

November 17, 2010

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

**RE: Revised Medical Criteria for Evaluating Mental Disorders  
Docket No. SSA-2007-0101**

Dear Commissioner Astrue:

Thank you for the opportunity to provide comments in response to the Social Security Administration's (SSA) request for comments on a Notice of Proposed Rulemaking (NPRN) regarding Revised Medical Criteria for Evaluating Mental Disorders, published in 75 Federal Register 51336 on August 19, 2010. As the nation's oldest and largest advocacy organization concerned with all aspects of mental health, Mental Health America (MHA) appreciates the opportunity to comment on complex issues regarding medical criteria for mental illnesses. MHA strongly supports the efficient and equitable distribution of social security benefits for individuals living with mental illnesses.

**MHA supports many of the changes in the proposed rule, including:**

1. 12.00A – What are the listings, and what do they require?

The proposed rule divides the “A” Criteria into broad categories of impairments, rather than specific diagnoses, and broadens the listings to include more mental disorders. We strongly endorse these changes. In particular, adding “Other Disorders Usually First Diagnosed in Childhood or Adolescence” (listing 12.11) and “Eating Disorders” (Listing 12.13), specific mention of post-traumatic stress disorder in Listing 12.06 and describing Listing 12.10 as “Autism Spectrum Disorders” are all improvements that we applaud.

We also support the statement in section 12.00A2b(i) regarding satisfying the paragraph B criteria if a mental disorder results in “marked” limitations of two or “extreme” limitation of one of the mental abilities in paragraph B. Including one “extreme” limitation as satisfying the B criteria more accurately reflects the reality of a claimant's ability to function in a work setting.

2. 12.00B – How do we describe the mental disorders listing categories?

The proposed rule provides a brief description of the mental disorders included in each listing category, followed by examples of symptoms and signs that persons with those disorders may

have. The descriptions of mental illnesses in this section are clear and accurate and we commend SSA for making this change. It is also important that SSA has included a statement to the effect that an individual does not have to have any of the specific disorders in the examples, but can qualify if their mental disorder can be included in one of the categories and satisfies the other criteria of the appropriate listing.

*However, it is also important to clarify that the rating of severity in the rule relates only to functioning and not to the diagnosis of the mental disorder. Language should be included in section 12.00 to clarify that rating of severity relates to functioning, not to the diagnosis of the mental disorder.*

3. 12.00D.2 – What We Mean by “Marked” Limitation - the use of the 5-point scale

The proposed rule states that a limitation is “marked” when symptoms and signs of the mental disorder “interfere *seriously* with your using that mental ability independently, appropriately, effectively, *and* on a sustained basis to function in a work setting.” The rule also proposes (but does not require) that examiners may use a 5 point rating scale to assess this. “Marked would be the fourth point on this five-point scale consisting of no limitation, slight limitation, moderate limitation, marked limitation, and extreme limitation.” MHA supports the use of a 5 point scale to assist disability examiners to anchor the standards of “marked” or “extreme” limitations in functioning.

4. 12.00D.4 – How We Consider Your Test Results

Apart from the questions we raise below regarding the validity of using standardized tests to measure functional limitations under the proposed paragraph B criteria, we agree that a claimant’s record that contains evidence showing seriously or very seriously limited functioning in day-to-day activities should be determined to have “marked” or “extreme” limitation. We believe this can be accomplished without test scores for people with mental illnesses.

5. 12.00E – What are the paragraph C criteria, and how do we use them to evaluate your mental disorder?

MHA supports the proposed change that expands the C criteria to every listing except Listing 12.05. The process described in the proposed rule provides that the paragraph C criteria are an alternative to paragraph B to evaluate “serious and persistent mental disorders.” The ability to use the paragraph C criteria without first considering whether a claimant’s mental disorder satisfies the paragraph B criteria will lead to SSA reaching the right decision at the earliest possible step in the process.

We also note that the length of time a claimant must have a medically documented history of the existence of a serious and persistent mental disorder in order to meet the paragraph C criteria is reduced in the proposed rule from two years to one year. MHA also supports this change.

**MHA has several concerns with the proposed rule, and hopes the following concerns will be addressed:**

1. 12.00C – What are the paragraph B criteria?

MHA supports the proposed rule changes to B criteria so as to make them more work-related. We also support the proposed change that would allow paragraph B to be met if one of the criteria is rated as extreme, in addition to allowing paragraph B to be met if two criteria are rated as marked.

