

Date: March 31, 1995

VAOPGCPREC 10-95

From: General Counsel (022)

Subj: Use of Diagnostic and Statistical Manual in Claims Based on  
Mental Disorders

To: Chairman, Board of Veterans' Appeals (01)

**QUESTION PRESENTED:**

To what extent must the Board of Veterans' Appeals employ the nomenclature, diagnostic criteria, and adaptive-functioning scale of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition, in determining appeals involving issues of service connection and rating of mental disorders?

**COMMENTS:**

1. Congress has authorized the Department of Veterans Affairs (VA) to establish "a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries." 38 U.S.C. § 1155. Pursuant to this authority, VA has promulgated the Schedule for Rating Disabilities, 38 C.F.R. part 4, which includes the rating schedule for mental disorders found at 38 C.F.R. § 4.132. As stated in 38 C.F.R. § 4.125, the psychiatric nomenclature currently employed in the schedule for rating mental disorders is based upon the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (APA Manual), Third Edition (DSM-III).<sup>1</sup> The APA Manual provides

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<sup>1</sup> The psychiatric nomenclature of the original 1952 APA Manual was utilized in the rating schedule for mental disorders in 1961. Transmittal Sheet 6 (Oct. 1, 1961). The rating schedule was amended in 1976 to employ the nomenclature of the second edition of the APA Manual, 41 Fed. Reg. 34,258 (1976), and in 1988 to conform to the terminology used in DSM-III. 53 Fed. Reg. 21 (1988). A revised edition of DSM-III (DSM-III-R) was published in 1987, after the notice of proposed rulemaking to amend the rating schedule based upon DSM-III was published in the Federal Register, but prior to publication of the final rule. There is no indication that the final rule was amended to incorporate any changes made in the revised edition of the

standardized diagnostic criteria for diagnosing various mental disorders. Section 4.126 of title 38, Code of Federal Regulations, states that, in rating psychiatric conditions, "[i]t must be established first that a true mental disorder exists" and the mental disorder "will be diagnosed in accordance with the APA manual." The last sentence of 38 C.F.R. § 4.125, which states that the "American Psychiatric Association Manual, 1980 Edition . . . will be hereinafter referred to as the APA manual," makes clear that the term "APA manual" as used in the regulations governing rating of mental disorders refers exclusively to DSM-III, as originally published in 1980. If the diagnosis is not in accordance with the manual, it "is not acceptable for rating purposes" and must be returned to the examiner.

2. Section 7104(c) of title 38, United States Code, provides that "[t]he Board [of Veterans' Appeals (BVA)] shall be bound in its decisions by the regulations of the Department." See also 38 C.F.R. § 19.5. The United States Court of Veterans Appeals has also stated that the BVA must follow the regulations which have been duly promulgated by VA. *E.g.*, *Franklin v. Brown*, 5 Vet. App. 190, 193 (1993); *Young v. Brown*, 4 Vet. App. 106, 109 (1993).

3. In addition, it is well established that substantive regulations which have been validly promulgated pursuant to statutory authority have the force and effect of law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979). Such regulations are binding on the Government as long as they remain in force. *Flores v. Bowen*, 790 F.2d 740, 742 (9th Cir. 1986); see also *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).<sup>2</sup> The failure to follow regulations which have been

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APA Manual. The fourth edition of the APA Manual (DSM-IV) was published in 1994.

<sup>2</sup> Administrative agencies have discretion to relax or modify procedural rules adopted for the orderly transaction of business when the ends of justice require it. *E.g.*, *National Labor Relations Bd. v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953). However, agencies must adhere to rules which confer important procedural benefits on individuals or operate as a binding standard. See *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-

validly promulgated "tends to . . . deny adequate notice contrary to fundamental concepts of fair play and due process." *National Labor Relations Bd. v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971). Characteristics of binding regulations are that they affect the rights and obligations of individuals, *Chrysler Corp.*, 441 U.S. at 301-02, and narrowly limit agency discretion. *Dyer v. Secretary of Health & Human Servs.*, 889 F.2d 682, 685 (6th Cir. 1989); *Guardian Fed. Sav. & Loan Ass'n v. Federal Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666-67 (D.C. Cir. 1978).

