

American Academy of Clinical Neuropsychology Response to Notice of Proposed Rulemaking
for the Revised Medical Criteria for Evaluating Medical Disorders

Introduction

The Social Security Administration (SSA) promulgated a set of proposed rules for evaluating disability claims, known as the Medical Criteria published issued a Notice of Proposed Rulemaking (NPRM) for the Revised Medical Criteria for Evaluating Mental Disorders on August 19, 2010. SSA solicited responses from interested parties to be submitted on or before November 17, 2010. The American Academy of Clinical Neuropsychology (“AACN”) submits the following response, including some general comments and followed by specific recommendations regarding: 1) Children and 2) Symptom Validity Testing.

General Comments

- Description of Key Proposed Revisions
 - Increased number of disorders.
 - Addition of “paragraph B” which gives criteria for determining level of impairment.
 - Revision of “paragraph C” which 1) changes the duration requirement from 2 years to 1 year, 2) substitutes “deterioration” for “decompensation” in identifying disorders with changing patterns of presentation and 3) extending the latter provision to more disorders.

- Positive changes
 - Broader set of criteria for determining disorder and functional impairments.
 - Inclusion of longitudinal evidence recognizing that symptoms may vary over time and that more than one evaluation may be required.
 - Inclusion of data regarding functioning across contexts, e.g., within and external to the assessment setting.
 - The inclusion of psychologists as providers of “medical” evidence for a mental disorder. Clearly professional psychologists, including clinical neuropsychologists, are amongst the best qualified experts to diagnose mental disorders.
 - Provision for evidence from “non-medical” sources including teachers, social workers and healthcare personnel other than physicians and psychologists who may provide valuable information regarding the claimant’s functioning.
 - The proposed rules appropriately distinguish between later acquired “cognitive disorders” due to injury or disease and “intellectual disability,” that is congenital in nature.
 - The four-pronged set of criteria for assessment of impairment-related limitations in functioning: (1) understanding, remembering, and applying information; (2) interacting with others; (3) concentrating, persisting, and maintaining pace; and

(4) managing oneself, represent an improvement over the more narrow and specific “activities of daily living” criteria used at present. The broader revised criteria are more likely to capture the types of impairment-related functioning manifested by claimants.

- The proposed changes to rule 12.05, especially the emphasis on adaptive skills, are helpful.
- Areas of concern and recommended modifications
 - The types of “medical” professionals, including physicians and psychologists, who may provide evidence regarding mental disorders should probably be made more specific. Some physicians and psychologists, e.g., psychiatrists and clinical neuropsychologists, are well qualified to provide this type of evidence whereas others may not be.
 - The proposed rules are weak with respect to specifying the standard of practice in psychometric evaluations. For example, the rules indicate in several locations that standardized test scores are not required for the determination of a developmental or mental disability. We would recommend stronger language that emphasizes the need for standardized assessment instruments with comprehensive and representative norms, and for which there is empirical evidence for construct and criterion validity in the demographic and diagnostic groups in which they are used.
 - We would recommend that rules 12.02 and 12.05 as well as the new developmental disabilities listings should be considered under separate general headings rather than being grouped with functional psychiatric disturbances. Intellectual disabilities and psychiatric disturbances are qualitatively different from each other and require different methods of determination.
 - The adaptive skills in rule 12.05 to be used by reviewers and administrative law judges should be described in more detail. Otherwise, they are likely to lead to informal and invalid assessments.
 - We question the elimination of the use of Full Scale IQ scores in favor the exclusive use of component scores. While we recognize the psychometric foundations of component scores, we also note that the Full Scale IQ is a widely understood and useful summary measure of intellectual functioning.

