

When Rape Isn't Like Combat: The Disparity Between Benefits for Post-Traumatic Stress Disorder for Combat Veterans and Benefits for Victims of Military Sexual Assault

*"It's very disconcerting to have somebody who is supposed to save your life, who has your back, turn on you and do something like that. . . . You don't want to believe it's real. You don't want to have to deal with it. The family doesn't want to deal with it. Society doesn't want to deal with it."*¹

I. INTRODUCTION

In the late 1990s, a disabled American veteran sought compensation.² His disability was physical, but his injury was not suffered on the battlefield.³ His claim was denied.⁴ The veteran, Frank L. Gallegos Jr., had been diagnosed with post-traumatic stress disorder (PTSD) caused by military sexual assault (MSA).⁵ Gallegos' medical doctor corroborated his account and wrote, "[t]he symptoms [Gallegos] gives are quite consistent with a highly traumatized experience of sexual rape to a man."⁶ Nevertheless, the United States Court of Appeals for Veterans Claims upheld the decision that Gallegos had not established a sufficient connection between his in-service rape and his PTSD.⁷ Absent that connection, Gallegos could not receive benefits in the form of psychological care and a disability pension from the United States Department

1. Sara Corbett, *The Women's War*, N.Y. TIMES, Mar. 18, 2007, § 6 (Magazine), at 42 (quoting Susan Avila-Smith, Dir., Women Organizing Women), available at <http://www.nytimes.com/2007/03/18/magazine/18cover.html> (recounting stories of female veterans victimized by military sexual assault).

2. Gallegos v. Peake, 22 Vet. App. 329, 331 (2008) (describing psychiatric treatment history of plaintiff-veteran).

3. *Id.* at 331-32 (recounting clinical diagnosis of PTSD and describing veteran's attestation of two rapes during service).

4. *Id.* at 338-39 (holding Board of Veterans' Appeal's (BVA) failure to provide proper notice under 38 C.F.R. § 3.304(f)(3) not prejudicial error).

5. *Id.* at 331 (describing PTSD and major depressive disorder diagnosis by clinical social worker). Several terms are frequently used to describe the sexual assault of a member of the military, such as, military sexual assault, military sexual trauma and, somewhat euphemistically, personal assault. Unless otherwise noted, this article will employ the term "military sexual assault" or MSA. See generally Ann M. Vallandingham, JAGC, USN, *Department of Defense's Sexual Assault Policy: Recommendations For a More Comprehensive and Uniform Policy*, 54 NAVAL L. REV. 205 (2007) (using terms interchangeably).

6. Gallegos, 22 Vet. App. at 331 (quoting opinion of Veterans Administration physician Charles Oppgaard, M.D.).

7. See *id.* at 339 (explaining court cannot hold process "essentially unfair" when evidence proved insufficient to convince BVA of service-connection).

of Veterans Affairs (VA).⁸

The VA serves America's veterans and their families "in ensuring that they receive the care, support, and recognition they have earned in service to this nation."⁹ Navigating the VA application process to obtain such care, support, and recognition presents unique challenges for veterans with mental illness, particularly those with PTSD.¹⁰ One cause of PTSD is sexual assault, which is surprisingly pervasive in the United States armed forces.¹¹ In 2008, 3,018 sexual assaults involving United States armed forces service members were officially reported to unit commanders.¹²

When veterans develop PTSD caused by a sexual assault as a result of their military service, they are entitled to disability compensation.¹³ The current regulatory framework imposes a higher evidentiary burden on those veterans seeking compensation for PTSD because of sexual assault than on those seeking compensation for PTSD caused by exposure to combat.¹⁴ This higher burden, one that generally requires corroboration from outside sources, instead of the veteran's lay testimony alone, prevents victims with PTSD claims from receiving compensation.¹⁵

This Note begins by describing the process for seeking benefits as a disabled veteran in the United States.¹⁶ It next examines how PTSD due to sexual

8. See *id.* (denying benefits).

9. See DEP'T OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES § 1.02 (1993) [hereinafter M-21-1 PROCEDURES] (describing mission of VA's service). The inscription on the Department of Veterans Affairs building in Washington, D.C., the VA's official motto, quotes Abraham Lincoln's second inaugural address: "To care for him who shall have borne the battle and for his widow, and his orphan." See DEP'T OF VETERANS AFFAIRS, CELEBRATING AMERICA'S FREEDOMS: THE ORIGIN OF THE VA MOTTO 2, <http://www1.va.gov/opa/publications/celebrate/vamotto.pdf> (last updated Nov. 10, 2009).

10. See *Eliminating the Gaps: Examining Women Veterans' Issues: J. Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs and the Subcomm. on Health of the H. Comm. on Veterans' Affairs*, 111th Cong. 7-9 (2009) [hereinafter *Eliminating the Gaps*] (statement of Anuradha K. Bhagwati, Executive Director, Service Women's Action Network), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg51873/pdf/CHRG-111hhrg51873.pdf> (describing challenges specific to disability claims for PTSD caused by MSA).

11. See Alina Suris et al., *Sexual Assault in Women Veterans: An Examination of PTSD Risk, Health Care Utilization, and Cost of Care*, 66 PSYCHOSOMATIC MED. 749, 755 (2004) (analyzing results of survey study of female VA healthcare patients); Corbett, *supra* note 1, at 42 (collecting anecdotal accounts of MSA from female veterans of Global War on Terror).

12. DEP'T OF DEF., FY08 REPORT ON SEXUAL ASSAULT IN THE MILITARY app. C (2009), available at http://www.sapr.mil/media/pdf/reports/dod_fy08_annual_report_combined.pdf [hereinafter FY08 REPORT] (listing statistical information concerning incidence of sexual assault and response of command to incidents). The sum of 3,018 sexual assaults includes 2,265 unrestricted reports of sexual assaults and 753 restricted reports. *Id.*

13. See 38 U.S.C. § 1110 (2006) (authorizing compensation for service-connected disability caused by personal injury or disease in wartime); § 1131 (authorizing compensation for service-connected disability caused by personal injury or disease in peacetime).

14. See 38 C.F.R. § 3.304(f) (2010) (detailing PTSD claims service-connection presumptions for various veteran categories).

15. See *infra* Part II.B. (explaining burden on sexual assault victims).

16. See *infra* Part II.A. (outlining steps in benefit process).

assault is subject to a higher level of scrutiny in the benefit application process.¹⁷ The Note then considers the prevalence of MSA in the armed forces and the veracity of victims' claims.¹⁸ It goes on to describe the clinical connection between MSA and PTSD.¹⁹ Lastly, it catalogs the obstacles to successful disability claims that the veterans disability application process presents.²⁰

This Note then analyzes the application process and suggests areas for improvement.²¹ Continued vigilance is necessary to abandon the outmoded stereotypes of sexual assault and this Note commends the Department of Defense (DOD) for taking important steps to that end.²² Unifying the veterans' disability application process would provide fair and equal treatment of PTSD claims regardless of cause.²³ The fact-finding process within the Board of Veterans' Appeals (BVA) should be reformed to ensure the Board does not delegate its fact-finding responsibilities to the medical professionals it turns to for evidence.²⁴ Finally, the contemporaneous proof requirement bars PTSD claims with an otherwise sound clinical basis—a profile that fits many claims based on MSA—and federal regulations should acknowledge this fact.²⁵

II. HISTORY

A. Seeking Compensation as a Disabled Veteran in America

As part of its mission, the VA provides compensation to any veteran who is at least 10% disabled as a result of military service.²⁶ Statutes entitle veterans of the United States armed forces to compensation for disabilities or diseases acquired during wartime or peacetime service.²⁷ A claim for veterans' benefits must satisfy five elements: status as a veteran; the existence of a disability; a connection between the veteran's military service and the disability; the degree of disability, which is expressed as a percentage representing decrease in work

17. See *infra* Part II.B. (emphasizing disparity in treatment).

18. See *infra* Part II.C. (describing difficulties with statistical information and history of suspicion of victims' claims).