4. Section 4.125 of title 38, Code of Federal Regulations, states that the nomenclature employed in the rating schedule for mental disorders is based upon DSM-III. Section 4.125 further states that "[t]o comply with the fundamental requirements for rating psychiatric conditions, it is imperative that rating personnel familiarize themselves thoroughly" with DSM-III. These provisions are merely informational and provide guidance to VA rating personnel on how to perform their jobs more effectively. They do not narrowly circumscribe administrative discretion or determine rights or obligations of claimants. These provisions do not in themselves require that the BVA rely in its decisionmaking on DSM-III.

5. However, section 4.126 requires that the diagnosis of a mental disorder conform to DSM-III. Such diagnoses are essential to establishing service connection for a disability. Service connection may only be granted for mental disorders which fall within the four categories of the rating schedule for mental disorders at 38 C.F.R. § 4.132, which, as noted in 38 C.F.R. § 4.125, rely on the terminology of DSM-III. See 38 C.F.R. §§ 4.9, 4.127 (indicating that service connection will not be established for personality disorders or

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39 (1970); *cf. Modern Plastics Corp. v. McCulloch*, 400 F.2d 14, 19 (6th Cir. 1968).

mental deficiency). Section 4.126 assures that diagnoses comport with the nomenclature used for identifying disorders within those categories and requires that the identification of disorders be based on the diagnostic criteria of DSM-III. The requirement that a mental disorder be diagnosed in accordance with DSM-III may be decisive in determining to which category of the rating schedule the disorder will be assigned or whether the disorder will be considered as falling within the scope of section 4.132. Acceptance of a diagnosis of a mental disorder conforming to DSM-IV rather than DSM-III would not only modify the evidentiary obligations imposed on claimants under current regulations, but could alter the outcome of claims. Section 4.126 may be determinative of the rights of claimants because it precludes acceptance of diagnoses which do not conform to DSM-III and defines a framework which is dispositive in assessing whether a mental disorder is service connected.

6. After stating that personality disorders will not be considered disabilities under the rating schedule, section 4.127 directs the attention of adjudicators to the outline of personality disorders in the APA Manual. Although this regulation does not specifically require use of the DSM-III diagnostic criteria for personality disorders, the regulation appears to imply that reference to those criteria will be made. In any event, the requirement in section 4.126 for diagnosis in accordance with DSM-III effectively mandates that the DSM-III criteria will be used in differentiating between personality disorders and other mental disorders.

7. In addition to introducing new diagnoses and deleting or subsuming in other categories some diagnoses used in prior editions, see DSM-IV at 773, DSM-IV incorporates numerous changes in the criteria for diagnosing particular conditions. For example, the criteria for post-traumatic stress disorder have been significantly revised in DSM-IV. The DSM-III requirement that the psychologically traumatic event or stressor be one "that would evoke significant symptoms of distress in almost everyone" has been deleted, and DSM-IV instead requires that the person's response to the stressor involve intense fear, helplessness, or horror. DSM-III at 238; DSM-IV at 427-28. A criterion requiring that the symptoms cause clinically significant distress or impairment

has been added in DSM-IV, and the duration of symptoms necessary to establish chronic post-traumatic stress disorder has been changed from six months or more to three months or more. See DSM-III at 238 and DSM-IV at 429.

8. Significant changes in diagnostic criteria may be found in other areas as well. For example, DSM-IV states that, to reduce false-positive diagnoses, active-phase symptoms for schizophrenia must last at least one month, DSM-IV at 285, 779; DSM-III did not specify a duration for active-phase symptoms. DSM-III at 188-90. A criteria set for schizoaffective disorder is provided in DSM-IV, DSM-IV at 295-96; DSM-III did not provide a set of diagnostic criteria for schizoaffective disorder. See DSM-III at 202. Criterion "A" for generalized anxiety disorder in DSM-IV refers to "[e]xcessive anxiety and worry," while DSM-III only mentions "[g]eneralized, persistent anxiety." DSM-III at 233; DSM-IV at 435. Also, DSM-IV added the requirement for generalized anxiety disorder that a person find it difficult to control the worry. DSM-IV at 435. Application of DSM-IV diagnostic criteria rather than those used in DSM-III, in the course of determining claims, could significantly alter the criteria for determining benefit eligibility. See generally *Bahramizadeh v. United States Immigration & Naturalization Serv.*, 717 F.2d 1170, 1173 (7th Cir. 1983) (agency may not interpret its regulations in a manner so as to nullify the regulation's wording).

