impacted by a veteran's mental disorder and the level of each affliction (determined by the frequency and intensity of a veteran's disability within the past month), a veteran is given an overall level of impairment, otherwise known as their disability rating.

II. Limiting Evaluations to The Level of Impairment Experienced Within the Month Prior to An Examination Will Inhibit Fair Ratings, Especially for Individuals with Eating Disorders.

Levels of impairment are evaluated by the frequency and intensity of a veteran's disability within the month prior to the evaluation. One month is a narrow as well as inflexible window that will limit the scope of review of examiners and may impair diagnoses based on the time of year of an exam. Depending on the date of a veteran's compensation and pension (C&P) exam, one's symptoms may be more or less prevalent and/or accurately represented. For example, during the winter or around the holidays, depression and other seasonal symptoms tend to spike.[4] This means that a veteran who is given an evaluation during a lull will receive a lower rating with fewer benefits.

More important than the time of year of the C&P exam is the duration of the scope of review. Limiting the review to the percent of impairment experienced by a veteran only in the month before the veteran's C&P exam would be especially damaging to veterans seeking disability for eating disorders, a category the proposal seeks to consolidate into the new rating schedule. While the proposal highlights that it is removing any weight or BMI barriers for a veteran seeking disability, it neglects to discuss that it is creating a narrower time span. An examiner under the present system for eating disorders analyzes a veteran's entire past year when making a diagnosis. For example, an individual seeking a 60% disability for Bulimia under today's system needs only demonstrate incapacitating episodes of more than six weeks total in duration per year (approximately 12% of the year), see 38 CFR 4.149. In contrast, for 50%

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[2] This study was not made available in the 2900-AQ82 Proposed Rule. Therefore, we do not have confidence in its efficacy.
[3] https://www.federalregister.gov/documents/2022/02/15/2022-02051/schedule-for-rating-disabilities-mental-disorders (Last visited April 18, 2022).
[4] https://etactics.com/blog/seasonal-affective-disorder-statistics (Last visited April 18, 2022); https://www.healthpartners.com/blog/why-we-get-depressed-during-holidays/ (Last visited April 18, 2022).

disability under the new rating system[5], an individual must prove "moderate impairment[6]" that occurs 25% or more of the time (in a given month).

While the proposal's wording seeks to be more encompassing by compensating for an "impairment of earning capacity" rather than a specific diagnosis, illnesses such as eating disorders require a larger timeframe to demonstrate such impairment. Thus, limiting the period for diagnosis to one month would severely inhibit an examiner from making an evaluation and impose a much higher burden on a veteran seeking relief. Under the DSM-5, the period of review for a Bulimia diagnosis is 3 months.[7] If the Department of Veteran Affairs seeks conformity with the DSM-5, it should adopt this timeframe as well.[8] Alternatively, if the VA cannot comply with the standards set forth in the DSM-5, then the VA should refrain from merging eating disorders into the new rating system.

On this note, the new evaluation places too great of a burden on veterans to report their symptom's level of impairment. Proving an impairment of 25% within the past month, as required under the new system, is crucial as the difference between 10% disability and 30% for a veteran (without any dependents) is $314.75.[9] Further, the difference between a 10% disability and 100% is $3,179.42.[10]

III. The New Ratings Give Too Much Power to VA Examiners.

As mentioned above, the new rating system under 38 U.S.C. § 1155 seeks to compensate veterans for "impairments of earning capacity," not specific diagnoses. The modification seeks to accomplish this goal by adopting the WHODAS 2.0 framework of domains. While the domains are broad and can allow for disability ratings based on impairment rather than a specific diagnosis (attempting to eliminate the issues that arise via pyramiding[11]), the domains are arguably too broad and give too much discretion to the examiners. In conjunction with placing a burden on veterans to prove the frequency and intensity of impairments per month, the burden is also on veterans to fit an impairment into one (or a few) domain(s) to receive such disability benefits.

Not only are the domains too broad, but also the classifications of "mild" and "moderate" leave much discretion to the examiner. We urge the VA to re-define the word "moderate" or to clarify the standard of "clinically significant."