19. See *infra* Part II.D. (discussing clinical connection between MSA and PTSD).

20. See *infra* Part II.D. (noting difficulty of benefit application process).

21. See *infra* Part III. (analyzing VA response to claims of PTSD caused by sexual assault).

22. See *infra* Part III.A. (highlighting military's attempts to curb sexual assault).

23. See *infra* Part III.B. (arguing against needless distinction of claimed stressor for PTSD claims).

24. See *infra* Part III.C. (noting powerful role of medical professionals in claims process).

25. See *infra* Part III.D. (criticizing contemporaneous proof requirement).

26. DEP'T OF VETERANS AFFAIRS, PAMPHLET 21-00-1, A SUMMARY OF VA BENEFITS (2009), available at <http://www.vba.va.gov/vba/benefits/factsheets/general/21-00-1.pdf> (detailing variety of benefits and programs available to veterans through VA).

27. See 38 U.S.C. § 1110 (2006) (authorizing compensation for service-connected disability caused by personal injury or disease in wartime); § 1131 (authorizing compensation for service-connected disability caused by personal injury or disease in peacetime).

capacity; and the effective date of the disability.²⁸ This Note primarily addresses the second, third, and fourth elements.²⁹ When veterans' disabilities do not become apparent until after their service has ended, they may still demonstrate that they acquired the disability during service by evidence, or by discovery of the disability within a "presumption period."³⁰

The presumption period is a variable length of time after a veteran's service has officially ended.³¹ If a disability is discovered during that time, the VA will treat the disability as if it had been discovered during service for purposes of the service-connection element.³² This is important because it affects the burden on each party in a dispute over benefits.³³ When the physical examination of a veteran before entry into military service did not find any disability, and a disability is subsequently discovered during military service or the presumption period, the disability is presumed to be service-connected.³⁴ To rebut that presumption, the VA must "show clear and unmistakable evidence of both a preexisting condition and a lack of in-service aggravation."³⁵

The fourth element, the degree of disability, is determined by reference to standard criteria and is reflected as a percentage.³⁶ The amount of compensation for a veteran is then determined from a table based on disability percentage and number of dependents.³⁷ The amount is generally increased annually to account for changes in cost of living.³⁸ Each veteran's disability percentage and family pattern will vary, but some examples illustrate the

28. *D'Amico v. West*, 209 F.3d 1322, 1326 (Fed. Cir. 2000) (listing five elements of claim for veterans' disability benefits); *see also* 38 C.F.R. § 4.130 (2009) (listing criteria for disability percentage dependent on symptoms described in DSM-IV).

29. *See infra* Parts III.B.-D. (analyzing issues in claims process).

30. *See Caluza v. Brown*, 7 Vet. App. 498, 505 (1995), *superseded by statute on other grounds*, Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096, *as recognized in Duenas v. Principi*, 18 Vet. App. 512, 515-16 (2004) (stating veteran may demonstrate disability was "incurred" during service within statutory meaning).

31. *See id.* (collecting authority describing different presumption periods for various maladies).

32. *See id.* (describing effect of discovery during presumption period). Controversy over presumptions of service-connection is not limited to benefits from PTSD, as the VA must frequently decide if a particular ailment should be presumed to be caused by certain activities during military service. *See* Dep't of Veterans Affairs Notice, Determinations Concerning Illnesses Discussed in the Institute of Medicine Report on Gulf War and Health: Updated Literature Review of Depleted Uranium, 75 Fed. Reg. 10,867, 10,871 (Mar. 9, 2010) (rejecting as unwarranted presumption of service-connection between illnesses and Gulf War-era exposure to depleted uranium).

33. *See Patrick v. Principi*, 103 F. App'x 383, 384 (Fed. Cir. 2004) (describing burden of proof on VA when disability discovered during service).

34. *See id.* (citing "presumption of soundness" codified in 38 U.S.C. § 1111).

35. *Id.* (quoting *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004)) (construing § 1111).

36. *See* 38 C.F.R. § 4.130 (2009) (listing diagnostic criteria for each level of impairment for various mental disorders).

37. *See* DEP'T OF VETERANS AFFAIRS, VETERANS COMPENSATION BENEFITS RATE TABLES (2009), <http://www.vba.va.gov/bln/21/Rates/comp01.htm> [hereinafter 2009 RATE TABLES] (listing disability pension payments in dollars by percentage and dependents).

38. *See id.* (stating no cost of living increase for 2010).

possible annual pension amount: a single veteran with 30% disability will receive \$4,512, a veteran with 50% disability with a spouse and a child will receive \$10,788, and a veteran with 100% disability with that family pattern will receive \$35,184.³⁹ By way of comparison, the 2009 Federal Poverty Guideline level for a family of three was \$18,310.⁴⁰ Thus, the income of a three-person family, solely supported by a 100%-disabled veteran, is just under 200% of poverty.⁴¹ An applicant for veterans' disability benefits is seeking this income as a disability pension.⁴²

Veterans face a complex process for challenging adverse decisions.⁴³ The BVA is the entity within the VA charged with hearing appeals from preliminary decisions concerning awards of benefits.⁴⁴ The vast majority of the BVA's decisions concern claims for disability compensation or survivor benefits.⁴⁵ BVA decisions may be appealed to the Court of Appeals for Veterans Claims.⁴⁶ The Court of Appeals for Veterans Claims' decisions may then be appealed to the Federal Circuit.⁴⁷ The Federal Circuit is the first Article III court in this chain.⁴⁸

The Court of Appeals for the Federal Circuit recently held that an applicant for veterans' disability benefits possesses a constitutionally protected property interest in those benefits, requiring procedural due process during the application process.⁴⁹ In considering the claim of a veteran who injured his back while serving in the military, the court chronicled the veteran's attempts

39. *See id.* (listing compensation rates for variety of disability percentages and family patterns)

40. Dep't of Health and Human Servs., Notice, Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4,199-04, 4,200 (Jan. 23, 2009).

41. *See id.* (\$35,184/\$18,310 = approximately 192%); 2009 RATE TABLES, *supra* note 37.

42. *See* 38 U.S.C. § 1131 (2006) (allowing creation of disability pension for veterans); § 1155 (authorizing creation of schedule of reductions in earning capacity resulting from disability).

43. *See Eliminating the Gaps*, *supra* note 10, at 16 (statement of Anuradha K. Bhagwati, Executive Director, Service Women's Action Network) (mentioning courage, stamina, and financial assistance necessary to pursue and appeal denied claim).

44. *See* M21-1 PROCEDURES, *supra* note 9, § 1.03(a)(6) (detailing job description and appointment process for BVA members).

45. JAMES P. TERRY, FISCAL YEAR 2008 REPORT OF THE CHAIRMAN, BOARD OF VETERANS' APPEALS 3 (2009), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2008AR.pdf (noting although Board has wide jurisdiction, 94.4% of appeals involve disability compensation or survivor benefits). The BVA conducted more hearings in 2008 than any year since 1991. *Id.* at 24 (showing 43,757 cases disposed and 10,652 hearings held in FY 2008); Letter from James P. Terry, Chairman, Bd. of Veterans' Appeals, to the Honorable Eric K. Shinseki, Sec'y of Veterans Affairs (Feb. 29, 2009) (accompanying annual report).

46. 38 U.S.C. § 7252(a) (2006) (vesting exclusive jurisdiction to review BVA decisions in Court of Appeals for Veterans Claims).

47. M21-1 PROCEDURES, *supra* note 9, § 1.03(b) (describing appellate review process of BVA decisions).

48. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315 (renaming United States Court for Veterans Claims); *see also* 38 U.S.C. § 7251 (2006) (establishing United States Court of Appeals for Veterans Claims under Article I of U.S. Constitution).