9. Section 4.132 divides mental disorders into four general categories, *i.e.*, psychotic disorders, organic mental disorders, psychoneurotic disorders, and psychological factors affecting physical condition. For the first three categories of mental disorders in section 4.132, criteria are provided for evaluating the extent of disability attributable to the conditions included in the category. Disabilities within the fourth category, psychological factors affecting physical condition, are evaluated under the rating formula for psychoneurotic disorders. While the rating criteria in the various categories share certain descriptive terms, the descriptions of symptoms are tailored to the particular category of disorder and differ significantly between categories. Also, certain notes and special rules are applicable to particular categories. Assignment of a disorder to a

particular category in the rating schedule is determinative of which criteria will be applied in evaluating the extent of the disability attributable to the disorder. To the extent that categorization in the rating schedule is dependent upon the nomenclature and diagnostic criteria of DSM-III, the BVA cannot apply a different version of the APA Manual because this might alter the criteria used for determining level of disability.

10. The Global Assessment of Functioning (GAF) Scale, DSM-IV at 32, which may be used as the basis for reporting overall functioning under Axis V in DSM-IV is not included as such in DSM-III. The GAF Scale provides criteria for rating individuals on a scale of 1 to 100 based upon psychological, social, and occupational functioning, at a particular time, or for a period of time, without regard to impairment of functioning due to physical or environmental limitations. DSM-IV at 30-32. DSM-III contains a much less detailed scale for assessing an individual's highest level of adaptive functioning during the past year based upon social relations, occupational functioning, and use of leisure time. DSM-III at 28-30.

11. The GAF Scale and the predecessor adaptive-functioning scale used in DSM-III provide a basis for assessment of the degree of social and occupational impairment of persons suffering from mental disorders. They do not specify nomenclature or criteria for use in diagnosis of disorders. See Webster's Third New International Dictionary 622 (1981) (defining "diagnosis" as "the art or act of identifying a disease from its signs and symptoms"). Therefore, these scales do not fall within the scope of the requirement in section 4.126 for diagnosis in accordance with DSM-III. Further, neither of these scales is reflected in the rating criteria of section 4.132. However, assessment of degrees of social and industrial impairment in evaluation of mental disabilities is a matter addressed in section 4.132, which uses terminology and disability levels which differ in a number of ways from those employed in the GAF Scale and the adaptive-functioning scale of DSM-III. While the regulations do not prevent reference to a medical report which includes an assessment based on either the GAF Scale or the DSM-III scale, the utility of such a report may be limited

to the extent the terminology and disability levels of those scales differ from those required to be used under the schedule for rating disabilities.

12. We recognize that the current schedule for rating mental disabilities is based upon, and requires application of, DSM-III, which is an outdated version of the APA Manual. However, a regulation may not be ignored on the basis that it has become outdated. *Reich v. Newspapers of New England, Inc.*, 834 F. Supp. 530, 535 (D.N.H. 1993), *aff'd*, 44 F.3d 1060 (1st Cir. 1995); *In re Sabin Oral Polio Vaccine Prods. Liab. Litig.*, 763 F. Supp. 811, 822 (D. Md. 1991), *aff'd*, 984 F.2d 124 (4th Cir. 1993). The current provisions of 38 C.F.R. part 4 provide the criteria by which VA should determine claims until such time as the regulations are amended.

**HELD:**

Sections 4.126 and 4.132 of title 38, Code of Federal Regulations, which require that diagnoses of mental disorders conform to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (APA Manual), Third Edition (DSM-III) and establish the criteria for rating disabilities attributable to mental disorders based upon the psychiatric nomenclature and diagnostic criteria used in DSM-III, require that the Board of Veterans' Appeals (BVA) use the DSM-III nomenclature and diagnostic criteria until such time as the regulations are amended. The BVA is not precluded from making reference to medical reports which employ the adaptive-functioning assessment scales of either DSM-III or the fourth edition of the APA Manual (DSM-IV). However, the utility of such reports may be limited by differences between the terminology and disability levels used in those scales and those employed in 38 C.F.R. § 4.132, the schedule for rating mental disorders.

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