

Date: November 9, 1993

O.G.C. Precedent 9-93

From: General Counsel (022)

Subj: Construction of the Schedule for Rating Disabilities--
"Definite" Impairment

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

QUESTION PRESENTED:

May the term "definite," as used in 38 C.F.R. § 4.132, be construed in a quantitative manner?

COMMENTS:

1. This is in response to your request for an opinion regarding construction of the term "definite," a matter the United States Court of Veterans Appeals (CVA) raised in its decision in *Hood v. Brown*, 4 Vet. App. 301 (1993). In that decision, the CVA found that the term "definite," used in 38 C.F.R. § 4.132 to describe a 30-percent degree of disability for purposes of rating claims based on certain mental disorders, is qualitative in nature and does not describe a degree of impairment, as do the other, quantitative terms used in that section to describe various other percentage degrees of disability resulting from mental disorders. 4 Vet. App. at 303. The CVA stated that the Board of Veterans' Appeals (BVA), in being given an opportunity to provide reasons or bases for its decision concerning the subject claim, is "free to construe the term 'definite' in section 4.132 in a way that quantifies the degree of impairment and not the mere fact that impairment exists." *Id.* at 303-04. The CVA remanded the case to the BVA, in part, to state the reasons or bases for its decision and "to detail how the term 'definite' can be applied in a quantitative manner." *Id.* at 304.

2. VA has used the term "definite" to rate mental disorders for many years. The current regulatory scheme for rating mental disorders first appeared in the 1933 edition of *The United States Veterans' Administration Schedule for Rating Disabilities* (March 20, 1933) (hereinafter "1933 Rating

Schedule (1st ed.)"). For psychoses, that schedule provided a 0-percent rating where a condition caused "no appreciable" social and industrial incapacity, a 10-percent rating for "slight" social and industrial incapacity, a 25-percent rating for "definite" social and industrial incapacity, a 50-percent rating for "considerable" social and industrial incapacity, a 75-percent rating for "pronounced" social and industrial incapacity, and a 100-percent rating for "complete" social and industrial incapacity. 1933 Rating Schedule (1st ed.) at 33. For psychoneurotic states, that schedule employed a more compressed scale with ratings at 0, 10, 25, and 50 percent for degrees of impairment characterized by the terms "no definite or appreciable," "definite and appreciable," "considerable," and "severe," respectively. *Id.* Our research has uncovered no record of why those particular terms were chosen. However, the ranking of "definite" between "slight" and "considerable" in the psychosis scale suggests that "definite" incapacity should be considered more than slight but less than considerable incapacity.

3. Vet. Reg. 3(a), promulgated by Exec. Order No. 6157 (June 6, 1933), required establishment of rating criteria in percentage increments divisible by ten. As a result, a second edition of the 1933 Schedule for Rating Disabilities was issued in which the percentage ratings for neuropsychiatric disabilities were changed, but the relative position of "definite" among the other descriptive terms remained the same. That schedule included rating criteria for psychoses at degrees of disability of 10, 30, 50, 70, and 100 percent, based on levels of social and industrial incapacity described, respectively, as "no appreciable," "slight," "definite," "considerable," and "complete." *The United States Veterans' Administration Schedule for Rating Disabilities* 31-32 (1933 2d ed.). It provided rating criteria for psychoneurotic states at degrees of disability of 0, 10, 30, 50, and 80 percent, based on levels of social and industrial incapacity described, respectively, as "no definite or appreciable," "definite and appreciable," "considerable," "severe," and "practically complete." *Id.* at 32. The rating scale was again adjusted in 1945, and the term "definite" was used to describe the 30-percent degree of disability for psychosis. *Veterans Administration Schedule for Rating Disabilities* 125-

28 (1945 ed.). Again, however, we have been unable to locate any explanation for the terms chosen to describe the various degrees of disability.