49. *See* *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (ruling on question of first impression).

to obtain a disability benefit beginning in 1974.⁵⁰ After repeated denials, the veteran eventually discovered that the officials who rejected his claim erroneously relied on a medical record that had been improperly altered.⁵¹ After the BVA refused to reconsider its decision in light of the tainted medical record, the veteran unsuccessfully appealed to the U.S. Court of Appeals for Veterans Claims.⁵² The Federal Circuit reversed, holding that a veteran's entitlement to disability benefits is a property interest protected by the Due Process Clause of the Fifth Amendment.⁵³ The court applied several circuit court decisions holding that when government benefits are nondiscretionary, an applicant for those benefits, as well as a recipient, possesses a property interest protected by due process.⁵⁴ The court then held that the veteran's right to a fair hearing was tainted by consideration of the erroneous medical record.⁵⁵ This decision has the potential to alter the veterans' disability framework by providing new grounds to challenge decisions of the BVA.⁵⁶

B. Post-Traumatic Stress Disorder: Heightened Scrutiny of an Invisible Disability

The American Psychiatric Association recognizes PTSD in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV).⁵⁷ PTSD is a clinical diagnosis resulting from exposure to certain types of stressful incidents that are known as stressors, which cause specific diagnostic criteria.⁵⁸ The symptoms include, but are not limited to, intrusive recollections of the

50. *See id.* at 1291-93 (recounting injury, partial disability award, and subsequent dispute with VA lasting more than 30 years).

51. *Id.* at 1293 (noting alteration of doctor's language in medical record to make disability appear less serious).

52. *Id.* at 1294-95 (detailing procedural history and Court of Appeals for Veterans Claims' refusal to reverse Board).

53. *See Cushman*, 576 F.3d at 1298 (finding veterans benefits "nondiscretionary [and] statutorily mandated").

54. *See id.* at 1297-98 (referencing regional circuit decisions on due process protections for applicants for various government benefits); *see also, e.g., Hamby v. Neel*, 368 F.3d 549, 557-58 (6th Cir. 2004) (considering applicants for Medicaid benefits); *Mallette v. Arlington Cnty. Emps.' Supplemental Ret. Sys. II*, 91 F.3d 630, 634-35 (4th Cir. 1996) (considering applicant for retirement benefits); *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 489-90 (3d Cir. 1980) (considering applicant for disabled child's annuity).

55. *Cushman v. Shinseki*, 576 F.3d 1290, 1299 (Fed. Cir. 2009) (rejecting government's argument that sufficient due process was afforded).

56. *See Edwards v. Shinseki*, 582 F.3d 1351, 1357 (Fed. Cir. 2009) (Rader, J., additional views) (criticizing majority opinion in *Cushman* as exceeding Supreme Court precedent). Still, until the Supreme Court settles the due process question, the characterization of an applicant as possessing a property interest is likely to remain controversial. *See id.* (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)) (characterizing *Cushman* as stepping "beyond the bounds set by the Supreme Court for property rights and due process protections").

57. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR 467-68 (4th ed. 2000) [hereinafter DSM-IV-TR] (detailing six-part test and multi-symptom diagnostic criteria).

58. *Id.* at 463.

event, avoidant or numbing behavior, and hyper-arousal, all lasting more than one month.⁵⁹

One study of women who were sexually assaulted found they exhibited a statistically significant 18.9% increase in PTSD symptoms.⁶⁰ A 1998 study of female Gulf War veterans found 7.3% reported experiencing sexual assault, 33.1% reported physical sexual harassment, and 66.2% reported verbal sexual harassment, while 30.2% reported no sexual harassment.⁶¹ In 1992, Congress authorized the VA to provide counseling services to female veterans to help them overcome psychological trauma caused by sexual assault or harassment.⁶² Two years later, Congress extended the same benefit to male veterans.⁶³ Nevertheless, female service members frequently do not report these crimes, which means they often have limited documentary evidence to substantiate a claim for benefits at a later date.⁶⁴

One reason female service members may decline to report sexual assault is that the military justice system has been criticized, sometimes in harsh terms, for its perceived institutional hostility towards sexual assault victims.⁶⁵ For example, one U.S. Marine Corps Judge Advocate characterized cross-examination of a sexual assault victim as “part of an overall campaign to revictimize a sexual assault survivor during the legal process.”⁶⁶ Prosecutions under the Uniform Code of Military Justice (UCMJ) can be particularly traumatic for victims, more so than in a civilian court system.⁶⁷ Failure to report means there is less evidence upon which to build a disability claim.⁶⁸ While statistics on VA decisions are difficult to obtain, the VA reports that the majority of denials of disability claims for PTSD result from lack of service-connection evidence.⁶⁹

59. *Id.* at 463-64.

60. Jessica Wolfe et al., *Sexual Harassment and Assault as Predictors of PTSD Symptomatology Among U.S. Female Persian Gulf War Military Personnel*, 13 J. INTERPERSONAL VIOLENCE 40, 48 (1998) (using statistical analysis methods to generate reliable estimates).

61. *Id.* (responding to paucity of empirical analysis of military sexual assault cases).

62. See Veterans Health Care Act of 1992, Pub. L. No. 102-585, § 102, 106 Stat. 4943, 4845 (authorizing counseling for female veterans who sustained sexual assault or harassment while on active duty).

63. See Veterans Health Programs Extension Act of 1994, Pub. L. No. 103-452, § 101, 108 Stat. 4783, 4784 (amending statute by replacing “women” with “individuals”).

64. *Eliminating the Gaps*, *supra* note 10 (opening statement of Chairman John J. Hall) (describing incidence of sexual harassment and subsequent barriers to benefits).

65. See Paul M. Schimpf, USMC, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 MIL. L. REV. 149, 150 (2005). Schimpf describes this defense strategy as intended to make “the personal costs of the criminal process too great for [victims] to bear.” *Id.*

66. *Id.* at 150 (quoting from confrontational cross-examination of sexual assault victim at Article 32 hearing).

67. See *id.* (portraying UCMJ defense tactics as targeting sexual assault victim with “psychological warfare”).

68. See *Eliminating the Gaps*, *supra* note 10 (opening statement of Chairman John J. Hall) (describing incidence of sexual harassment and subsequent barriers to benefits).

69. See CONGRESS. BUDGET OFFICE, COST ESTIMATE: H.R. 5892 VETERANS DISABILITY BENEFITS

An applicant who seeks benefits for PTSD must provide proof of the stressor that caused the disorder.⁷⁰ By statute, the lay testimony of combat veterans is presumptively sufficient to establish a combat experience as an in-service stressor.⁷¹ In contrast, applicants whose stressor was military sexual assault do not have the benefit of that presumption.⁷² One author has criticized the disparity in treatment of combat veterans as compared to non-combat veterans, without specifically focusing on victims of military sexual assault as a particularly vulnerable class of non-combat veterans.⁷³

The VA recently expanded the types of stressors for which lay testimony may be sufficient to state a claim for benefits.⁷⁴ Previously, only the lay testimony of veterans who engaged in combat with the enemy or who were prisoners of war was sufficient to establish an in-service stressor.⁷⁵ Combat veteran status was typically demonstrated by assignment to a combat unit or by award of combat medals.⁷⁶ Under the new VA regulation, the lay testimony of a veteran whose stressor was fear of hostile military or terrorist activity, but whose service may not otherwise be categorized as combat, such as in the case of a mechanic or a cook serving in a hostile area, is sufficient to establish the service-connection element of a PTSD claim.⁷⁷ The presumption will stand in the absence of clear and convincing evidence to the contrary, and so long as the stressor was consistent with the places, types, and circumstances of the veteran's service.⁷⁸ The change is intended to take into account the realities of service in a non-combat unit in a modern war zone, where hostile forces can,

CLAIMS MODERNIZATION ACT OF 2008 2 (July 28, 2008), available at <http://www.cbo.gov/ftpdocs/96xx/doc9626/hr5892.pdf> (reporting 50% approval rate for PTSD disability claims).

70. 38 C.F.R. § 3.304(f) (2010) (describing regulatory criteria for PTSD disability claims).

71. 38 U.S.C. § 1154(b) (2006) (mandating acceptance of lay testimony absent clear and convincing evidence to contrary).

72. See 38 C.F.R. § 3.304(f)(5) (2010) (omitting lay evidence provision from section applicable to PTSD caused by sexual assault).

73. See Alison Atwater, Comment, *When Is a Combat Veteran a Combat Veteran?: The Evidentiary Stumbling Block For Veterans Seeking PTSD Disability Benefits*, 41 ARIZ. ST. L.J. 243, 270 (2009) (urging congressional action rectifying non-combat veteran benefit disparity in light of modern combat realities).

74. Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843, 39,850 (July 13, 2010) (to be codified at 38 C.F.R. pt. 3) (announcing final rule liberalizing evidentiary standard for in-service stressor element of PTSD claim).

75. 38 C.F.R. § 3.304(f) (2010) (detailing PTSD claims and service-connection presumptions for prisoners of war, combat veterans, and MSA victims).

76. See *West v. Brown*, 7 Vet. App. 70, 75 (1994) (noting military citations as one means of proof of combat service).

77. See Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. at 39,844-45 (detailing changes to 38 C.F.R. § 3.304(f) by creating new category for these veterans); see also *Eliminating the Gaps*, supra note 10 (statement of First Sergeant Delilah Washburn, USAF (Ret.), Spokeswoman for Nat'l Ass'n of State Women Veterans Coordinators) (discussing how soldiers' non-combat duties can still expose them to combat stress).

78. See Stressor Determinations for Posttraumatic Stress Disorder, 74 Fed. Reg. at 42,617 (proposed Aug. 24, 2009) (requiring confirmation by VA psychiatrist or psychologist of claimed stressor "to ensure standardization and consistency").

and do, target all members of the military.⁷⁹ This change would not affect the evidentiary requirement for veterans who were victims of MSA.⁸⁰

Under the current system, a veteran's testimony that sexual assault occurred, even if corroborated by some evidence that was contemporaneously created with the alleged event, may not necessarily be sufficient to prevail on a claim.⁸¹ Even if a written record exists that shows a veteran reported distress during military service, such evidence might not be considered sufficient to prevail on a claim if the distress could reasonably be attributed to a different cause at the time the record was written.⁸² In either case, the investigation requires significant fact-finding on the part of the veteran and the VA.⁸³ Furthermore, pre-military sexual abuse may pose an obstacle to obtaining benefits for PTSD caused by sexual assault during military service.⁸⁴ Such abuse may allow the VA to satisfy its clear and unmistakable evidentiary burden.⁸⁵

This question arose in congressional hearings considering the Veterans Disability Benefits Claims Modernization Act of 2008 (VDBCMA).⁸⁶ Among other provisions, the bill would have required a study on adjusting the disability compensation schedule to better account for the effects of mental disabilities.⁸⁷ The proposed legislation required the Secretary of Veterans Affairs to make the disability claims process for mental disabilities consistent with current medical knowledge.⁸⁸ The bill also proposed modifying the jurisdiction of the Court of Appeals for Veterans Claims to allow remand without disposition of all issues

79. See *id.* at 42,618 (citing increase in guerilla warfare and insurgent activities as prompting need for rule change).

80. See Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843, 42,618 (July 13, 2010) (to be codified at 38 C.F.R. pt. 3) (noting paragraph (4)—MSA section—would become paragraph (5) without change).

81. See *Farrell v. Peake*, No. 06-1645, 2008 WL 2962679, at *5 (Vet. App. July 30, 2008) (unpublished memorandum decision) (affirming denial of benefits when BVA found discipline records did not corroborate MSA claim).

82. See *Lambert v. Peake*, No. 05-1910, 2008 WL 2128053, at *5-6 (Vet. App. Feb. 29, 2008) (unpublished memorandum decision) (holding SMRs do not corroborate MSA claim because author attributed stress to routine military duty).

83. See Title Redacted by Agency, 00-03 430, Bd. Vet. App. 0318972, 2003 WL 23616831, at *5-6 (Aug. 5, 2003) (remanding and requiring veteran to furnish extensive information concerning private mental health treatment).

84. See Title Redacted by Agency, 00-05 165, Bd. Vet. App. 0206615, 2002 WL 32547234, at *4-5 (June, 20 2002) (noting VA examiner attributed veteran's mental health symptoms to childhood abuse and denying claim).

85. See *Patrick v. Principi*, 103 F. App'x 383, 384 (Fed. Cir. 2004) (unpublished decision) (describing VA's burden of proof in undetected pre-existing disability cases).

86. *Veterans Disability Benefits Claims Modernization Act of 2008: Hearing on H.R. 5892 Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 16-17 (2008) [hereinafter *Hearing on H.R. 5892*] (statement of Kerry Baker, Associate National Legislative Director, Disabled American Veterans).

87. H.R. 5892, 110th Cong. § 102(a) (2008) (mandating study on compensation schedule's potential disparity between mental and physical disability compensation).

88. *Id.* § 102(b)(1)(A) (making specific reference to current editions of medical manuals such as DSM).

when benefits are ordered.⁸⁹ Although the VDBCMA passed in the House of Representatives, it later died in the Senate.⁹⁰

The regulation governing claims for service-connected PTSD resulting from sexual assault, 38 C.F.R. § 3.304(f), establishes the requirements needed to show the occurrence of a stressor.⁹¹ The National Organization of Veterans' Advocates, Inc. (NOVA) subsequently petitioned the Federal Circuit for review of the regulation's conformity, or lack thereof, with its statutory basis.⁹² The court denied NOVA's petition for review.⁹³ The court accepted the VA's argument that it was filling a gap created by 38 U.S.C. § 1154(a), which failed to define the types of evidence necessary to substantiate the service-connection element of a non-combat PTSD claim.⁹⁴ Accordingly, the court held the VA was free to fill that gap by regulating the nature and extent of proof necessary to substantiate a claim.⁹⁵ The court construed the VA's treatment of claims based on combat stressors as an exception to the rule requiring credible evidence of a stressor in PTSD claims.⁹⁶ The court did reiterate the requirement that the VA consider the veteran's lay testimony concerning an in-service sexual assault as part of its evaluation of the claim, but upheld § 3.304, which does not treat lay testimony as independently sufficient to substantiate a claim.⁹⁷ The court also held that § 3.304 did not conflict with 38 U.S.C. § 5107(b), which mandates that the VA consider all evidence, including lay

89. *Id.* § 202 (proposing changes to modify court's jurisdiction).

90. *Bill Summary & Status, 110th Congress (2007-2008), H.R. 5892*, LIBRARY OF CONGRESS, <http://hdl.loc.gov/loc.uscongress/legislation.110hr5892> (last visited Feb. 19, 2011) (describing latest major action as July 31, 2008, "Received in the Senate and Read twice and referred to the Committee on Veterans' Affairs").

91. 38 C.F.R. § 3.304(f)(5) (as subsequently amended in 2005, 2008, 2009, and 2010).

92. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1346 (Fed. Cir. 2003) (challenging § 3.304(f) as arbitrary, capricious, and abuse of discretion under 38 U.S.C. § 502 and not in accordance with §§ 1154(a) and 5107(b)). The Administrative Procedure Act permits judicial review of federal agency rule-making. *See* 38 U.S.C. § 502 (2006). Actions for review must be brought in the Court of Appeals for the Federal Circuit. *Id.* The court will reject agency rules that are "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *See Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1339 (Fed. Cir. 2003). "This review is highly deferential to the actions of the agency." *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 691 (Fed. Cir. 2000) (internal quotations omitted).

93. *Nat'l Org. of Veterans' Advocates*, 330 F.3d at 1346 (holding 38 C.F.R. § 3.304 valid because not arbitrary, capricious, or contrary to law).

94. *Id.* at 1350 (noting § 1154(a) mandates VA give "due consideration . . . to all pertinent medical and lay evidence"). The court held that § 3.304(f), the regulation expanding upon § 1154(a)'s mandate, did not conflict with the statute because it did not alter the VA's underlying obligation to consider all pertinent evidence. *See id.* at 1351.

95. *See id.* at 1351 (relying on VA's 38 U.S.C. § 501(a) authority to regulate veterans benefit entitlement proof and evidence).

96. *See id.* (construing § 3.304(f) as excepting combat and prisoner-of-war related claims from corroborating evidence requirement).