However, we have a very significant concern about the wording in paragraph B3, which also applies to paragraph B1. Specifically, SSA should ensure that the wording is entirely clear as to the claimant's ability to not do (or do) all of the functions listed in each B criteria in order to be found to meet, or not meet, the criteria.

Currently, the proposed rule reads as follows:

“B. *Marked* limitations of *two* or *extreme* limitation of *one* of the following mental abilities:”

1. “Ability to understand, remember, *and* apply information”;
2. “Ability to interact with others”;
3. “Ability to concentrate, persist, *and* maintain pace”; and
4. “Ability to manage oneself.”

The difficulty is in the potential for misinterpretation of this wording. In the preamble, SSA explains the change from “or” to “and,” emphasizing that it is not a substantive change from current policy, “but only a clarification of the overall requirement.” Specifically, SSA makes clear that a person needs to be unable to understand, remember, *and* apply information, he or she is also expected to be able to concentrate, persist, *and* maintain pace. Someone who cannot do any or all of these functions should meet the B criteria paragraph.

However, changing “or” to “and” in the actual Listing could be misinterpreted as a change in policy that would set a higher standard in which a claimant would have to demonstrate limitation in every one of the three components of criteria B1 and B3. Careful reading of the preamble and the language in the proposed rule would suggest that this is not the intent. But our concern is that an adjudicator could find that the criterion is not met if the claimant can concentrate and persist, but has extremely limited ability to maintain pace. It appears that SSA intends that such an individual would meet that paragraph's standard if there is an extreme limitation in any one of the three parts of the paragraph. However, the way that the proposed paragraph is written, it could be interpreted to require an extreme limitation in all three components.

Recommendation: We therefore strongly recommend that SSA change the word “and” to “or” in paragraph B1 and B3 for all of the specific listings in the “Category of Impairments, Mental Disorders” and rewrite the introduction to that section to make explicitly clear that a person can be found to have a limitation even if not all three parts of the paragraph are met. We also suggest that SSA include the language in the preamble in the section 12.00 Introduction, clarifying for adjudicators SSA's existing policy regarding the overall requirement, i.e., that a “marked” or “extreme” limitation in any one of the three components in paragraphs B1 and B3 will meet the requirements of that particular paragraph.

2. 12.00D.2 – What We Mean by “Marked Limitation” – the use of standardized test scores and “standard deviations”

SSA proposes to incorporate provisions from the childhood SSI functional equivalence regulation (20 C.F.R. § 416.926a(e)) regarding the definition of “marked.” This results in SSA defining “marked” and “extreme” in terms of standardized testing and standard deviations below the mean. Under this change, someone will be found to have a marked limitation of a paragraph B mental ability when they have a score that is at least two, but less than three, standard deviations below the mean on an individually administered standardized test designed to measure that ability and will be found to have an extreme limitation when they have a score that is three standard deviations below the mean. While SSA does not require standardized test scores, the agency suggests that they can be used and relied upon when the evidence shows that the person’s functioning over time is consistent with the score. (Proposed section 12.00D2b.)

This is a flawed approach which should not be used in the Listings for either adults or children with mental health disorders. A fundamental tenet in the field of assessment is that standardized tests measure only what they are designed to measure. The corollary to this tenet is that assessment instruments should not be used for purposes other than those they were designed to serve. Test administration procedures (which all licensed professionals who perform assessments are required to follow) prohibit examiners from using tests to serve purposes for which they were not designed. Nor are professionals permitted to misuse test results by applying them outside of the domains covered by the test (domains are always specified by the developer of the test).

There are many well constructed tests of impairment in psychological and behavioral functioning that are used to make decisions about need for treatment, treatment planning and improvement and outcomes, and for research, but their use for even those purposes is not without caveats. Moreover, most tests related to functioning of a person with mental illness are designed for the purpose of measuring changes over time or relative strengths and weaknesses, not to measure person relative to the general population.

There is disagreement in the field as to whether these tests can be validly used for treatment decisions, let alone to measure ability to perform the specific functions in the B criteria. Despite the widespread use of some of these standardized tests, an entire body of scholarly literature is devoted to warning test users there is insufficient empirical evidence to justify the use of even the most popular standardized instruments to make certain types of treatment decisions.

Examiners can only make use of tests that already exist and so they will not be able to use tests that have been specifically developed, validated and normed for measuring the functional abilities listed in the B criteria.

To date, no standardized instruments suitable for measuring the specific functions in the B criteria have been developed and widely accepted by the field of assessment. While many useful instruments are available, all require the examiner to draw an inference to connect test results to the B criteria. Inferences, even those based upon a wealth of objective information, are subjective.