The 2900-AQ82 Proposed Rule mentions that it will provide training to VA personnel. Does this mean that only VA personnel and that no private examiners will be able to conduct such exams? To what extent will outsourcing be allowed and what will the standard of review be for external exams? Additionally, what questions are in the Disability Benefits Questionnaire ("DBQ") and how is the output for an impairment mathematically calculated? Will a veteran's

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[5] The closest comparison possible between the two rating schedules.

[6] We find it important to note the ambiguity of the term "clinically significant." As defined by the proposal, a moderate impairment occurs when an individual suffers "clinically significant" difficulty. We urge the Department of Veteran Affairs to adjust the terminology as this term leaves room for interpretation for medical examiners.

[7] https://www.ncbi.nlm.nih.gov/books/NBK519712/table/ch3.t16/ (Last visited April 18, 2022).

[8] *Id.* We urge the Department of Veteran Affairs to look to the DSM-5 for the proper time frame needed for ascertaining other impairments as well. If other mental illnesses require a longer time frame, the Department of Veteran Affairs should conform. Although the goal of the proposal is to compensate for impairment of earning capacity rather than specific diagnosis, this cannot be fully ascertained without the full period of review.

[9] https://www.va.gov/disability/compensation-rates/veteran-rates/ (Last visited April 18, 2022).

[10] *Id.*

[11] The evaluation of the same disability under various diagnoses is to be avoided, 38 CFR § 4.14.

estimated percent be the only factor, and if so, will veterans seeking ratings be given materials (or assistance) so that they may accurately track such impairments prior to their C&P exams? Lastly, to what extent can an examiner ignore a DBQ's questions/answers and make an independent diagnosis?

IV. The New Minimum Disability Will Provide a Protective Buffer

There are benefits to the proposed rating system. For instance, the new rating system removes the minimum rating of 0% and replaces it with 10%. We strongly agree that mental disorders interfere with social and occupational functioning and should not be given a 0% disability rating. Since medical examiners will be given the discretion to incorporate the ameliorative effects of medication, the minimum of 10% rating will provide a protective "buffer." [12]

V. Accounting For the Ameliorative Effects of Medication Will Incentivize Veterans to Forego Their Medications

However, we fear that bestowing examiners with the power to calculate the ameliorative effects of medication will create pharmacophobia. Although the court in *Jones v. Shinseki* held that the VA is entitled to evaluate the ameliorative effects of medication and despite 2900-AQ82 creating the "buffer," many veterans may forego taking their medications in hopes of receiving higher ratings. Under 38 CFR 4.2, a veteran working or seeking work should not be instilled with the fear that if one takes their medication, then the VA will withhold the same benefits needed to maintain one's mental health. Rather, the VA should properly conform with 38 CFR 4.2, taking into account a veteran's entire mental health recorded history, considering symptoms without/before medication. Although 10% will provide $152.64 per month in benefits (for a veteran without dependents), this amount would not even cover the cost of a monthly supply of most brand-name antidepressants.[13] We urge the Department of Veteran Affairs to reconsider its "second note" as the potential detriment to veterans should outweigh the minor costs and does not call for the VA or its examiners to speculate on any symptoms experienced by a veteran. If the Department of Veteran Affairs insists on maintaining the power granted in *Jones v. Shinseki*, perhaps the VA will supplement any ameliorative deductions by granting the costs of medications in addition to the minimum disability granted so that veterans are able to remain at the minimum disability.

In conclusion, while CBJC recognizes and applauds the advancements contained within the 2900-AQ82 Proposed Rule, our experience providing legal services to veterans of low income strongly convinces us that further modification is necessary. We respectfully urge the Department of Veteran Affairs to consider our recommendations and to include express language clarifying the domains and levels of impairments. Further, we urge the Department of Veteran Affairs to re-assess the allocated timeframe for evaluating the frequency of an impairment as well as the risks associated with including the ameliorative effects of medicine when producing a rating. Thank you for your time and consideration.

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[12] https://www.va.gov/disability/compensation-rates/veteran-rates/ - a veteran with no dependents with a 10% disability rating receives $152.64 per month (Last visited April 18, 2022); *Jones* v. *Shinseki*, 26 Vet. App. 56, 63 (2012).

[13] https://www.ncbi.nlm.nih.gov/books/NBK43419/table/clindep.t1/ (Last visited April 18, 2022).

Sincerely,

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