



**Urban Justice Center**

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Commissioner Michael J. Astrue  
Social Security Administration  
137 Altmeyer Building  
6401 Security Boulevard  
Baltimore, Maryland 21235-6401

**RE: COMMENTS REGARDING REVISED MEDICAL CRITERIA FOR EVALUATING  
MENTAL DISORDERS, NOTICE OF PROPOSED RULEMAKING**

75 Fed. Reg. 51336 (Aug. 19, 2010)  
Docket No. SSA-2007-0101

The Mental Health Project of the Urban Justice Center (“MHP”) submits these comments regarding the Social Security Administration’s (“SSA”) proposed changes to the medical criteria for evaluating mental disorders.

MHP is a non-profit organization based in New York City that provides legal and social work services in an effort to help break the cycle of homelessness, hospitalization and incarceration affecting many with mental illness. Our legal services include the representation of Social Security claimants with severe mental illness who are appealing the denial or suspension of Social Security disability and Supplemental Security Income before the SSA and in federal court.

Overall, the proposed changes are positive improvements that we believe will make for a more fair and effective disability analysis for individuals with mental disabilities. But while the substance of these improvements are laudable, we believe there are several areas of improvement where SSA should clarify the language, so as to insure that the rules are understood and applied properly. There are also some changes with which we disagree and urge SSA to reconsider.

**DISCUSSION**

**12.00A2b What are the listings, and what do they require?**

This section states that the paragraph B requirements can be satisfied by either marked impairments in two paragraph B categories, or an extreme impairment in one category. The ability to satisfy paragraph B criteria by evidence of an extreme limitation in one category is a change we support.

## **12.00B How do we describe the mental disorders listing categories?**

We support the change to broaden the paragraph A requirements by eliminating the need to show specific signs and symptoms. This will allow the inclusion of many conditions which although potentially disabling, defy a “checklist” of criteria.

### Non-exhaustive list of examples

Although 12.00B states that a “mental disorder does not have to match one of the examples in this section”, the description of each mental disorder category provides examples by stating “examples of disorders in this category include...” without clarifying, as elsewhere, that the list is non-exhaustive. This appears to contradict SSA’s intent, and stands in contrast with the language regarding symptoms which appears immediately before it, where the description permits that “[s]ymptoms and sign may include, but are not limited to,....”.

RECOMMENDATION: When describing each mental disorder category, SSA should clarify the non-exhaustive nature of the list by stating, before listing examples of mental disorders, that “examples of disorders in this category include but are not limited to...”

## **12.00C What are the paragraph B criteria?**

In this section, SSA has shifted the focus to functional limitations in a work setting. It has also made changes to the categories of functioning to be considered in paragraph B. We strongly support both these changes but urge SSA to make some important corrections.

### Disjunctive Nature of Paragraph B Categories – Understand, remember, and apply information (paragraph B1) (12.00C1) & Concentrate, persist, and maintain pace (paragraph B3)(12.00C3)

In the changes to paragraph B, the category “concentrate, persist, or maintain pace” has been retained from the current listings except that the “or” has been changed to “and.” In the preamble to the proposed changes, SSA notes this is not a substantive change. However it remains unclear and confusing in the body of the listings.

The word “and” has a conjunctive purpose. SSA clarifies in the preamble that it has conjunctive meaning with respect to the three abilities all required for work. As all three are necessary, the lack of any one ability would satisfy the category. However, because the listings are read as criteria to show disability, this could easily be interpreted as a list of three mandatory elements to be shown by the claimant. Thus, it would be best to phrase to structure the language to refer to the criteria from the perspective of what a claimant must show to satisfy the requirements.

The text of the subsection also adds to the confusion because it refers to this category of functioning as a singular “ability.” This could be interpreted, contrary to SSA’s apparent intent expressed in the preamble, that a person must show severity of each of those three elements.

The same problems exist with the category “understand, remember, and apply information.”

