Military Sexual Trauma
Legal Arguments

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Additional weight given to medical opinion regarding occurrence of the assault

The VA acknowledges that a medical professional is qualified to give an opinion regarding the occurrence of the in-service personal assault. The VA United States Court of Appeals for Veterans Claims Court has held that the "VA has provided special evidentiary development procedures, including the interpretation of behavior changes by a clinician and interpretation in relation to a medical diagnosis." Moreau v. Brown 9 Vet. App. 389, 395-96 (1996). In addition, 38 C.F.R. § 3.304(f)(3) provides that VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether the evidence indicates that a personal assault occurred.

Furthermore, the VA recognizes the difficulty of obtaining in-service records that corroborate a veteran's statement in cases of sexual assault, and affords a veteran making a PTSD claim based on a sexual assault a more relaxed standard of evidence. In other types of cases, an opinion by a mental health professional based on a post-service examination cannot be used to establish the occurrence of a stressor, however in cases of personal assault, it may be used. See Patton v. West, 12 Vet. App. 272, 281 (1999). The U.S. Court of Appeals for the Federal Circuit in Menegassi v. Shinseki, 638 F.3d 1379, 1382 (Fed. Cir. 2011), expressly [has held] that, in PTSD cases where the alleged in-service stressor is a sexual assault, 'under 38 C.F.R. § 3.304 (f) (5), medical opinion evidence may be submitted for use in determining whether occurrence of the stressor is corroborated.'" See, YR v. West, 11 Vet. App. 393 (1998). "[I]t is undisputed and clear from the record that the appellant has been unequivocally diagnosed several times with PTSD. It is also clear that the mental health professionals' diagnoses accepted her account of an in-service sexual assault as the precipitating cause of her PTSD. Therefore, the only remaining disputed issue is whether the veteran has submitted credible evidence to establish that the claimed in-service assault actually occurred." Ibid.

Corroborating Evidence

38 C.F.R. §3.304(f)(5) provides that "evidence from sources other than the veteran's service records may corroborate the veteran's account of the stressor incident." Per this regulation, such evidence may include *inter alia* "deterioration in work performance...episodes of depression...anxiety without an identifiable cause; or unexplained economic or social behavior changes." This evidence can be used to show behavior changes following the claimed assault. "PTSD claims involving allegations of personal assault fall within the category of situations in

which it is not unusual for there to be an absence of service records documenting the events of which the Veteran complains....evidence from sources other than the Veteran's service records may corroborate an account of a stressor incident." See Patton v. West, 12 Vet. App. 272, 281 (1999). The VA M21-1, Part III, 5.14c subparagraph (8) (re-designated Part VI, 11.38b(2)), specifically provides that "[i]f the military record contains no documentation that a personal assault occurred, alternative evidence might still establish an in-service stressful incident." Behavior changes that occurred at the time of the incident may indicate the occurrence of an in-service stressor. Furthermore, the M21-1 Subparagraph (9) provides that [r]ating boards may rely on the preponderance of evidence to support their conclusions even if the record does not contain direct contemporary evidence.

The VA M21-1MR, Part IV, subpart ii, Chapter 1, Section D, Subparagraph 13 instructs the rating board to "accept a buddy statement as corroboration of a claimed in-service stressor, so long as the statement is consistent with the time, place, and circumstances of the service of both the Veteran and the buddy."

Veteran's testimony is competent corroborating evidence

As a lay person, the Veteran is competent to provide evidence of observable events, including having been harassed and/or assaulted. See Savage v. Gober, 10 Vet. App. 488, 496 (1997). The question thus becomes one of credibility. When adjudicating a PTSD claim based on alleged in-service sexual assault, the BVA may not treat the absence of records/reports of the MST as evidence that the MST did not occur. See AZ v. Shineski, 731 F. 3d 1303 (2013). "When assessing the credibility of lay statements, the Board may consider factors such as facial plausibility, bias, self-interest, and consistency with other evidence of record. See Buchanan v. Nicholson, 451 F.3d 1331, 1337 (Fed. Cir. 2006). The Board may consider the absence of contemporaneous medical evidence but may not determine that lay evidence lacks credibility solely because it is unaccompanied by contemporaneous medical evidence. Buchanan, 451 F.3d at 1331. When a medical condition or symptom has not been noted in the medical records, the Board may not consider that as negative evidence unless it is the sort of condition or symptom that would normally be noted or reported." See Buczynski v. Shinseki, 24 Vet.App. 221, 226-27 (2011) and Henderson v. Shinseki, Docket No. 12-0869, 2013 U.S. App. Vet. Claims LEXIS 999, at *25 (Vet. App. June 25, 2013).

The VA has made it clear that many incidents of personal assaults are not reported and, for this reason, established special regulations to deal with the evidentiary problems this raises. 65 Fed. Reg. 61,132-01 (2000) (proposed rule). See also AZ v. Shineski, 731 F. 3d 1303, 1312-15 (Fed. Cir. 2013 - summarizing evidence of the underreporting of personal assaults in the military). CAVC has ruled that such lay evidence which pertains to matters for which a claimant or witness has first-hand knowledge ("such as observed symptomology") constitutes competent evidence of a claim. See Layno v. Brown, 6 Vet. App. 465, 469 (1994); Washington v. Nicholson, 19 Vet. App. 362, 368 (2005).

VA's Duty to investigate MST claims

The VA is obligated under 38 U.S.C. § 5103A to make reasonable efforts to obtain records pertaining to another individual if: (a) those records were adequately identified, would be relevant to the [v]eteran's claim, and would aid in substantiating the claim; and (b) VA would be

authorized to disclose the relevant portions of such records to the [v]eteran under the Privacy Act and 38 U.S.C. §§ 5701 and 7332." VA G.C. Precedent Opinion 05-14; Molitor v. Shulkin, No. 15-2585 (Argued March 30, 2017, June 1, 2017). It “When a claimant adequately identifies relevant records of fellow service members that may aid in corroborating a claimed personal assault, the duty to assist requires the VA to attempt to obtain such records or, at a minimum to notify the claimant why it will not undertake such efforts.” Id.

Furthermore, when a veteran presents a well-grounded claim for service connection, the Secretary of Veterans Affairs has a duty to assist the veteran in developing the facts pertinent to his claim. 38 U.S.C.S. § 5107(a). “Such a claim need not be conclusive but only possible to satisfy the initial burden of § 5107(a). Once the veteran has presented such a claim, the burden is shifted to the secretary to assist the veteran in developing all relevant facts, not just those for or against the claim. The secretary's duty includes assisting the veteran in obtaining both government and civilian records. Courts have held that “when a veteran’s claim alleges post-traumatic stress disorder arising from in-service personal assault,” the VA has “a special obligation to assist a claimant in producing corroborating evidence of an in-service stressor” because of the “unique problems in documenting personal-assault claims.” Forcier v. Nicholson, 19 Vet. App. 414, 416 (U.S. 2006)