April 13, 2022

Director, Office of Regulation Policy and Management
U.S. Department of Veterans Affairs
810 Vermont Avenue NW, Room 1064
Washington, DC 20420
via: www.Regulations.gov

Comment Concerning AQ82-Proposed Rule-Schedule for Rating Disabilities: Mental Disorders.

Dear Director,

On behalf of the Connecticut Veterans Legal Center (CVLC), we file this comment regarding the Department of Veterans' Affairs' (VA) proposed changes to the Mental Health Rating Schedule. CVLC appreciates that VA has begun taking the necessary steps to reform the rating schedule for mental health, as an update is long overdue. However, we posit the below concerns to the proposed changes, and ask that VA modify its proposed regulations in order to better serve the disabled veterans that both VA and the Connecticut Veterans Legal Center have in common.

WHO WE ARE

The Connecticut Veterans Legal Center was founded in 2009 as the United States' first medical-legal partnership with the Veterans Health Administration. CVLC's mission is to help veterans recovering from homelessness and mental illness overcome legal barriers to housing, healthcare, and income. In partnership with VA clinicians, we serve veterans who are struggling with service-connected disabilities pertaining to their mental health, including post-traumatic stress disorder, major depressive disorder, and the effects of military sexual trauma.

FEEDBACK AND CONCERNS

As advocates who work closely with veterans in recovery from mental illness, we are familiar with the current iteration of the mental health schedule and how it impacts veterans' lives – for better, or for worse. We are encouraged that VA has recognized the current mental health rating schedule to be antiquated and inaccurate as a measure of disability severity. We submit the following feedback and concerns detailed below.

1) CVLC **supports** the eradication of the current Eating Disorder Schedule.

2) CVLC **supports** the implementation of the WHODAS 2.0 Domain System for Mental Health Rating.

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3) CVLC **cautions** against the implementation of such terms such as "mild," "moderate," or "severe," as VA has issued Office of the Inspector General ("OIG") reports that such terms are not effective in reflecting an accurate measure of disability.

4) CVLC **cautions** against the implementation of a "30-day lookback" period for disability because limiting an examination of disability to 30 days will not result in an accurate depiction of mental health disability.

5) CVLC **cautions** against combining all mental health diagnoses into one rating, as this will result in an unjust and inaccurate reduction of rating for veterans who are diagnosed with more than one mental health diagnosis.

6) CVLC **urges** VA to offer further clarification on the ameliorative effects of mediation.

I. CVLC supports the eradication of the current Eating Disorder Schedule.

The current mental health rating schedule is exceptionally limiting, particularly when it comes to veterans who struggle with eating disorders. The current rating schedule for eating disorders does not allow for a rating higher than 0% unless a veteran has a mandatory amount of hospitalization per year.[1]

This is not an accurate reflection of the disabling effects of eating disorders. Many veterans experience significant disability and earning loss because of eating disorder diagnoses, even if they do not have the financial option of seeking inpatient care. The current rating schedule fails to compensate many veterans who struggle with eating disorders that may not be immediately life-threatening.[2] Lengthy hospitalization or treatment is simply not an option for quite a lot of people – as such, restricting higher ratings only for those who are able to be hospitalized precludes many veterans who are significantly disabled by their eating disorders. CVLC agrees that the eradication of this schedule is necessary to accurately compensate the veterans who are impacted by these debilitating illnesses – with the provision that said eating disorders are now to be examined underneath a mental health lens.

II. CVLC supports the implementation of the WHODAS 2.0 Domain System for Mental Health Rating.

CVLC supports the move toward using the WHODAS 2.0 domain system in analyzing mental health. Rather than focusing on a hyper-specific list of symptoms in order to determine impact, the domain system allows for a broader analysis of the impact a mental health disability has on a veteran's life. For example, a veteran who struggles with depression and anxiety as their main symptoms may only be rated at 30% under the current rating schedule. However, a veteran who articulates that their depression and anxiety manifests in multiple domains of their life would be

[1] 38 CFR § 4.149.

[2] The National Institute of Mental Health lists a wide swath of behaviors under the umbrella of "eating disorders." In addition to the most commonly known disorders (anorexia nervosa and bulimia), NIMH also lists binge eating. All of these disorders have symptoms and behaviors associated with them that can be exceptionally debilitating, but not necessarily so that requires hospitalization or bed rest. Under the current rating schedule, a veteran who binge eats regularly and plans his entire day around said behavior, but does not require hospitalization, would be rated at 0%. *See* Eating Disorders, The National Institute of Mental Health, https://www.nimh.nih.gov/health/topics/eating-disorders.

able to be rated more accurately, reflecting the degree to which they are disabled by their illnesses.