97. *See Nat'l Org. of Veterans' Advocates*, 330 F.3d at 1351 (noting § 3.304 does not abrogate VA's § 3.303 requirement). The VA continues to be responsible for considering "all pertinent medical and lay evidence," when making service-connection determination. *See id.* The court found that the combat rule was simply a legislative exception to the general rule precluding the exclusive use of lay evidence. *See id.*

evidence.⁹⁸ Despite NOVA's contention that this language shows the VA's responsibility to treat lay evidence on par with all evidence, the court determined that 38 U.S.C. § 1507(b) did not preclude § 3.304(f)'s "credible supporting evidence" requirement.⁹⁹ The ruling clarified that the inclusion of a requirement to consider lay testimony did not abrogate the need for additional credible evidence.¹⁰⁰

C. The Prevalence of Military Sexual Assault in the Armed Forces and the Veracity of Victims' Claims

Institutional suspicion of sexual assault claims has a long and sordid history in the Anglo-American judicial system.¹⁰¹ Sir Matthew Hale's oft-quoted warning regarding accusations of rape is no longer a part of accepted judicial practice:

It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.¹⁰²

Notwithstanding Lord Hale's view, very few estimates of the rate of false reports of sexual assault are based on credible research.¹⁰³ Most research articles published on the subject do not include information about their methodology that is necessary to evaluate reliability.¹⁰⁴ A few rely solely on anecdotal evidence.¹⁰⁵ The percentage of false reports found by

98. Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 330 F.3d 1345, 1351 (Fed. Cir. 2003) (quoting 38 U.S.C. § 5107(b)). The court considered whether the two conflicted because that conflict was one basis by which NOVA sought to have the regulation invalidated. *See id.* The portion of 38 U.S.C. § 5107(b) that NOVA questioned, and the court concluded did not conflict, reads, "[t]he Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits." *Id.*

99. *See id.* at 1352 (holding § 3.304(f) consistent with § 5701(b) in not precluding lay evidence).

100. *See id.* (finding lay testimony must still meet "credible supporting evidence" standard).

101. *See Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1071 (1991) (characterizing prevalence of rape myth as barrier to justice for rape victims).

102. SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 634 (Sollom Emlyn ed., Phila., Robert H. Small 1st Am. ed. 1847); *see also* Hardin v. State, 840 A.2d 1217, 1221-24 (Del. 2003) (collecting cases rejecting "Lord Hale" instruction and forbidding use in Delaware courts "under any circumstances"). One judge recalled the judicial birth of the rape corroboration requirement in an 1886 decision, which quoted Sir Hale's warning, and the legislative death of the doctrine in 1989. *See* State v. Schmidt, 750 N.W.2d 390, 404-05 (Neb. Ct. App. 2008) (Cassel, J., concurring).

103. *See* Kimberly A. Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 43-MAR PROSECUTOR 10, 10 (2009) (recognizing perception as barrier to successful prosecution of sexual assault cases).

104. *See id.* (describing research not considered credible due to lack of background information).

105. *See id.* at 10-11 (mentioning non-scientific methods and/or personal beliefs and accounts as sources of

methodologically rigorous research converges around 2-8%.¹⁰⁶ A British study described as “[t]he largest and most rigorous” in the area of research into false reporting of sexual assaults found a false reporting rate of 2.5%.¹⁰⁷ Nevertheless, stigma appears to remain, as one victim of MSA did not report three years of abuse by a superior until twenty years later because she “felt weak because I didn’t do anything about it. For a long time, I thought I was a bad person.”¹⁰⁸

Perhaps also frustrating for Lord Hale’s formulation is the fact that sexual assault is quite common.¹⁰⁹ In one study, 20% of female college students reported non-consensual, forced sexual intercourse during their lifetime.¹¹⁰ The risk factors for sexual assault in the military population are similar to those in the civilian world.¹¹¹ Barriers to reporting sexual assault are also similar to those civilians face, but military service members face their own unique challenges as well.¹¹²

Current military policy, recently modified in an attempt to encourage reporting of sexual assault,¹¹³ allows a victim of sexual assault to choose between two reporting methods: restricted and unrestricted.¹¹⁴ Restricted reporting allows a service member to disclose that he or she has been the victim of a sexual assault to certain officials without triggering a law enforcement investigation.¹¹⁵ A commanding officer, however, is given some information about the assault.¹¹⁶ In contrast, an unrestricted report with details of the incident will be disseminated to command and law enforcement for investigation.¹¹⁷ The unrestricted reporting can lead to inaction or even retaliation by military superiors.¹¹⁸ Nevertheless, some veterans’ advocates

research not considered credible).

106. *See id.* at 11 (comparing to non-rigorous studies reporting false reporting rates as high as 41%).

107. Lonsway et al., *supra* note 103, at 12 (citing 2005 British study by Kelly, Lovett, & Regan).

108. *See* Russell Goldman, *Female Veterans Seek Treatment for Sexual Assaults*, ABC NEWS, Oct. 31, 2007, <http://abcnews.go.com/US/story?id=3797346> (quoting United States Navy veteran Valerie Cortazzo).

109. *See* Nancy D. Brener et al., *Forced Sexual Intercourse and Associated Health-Risk Behaviors Among Female College Students in the United States*, 67 J. CONSULTING & CLINICAL PSYCHOL. 252, 254 (1999).

110. *See id.* (reporting data from 1995 National College Health Risk Behavior Survey).

111. *See* DEP’T OF DEF., TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 22 (2004), available at <http://www.defense.gov/news/may2004/d20040513satfreport.pdf> [hereinafter TASK FORCE REPORT] (comparing risk factors, such as youth, to civilian population).

112. *See id.* at 28 (describing findings regarding barriers to reporting sexual assault). Some barriers unique to the military that the Task Force identified include victim concern that reporting would damage unit cohesion or delay the victim’s future deployment or transfer. *See id.*

113. *See* FY08 REPORT, *supra* note 12, at 8 (encouraging reporting of sexual assault as part of broader goal of eliminating conduct).

114. *See id.* at 9-10 (describing two reporting options for sexual assault within military).

115. *See id.* at 10 (stating prohibition on release of information beyond medical professionals and victim advocate absent applicable exception).

116. *Id.* (explaining information given to command to ensure others are kept safe).

117. FY08 REPORT, *supra* note 12, at 10 (contrasting reporting options).

118. *See Eliminating the Gaps, supra* note 10, at 8 (statement of Anuradha K. Bhagwati, Executive Director, Service Women’s Action Network) (criticizing DOD for failing to enforce own policies against this

worry that a restricted report will not be accessible by the VA in a future claim for benefits for PTSD resulting from sexual assault, and that failure to punish perpetrators will allow them to assault again.¹¹⁹ In addition, the military may need to refine the restricted reporting option to protect victims' confidentiality.¹²⁰

MSA is arguably more devastating to its victims than civilian sexual assault.¹²¹ One study found that MSA victims experienced poorer psychological functioning and poorer quality of life than civilian victims.¹²² The study's authors opined that the disparity could be a result of the nature of military service.¹²³ For example, active duty military personnel generally have less ability than civilian victims to distance themselves from a perpetrator after a sexual assault, especially if the victim and perpetrator work closely together.¹²⁴

D. Military Sexual Assault and PTSD: The Clinical Connection and the Compensation Obstacle

A woman sexually assaulted while in the military is nine times more likely to suffer from PTSD than a woman who was not assaulted.¹²⁵ According to VA benefit statistics, as of 2008, 17,075 female veterans have established service-connection and obtained benefits for PTSD.¹²⁶ Of those claims, 5,774 designated personal trauma as the source of their PTSD, in contrast to combat or other stressors.¹²⁷ Meanwhile, 22,283 women could not establish service-connection for PTSD and consequently could not obtain benefits.¹²⁸ No comprehensive examination has been conducted on the extent to which female veterans are denied disability compensation.¹²⁹

conduct).

119. See *Hearing on H.R. 5892*, *supra* note 86, (statement of Joy J. Ilem, Deputy National Legislative Director, Disabled American Veterans) (referring to VA Under Secretary for Health Work Group on Women Veterans report).

120. See Vallandingham, *supra* note 5, at 220-33 (recommending improvements to restricted reporting option).

121. See generally Alina Suris et al., *Mental Health, Quality of Life, and Health Functioning in Women Veterans: Differential Outcomes Associated with Military and Civilian Sexual Assault*, 22 J. INTERPERSONAL VIOLENCE 179, 192 (2007) (comparing impact of sexual assault in civilian and military populations).