Comments specific to Children

- Positive Changes
 - We strongly endorse several aspects of the proposal as they pertain to children, especially the clear separation of childhood from adult disorders, with a set of criteria (A, B, C) that is consistent across conditions.
 - The inclusion of longitudinal evidence, as noted above is especially useful in the evaluation of children, for whom a developmental perspective is necessary.
- Areas of concern and recommended modifications

- The distinction between “cognitive disorder” (e.g., as the result of HIV) and “intellectual disability” (e.g., as associated with Down’s) is appropriate, and the language under “cognitive disorder” in children under 112.02 on page 26 is also sufficiently different from that describing Alzheimer’s, Huntington’s and other dementias for adults under 12.02 on page 20. However, the same careful attention was not given to the differentiation of personality disorders, where the children’s section 112.08 on page 26 is too similar to the adult section 12.08 on page 21 and does not acknowledge unique features of childhood disorders. Specifically, there is insufficient appreciation of the fact that personality disorders typically do not manifest until adolescence, and conditions such as Conduct Disorder and Oppositional Defiant Disorder are not even mentioned.

- The descriptions of the two categories of mental disorder, 1) Dementia, Amnesic and Other Cognitive Disorders (12.02) and 2) Other Disorder Usually First Diagnosed in Childhood or Adolescence (12.11) are incompletely specified. The first of these categories appropriately includes traumatic brain injury (TBI). However, there are many other types of childhood brain insult other than TBI, including insults to the brain related to tumors, epilepsy, cancer treatment for conditions such as acute lymphocytic leukemia, genetic disorders, toxic exposures (such to environmental lead), and perinatal brain insults (e.g., those related to preterm birth, hypoxic ischemic encephalopathy, and perinatal or early childhood stroke). Children with these conditions fall more clearly in the first of the above mentioned categories than in the second. Unfortunately, which category encompasses these conditions is unclear from the descriptions of the two categories. It is also important to recognize that these conditions often result in circumscribed deficits in cognition, behavior, and learning without generalized intellectual disability. We believe that proper evaluation of these disorders requires assessments of specific skill domains such as would be provided in comprehensive neuropsychological assessments.

- Although it is understandable that a comprehensive assessment of development, such as the Bayley Scales of Infant Development or Mullen Scales of Early Learning, may be difficult to administer until after the first few months of life, it is unclear that deferring determination of disability for a period of three months as proposed in the rules is justifiable in cases of more extreme disability. There would seem to be little reason to defer assessment of a child born at extreme risk for ongoing developmental problems, such as those with perinatal brain insults, including hypoxic ischemic encephalopathy with severe deficits in early neurodevelopment, extreme prematurity with severe early neurologic impairments and perinatal strokes.

- The proposed rules need to be particularly specific with what is a proper standard of practice for the assessment of children. The rules should include language that emphasizes the need for standardized assessment instruments that have been specifically developed for use with children, with appropriate

norms and evidence of validity for assessing children in general and those with neurological and neurodevelopmental conditions in particular.

- Section 112.14 provides for the use of non-standardized measures for the determination of the level of impairment related to developmental disorders in younger children. We recognize that this practice is appropriate in situations where well-developed measures with age-standardized scores may not be available for some measures. On the other hand, determination of level of impairment based on performance that is “more than one-half, but not more than two-thirds or chronological age (as stated at end of p. 51364) is problematic given that standards based on fractions of what would be expected for chronological age have different meaning for children of different ages. For example, a performance half of expected age in a 4-month-old child only represents a delay of 2 months, whereas half of expected age for a 4-years-old is a much more severe delay. We believe that age-related percentiles may serve as a better standard.
- Determination of age-expected development in children born preterm or with low birth weight is often corrected for gestational age to take into account post-conceptual rather than post-delivery (chronological) age. This is an accepted practice until a chronological age of 2 years, after which such adjustments are often not made. However, a problem in using corrected age is that it may delay services for children who most need them. It would thus be critical not to defer disability determination in these cases, as this could result in delay in services to children with severe neurodevelopmental disorders. Research also indicates that the risks of ongoing problems in these children beyond the first few months are extremely high (Wood et al., 2000). While it is clear that the proposed rule changes specify that adjudication “may” be deferred, rather than required, it would be important to emphasize in the rule changes that deferral of determination of age-expected development not be made the default rule.
- Asperger’s Disorder is still listed under Autism Spectrum (112.10) on page 27. There is considerable debate in the DSM-V workgroup about possibly eliminating the former as a separate diagnosis. If that happens with DSM-V, then the federal rules for disability should be made consistent with this change.