Quite apart from the fact that there are no reliable tests, SSA has set a standard for results that is far too stringent. Moreover, the Listings are now internally inconsistent with respect to these assessments. Requiring test results to fall two or three deviations from the norm does not comport with the proposed 5-point scale, which would be a more appropriate guide to

examiners. While it is understandable that SSA would wish to make the assessment of impairments objective, there is in fact no objective way to measure functioning of people with mental illness through a standardized test. These tests will tell examiners nothing in terms of the specific limitations in the B criteria and the person's ability to function in a work setting.

In the Introduction SSA appears to downplay the use or the reliance on tests. In the Introduction, SSA states that the test must be "designed to measure that ability and the evidence shows that your functioning over time is consistent with the score. (See also 12.00D4.) SSA also emphasizes: "The interpretation of the test is primarily the responsibility of the professional who administered the test." However, SSA has created the interpretation of the results by setting standard deviation requirements for "marked" and "extreme."

Examiners will find it easy to rely on tests that present them with scores, but are unlikely to know how to judge the validity (or lack of validity) of the test. Tests to reliably measure these functional abilities in people with mental illnesses in relation to work just do not exist. But given the inclusion of this reference to such tests in the rule itself, tests are likely to be used to the significant detriment of claimants.

It is imperative that any judgment about whether the evidence shows that a claimant's functioning over time is consistent with the requirements of the B criteria should be based on medical evidence and, as of today, it will necessarily have some subjectivity.

MHA has concerns about section 12.00D.3, "What we mean by 'Extreme' Limitation" and the use of standardized test scores and standard deviations. These concerns are essentially the same as the concerns raised regarding section 12.00D.2.

Recommendation: SSA should eliminate the reference to the use of tests for measuring the functional abilities of people with mental illnesses until such time as such tests have been developed, assessed and found to truly measure what SSA intends them to measure.

We also recommend that section 12.00D.2 clearly state that adjudicators cannot override the validity of a medical professional's interpretation of any test results for any individual with disabilities.

### 3. 12.00F – How do we consider psychosocial supports, highly structured settings, and treatment when we evaluate your functioning?

MHA supports and appreciate SSA's recognition that psychosocial supports and highly structured settings may help a claimant to function, and that how a claimant functions in a less demanding, more structured or more supportive setting than a work place does not necessarily show how that claimant would function in a work setting under the stresses of a normal workday and workweek on a sustained basis. This is particularly true for individuals with serious mental illnesses. We are also pleased that SSA will consider the kind and extent of supports a claimant receives and the characteristics of any structured setting in which he or she spends time when evaluating the effect of a mental disorder on the claimant's ability to function.

Section 12.00F.2 lists examples of "psychosocial supports and highly structured settings." This section should be amended to include the setting for people with mental illnesses in the

community that is currently promoted as a priority by state mental health systems. That is, supported housing with wrap-around services in the home. In addition, this section should clarify that this is not a complete list and that other types of supports and highly structured settings must be considered.

Recommendation: Language should be added to section 12.00F.2 to include supported housing with wrap-around services in the home as an example of a structured setting. In addition, this section should be changed to clarify that this is not an exhaustive list and that all types of supports and highly structured settings must be considered.

4. 12.00G – What evidence do we need to evaluate your mental disorder?

MHA strongly supports the reclassification of certain professional, non-physician treating sources as “medical sources.” Under the proposed rule, SSA will consider all relevant medical evidence about a mental disorder from physicians, psychologists and other medical sources, including physician assistants, nurses, licensed clinical social workers, and therapists. We agree with SSA that other medical sources can be very helpful in providing evidence, especially if they see the claimant regularly. (Proposed section 12.00G.2.)

Under current section 12.00D.1, these treating professionals’ information is described as “other information,” separate from “medical evidence,” and categorized in the same section as lay evidence from family, etc. As a result, some adjudicators may not treat evidence from these non-physician sources as “medical evidence of record,” even though the evidence is prepared by a professional who is an integral part of a treatment team. Yet, these professionals may be the treating sources most familiar with the case and the individual’s functional limitations and may see the individual far more frequently than the psychiatrist.

Recommendation: Evidence from all medical sources (as those sources have been defined by SSA) should have equal weight and be considered separately from the other information collected from non-medical sources.

MHA appreciates the opportunity to provide comments on this proposed rule. We urge you to consider our recommendations in order to provide more equitable and appropriate guidance in the Mental Impairment Listings. Please contact us (703-684-7722) if you have any questions or if we can be of further assistance on this matter.

Sincerely,



David L. Shern, Ph D  
President and CEO