CITATION: VAOPGCPREC 7-89
Vet. Aff. Op. Gen. Couns. Prec. 7-89

DATE: 3-8-89

TEXT:

Revision of Neuropsychiatric Disorder Rating Codes

1. This is in response to your memorandum requesting an opinion regarding the impact of certain recent changes to the Schedule for Rating Disabilities, i.e., changes which standardized the adjectives used to describe the levels of disability in the schedular provisions on mental disorders. As you noted, accompanying the changes published in the Federal Register last January was the statement that '. . . the uniform use of descriptive adjectives is not intended to increase or reduce evaluations of mental disorders, but is designed to reflect consistency in describing social and industrial impairment in each of the categories of mental disorders.' Hence, you posed these questions for our consideration:

a. Is it legally appropriate to make these changes while at the same time requiring that they result in no increase or decrease in the evaluation effected--in effect to change the meaning of common adjectives by regulation?

b. Is the Board bound by the disclaimer in the Federal Register--that is, must prior rating levels be maintained (if the factual situation has not changed) regardless of the changes in the adjectival descriptions?

2. Under these regulatory changes the terms in the Schedule which characterize the degrees of social and industrial impairment for mental disorders now uniformly describe the impairment as 'total' for a 100% rating, 'severe' for a 70% rating, 'considerable' for a 50% rating, 'definite' for a 30% rating, and 'mild' for a 10% rating. As you indicated, previously some differences existed within the several categories of disorders, e.g., for a neurosis or psychophysiologic disorder, 'severe' impairment had warranted a 50% rating, whereas for a psychosis or organic brain disorder, 'severe' impairment warranted a 70% rating.

3. In responding to your questions, we must note our disagreement with the premise contained in your first question that a requirement exists that no increase or decrease in evaluation may result from the regulatory changes. This apparently stems from the above quoted statement accompanying the changes published in the Federal Register last January. That statement sets forth, in the second clause quoted, the purpose behind the regulatory changes--i.e., to provide consistency to the descriptions of social and industrial impairment within the several categories of mental disorders. Significantly, the first clause quoted simply states what was not the purpose--i.e., to increase or reduce evaluations of mental disorders. Although this can, and should be taken to signify that no automatic

adjustments in ratings should ensue, it should not be viewed as extending further than that. In other words, we disagree with your premise that the first clause requires that the adjectival changes result in no increases or decreases in disability evaluations. We believe that, even though not directly intended, ratings in neuropsychiatric cases in effect prior to the changes may be affected by the changes. Moreover, this is a view shared by the Department of Veterans Benefits.

4. Some elaboration of this position may be in order. The two clauses quoted from the Federal Register statement would conflict with one another if the first is interpreted as requiring no alterations in disability ratings by reason of the changes. Such an interpretation would undermine the basic purpose of the changes, as set forth in the second clause. For, true consistency in the description of social and industrial impairment can be achieved only if the adjectival terms and their meanings are the same within each category of mental disorders. Those terms were not aligned simply for alignment's sake. Their ordinary meanings must be applied uniformly within the categories of mental disorders, particularly considering the absence of any contrary indication in the amendments themselves or the ancillary materials. See Perrin v. United States, 444 U.S. 37, 42 (1979); Atlantic Cleaners and Dyers v. United States, 286 U.S. 424, 433 (1932); Director, Office of Workers' Compensation Programs v. Forsyth Energy, Inc., 666 F.2d 1104, 1107; Sutherland Statutory Construction, §§ 46.06, 47.28 (rev. 4th ed. 1984).

5. This can be demonstrated in more practical terms by referring to the hypothetical example you raised. In the example, you noted that initially the Board, under the old criteria, had sustained a 50% rating for a veteran's neurosis finding it produced severe industrial impairment, and that, when the case later came before the Board, the evidence disclosed the condition was unchanged. You posited that under the new criteria the Board would be 'forced to conclude' that the disorder produced 'considerable', rather than 'severe', industrial impairment.

6. We do not believe the Board is so constrained. If the Board Section reviewing the case agrees with the prior factual determination that the veteran's symptoms produce 'severe' impairment, clearly it should not be foreclosed from making the same determination and hence concluding that a 70% rating is warranted (on the basis of liberalizing criteria). Indeed, under the hypothetical circumstances you pose, the Section would seem to have little alternative but to reach that conclusion. However, as already indicated, the Section would also have the latitude to find, on the basis of the present evidentiary picture, that the (unchanged) symptomatology is better characterized as representing 'considerable' impairment instead of 'severe'--in light of the meanings it attaches to those terms. The point remains that nothing in the regulatory changes requires a particular factual finding in this situation.

7. These additional observations are in order. Basically, the adjectival terms bear the same meanings (i.e., their ordinary meanings) which they had before the changes. Nothing published in the Federal Register declared otherwise. Yet, we

must recognize that by virtue of the alignment process itself some modification in meaning has occurred involving terms which were changed. For example, within the rating spectrum for psychoneurotic disorders, there is no longer the (rather amorphous) classification of 'pronounced' impairment. The concept of 'pronounced' impairment has been subsumed by 'severe' impairment. Hence, there it can be said that the term 'severe' has taken on a larger meaning.

8. We recognize the concerns you expressed as to the subjectivity which comes into play in the evaluation of mental disorders. Obviously, there are no bright lines of demarcation separating the several amorphous levels of disability within the mental disorder classificatory scheme. Indeed, very blurred lines exist between no impairment and mild impairment, mild and definite, definite and considerable, considerable and severe, and severe and total. Due to this blurriness--which seems incurable--there is much room for difference of opinion in the evaluation of mental disorders. Nevertheless, we believe that in the long run these limited changes will increase, rather than diminish, consistency in the application of rating criteria. For example, in cases wherein the nature and diagnosis of a service-connected mental disorder have changed, it seems appropriate, and should prove helpful to adjudicators, that the individual adjectives coincide within each category and carry the same legal consequence (i.e., disability rating).

9. Our responses to your two questions can be briefly summarized. As for the former question, first, we disagree with the premise therein that a requirement exists that no increase or decrease in evaluations may result from the regulatory changes made. And second, there was nothing legally inappropriate about the changes, given the Administrator's broad authority, under 38 U.S.C. § 355, to readjust schedular provisions (even if word meanings are affected). As for your second question, no response is necessary since there is no requirement that prior rating levels be maintained in cases wherein the factual situation has not changed.

HELD:

Recent changes to the Schedule for Rating Disabilities, which standardized the adjectival descriptions of disability levels respecting mental disorders, were issued in consonance with the Administrator's broad authority, under 38 U.S.C. § 355, to readjust schedular provisions. In conjunction with these changes, there is no requirement that existing ratings in neuropsychiatric cases remain unaffected by the adjustments in terminology.

VETERANS ADMINISTRATION GENERAL COUNSEL
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