



U.S. Department
of Veterans Affairs

Office of the General Counsel
Washington DC 20420

JUL 14 2014

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Ms. Abigail Graber
The Jerome N. Frank Legal Services Organization
Yale Law School
P.O. Box 209090
New Haven, CT 06520

In Reply Refer To:

Dear Ms. Graber:

This is in response to your petition for rulemaking. You request that the Department of Veterans Affairs (VA) promulgate a regulation governing claims for compensation for mental health disabilities incurred or aggravated as a result of military sexual trauma (MST). Your proposal would eliminate the requirement for corroborating evidence that a claimed MST occurred if a stressor claimed by a Veteran is related to the Veteran's reported experience of such trauma and a psychiatrist or psychologist confirms that the claimed stressor is adequate to support a diagnosis of a mental health condition and that the Veteran's symptoms are related to the claimed stressor. You filed this request on behalf of Service Women's Action Network and Vietnam Veterans of America. The Acting Secretary of Veterans Affairs has asked that I inform you that VA declines to promulgate a regulation as requested in your petition.

With regard to your assertion that it is often difficult to produce evidence to establish occurrence of a personal assault, VA has acknowledged the sensitive nature of MST stressors and the reluctance on the part of Servicemembers to report such events during military service. The Department therefore promulgated a regulation governing adjudication of MST claims, which VA believes addresses the difficulty of producing evidence to prove occurrence of an in-service personal assault. In order to establish service connection for posttraumatic stress disorder (PTSD) under 38 C.F.R. § 3.304(f), the record must contain medical evidence diagnosing PTSD and establishing a link between a Veteran's current symptoms and an in-service stressor and credible supporting evidence that the claimed in-service stressor occurred. In 2002, VA promulgated 38 C.F.R. § 3.304(f)(3) (currently codified at 38 C.F.R. § 3.304(f)(5)), concerning the proof necessary to establish occurrence of a stressor in claims for service connection for PTSD resulting from personal assault, including MST. 67 Fed. Reg. 10,330 (Mar. 7, 2002). The regulation states that "evidence from sources other than a veteran's service records may corroborate the veteran's account of the stressor incident." This includes records from law enforcement, authorities and rape crisis centers, pregnancy tests, statements from family members, roommates, and fellow Servicemembers, and evidence of behavioral changes. Section 3.304(f)(5) requires notification to the Veteran of the types of evidence that may establish the stressor, and provides that "VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that a personal assault occurred." In addition, under section 3.304(f)(5), a medical opinion based on a post-service

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examination of a Veteran may serve as evidence supporting occurrence of an in-service assault.

You state that the list of potential sources of corroborating evidence in VA's regulation is deficient because not all victims of assault will respond in the same manner and thus not all victims will, for example, display decreased work performance. However, VA's regulation does not require the same form of corroborating evidence for all claimants, but lists a variety of sources that may provide such corroborating evidence, to include evidence of decreased work performance, evidence of behavioral changes, or statements from family members, roommates, fellow Servicemembers, or clergy. Further, the regulation makes clear that this list is not exclusive and that other types of evidence may also serve to establish that an assault occurred.

We note as well that, as a result of a recent court decision in *AZ v. Shinseki* and *AY v. Shinseki*, 731 F.3d 1303 (Fed. Cir. 2013), the absence of a service record of a sexual assault or a failure to report the assault to military authorities cannot be considered by VA as evidence that the sexual assault did not occur.

You assert that "VA adjudicators often misapply the current evidentiary standard" in adjudicating MST claims. Specifically, you state that adjudicators often fail to acknowledge the sufficiency of the very types of evidence that section 3.304(f)(5) indicates may constitute sufficient evidence that an assault occurred. You state that this may result from conscious or unconscious bias toward claims of personal assault. VA is committed to serving our Nation's Veterans by accurately adjudicating claims based on MST in a fair, consistent, and thoughtful manner, and VA is very mindful of the uniquely sensitive nature of these claims. In response to concerns similar to those expressed in your petition, VA has over the past several years undertaken a number of measures to ensure that Department employees develop and adjudicate MST claims consistent with VA's regulation and with sensitivity to the unique circumstances presented by each individual claim.

