

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

SERVICE WOMEN’S ACTION	)	
NETWORK and VIETNAM	)	
VETERANS OF AMERICA,	)	
	)	
Petitioners,	)	
v.	)	<b>PETITION FOR REVIEW</b>
	)	
ERIC K. SHINSEKI,	)	
Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	
<hr style="width:45%; margin-left:0;"/>		

**INTRODUCTION**

Widespread rape, sexual assault, and sexual harassment plague the military, threatening the strength of the armed forces, undermining national security, and destroying the lives of survivors and their families. Nearly one in every three women is raped during her service and more than half experience unwanted sexual contact. Moreover, of the 26,000 service members who reported unwanted sexual contact in 2011-12, fifty-two percent were men. These assaults often result in devastating, long-term psychological injuries, most notably Post-Traumatic Stress Disorder (“PTSD”). Sexual violence correlates with PTSD more highly than any other trauma, including combat.

After completing their service, many survivors of military sexual violence return home with severe physical and psychological disabilities only to confront homelessness, unemployment, isolation, and substance abuse. As a result, survivors seek care and support from the U.S. Department of Veterans Affairs (“VA”). One in five female veterans and one in one hundred male veterans seeking VA healthcare reports an experience of rape, sexual assault, or sexual harassment, which VA refers to collectively as military sexual trauma (“MST”).

Like other veterans, MST survivors seek disability compensation from VA, most commonly for PTSD, in order to support themselves and their families while making up for earnings lost as a result of their injuries. To receive benefits, a veteran must prove that a current disability is related to military service, or “service-connection.” Recognizing the difficulties of proving service-connection, VA has eased the evidentiary requirements for veterans with certain disabilities and diseases, including combat- and fear-related PTSD, herbicide exposure in Vietnam, and experience as a prisoner of war. For these veterans, service-connection is rightfully presumed.

MST survivors, however, are not afforded the same legal presumptions as other veterans, even though their service connection is often more difficult to prove. Instead, since VA often rejects lay testimony alone,

victims must present other corroborating evidence of their sexual trauma. Due to systemic under-reporting of in-service sexual trauma, most MST is not documented. Moreover, until December 2011, U.S. Department of Defense policy required restricted reports of MST to be destroyed after only five years, and sexual harassment reports after only two. Even when evidence is available, VA frequently fails to give it adequate weight. As a result, MST survivors are regularly unable to meet the heavy burden required to secure disability benefits. From 2009 to 2012, the annual grant rate for MST-related PTSD claims lagged behind the rate of other PTSD claims by 16.5 to 29.6 percentage points.

Years of informal advocacy have failed to persuade VA to end the disproportionate rejection of MST-related claims by adopting the same sort of evidentiary presumptions that it uses for other claims. As a result, petitioners Service Women's Action Network ("SWAN") and Vietnam Veterans of America ("VVA") submitted a formal petition for rulemaking in June 2013 (attached as Exhibit 1). The petition seeks to amend the evidentiary rule, 38 C.F.R. § 3.304, by creating a new subsection § 3.304(g), to provide the same sort of evidentiary presumption for MST-related PTSD as VA now applies to combat- and fear-related PTSD claims.

//

In their petition, SWAN and VVA challenged multiple aspects of VA's regulations. First, the stringency of VA's current evidentiary standard effectively bars many meritorious MST-related claims. Second, prior amendments did not eliminate gender discrimination or abuses of discretion in MST-related PTSD claims. Petitioners' proposed amendment to § 3.304 would ease the evidentiary burden and allow applicants to submit independent medical evaluations and diagnoses in a manner consistent with good medical practice. The proposed amendment would also alleviate the administrative backlog, expedite claims, and produce consistent and equitable results without regard to gender.

VA has ignored SWAN and VVA's petition since its submission in June 2013. Accordingly, Petitioners now have no choice but to seek this Court's intervention.

First, SWAN and VVA petition this Court to review the failure to respond to their rulemaking petition. VA's failure to respond violates the Administrative Procedure Act ("APA"), which requires an agency to conclude a matter before it within a "reasonable time." 5 U.S.C. § 555(b); *id.* § 706(1).

Second, to the extent VA's failure to act on the petition amounts to a constructive denial of the petition, then this denial violates the APA because

it is arbitrary, capricious, an abuse of discretion, and unauthorized by law. 5 U.S.C. § 706(2).

Third, this constructive denial also constitutes discrimination on the basis of gender, in violation of the equal protection component of the Fifth Amendment Due Process Clause. U.S. Const. amend. V. The absence of an evidentiary presumption in § 3.304(f) for veterans seeking disability benefits for MST-related PTSD discriminates against both women and men on the basis of gender. Sexual violence in the military is suffered disproportionately by women, who seek benefits for the resulting injuries at a higher rate than men. VA includes numerous evidentiary presumptions for injuries incurred in conflicts and roles from which women have been historically excluded, including PTSD based on combat, but excludes a comparable presumption for an injury suffered disproportionately by women, namely PTSD based on sexual violence. This discriminatory treatment against women, based, in part, on outdated and inaccurate stereotypes of women, violates equal protection.

VA's failure to adopt the evidentiary presumption also discriminates against men, as the VA grants benefits to men with MST-related PTSD disabilities at an even lower rate than it does for women. In 2011, VA granted nearly 49 percent of PTSD claims from female survivors, but only

37 percent of claims from male survivors. This discriminatory treatment of men on the basis of their gender also violates equal protection.

### **JURISDICTION**

The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to review the rules and regulations of the United States Department of Veterans Affairs. 38 U.S.C. § 502; Federal Circuit Rule 47.12.

### **STANDING**

SWAN and VVA submitted a petition for rulemaking in June 2013, to which VA has not responded. SWAN has organizational standing to compel a response, or in the alternative to obtain judicial review of VA's constructive denial, because VA has forced SWAN to divert scarce resources to address the VA failings detailed in the petition. This diversion of resources is an injury-in-fact. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-379 (1982). Co-petitioner Vietnam Veterans of America has organizational standing and also has associational standing on behalf of its members, including individuals denied MST-related disability benefits from VA and those presently seeking such benefits under VA's current unfair and discriminatory evidentiary regulations. *See Hunt v. Wash. State Apple Adver.*

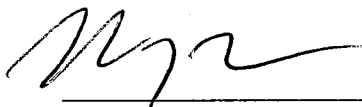
*Com'n.* 432 U.S., 333, 343 (1977). *Institut Nat'l Des Appellations D'Origine v. Vintners Int'l Co., Inc.*, 958 F.2d 1574 (Fed. Cir. 1992); *Disabled American Veterans v. Gober*, 234 F.3d 682 (2000).

### CONCLUSION

SWAN and VVA are adversely affected and aggrieved by VA's failure to respond to, and constructive denial of, their rulemaking petition to amend § 3.304. Petitioners request that the Court hold VA's constructive denial unlawful, set it aside and compel the agency to undertake a rulemaking and enact the proposed rule within a reasonable period of time. In the alternative, petitioners request that the Court compel the Secretary to respond to Petitioners' Petition within thirty (30) days of this Court's order.

April 29, 2014

Respectfully submitted,



Michael Wishnie, Supervising Attorney  
Daniela Nogueira, Law Student Intern  
Daniella Rohr, Law Student Intern  
Joya Sonnenfeldt, Law Student Intern  
Veterans Legal Services Clinic  
Jerome Frank Legal Services Organization  
Yale Law School  
P.O. Box 209090  
New Haven, CT 06520-9090  
(203) 432 - 4800