Symptom Validity Testing (“SVT”)

SSA has debated the problems associated with exaggerated symptoms in disability determination since its inception in 1935. During a 1996 interview available at

<http://www.socialsecurity.gov/history/hboral.html>

an early SSA employee, Herb Borgen, described how the problem was viewed in the early years,

“...because I did feel there was some potential for fraud and malingering. That sort of stuff is an age-old problem with these kinds of benefits. So I thought, properly handled and controlled, it would work. But I didn't argue very strongly for that certainly. I thought it would be good, but the decision was we're not going to do anything like that.”

“The issues raised... are the same issues we struggled with in the 1940s and 1950s as we were designing the disability program. We were fully cognizant of these problems and we simply concluded they could not be resolved, that we would have to live with them. And those same problems are present today, and nobody should be surprised by this.”

- Introductory Comments
 - The NPRM appropriately emphasizes the importance of “the validity of a test result” when making disability determinations, see multiple references beginning on page 51340. Invalid test findings can lead to incorrect conclusions and actions resulting from disability determinations. The importance of valid findings from the Psychological Consultative Evaluation (“PCE”) cannot be overstated. Using SVT science in disability evaluations is one method of enhancing validity and it follows that this science should be employed routinely. Accordingly, we strongly recommend that references to the validity of test results incorporate advances in symptom validity science (“SVT science”).
 - In addition, Claimants who deliberately misrepresent symptoms in order to achieve regular monthly compensation (malingering) are of concern for an SSA organization dedicated to helping those who are truly disabled.
 - The proposed rules do not go far enough to promote training in SVT methods or to encourage change in PCE practice. Further, the absence of SVT science references in the NPRM should be viewed in consideration of other governmental reports regarding the prevalence of SSA waste, fraud, and abuse. An OIG Audit Report (1997) highlighted the problem with malingering during SSA consultative evaluations noting that “the lack of information regarding level of effort in CE reports involving psychological test results causes the SSI evaluation program to be vulnerable to fraud and abuse.” (*see* Malingering section of A-04-95-06020). Indeed, a subsequent OIG Audit Report (2007) included 34 cases where individuals were convicted of crimes related to the wrongful payments for exaggerated symptoms over a two-year period. (A-06-06-16132). Furthermore, research briefly described below below suggests that these prosecutions represent only a small segment of the actual number of cases where an applicant has deliberately performed at a suboptimal level
 - The NPRM states the proposed revisions reflect, *inter alia*, “our adjudicative experience, advances in medical knowledge, ... and comments we received from experts.” (p. 51336). However, the NPRM makes no mention of the

growing application of SVT science in evaluating response bias, effort, and malingering during PCEs as used by federal courts to adjudicate SSA claims.