In 2011, the Veterans Benefits Administration (VBA) directed regional offices (ROs) to designate adjudicators with experience and skills processing complex claims to assist in development of MST claims and adjudication of the claims. This was done to enable skilled and sensitive adjudicators to develop the expertise and familiarity to address the unique issues presented in these claims. In addition, VBA developed additional guidance and training for these adjudicators, including a VBA Training Letter 11-05 (Dec. 2, 2011) and training sessions, which included a 1.5 hour nationwide Microsoft Live Meeting broadcast on MST claims adjudication, and a separate 4-hour instructor-led training session on MST provided at VA regional offices. These trainings discussed the varied types of evidence that may support an MST claim and the procedures for developing the claims in a thorough and sensitive manner. Finally, the Veterans Health Administration, in collaboration with VBA, provided a 1.5 hour information session regarding how to conduct medical examinations of Veterans claiming disability as a result of MST.

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As a result of this training, VA's grant rate for PTSD claims based on MST rose from a rate of 38 percent prior to this training initiative to a rate of 52 percent at the end of February 2013, which was roughly comparable to the 59-percent grant rate at that time for all PTSD claims. *Legislative Hearing on H.R. 569, H.R. 570, H.R. 602, H.R. 671, H.R. 679, H.R. 733, H.R. 894 and H.R. 1405 Before the Subcomm. On Disability Assistance and Memorial Affairs of the H. Comm. On Veterans' Affairs, 113th Cong. (Apr. 16, 2013) (statement of David R. McLenachen, Director, Pension and Fiduciary Service, U.S. Dep't of Veterans Affairs), available at <http://veterans.house.gov/witness-testimony/david-r-mclenachen>. During fiscal year (FY) 2013, VA granted service connection for 3,091 out of 6270 PTSD claims based on MST, resulting in an average grant rate of 49 percent. During FY 2013, the average grant rate for all PTSD claims was 55 percent. This higher grant rate for all claims is likely due to the numerous combat-related PTSD claims that VA has received. Regarding gender variations, the grant rate for male Veterans claiming PTSD based on MST rose to within 7 points of the grant rate for female Veterans filing the same claims. VA continues to monitor MST and overall PTSD grant rates closely.*

Furthermore, in April 2013, VA sent letters to Veterans whose claims were denied between September 2010 and April 2013, inviting them to contact VA if they would like their PTSD claims reviewed to determine entitlement to service connection. Veterans whose claims were denied prior to September 2010 could also resubmit their claims but were not provided a letter notifying them of the opportunity because prior to September 2010, VA did not systematically track claims based on MST. An addendum to Training Letter 11-05 was published on June 17, 2013, outlining procedures that ROs must take to complete a special review of previously denied claims for PTSD based on MST.

Your letter also states that "combat veterans must prove only that they served in general conditions in which stressors causing PTSD frequently occur" and "do not have to present any threshold evidence of the specific stressor." This is a misstatement of the law. Rather, a Veteran must establish that he or she "engaged in combat with the enemy," *i.e.*, "personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality," before the Veteran's testimony alone may establish occurrence of the in-service stressor under 38 C.F.R. § 304(f)(2). *Moran v. Peake*, 525 F.3d 1157, 1159 (Fed. Cir. 2008); *Stone v. Nicholson*, 480 F.3d 1111, 1113 (Fed. Cir. 2007).

Finally, you advocate for a rule for MST claims similar to 38 C.F.R. § 3.304(f)(3), which eliminates the requirement for corroborating that the claimed in-service stressor occurred if a stressor claimed by a Veteran is related to the Veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of PTSD and that the Veteran's symptoms are related to the claimed stressor, provided that the claimed stressor is consistent with the places, types, and circumstances of the Veteran's service. Under 38 U.S.C. § 1154(a), VA must consider the places, types, and circumstances of a Veteran's service when deciding whether the Veteran incurred a disease or injury in service. VA promulgated section 3.304(f)(3) based on an Institute of Medicine finding that

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military personnel deployed to war zone, even if they do not experience direct combat, experience other potent stressors as a result of the circumstances of their service. VA concluded that a reduced evidentiary burden is justified where the circumstances of a Veteran's service are likely to have placed the Veteran in a stressful situation related to fear of hostile military or terrorist activity. However, sexual assault is not indisputably associated with particular places, types, and circumstances of service. VA has therefore promulgated 38 C.F.R. § 3.304(f)(5) to address the difficulty of producing evidence to prove occurrence of an in-service personal assault. VA believes this regulation, and the training program VA has established, provide for the accurate, fair, and sensitive adjudication of claims based on MST.

For these reasons, VA denies your petition for rulemaking. I hope this information is helpful to you.

Sincerely,

A handwritten signature in black ink that reads "Tammy L. Kennedy". The signature is written in a cursive, flowing style with a large initial "T" and "K".

Tammy L. Kennedy
Acting General Counsel