122. See *id.* at 179 (noting difference no longer statistically significant following statistical adjustments).

123. See *id.* at 193 (describing traumatization resulting from continuing to share work-environment with MSA perpetrator).

124. See *id.* (pointing to difficulty in swiftly obtaining transfer to another work site within military system).

125. See Suris et al., *supra* note 11, at 755 (detailing greater likelihood of PTSD in veteran victims of MSA).

126. See *Eliminating the Gaps*, *supra* note 10, at 37 (statement of Bradley G. Mayes, Director, Compensation and Pension Service, Veterans Benefits Administration) (referring to data subsequently provided by VA following hearing).

127. *Id.* at 46 (classifying personal trauma claims by type, including sexual harassment and assault).

128. *Id.* at 47 (describing PTSD as among top ten disability claims).

129. *Id.* at 8 (statement of Anuradha K. Bhagwati, Executive Director, Service Women's Action Network)

The DOD has taken significant steps to prevent MSA.¹³⁰ Among the DOD's efforts is a website providing guidance on sexual harassment policy and resources for sexual assault victims.¹³¹ The DOD's Sexual Assault Prevention and Response Office (SAPRO) is rapidly fulfilling its mission, holding its first training session in March 2010.¹³²

Veterans advocacy groups have expressed concern over the difficulties of the VA process for substantiating a PTSD claim based on MSA.¹³³ Their representatives made statements at a congressional hearing in 2009.¹³⁴ A representative of Disabled American Veterans (DAV) characterized the benefits process when a sexual assault is not officially reported during service as "very challenging."¹³⁵ She raised concerns with the compatibility of VA evidentiary requirements and the restricted sexual assault reporting option in the military.¹³⁶ Sexual assaults reported through the restricted process may not be easily accessible for future evaluation in the VA benefit process if steps are not taken to ensure better communication between the DOD office tasked with retaining the reports and the VA.¹³⁷ A spokeswoman for the Service Women's Action Network lamented the "overwhelming odds" against veterans seeking a disability rating for PTSD caused by MSA.¹³⁸ A representative for the Wounded Warrior Project urged Congress to take affirmative steps to encourage victims of unreported sexual assault to seek counseling.¹³⁹

There are obstacles within the VA health care system to victims of MSA obtaining appropriate medical care.¹⁴⁰ One veterans advocate highlighted some barriers to effective delivery of care: the lack of female clinicians,

(suggesting VA supply claim denials including gender breakdown).

130. FY08 REPORT, *supra* note 12, at 5-6 (detailing policy initiatives and programs aimed at reducing MSA).

131. See *Sexual Assault Prevention and Response Office*, DEP'T OF DEF., <http://www.sapr.mil> [hereinafter *SAPRO*] (last visited Feb. 19, 2011) (listing resources on policy and victims' programs).

132. *All Hands Radio News Podcast*, U.S. NAVY (Mar. 1, 2010) (downloaded from <http://www.navy.mil/media/audio/AHRN%20100301.mp3>).

133. See *Eliminating the Gaps*, *supra* note 10, at 65-66 (statement of Joy J. Ilem, Deputy National Legislative Director, Disabled American Veterans) (pointing out BVA policy manuals lack procedure for obtaining restricted reports of sexual assault).

134. See generally *Eliminating the Gaps*, *supra* note 10 (hearing statements from various veterans advocacy groups).

135. See *id.* at 65-66.

136. *Id.* (reporting DAV unable to confirm restricted reports used to substantiate claims).

137. See *Eliminating the Gaps*, *supra* note 10, at 65-66 (prepared statement of Joy J. Ilem, Deputy National Legislative Director, Disabled American Veterans) (noting SAPRO training does not appear to include VA coordination procedure).

138. *Id.* at 69 (statement of Anuradha K. Bhagwati, Executive Director, Service Women's Action Network) (characterizing application of standard of proof of MSA as "unjust and grossly irresponsible").

139. *Id.* at 71 (statement of Dawn Halfaker, Vice President of the Wounded Warrior Project) (describing VA medical facility institutional barriers to encouraging female veterans to seek care).

140. *Eliminating the Gaps*, *supra* note 10, at 68-69 (statement of Anuradha K. Bhagwati, Executive Director, Service Women's Action Network) (identifying barriers to VA's effective delivery of care to MSA victims).

unsympathetic minimizing by administrative staff, and poorly trained or apathetic medical staff.¹⁴¹

Even in the face of substantial evidence of MSA as an in-service stressor, the BVA has remanded cases for review by a VA medical professional tasked as a fact-finder.¹⁴² For example, one veteran claimed he was sodomized while stationed in Germany during the Vietnam War; however, he could not recall the date of the assault.¹⁴³ Claiming to have developed PTSD as a result, he applied for disability benefits from the VA's regional office in 2006.¹⁴⁴ The BVA's review of his service record revealed that, after the date of the alleged incident, the veteran was treated for hemorrhoids, blood in his stool and a sexually-transmitted disease.¹⁴⁵ The veteran identified his attackers and produced a letter from his sister stating that he told her about the incident.¹⁴⁶ Although the BVA's decision acknowledged that the evidence submitted satisfied 38 C.F.R. § 3.304(f)(3), the BVA found that:

[i]n essence, unlike claims for PTSD that do not involve an assertion of personal or sexual assault, VA can take into account the opinion of a medical professional as to the likelihood that the stressor actually occurred, rather than just relying on such a professional to determine whether or not a stressor supports a diagnosis of PTSD.¹⁴⁷

As a result, the VA denied the veteran's claim.¹⁴⁸ On remand, the BVA instructed the medical professional to determine if it was "as likely as not" that the assault took place.¹⁴⁹ The ultimate finding of the medical professional in this case is not available because litigants' names are redacted from BVA decisions.¹⁵⁰

While critical to the VA decision, the medical professional's review of the evidence is not intended to supplant the VA decision maker's fact-finding

141. *See id.* at 68 (arguing deficiencies contribute to lack of understanding concerning how to treat female victims of MSA).

142. Title Redacted by Agency, 07-00 184, Bd. Vet. App. 0927683, 2009 WL 2935046, at *3-4 (July 24, 2009) (remanding PTSD claim for VA medical professional's determination as to whether sexual assault occurred).

143. *See id.* at *2-3 (reviewing veteran's military service from February 1968 to May 1970).

144. *Id.* (describing procedural history of case and Michigan field office's denial of claim).

145. *See id.* at *3 (identifying diseases as genital or anal warts).

146. Title Redacted by Agency, 07-00 184, 2009 WL 2935046, at *3 (pointing out sister did not indicate if veteran told her when event occurred).

147. *Id.* "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." 38 C.F.R. § 3.304(f)(5).

148. Title Redacted by Agency, 07-00 184, Bd. Vet. App. 0927683, 2009 WL 2935046, at *4 (July 24, 2009) (instructing medical professional "to determine the likelihood that the Veteran's claimed personal assault actually took place").

149. *See id.* (indicating term "as likely as not" meant more than "within the realm of possibility").