The domain system also allows for greater flexibility in analyzing symptoms. The new system allows for a more holistic view of mental health symptoms and diagnoses. The WHODAS 2.0 system incorporates a flexibility into the analysis of symptoms that will provide an accurate reflection of disability. Overall, the shift from a strictly symptomatic viewpoint to a broader approach on impact on livelihood is a positive change that CVLC supports.

In the same vein, we support VA's removal of suicidality as part of the rating consideration. Prior iterations of the rating schedule have included suicidality in the higher ratings and place a particular emphasis on suicidality in order to be highly rated. The same is true for hospitalization and a complete disruption of daily life. As stated before, many veterans must continue in their day-to-day lives in order to survive even with a disability that is highly debilitating. Removing suicidality from consideration will allow veterans to be more appropriately rated and will relieve veterans of the requirement to discuss suicidal ideation at compensation and pension exams, which is an unnecessary burden.

III. CVLC cautions against the implementation of such terms such as "mild," "moderate," or "severe," as VA has issued OIG reports that such terms are not effective in accurately measuring disability.

In section III.B of the proposed rule, VA outlines its terminology for adjudicators and clinicians to use when assessing different levels of disability. While CVLC supports the shift from the current rating schedule to the WHODAS 2.0 model, we submit documentation from VA that the utilization of vague terms such as "mild," "moderate," or "severe" allows for too much subjectivity on behalf of the adjudicators.

In a report dated September 5, 2019, the Office of the Inspector General (OIG) released an analysis of claims concerning conditions of the spine. While VA's proposed rule on mental health does not pertain to a physical disability, we implore VA to revisit its own internal investigations concerning the utilization of vague terminology in the rating schedule.

Specifically, the OIG writes: "Although the VBA procedures manual contains clear requirements for spine evaluations based on objective and measurable evidence, such as limitations with regards to range of motion, the manual contains some subjectivity regarding peripheral nerve disability evaluations."[3] The OIG report then goes on to detail the rating schedule definitions for "mild," "moderate," and "severe."[4] The OIG criticizes the use of these vague terms by noting that "[t]he manual does not define or explain the terms [.] It also does not provide the specific severity of symptoms required to meet each level of disability . . ., and instead states that the RVSR is solely responsible for judging the appropriate level."[5]

Much as the OIG analysis of the prior rating schedule of spinal disability indicates, the current proposed definitions for "mild," "moderate," and "severe" allow for the same vagueness without additional specific definition concerning what constitutes "mild," "moderate," and "severe."

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[3] Veterans' Affairs Office of the Inspector General, VA OIG 18-0563-189, Accuracy of Claims Decisions Involving Conditions of the Spine, September 9, 2019 , at p. 11, https://www.va.gov/oig/pubs/VAOIG-18-05663-189.pdf.
[4] *Id.*
[5] *Id.*

The Proposed Rule defines the terms below as follows:

- None— "No difficulties" associated with the domain;
- Mild— "Slight difficulties in one or more aspects" of the domain that "do not interfere with tasks, activities, or relationships;"
- Moderate— "Clinically significant difficulties in one or more aspects" of the domain "that interfere with tasks, activities, or relationships;
- Severe— "Serious difficulties in one or more aspects" of the domain "that interfere with tasks, activities, or relationships;" and
- Total— "Profound difficulties in one or more aspects" of the domain "that cannot be managed or remediated; incapable of even the most basic tasks within one or more aspects" of the domain; "difficulties that completely interfere with tasks, activities, or relationships."

These definitions are just as vague as the terms themselves – there is no additional definition for terms such as "profound" or "serious." It seems to be left up to the clinician to determine what is considered a serious difficulty versus what is a profound difficulty. This problem is precisely the problem that the OIG detailed in the aforementioned report; vague terminology results in inaccurate ratings and inconsistent diagnoses.

There must be concrete guidelines as to what these terms mean for adjudicators, clinicians, and veterans to navigate this system accurately and consistently. In order to produce more accurate assessments of the impact of mental illness on veterans' lives, VA should construct a specific framework for both adjudicators and clinicians to utilize when determining the level of disability. The difference between a clinician determining a veteran's inability to function in a social setting as "profound" versus "serious" can be the difference between a 50% or a 70% rating – a substantial change in income that could prove the difference between a veteran paying their rent or being unable to make ends meet.

