UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SERVICE WOMEN'S ACTION NETWORK and VIETNAM VETERANS OF AMERICA,	)	
Petitioners,	)	
v.	)	**PETITION FOR REVIEW**
SLOAN D. GIBSON, Acting Secretary of Veterans Affairs,	)	
Respondent.	)	

Service Women's Action Network and Vietnam Veterans of America hereby petition for review of the denial of their petition for rulemaking by the U.S. Department of Veterans Affairs. The petition for rulemaking addressed adjudication of disability benefits applications by veterans who survived rape, sexual assault, or sexual harassment during military service (collectively "military sexual trauma" or "MST").

INTRODUCTION

Thousands of service members are raped, sexually assaulted, or sexually harassed in the military each year. Nearly one in every three women is raped during her service and more than half experience unwanted sexual contact. Moreover, of the26,000 service members who reported unwanted sexual contact from 2011 to 2012, fifty-two percent were men. Due to this abuse, service

members suffer grave physical and emotional harm, impaired family and intimate relationships, homelessness, and enduring difficulties in employment.

Like other disabled veterans, survivors of rape, sexual assault, or harassment during military service seek compensation from VA, most commonly for post-traumatic stress disorder ("PTSD"), to support themselves and their families while making up for earnings lost as a result of their injuries. Sexual violence correlates with PTSD more highly than any other trauma, including combat. In fact, one in five female veterans and one in one hundred male veterans seeking VA healthcare reports experiencing military sexual trauma.

MST survivors face higher hurdles to obtaining VA benefits, however. To receive benefits, a veteran must prove that a current disability is related to military service, a concept that VA terms "service-connection." Yet because the military discourages and threatens MST survivors against reporting their attacks, veterans with PTSD often possess little or no documentation of a rape, sexual assault, or sexual harassment when required by the VA to produce this evidence months or years later. In addition, VA frequently rejects lay testimony of MST survivors. Moreover, U.S. Department of Defense policy has required swift destruction of those few MST reports that are made in the military.

As a result, VA denies the claims of thousands of MST survivors each year, and denies these claims at a greater rate than all other PTSD claims. From 2009 to

2012, VA's annual grant rate for MST-related PTSD claims lagged behind the rate for other PTSD claims by 16.5 to 29.6 percentage points. A 2014 Government Accountability Office report revealed that this disparity continues to the present, despite the agency's claims that it has implemented internal reforms to end discrimination against MST survivors. In addition, VA denies MST claims submitted by men significantly more often than similar claims submitted by women, and the approval of these claims varies wildly by local VA office.

Recognizing the difficulties of proving service-connection for certain injuries, VA has eased the evidentiary requirements for veterans with various disabilities and diseases, including combat- and fear-related PTSD, herbicide exposure, herbicide-related diseases, and experience as a prisoner of war. For veterans suffering these wounds, VA rightfully presumes service-connection. Despite also acknowledging evidentiary difficulties for veterans suffering from PTSD due to MST, however, VA has refused to afford them the same legal accommodations as other veterans who experience PTSD --even though service connection for MST survivors is often *more* difficult to prove.

For years, Petitioners Service Women's Action Network (SWAN) and Vietnam Veterans of America (VVA) have urged VA to adopt concrete, common-sense reforms for adjudicating claims by MST survivors, including by implementing the same type of evidentiary accommodations it uses for other

claims that are well-recognized as difficult to document, including for combat- and fear-related PTSD claims. When VA ignored these proposals, Petitioners submitted a formal petition for rulemaking in June 2013 (copy attached as Exhibit A). The petition requested both commencement of a rule-making process and amendment of VA regulations to provide the same sort of evidentiary accommodation for MST-related PTSD as VA now applies to combat- and fear-related PTSD claims. Comparable to these other PTSD claims, the proposed rule would make a mental health diagnosis sufficient evidence for MST claims.

In their petition, SWAN and VVA challenged multiple aspects of VA's failure to promulgate a regulation establishing an evidentiary accommodation for MST-related PTSD claims. First, the stringency of VA's current evidentiary standard effectively bars many meritorious MST-related claims, thereby denying thousands of wounded veterans the benefits that their service has otherwise earned. Second, prior regulatory amendments and other agency reforms have failed to eliminate gender discrimination and other arbitrary and capricious denials of *bona fide* MST-related PTSD claims. Petitioners' proposed amendment 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 VA's administrative backlog, expedite claims so as to more swiftly deliver benefits to disabled veterans, and produce consistent and

equitable results without regard to gender.

VA initially ignored SWAN and VVA's petition, leading the organizations to file suit in an effort to compel the agency to act. See SWAN v. Gibson, No. 14-2079 (Fed. Cir.). By letter dated July 14, 2014, VA denied the petition (copy attached as Exhibit B). Petitioners now seek judicial review of this denial, because it was arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedure Act ("APA"). VA's denial also violates the equal protection component of the Fifth Amendment. VA's rejection of the rulemaking petition demonstrates the agency's failure to acknowledge the gravity of the harm that MST survivors suffer on a daily basis, the inadequacy of the agency's efforts to redress its arbitrary and discriminatory denials of MST claims, and the urgent need to reform the regulations that perpetuate this suffering.

SUMMARY OF ARGUMENT

1. VA's denial of the rule-making petition is arbitrary and capricious in violation of the APA. First, for years VA has denied MST-related PTSD claims at a significantly higher rate than other PTSD claims, and internal agency retraining programs have not eliminated this disparate treatment. See, e.g.AZ v. Shinseki, 731 F.3d 1303 (Fed. Cir. 2013) (in a rare MST case to reach this Court, vacating and remanding VA denial of applications by two MST claimants).