RECOMMENDATION: Change “and” to “or” and in discussing each category. Also, rather than describing the category by stating “This is the ability to..”, state instead “This category of functioning includes the abilities to...”

Manage oneself (12.00C4)

We are especially pleased to see this category added because we believe it addresses a significant blind spot in the assessment of mental disorders. It is also particularly important to have incorporated and highlighted the effect of stress as an important factor to be considered by adjudicators. We strongly support this change.

**12.00D How do we use the paragraph B mental abilities to evaluate your mental disorder?**

Number of activities (12.00D1c)

SSA should clarify that to satisfy the paragraph B criteria, it can be sufficient to show severity in only one activity within a category of functioning. This is made explicit in the current listings, but remains unclear in the proposed new listings. This instruction is important because if severe enough, an impairment in one particular activity can indeed be disabling.

The current listings provide that

[a] marked limitation may arise when several activities or functions are impaired, or even when only one is impaired, as long as the degree of limitation is such as to interfere seriously with your ability to function independently, appropriately, effectively, and on a sustained basis...

...We do not define ‘marked’ by a specific number of activities [or behaviors or tasks] in which functioning is impaired, but by the nature and overall degree of interference with function.

(Appendix 1 to Subpart P of Part 404 – Listing of Impairments 12.00C)(citations to regulations omitted)

SSA states in the preamble that it attempted to avoid repetition of the previous listings by consolidating the language, because the second sentence above was repeated three times. 75 Fed. Reg. at 51341. However, the current language is much clearer than that contained in the proposed new rules, which states that a

marked or extreme limitation...does not necessarily reflect a specific type or number of activities, including activities of daily living, that you have difficulty doing. In addition, no single piece of information (including test scores) can establish [a marked or extreme limitation.]

Id. at 51356

There is no reference to overall assessment or degree of interference with functioning. Moreover, the second sentence could in fact be interpreted to suggest the opposite – that it would be insufficient to rely on one element, no matter how strong.

**RECOMMENDATION:** The following language from the current listings should be retained and incorporated into this section: “A marked limitation may arise when several activities or functions are impaired, or even when only one is impaired, as long as the degree of limitation is such as to interfere seriously with your ability to function independently, appropriately, effectively, and on a sustained basis.”

#### Five-point scale (12.00D2)

We support the expansion of the scale to assess severity to include no limitation, slight limitation, moderate limitation, marked limitation, and extreme limitation. However, because extreme limitation “does not necessarily mean a total lack or loss of ability to function,” the scale should be expanded to include the possibility of total impairment. We are concerned that a scale that begins at no limitation but ends short of total limitation is confusing and incongruous. We believe this scale would artificially tilt the balance towards a less severe rating.

**RECOMMENDATION:** SSA should add a sixth level to be used when there is total or complete limitation.

#### Testing (12.00D2b, 3b; 12.00D4)

The reference to testing is of great concern and we strongly urge SSA to change this portion of the proposed listings. Although the proposed new listings contains some qualifying language stating that standardized test scores are not required, the overall effect of the discussion is to highlight testing as a framework for assessing the severity of an impairment. To do so when there is in fact no objective testing available for paragraph B functioning is troublesome. Scientifically, there is currently no testing available to be relied upon to evaluate paragraph B functioning. This language will thus confuse and obfuscate the disability determination process for individuals with psychiatric impairments.

A major challenge of applying for benefits based on a mental impairment is the very lack of objective medical evidence. Our experience is that while there are some adjudicators who demonstrate a depth of knowledge about and sensitivity towards mental impairments, there is still a severe lack of understanding about mental illness, and adjudicators often demonstrate a difficulty with claims based entirely on subjective elements and measures. An emphasis on testing will add to this confusion and misunderstanding of mental illness by inviting adjudicators to look for evidence which does not exist.