IV. CVLC urges VA to extend the "30-day lookback" period for disability, as limiting an examination of the intensity and frequency to 30 days will result in inaccurate ratings for disabled veterans.

CVLC's clients are veterans in recovery from homelessness and mental illness. We work with a multitude of individuals, ranging from the homeless to the recently housed. Our client base is diverse in terms of race, gender identity, and sexual orientation. It is because of our diverse clientele that we can emphatically state that no matter who VA serves, a thirty-day lookback is not long enough to appropriately judge the intensity or frequency of a veteran's illness.

Combat veteran Juliet Taylor began her transition from the military to civilian life in September 2014. She had employment lined up upon separation and, overall, her life was smooth. She worked, cared for her children, paid her bills on time, and managed the best way that she could. However, Juliet's symptoms soon began to manifest. "I experienced dizziness, major attentional difficulties, hypervigilance, intrusive thoughts and memories, as well as sudden heart-racing." These episodes occurred roughly three times a month, but Juliet's doctors had not yet noticed that she had a mental health condition. Instead, VA treated her for migraines, and Juliet continued to keep calm and carry on.

A catalyst occurred one evening when Juliet drove home and dissociated. "I remembered my heart racing as I noticed the overpass approaching – the next thing I knew, a man in a gray

uniform approached my vehicle from my 3 o'clock." Juliet had dissociated so severely that she had no real recollection where she was. It was only upon seeing an American flag on the overpass that she realized she was in Connecticut.

Following this event, Juliet called out sick for a week before ultimately resigning from her job. She stayed in bed for three months and hid her struggle from her family and friends. Eventually, Juliet was forced to return to work because she had no other choice. It was only then that an employed Juliet Taylor sought help from VA for her mental health.

We submit this experience because Juliet, like many other veterans, must keep calm and carry on. Had VA only analyzed a thirty-day period of Juliet's life prior to this exceptionally troubling and lengthy crisis, her rating would be much lower than appropriate. While Juliet had forced herself back onto her feet, she had not cured her ongoing mental health issue. Indeed, VA would have met an employed veteran who was forcing herself throughout the day, had only recently engaged in mental health treatment, and was vulnerable to loss of income due to illness. A full lookback of twelve months would illustrate the whole story – that Juliet struggled heavily with her diagnosis. A thirty-day window of her life would not provide an accurate depiction of the severity of how her mental health diagnosis impacted her life

CVLC requests that VA extend this lookback period to twelve months, which would provide an accurate depiction of a veteran's illness(es). It would allow a veteran to submit evidence as to the severity of their illness and provide a bigger picture of impact their mental health diagnosis has on their day-to-day life.

Finally, we note that for diagnoses such as Post-Traumatic Stress Disorder, a veteran must be symptomatic for *more* than a month in order to qualify for a diagnosis[6] – which would necessitate a clinician examining a veteran's history prior to thirty days. If a clinician already must do this in order to accurately diagnose a veteran, then there is no reason why a clinician could not take into consideration records and details prior to thirty days in terms of determining intensity and frequency.

V. CVLC cautions against combining all mental health diagnoses into one rating, as it will result in inaccurately low ratings for veterans who are disabled by more than one mental illness.

In section VI of the Proposed Rule, VA adds a notation. This note "will instruct adjudicators not to assign individual disability ratings to more than one mental disorder given the likelihood of comorbid mental disorders and the prevalence of overlapping symptoms among such disorders."

Comorbidity is generally defined as the occurrence of two or more mental or physical conditions within a singular patient.[7] For example, data indicates that the majority of individuals who have been diagnosed with an eating disorder also struggle with at least one more mental health

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[6] *See* National Institute of Mental Health, Post-Traumatic Stress Disorder, https://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd; *see also* National Center for PTSD, Do I Have PTSD?, https://www.ptsd.va.gov/understand/isitptsd/have_ptsd.asp.

[7] Cambridge Dictionary defines 'comorbidity' as "the fact that people who have a disease or condition also have one or more diseases or conditions." *See* https://dictionary.cambridge.org/us/dictionary/english/comorbidity.

diagnosis.[8] In addition, VA has thoroughly researched the prevalence of mental illness among the veteran community – data indicates that nearly 1 in 5 veterans who treat through VA struggle with some form of mental illness.[9] This poses a massive amount of individuals who may fall into the category of those with comorbidity.