Second, VA's adjudication of MST claims reflects enduring gender

discrimination. Female service members are disproportionately injured by MST, and thus VA's denial of MST-related PTSD claims at rates substantially higher than other PTSD claims disproportionately affects women. VA's denial of the rulemaking petition also discriminates against men, whose MST-related claims VA denies even more often than claims submitted by women veterans.

Third, the grant rates for MST claims among VA Regional Offices (VAROs) vary wildly. VAROs' grant rates for MST-related claims fluctuated from about 14 to 88 percent in 2013, demonstrating a system so arbitrary that the outcome of a veteran's case depends more on a geographic lottery than on the veterans' injuries or evidence presented.

Fourth, VA has promulgated regulations establishing nearly one dozen evidentiary presumptions, in total covering scores of disabilities – and properly so.[1]These regulatory presumptions have resulted in swifter processing of claims by disabled veterans and reduced administrative expense. Yet the injuries for which VA has promulgated evidentiary accommodations to date are suffered overwhelmingly by men. In denying the instant petition, VA has refused to establish a presumption for even *one* injury suffered disproportionately by women.

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[1] See, e.g.,38 C.F.R.§3.304(f)(2) (presumption for combat-related PTSD);id. § 3.304(f)(3) (presumption for fear-related PTSD); id. § 3.307(a)(5) (presumption for prisoner-of-war related diseases); id. § 3.307(a)(6)(ii) (presumption for Agent Orange or herbicide related diseases); id.§ 3.307(a)(6)(iii) (presumption of exposure to Agent Orange or other herbicide); id. § 3.307(a)(3)-(4) (presumption for tropical and chronic diseases).

This denial is particularly egregious in that VA has correctly established evidentiary presumptions for combat- and fear-related PTSD, but has refused to do so for MST-related PTSD—even though sexual violence correlates with PTSD more highly than any other trauma, including combat.

2. VA's denial also violates the equal protection component of the Fifth Amendment Due Process Clause. U.S. Const. amend. V. VA impermissibly discriminates on the basis of sex by(1) denying MST-related PTSD claims substantially more often than other PTSD claims, where MST is suffered disproportionately by female service members; (2) denying MST-related PTSD claims submitted by men more frequently than similar claims submitted by women; and (3) intentionally refusing to promulgate regulations establishing an evidentiary accommodation for MST-related PTSD claims despite adopting similar accommodations for scores of disabilities suffered disproportionately by men. This discriminatory treatment against women is consistent with outdated and unfounded stereotypes of women falsely accusing innocent men of rape, and violates equal protection.

VA's denial asserts that its training and management programs have adequately addressed mistreatment of MST claims, such that no regulatory reform is needed. In light of recent evidence of widespread VA misreporting of healthcare statistics, including potential criminal fraud, VA's assertion of some statistical

improvements in MST claims processing may not withstand scrutiny. In any event, even assuming *arguendo* that in this case VA has not misrepresented its data, these alleged internal reforms have nevertheless failed to redress VA's continuing discrimination against MST claimants and its arbitrary and capricious denial of thousands of claims each year. For reasons summarized above, VA's reasoning is flawed and unsupported by evidence, and its denial is arbitrary, capricious, and impermissibly discriminatory.

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(exclusive jurisdiction to review an "action of the Secretary [of VA] to which section . . . 553 of title 5 . . . refers"); see also5 U.S.C. § 553 ("Rule making"); id. § 553(e) (referring to "the right to petition for the issuance, amendment, or repeal of a rule");id. § 706 (federal courts may "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Federal Circuit Rule 47.12.

STANDING

SWAN and VVA submitted a petition for rulemaking in June 2013, which VA denied by letter dated July 14, 2014. SWAN has organizational standing

because VA has forced SWAN to divert scarce resources to address the VA failings detailed in the petition and to seek judicial review of VA's denial of 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).

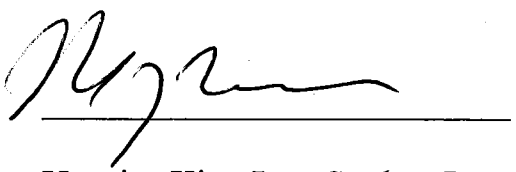
Co-petitioner VVA has organizational standing because it too has been forced to divert resources to address VA's arbitrary, capricious, and discriminatory denial of MST claims and of the rulemaking petition. VVA also has associational standing on behalf of its members, including individuals denied MST-related 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). The interests VVA seeks to protect are also germane to the organization's purpose. Its members would have standing to sue in their own right and neither the claims asserted in this petition for review nor the relief requested require the participation of individual VVA members. Hunt, 432 U.S. at 343; Institut Nat'l Des Appellations D'Origine, 958 F.2d at 1579; Disabled American Veterans, 234 F.3d at 689.

CONCLUSION

SWAN and VVA are adversely affected and aggrieved by VA's denial of their rulemaking petition. Petitioners request that the Court hold VA's denial unlawful, set it aside and compel the agency to undertake a rule-making procedure and enact the proposed rule.

July 28, 2014

Respectfully submitted,



Yunsieg Kim, Law Student Intern
Daniella Rohr, Law Student Intern
Joya Sonnenfeldt, Law Student Intern
Megan Wade, Law Student Intern
Bethany Li, Supervising Attorney
Michael Wishnie, Supervising Attorney
Veterans Legal Services Clinic
Jerome Frank Legal Services Organization
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090