In addition, the testing criteria expressed in the proposed listings employs a scale that is inconsistent with SSA’s scale used for assessing the severity. To show a marked impairment through the use of test scores, a person must be two to three deviations below the mean, or the bottom 98<sup>th</sup> percentile or lower. This is much lower than the definition of marked as used elsewhere.

RECOMMENDATION: Eliminate references to testing for purposes of assessing paragraph B functioning.

**12.00E What are the paragraph C criteria, and how do we use them to evaluate your mental disorder?**

This section changes the paragraph C criteria by requiring a medically documented history of a specified chronic mental disorder of one year, rather than two years. It also broadens the criteria for marginal adjustment and eliminates the need to show a specific number of episodes of decompensation. We support these changes.

**12.00F How do we consider psychosocial supports, highly structured settings, and treatment when we evaluate your functioning?**

This section recognizes the role of psychosocial supports and that how a person functions in a setting that is less demanding, more structured, or more supportive than a workplace does not necessarily show how that person would function in a work setting. We strongly support these changes.

**12.00G What evidence do we need to evaluate your mental disorder?**

We support SSA's focus on evidence of functioning in a work setting, and strongly support SSA's inclusion of a detailed discussion regarding the need to consider evidence of how a claimant handles stress, and SSA's recognition that this assessment is an individualized one. We also support SSA's acknowledgment that the results of a mental status examination are limited in time and context and may not necessarily indicate how a person would function in a work setting.

We are pleased that SSA recognizes the value of other, non-medical evidence "as 'especially helpful' to [SSA's] assessment of the severity of mental disorders and their effects on functioning." 75 Fed. Reg. at 51344. However, it has been our experience that this type of evidence is often not developed or properly considered, despite the existing regulations and Social Security Ruling ("SSR") 06-3p which require it.

RECOMMENDATION: We believe SSA should restate more clearly in this section that adjudicators are in fact required to consider other evidence, as set forth in SSR 06-3p.

**12.00H How do we evaluate substance use disorders?**

We do not object to the removal of the listing 12.09 for Substance Addiction Disorders. However, this section of the proposed changes provides insufficient guidance on how substance use disorders are to be considered. The rules simply refer the reader to the regulations without articulating the standard for determining materiality of drug or alcohol addiction ("DAA,"), nor noting SSA's subregulatory policies on the issue. In fact, the question of how to determine materiality of DAA is one that is frequently misapplied and misunderstood. The issue calls for more clarity to be provided to adjudicators.

In cases where there is the presence of substance use, it is our experience that adjudicators at the initial and administrative law judge levels often fail to apply the correct analysis to determine the materiality of DAA, and that the Social Security Act and SSA's policies are routinely ignored or misapplied. Often, we see adjudicators fail to apply the five-step disability analysis before making a determination of materiality. Even more commonly, claimants with dual diagnoses are harmed by the frequent failure to apply Social Security policy articulated in Emergency Message EM-96200, which expressly instructs that in cases where DAA and psychiatric symptoms are intertwined, benefits must be granted: "When it is not possible to separate mental restrictions and limitations imposed by DAA and the various other mental disorders shown by the evidence, a finding of 'not material' would be appropriate." (EM-96200, issued on August 30, 1996: "Questions and Answers Concerning DAA from the 07/02/96 Teleconference—Medical Adjudicators—ACTION", answer to question 29).

This confusion highlights the need for further clarity in SSA's instructions on this issue.

**RECOMMENDATION:** SSA should update its regulations regarding DAA to reflect its sub-regulatory policies on the issue. Also, section 12.00H of the mental listings should provide additional guidance regarding the determination of DAA materiality. Such guidance should incorporate the following standard regarding the consideration of DAA when there is a co-occurring mental illness: "When it is not possible to separate mental restrictions and limitations imposed by DAA and the various other mental disorders shown by the evidence, a finding of 'not material' would be appropriate."

### **CONCLUSION**

Thank you for the opportunity to comment on these proposed rules. We appreciate your consideration of these comments.

Sincerely,

/s/

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