150. *See generally id.* (showing redacted title and use of "veteran" in place of litigant's name).

authority.¹⁵¹ In publishing the final version of § 3.304, the VA acknowledged a commenter to the final rule who was concerned that implementing § 3.304(f)(5) meant instructing a medical professional to make a factual finding, not offer a medical opinion.¹⁵² The VA did not revise the rule.¹⁵³ Instead, the VA pointed out that the opinion of the medical professional was not binding on the VA.¹⁵⁴ The VA rule drafters envisioned the role of the medical professional as helping interpret evidence to assist VA decision makers in understanding it.¹⁵⁵

In contrast, the BVA has concluded that accepting a medical professional's opinion that a stressor occurred is tantamount to accepting a veteran's unsubstantiated testimony.¹⁵⁶ In response to another comment on the proposed rule, the VA declined to revise the rule "to provide 'that a competent and credible diagnosis of PTSD due to personal assault during service will be accepted as proof of service connection in the absence of evidence to the contrary.'"¹⁵⁷ The VA criticized the commenter's proposal as inconsistent with current case law.¹⁵⁸ The VA pointed out it is not bound to accept a veteran's uncorroborated account of a stressor, nor to "accept the social worker's and psychiatrist's unsubstantiated opinions that the alleged PTSD had its origins in appellant's [military service]."¹⁵⁹ The VA also noted it need not accept doctors' opinions that are based on an unsubstantiated history given by a patient.¹⁶⁰ Because doctors typically rely on their patients' statements in reaching a diagnosis, the VA found a doctor's opinion as to whether or not the stressor occurred was "no more probative" than a veteran's statement.¹⁶¹ Of course, this medical inquiry is unnecessary for combat veterans whose lay testimony is sufficient to establish the stressor element.¹⁶² The VA predicted that if the adjudicator found the doctor's opinion to be "competent and

151. See Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330, 10,330 (Mar. 7, 2002) (to be codified at 38 C.F.R. pt. 3) (describing medical professional's opinion as part of all evidence weighed).

152. See *id.* (describing concern that "essence" of rule took fact-finding from VA).

153. See *id.* (declining revision because medical professional's opinion "could be helpful" to VA adjudicators).

154. *Id.* (emphasizing VA adjudicator's role as fact-finder).

155. See Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,330 (mentioning medical professional's opinion could assist veteran through corroboration).

156. See *id.* (evaluating commenter's suggestion to accept diagnostician's judgment of patient's credibility).

157. Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330, 10,330 (Mar. 7, 2002) (to be codified at 38 C.F.R. pt. 3) (rejecting commenter's proposed revision to § 3.304(f)).

158. See *id.* (citing *Wood v. Derwinski*, 1 Vet. App. 190, 192 (1991) (holding VA not bound to accept unsubstantiated opinions that PTSD was caused by military service), and *Godfrey v. Brown*, 8 Vet. App. 113, 121 (1995) (holding VA not bound to accept medical opinion based on veteran's recitation of medical history)).

159. *Id.* (citing *Wood v. Derwinski*, 1 Vet. App. 190, 192 (1991)).

160. *Id.* (citing *Godfrey v. Brown*, 8 Vet. App. 113, 121 (1995)).

161. See Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,330 (characterizing doctor's opinion as simply reciting patient's statement).

162. See 38 U.S.C. § 1154(b) (2006) (stating lay testimony of combat veteran sufficient proof of stressor if consistent with combat service).

credible,” the opinion would be accepted as competent medical evidence.¹⁶³

The onerous evidentiary requirements for substantiating claims have led to calls for reform.¹⁶⁴ One such reform would make a physician’s diagnosis of MSA-related conditions sufficient to obtain VA care.¹⁶⁵ Another would require the VA to provide same-sex counselors to victims of MSA.¹⁶⁶ A third would allow victims of MSA to receive VA-paid care outside the VA system if MSA-qualified VA counselors were not locally available.¹⁶⁷

The VA’s actions indicate that it has recognized the problem.¹⁶⁸ An internal report found barriers, unique to women, to effectively seeking proper psychological care post-deployment.¹⁶⁹ The report made a number of suggestions for improving this and other problems related to the VA’s delivery of health care to female veterans.¹⁷⁰ Whether the VA will obtain sufficient funding to implement these recommendations remains an open question.¹⁷¹ At present, more progress is required.¹⁷²

III. ANALYSIS

A. *Leaving Behind the Stereotypes of Sexual Assault*

The Pentagon has taken important steps to end sexual assault in the military.¹⁷³ By establishing a command devoted to ensuring compliance with anti-sexual harassment policies and procedures, the military has demonstrated

163. Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330, 10,330 (Mar. 7, 2002) (to be codified at 38 C.F.R. pt. 3) (expressing belief doctor’s opinion would be accepted when no contrary evidence in record).

164. See *Eliminating the Gaps*, *supra* note 10, at 69 (statement of Anuradha K. Bhagwati, Executive Director, Service Women’s Action Network) (listing recommendations to bridge gap between treatment of male and female veterans).

165. See *id.* (urging acceptance of lay testimony as sufficient to establish MSA stressor).

166. *Id.* at 72-73 (statement of Dawn Halfaker, Vice President of the Wounded Warrior Project) (criticizing current VA practice of only “strongly encouraging” this practice).

167. *Id.* at 75 (statement of First Sergeant Delilah Washburn, USAF (Ret.), President, National Association of State Women Veterans Coordinators) (suggesting option of fee-based or contract care when VA resources are inadequate).

168. See *Veterans Disability Benefits Claims Modernization Act of 2008: Hearing on H.R. 5894 Before the Subcomm. on Disability Assistance and Men’s Affairs of the H. Comm. on Veterans’ Affairs*, 110th Cong. 63-64 (2008) (statement of Joy J. Ilem, Deputy National Legislative Director, Disabled American Veterans) (referring to VA Under Secretary for Health Work Group on Women Veterans report).

169. See *id.* at 60 (noting fragmented delivery of health services)

170. See *id.* at 62 (outlining specific recommendations).

171. See *id.* at 63-64 (questioning ability of VA to implement change without increased funding).

172. See *Eliminating the Gaps*, *supra* note 10, at 68 (statement of Anuradha K. Bhagwati, Executive Director, Service Women’s Action Network) (characterizing award of disability rating to female veterans as “grossly inadequate”).

173. See Veterans Health Programs Extension Act of 1994, Pub. L. No. 103-452, 108 Stat. 4783, 4784 (amending counseling program by removing “women” from statute and replacing with “individuals”).

its commitment to lowering the rate of sexual assault.¹⁷⁴ Until then, however, there will be veterans who were sexually assaulted during their service.¹⁷⁵ Some of these victims will develop PTSD.¹⁷⁶ When they seek disability compensation, the VA should treat them equitably and avoid an overly burdensome process, partly premised on a societal mistrust of sexual assault accusations.¹⁷⁷

The Pentagon can reduce the stigma associated with MSA claims and encourage victims to report MSA by ensuring officials treat their claims seriously.¹⁷⁸ Methodically rigorous studies of the veracity of sexual assault claims place the false reporting rate at 2.5%, which is similar to other crimes.¹⁷⁹ Nevertheless, shame and silence remain while victims of MSA decline to report incidents for decades, if ever.¹⁸⁰

B. Building a Bridge Too Far: The Disparity in the VA's Treatment of Veterans with PTSD Based on the Claimed Stressor

The disparity in the VA's treatment of combat veterans as compared to non-combat veterans is quite controversial.¹⁸¹ In addition to facing the same challenges as other non-combat veterans, those seeking benefits for PTSD caused by military sexual assault seem to face additional hurdles.¹⁸² The VA can require veterans to furnish extensive information concerning private mental health treatment.¹⁸³ Non-combat veterans are tasked with providing proof of an in-service stressor.¹⁸⁴ VA examiners can deny claims upon concluding that the veteran's PTSD is attributable to childhood abuse.¹⁸⁵ The VA can choose to ignore the conclusions of the veteran's long-time physician in favor of an

174. See *SAPRO*, *supra* note 131 (listing resources on policy and victims' programs as part of Pentagon's efforts).

175. See Suris et al., *supra* note 11, at 755 (finding woman assaulted in military nine times more likely to suffer from PTSD).

176. *Id.*

177. See Lonsway et al., *supra* note 103, at 22 (addressing societal stereotypes of false accusations). See generally Torrey, *supra* note 101 (discussing how distrust of rape claims prevents justice for victims).

178. See TASK FORCE REPORT, *supra* note 111, at 28 (detailing barriers to effective sexual assault reporting).

179. *Id.* (stating rates of false reporting)

180. See Goldman, *supra* note 108 (reporting Navy veteran's disclosure of military sexual assault twenty years after incident).

181. See Atwater, *supra* note 73, at 270 (urging congressional reform to eliminate combat and non-combat distinction in light of contemporary combat realities).