- In a letter to Commissioner Astrue on March 18, 2008 signed by numerous prominent neuropsychologists and forensic psychologists, and subsequently published in the NADE Advocate (Chafetz, 2008a), Dr. Chafetz pointed out the errors of an internal Policy Clarification DI 24515.066, issued on 1-22-08, reiterating prior statements
- On April 1, 2008, the American Academy of Clinical Neuropsychology (“AACN”) further advised SSA that the policy clarification contained factual errors. AACN specifically noted those errors, including SSA statements that symptom validity tests “are not programmatically useful” and “should not be given greater weight than other factors” when making disability determinations (Soc. Sec. Admin., 2008). In response, SSA requested a conference call with AACN that was conducted on June 16, 2008 to discuss the AACN concerns. The NPRM does not adequately address the concerns expressed by AACN.
- In summary, we urge reconsideration and incorporation of provisions reflecting SVT science based on the following SSA adjudicative experience, scientific advances, and expert consensus statements. We discuss each of these areas in turn.
- Adjudicative experience: Case law and the legal basis for the use of SVTs
 - In *Green v. Apfel* (1999), a the court recognized the enhanced value added by a neuropsychological evaluation that included “a test looking for malingering” (p. 26) as administered by an independent examiner. The court criticized the limited PCE report for a number of reasons, including that it “does not disclose that any test looking for malingering was administered.” (p. 28).
 - The *Green* court concluded, “In light of the more thorough, comprehensive and documented evaluation and report..., the court simply cannot say on the basis of the entire record that a reasonable mind might accept the consulting psychologist's report as adequate to support a finding of no disabling mental impairment. Thus, the court remands the case for additional proceedings consistent with this order. While the case is on remand, the court believes the Commissioner should take the opportunity to address areas where the ALJ's decision is deficient.”(p. 31).
 - *Green* viewed the failure to consider a neuropsychological evaluation using symptom validity tests as a deficiency in the ALJ’s decision.
 - Two additional cases provide a legal basis for the use of symptom validity techniques in PCEs when making disability determinations (*Sullivan v. Cont'l Cas. Co.*, 2006; *Holmstrom v. Metro. Life Ins. Co.*, 2010). Although the facts

in these cases are quite different, both highlight the admissibility and unique weight afforded to SVT.

- For example, the court in *Sullivan* noted that cognitive symptom validity was an “absolute ‘must’ to confirm legitimate post-traumatic cognitive problems (p. 26).”
 - Likewise, the appeals court in *Holstrom* called for greater specificity of definitions of “symptom validity” as well as related terms such as “battery” and “neurocognitive testing” (p. 40).
 - These cases also highlight how PCEs performed by psychologists are increasingly necessary to help identify potential waste, fraud, and abuse. The NPRM does not adequately address symptom validity measures when discussing the increased consideration of the validity of test results.
 - Therefore, we strongly urge that the SSA to consult more closely with AACN and other neuropsychology organizations (APA Division 40, NAN) that have already offered considerable expertise in these matters to revise and expand provisions addressing symptom validity in the NPRM.
- Scientific advances support the use of symptom validity measures
 - Empirical data from over decade of studies aimed at understanding symptom validity during disability evaluations provide evidence for the efficacy of symptom validity measures as well as the need for such measures in neuropsychological evaluations (Chafetz, Abrahams, & Kohlmaier, 2007; Chafetz, 2008b; Chafetz, 2010). Specific findings from these studies include:
 - Over 50% of adult Disability Determination Service (DDS) claimants fail some form of SVT in every jurisdiction studied.
 - Over 40% of adult DDS claimants are found to meet conservative guidelines for symptom invalidity.
 - 12%-13% of adult DDS claimants are observed to provide definite invalid responding.
 - Suboptimal effort is not generally the result of low intelligence given that 1) these estimates eliminate claimants with true impairment, 2) developmentally disabled individuals are able to pass symptom validity tasks at high rates, and 3) low IQ individuals motivated to work or to regain their children from state custody show minimal or no failure of validity testing.

- Claimants may appear to be low functioning when they are not. The actual IQ finding is heavily dependent upon the claimant’s effort during testing.
 - Children can malingering on behalf of their parents (malingering-by-proxy).
- Expert Consensus also supports the use of symptom validity measures.
 - Both major national Neuropsychology organizations, the American Academy of Clinical Neuropsychology (AACN) and the National Academy of Neuropsychology (NAN), have advised that symptom validity assessment be a part of the neuropsychological examination, particularly when compensation may be dependent even in part upon the test results. There is now broad expert consensus on SVT science applications for assessment (Heilbronner et al., 2009).
 - Specifically, AACN urges SSA to incorporate the “AACN Consensus Conference statement on neuropsychological assessment of effort, response bias, and maliningering” by expressed reference in these proposed regulations.
- Conclusion
 - The use of SVT is supported by case law, empirical peer-reviewed research findings and expert consensus. We urge the explicit adoption of SVT in the Revised Medical Criteria for Evaluating Mental Disorders and encourage the SSA to consider how to apply SVT science during PCEs, through enhanced training for evaluators and appropriate modification of PCE practice.