It is because of this that we understand the importance of correct diagnosis and correct rating of symptoms. The current rating table lumps all mental health conditions together and rates them all as if they were a singular illness. As such, a veteran who struggles with both schizophrenia and post-traumatic stress disorder may only be rated at 50%, even though the combined effect of both of these illnesses has a far more debilitating impact on a veteran's life and ability to earn income than either of the illnesses alone. Quite often, dealing with two debilitating illnesses leads to catastrophic effects on veterans' lives, even if their symptoms may not be so readily apparent.

We concede that a veteran's symptoms may be duplicative across multiple diagnoses. After all, many disorders have depressive symptoms, and to count the same severe depressive symptoms more than once for different service-connected disabilities could result in an artificial inflation of rating. However, we urge VA to recognize that the opposite is also true – combining all mental health diagnoses into a single service-connected rating could downplay the severity of symptoms and their combined effects. Not acknowledging that a veteran's symptoms of depression will understandably be worse with comorbidity could result in a wrongful determination of a lower rating. If a veteran does not apply for all diagnoses and receive an examination and subsequent rating for each one, the adjudicator could very well not see the entire picture.

As such, we request that VA issue separate ratings for each mental health diagnosis. Symptoms that are duplicative can be taken into consideration in issuing the final combined rating to avoid an artificially inflated rating. As VA already has a mechanism in place to differentiate symptoms from non-service connected disabilities (such as personality disorders) and service-connected disabilities, this should not hinder the process of adjudication.

The act of separating ratings for different conditions benefits veterans by accurately rating the disabling effects of having more than one service-connected mental health condition. In sum, should a veteran have schizophrenia and post-traumatic stress disorder – two wholly different conditions without an extraordinary amount of symptomatic overlap – they should not be penalized for it.

VI. CVLC urges VA to offer further clarification on the ameliorative effects of medication.

We strenuously disagree with the notion that a veteran taking medication for their symptoms should result in a lower rating due to the ameliorative effects of said medications. This will incentivize veterans to not take their medication in order to secure a higher rating, which would be disastrous for many veterans. Instead, we encourage VA to take a more holistic approach to the rating schedule and incorporate an understanding that anti-depressants or anti-psychotics are comparable to any other daily medication that a veteran must take in order to manage a health condition. A veteran who takes medication to control his blood pressure is analogous to a

[8] National Eating Disorders Collaboration, Comorbidity, https://nedc.com.au/eating-disorders/eating-disorders-explained/types/comorbidity.
[9] Department of Veterans Affairs, Office of Research and Development, VA Research on Mental Health, https://www.research.va.gov/topics/mental_health.cfm.

veteran who takes medication to manage his mental health symptoms. To say that either veteran is less disabled as a result of the medication is a fallacy, as the veteran has the additional burden of daily medication in order to function. Further, should that veteran stop taking their medication, their condition would surely deteriorate.

CVLC proposes that VA utilize the same consideration for medication as they do in other rating schedules, such as those for herpes or other sexually transmitted diseases.[10] If a veteran must take medication daily in order to manage the impact of post-traumatic stress disorder or schizophrenia, they should not be penalized for it. Rather, VA should consider the action of being required to take a daily anti-depressant or anti-psychotic medication as "constant or near constant systematic therapy." This language is utilized to gauge accurate rating of disability in other rating schedules.[11] Should a veteran be required to take daily medication in order to manage their symptoms, they should be granted an appropriately higher rating.

CONCLUSION

The VA's Proposed Rule is a step in the right direction in making the VA Rating Schedule more accurate, accommodating, and veteran-friendly. However, the Proposed Rule could be improved upon in the aforementioned ways in order to ensure that VA provides full, fair, and just compensation to veterans in need.

Respectfully submitted,

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[10] There is precedent for utilizing medication in determining the severity of symptoms. For example, in 38. C.F.R. 4.118, a veteran is entitled to a 60% rating for genital herpes if a veteran has "constant or near constant systemic therapy [. . .] required over the past twelve month period." *Id.* Rather than penalize a veteran for requiring medication in order to manage their symptoms, VA constructed their rating schedule for STIs to accurately reflect the realities of the illness. The same could be done for mental health diagnoses that require medication to mitigate severe symptoms, such as PTSD or schizophrenia.
[11] *Id.*