182. See *supra* Part II.D (detailing barriers unique to MSA victims).

183. See Title Redacted by Agency, 00-03 430, Bd. Vet. App. 0318972, 2003 WL 23616831, at *3-4 (Aug. 5, 2003) (explaining alternative, detailed evidence necessary for MSA claims).

184. See Atwater, *supra* note 73, at 250 (explaining non-combat veterans' lay testimony of in-service stressor insufficient to support claim).

185. See Title Redacted by Agency, 00-05 165, Bd. Vet. App. 0206615, 2002 WL 32547234, at *2-4 (June 20, 2002) (demonstrating obstacle posed by pre-military sexual abuse).

opinion based on a single visit and record review by a VA physician.¹⁸⁶

C. Change is Necessary: Reforming the BVA Fact-Finding Process

By remanding cases for medical fact-finding, the BVA appears to be engaging in the type of process feared by critics of the proposed changes to § 3.304(f).¹⁸⁷ Specifically, the BVA is allowing medical professionals to take on a fact-finding role regarding events they did not witness.¹⁸⁸ The language in § 3.304 can be interpreted in the manner suggested by the VA rule-makers at the time they rejected the commenter's suggestion.¹⁸⁹ In their response, the rule-makers stated their belief that information provided by the medical professional "could be helpful" to the VA fact-finder.¹⁹⁰ The characterization of one potential use of the information as "helpful" seems to suggest the rule-makers envisioned the role of the medical professional as that of an expert, not as a fact-finder.¹⁹¹

In practice, medical professionals seem to have adopted the latter role.¹⁹² In one case, a veteran presented medical evidence consistent with sexual assault in the form of diagnoses of sexually transmitted diseases.¹⁹³ The BVA required a medical evaluation of whether or not this evidence was consistent with sexual assault despite the presence of sexually transmitted diseases, which is one example of acceptable evidence of PTSD caused by MSA set forth in § 3.304.¹⁹⁴ Most troubling is that this type of evidence is listed only a few sentences before the provision allowing for referral to a medical professional, making it curious how the BVA could avoid reading them together.¹⁹⁵

The BVA's reasoning departs from the regulatory intent as described in the

186. See Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330, 10,330 (Mar. 7, 2002) (to be codified at 38 C.F.R. pt. 3) (citing *Wood v. Derwinski*, 1 Vet. App. 190, 192 (1991), and *Godfrey v. Brown*, 8 Vet. App. 113, 121 (1995)).

187. See *id.* (describing concern that "essence" of rule took fact-finding from VA).

188. See *id.* (citing *Godfrey v. Brown*, 8 Vet. App. 113, 121 (1995) (holding VA "is not required to accept doctors' opinions that are based upon the appellant's recitation of medical history").

189. See 38 C.F.R. § 3.304(f)(5) (2010) (allowing VA to 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").

190. Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,330 (declining revision).

191. See *id.* (emphasizing VA adjudicator's fact-finding role in rejecting concern that medical expert could supplant that role).

192. See Title Redacted by Agency, 07-00 184, Bd. Vet. App. 0927683, 2009 WL 2935046, at *3-4 (July 24, 2009) (remanding for medical opinion as to whether it was "as likely as not" assault occurred).

193. See *id.* at *3 (describing veteran's treatment for hemorrhoids, blood in stool, and sexually-transmitted disease).

194. See 38 C.F.R. § 3.304(f) (2010) (listing types of evidence that may be used to corroborate veteran's account of stressor incident).

195. See *id.* (including non-exclusive list of types of evidence that may be used to corroborate veteran's account).

final notice of the modified rule.¹⁹⁶ First, the rule-makers have determined that some types of evidence corroborate a veteran's account of in-service sexual assault, such as a diagnosis of sexually transmitted diseases or pregnancy.¹⁹⁷ Second, should a veteran offer evidence not included in the list, the BVA may submit the evidence to a medical expert to determine if the type of evidence offered supports the conclusion that a sexual assault occurred.¹⁹⁸ This appears to be the result of a misunderstanding between the BVA adjudicators and the BVA rule-makers.¹⁹⁹

D. A Better Model: Eliminating the Contemporaneous Proof Requirement from the Stressor Element

Unlike combat veterans, whose uncorroborated lay testimony is sufficient as a matter of law to substantiate their stressor, veterans with PTSD caused by MSA must produce contemporaneous evidence that the sexual assault occurred during their military service.²⁰⁰ Still, certain types of contemporaneous evidence are not enough.²⁰¹ The Federal Circuit has characterized the MSA claims process as an exception to the general rule created for combat veterans.²⁰² A better solution is to make the acceptance of veterans' lay testimony the rule and not the exception.²⁰³ While some might assume this change would open the floodgates to improper claims, it is important to recall the various requirements necessary to establish the existence of PTSD in the first instance.²⁰⁴ A veteran must undergo a clinical screening resulting in a PTSD diagnosis to substantiate a claim.²⁰⁵ Further, there is no substantial pecuniary reward at the end of a successful PTSD claim, as a successful veteran can expect to receive compensation within 100-200% of the federal poverty

196. See Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330, 10,331 (Mar. 7, 2002) (to be codified at 38 C.F.R. pt. 3) (predicting VA adjudicator would accept physicians findings when found "competent and credible").

197. See 38 C.F.R. § 3.304(f) (listing types of evidence that may be used to corroborate veteran's account of stressor incident).

198. *Id.* (providing BVA may submit evidence to medical expert for opinion).

199. See *supra* Part II.D.

200. 38 C.F.R. § 3.304 (2010) (setting disparate standards for evidence based on claimed stressor).

201. See *Farrell v. Peake*, No. 06-1645, 2008 WL 2962679, at *5 (Vet. App. July 30, 2008) (unpublished memorandum decision) (affirming denial of benefits when BVA found discipline records insufficient to corroborate MSA claim).

202. See *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1350-51 (Fed. Cir. 2003) (upholding regulation requiring credible evidence of stressor except claims from combat and imprisonment during war).

203. See Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330, 10,330 (Mar. 7, 2002) (to be codified at 38 C.F.R. pt. 3) (rejecting proposed revision to § 3.304(f) to accept as sufficient lay testimony with medical support).

204. See DSM-IV-TR, *supra* note 57, at 467-68 (detailing six-part test and multi-symptom diagnostic criteria).

205. See 38 C.F.R. § 3.304(f)(5) (2010) (requiring clinical diagnosis in PTSD claim).

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guidelines.²⁰⁶

IV. CONCLUSION

Long dead, and officially repudiated, Lord Hale and his oft-quoted warning about the veracity of rape accusations live on in the form of societal distrust of sexual assault claims.²⁰⁷ One way this distrust manifests itself is through the disparity in treatment, both in policy and practice, of veterans who claim benefits for post-traumatic stress disorder caused by military sexual assault. This disparity begins with the statutory distinction between combat and non-combat veterans. That disparity should be corrected with a unified approach. When a veteran's medical doctor has diagnosed him or her with PTSD, and the veteran's lay testimony supports a stressor during military service, an appropriate disability claim should be granted. PTSD is a serious diagnosis, one that is not easily fabricated. In addition, there is no motivation to do so. The brass ring at the end of this process comes primarily in the form of medical care for the disability, and perhaps a modest disability pension in the vicinity of the poverty line. Simply put, there is no pot of gold at the end of this process.

The veterans disability claims process exists for a reason; entitlement programs cost taxpayers money. Their disbursements must be closely controlled to conserve resources and ensure their availability to those who need them. This important reality, however, should not eclipse the purpose of the veterans disability program: repaying America's debt to its men and women in uniform. Veterans who sustain injuries while serving in the armed forces deserve appropriate care after their service has ended. This country should afford that care whether those injuries were physical or mental, and whether they were inflicted on the battlefield or in the barracks. Ours is too proud a history for anything less.

Sexual assault and mental illness share a history of distrust, stigma, and shame. Ending that pervasive tradition begins with equitable treatment for victims of sexual assault and people with psychological disorders. Reforming the disability system for veterans with PTSD caused by MSA provides a unique opportunity to do both.

Ben Kappelman

206. See *supra* notes 39-40 and accompanying text (describing VA disability pension in relation to federal poverty guidelines).

207. See generally HALE, *supra* note 102.