Submitted respectively,

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at the request and on behalf of the AACN Board of Directors, and as a member of the APA Division 40 Task Force chaired by A. John McSweeney, J.D., Ph.D., ABPP, H. Gerry Taylor, Ph.D., ABPP (President, Division 40), Michael D. Chafetz, Ph.D., ABPP, Jacobus Donders, Ph.D., ABPP John Goff, Ph.D., and Daniel Marson, J.D., Ph.D.

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References

- Chafetz, M.D. (2008a). On Symptom Validity Testing: A Response. National Association of Disability Examiners (NADE) Advocate, Spring, 2008, 22-23.
- Chafetz, M. D. (2008b). Malingering on the Social Security Disability Consultative Examination: Predictors and base rates. *The Clinical Neuropsychologist*, 22 (3), 529-546.
- Chafetz, M. D. (2010). Symptom validity issues in the Psychological Consultative Examination for Social Security Disability. *The Clinical Neuropsychologist*, 24, 1045-1063.
- Chafetz, M. D., Abrahams, J. P., & Kohlmaier, J. (2007). Malingering on the Social Security Disability Consultative Examination: A new rating scale. *Archives of Clinical Neuropsychology*, 22, 1-14.
- Heilbronner, R. L., Sweet, J. J., Morgan, J. E., Larrabee, G. J., Millis, S. R., and Conference Participants (2009). American Academy of Clinical Neuropsychology Consensus Conference statement on the neuropsychological assessment of effort, response bias, and malingering. *The Clinical Neuropsychologist*, 23, 1093-1129.
- Slick, D. J., Sherman, E. M. S., & Iverson, G. L. (1999). Diagnostic criteria for malingered neurocognitive dysfunction: Proposed standards for clinical practice and research. *The Clinical Neuropsychologist*, 13(4), 545–561.
- Soc. Sec. Admin. Office of the Inspector General (1997). AUDIT REPORT: Special Joint Vulnerability Review of the Supplemental Security Income Program (A-04-95-06020), (December 16, 1997)
- Soc. Sec. Admin. Office of the Inspector General (2007). AUDIT REPORT: Disability Insurance Beneficiaries Convicted of Crimes Against the Social Security Administration's Programs (A-06-06-16132), (September, 2007). (Accessed at http://www.ssa.gov/oig/ADOBEPDF/audit_https/49506020.htm)
- Soc. Sec. Admin. Office of the Inspector General (2007). AUDIT REPORT: Disability Insurance Beneficiaries Convicted of Crimes Against the Social Security Administration's Programs (A-06-06-16132), (September, 2007). (Accessed at <http://www.ssa.gov/oig/ADOBEPDF/auditxt/A-06-06-16132.htm>)
- Soc. Sec. Admin. Policy Clarification (2008). National Question & Answer: Do tests of malingering have any value for SSA evaluations? (DI 24515.066), (January 22, 2008).
- Wood, N.S., Marlow, N., Costeloe, K., Gibson, A.T., & Wilkinson (2000). Neurologic and developmental disability after extremely preterm birth. *New England Journal of Medicine*, 343, 378-384.

Cases

Green v. Apfel, 1999 U.S. Dist LEXIS 19886 (D. Kan.: 1999).

Holmstrom v. Metro. Life Ins. Co., 615 F.3rd 758 (7th Cir., 2010).

Sullivan v. Cont'l Cas. Co., 2006 U.S. Dist. LEXIS 49932 (M.D. Fla., 2006).