4. In 1986, VA proposed amendment of 38 C.F.R. § 4.132 to eliminate an inconsistency between the rating criteria for psychotic and organic mental disorders, which used the terms "slight," "definite," "considerable," and "severe" to describe the 10, 30, 50, and 70-percent disability levels, respectively, and the criteria for psychoneurotic disorders, which used the terms "moderate," "considerable," "severe," and "pronounced" to describe those respective levels of disability. 51 Fed. Reg. 16,350 (1986). The final rule, published in 1988, changed the adjective for a 10-percent rating for all three types of mental disorders to "mild," employed "considerable" as the adjective for a 50-percent rating for all three types of disorders, and retained "definite" as the adjective for a 30-percent rating. 53 Fed. Reg. 21 (1988). The only reasons given for retaining "definite" were that it already was the descriptive term for that level of disability for two of the three categories of mental disorders included in the regulation and that "a change [was] not deemed necessary." *Id.* Both the proposed-rule and the final-rule notices indicated that no change in ratings was intended, but that the change was intended merely to produce consistency of descriptions. *Id.*; 51 Fed. Reg. at 16,351. Finally, it was noted that the descriptive terms do not necessarily refer to severity of disease, but refer to the degree a disease impairs social and industrial activity. 51 Fed. Reg. at 16,351.

5. Our research has also failed to uncover any intra-Departmental definition of "definite" or directive as to how to apply the term. Therefore, we resort to principles of construction and interpretation to determine the meaning of the term.

6. Generally, the principles of statutory construction and interpretation also apply to construction of rules and regulations. *General Electric Co. v. United States*, 610 F.2d 730, 734 (Ct. Cl. 1979); *Borelli v. Reconstruction Finance Corp.*, 196 F.2d 730, 736 (Emer. Ct. App. 1952); see also 1A Norman J. Singer, *Sutherland Statutory Construction* § 31.06

(4th ed. 1985). Words in a regulation are to be given their ordinary meaning absent persuasive reasons to the contrary. *E.g., Chicago Transit Auth. v. Adams*, 607 F.2d 1284, 1289 (7th Cir. 1979), *cert. denied*, 446 U.S. 946 (1980). However, "[t]he meaning of particular terms is to be derived not only by consideration of the words themselves but also by examination of the context, the purpose, and the circumstances under which the terms are used." *General Electric*, 610 F.2d at 734.

7. The word "definite," in its ordinary usage, means "having distinct or certain limits: determinate in extent or character: limited, fixed," and "marked by absence of the ambiguous, obscure, doubtful, or tentative." *Webster's Third New International Dictionary* 592 (unabridged 1981). There appears to be no quantitative element to the word's ordinary meaning. Furthermore, we have found the term "definite" to have no special meaning for medical or mental health professionals in quantifying impairment resulting from mental disorders or other causes. Based on the ordinary meaning of the term, one might be led to the conclusion that any certain or fixed degree of social and industrial inadaptability, however slight, should be considered "definite" impairment of social and industrial adaptability, and thus should warrant at least a 30-percent rating. However, in the context of the range of rating criteria for mental disorders, clearly the degree of impairment represented by "definite" was contemplated to be greater than that represented by "mild" and less than that represented by "considerable."

8. "Mild," the criterion for a 10-percent rating, means "of moderate strength or intensity" and, as applied to disease, "not severe or dangerous." *Webster's* at 1433. "Considerable," the criterion for a 50-percent rating, means "rather large in extent or degree." *Id.* at 483. A 30-percent rating lies midway between a 10-percent rating and a 50-percent rating, implying that "definite" was meant to describe a level of impairment of social and industrial adaptability approximately midway between mild and considerable impairment.

9. Given the context in which "definite" is used in section 4.132, we conclude that the term may be construed to mean distinct, unambiguous, and moderately large in degree. This construction combines the qualitative element inherent in the ordinary meaning of "definite" with the quantitative element suggested by the position of the term in the rating scale. "Moderately large" describes a degree between "moderate" and "rather large," which, as noted, may be used to define "mild" and "considerable," respectively. Coupling "large" with "moderately" indicates a degree more than just "moderate," which, standing alone, means "average" or "limited." *Webster's* at 1451. Further, "moderately large" describes a degree which is less than "rather large," since "rather" means "quite," *Webster's* at 1885, a term suggesting a higher level of intensity than "moderately." See *Webster's* at 1867. In this sense, we consider "distinct, unambiguous, and moderately large in degree" to be a reasonable construction of the term "definite" as used in the rating scale.

HELD:

The word "definite," as used in 38 C.F.R. § 4.132 to describe a 30-percent degree of disability for purposes of rating claims based on certain mental disorders, should be construed to mean distinct, unambiguous, and moderately large in degree, more than moderate but less than rather large.

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