

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

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“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.”<sup>2</sup>

## I. Introduction

In the late 1990s, a disabled American veteran sought compensation.<sup>3</sup> His disability was physical.<sup>4</sup> And it was not suffered on the battlefield.<sup>5</sup> His claim was denied.<sup>6</sup> The veteran, Frank L. Gallegos, Jr., had been diagnosed with post-traumatic stress disorder (PTSD) caused by military sexual assault (MSA).<sup>7</sup> Gallegos’ account was corroborated by his medical doctor, who wrote, “[t]he

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<sup>2</sup> 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).

<sup>3</sup> *Gallegos v. Peake*, 22 Vet. App. 329, 331 (2008) (describing psychiatric treatment history of plaintiff-veteran).

<sup>4</sup> *Id.* (recounting clinical diagnosis of PTSD and major depressive disorder).

<sup>5</sup> *Id.* (describing veteran’s attestation of two rapes during service of court-martial sentence)

<sup>6</sup> *Id.* at 338-39 (holding BVA’s failure to provide proper notice under 38 C.F.R. § 3.304(f)(3) not prejudicial error).

<sup>7</sup> *Gallegos*, 22 Vet. App. 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.

symptoms [Gallegos] gives are quite consistent with a highly traumatized experience of sexual rape to a man.”<sup>8</sup> 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.<sup>9</sup> Absent that connection, Gallegos could not receive benefits in the form of psychological care and a disability pension.<sup>10</sup>

The Veterans Administration (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.”<sup>11</sup> Navigating the VA application process to obtain that care, support, and recognition presents unique challenges for veterans with mental illness, such as those with PTSD.<sup>12</sup> One cause of PTSD is sexual assault, which is particularly pervasive in the United States armed forces.<sup>13</sup> In 2008, 2,265 sexual assaults involving United States armed forces service members were officially reported to command.<sup>14</sup>

This article will begin by describing the process for seeking benefits as a disabled veteran in the United States.<sup>15</sup> Second, it will examine PTSD as a disability often perceived as invisible and subject to higher levels of scrutiny in the

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<sup>8</sup> *Id.* (quoting opinion of Veterans Administration physician Charles Oppegard, M.D.).

<sup>9</sup> *Id.* at 339 (explaining court cannot hold process “essentially unfair” when evidence submitted proved insufficient to convince Board of service-connection).

<sup>10</sup> *Id.* (denying benefits).

<sup>11</sup> See DEPARTMENT OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES § 1.02 (1993) (describing mission of the VA’s service).

<sup>12</sup> *Eliminating the Gaps: Examining Women Veterans’ Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans’ Affairs*, 111th Cong. (2009) (statement of Anuradh P. Bhagwati, Executive Director, Service Women’s Action Network) (describing challenges specific to disability claims for PTSD caused by MSA).

<sup>13</sup> Corbett, *supra* note 2, at 42 (collecting anecdotal accounts of MST from female veterans of Global War on Terror).

<sup>14</sup> DEPARTMENT OF DEFENSE, FY08 REPORT ON SEXUAL ASSAULT IN THE MILITARY app. C (2009) (listing statistical information concerning incidence of sexual assault and response of command to incidents).

<sup>15</sup> See § II.A. *infra* at 4.

benefit application process.<sup>16</sup> Third, it will consider the prevalence of military sexual assault in the armed forces and the veracity of victims' claims.<sup>17</sup> Fourth, it will describe the clinical connection between military sexual assault and PTSD and the obstacles to successful disability claims presented by the veterans disability application process.<sup>18</sup>

This article will then analyze the current system and suggest areas for improvement.<sup>19</sup> First, it will call for continued vigilance in abandoning the outmoded stereotypes of sexual assault and commend the Department of Defense for taking important steps to that end.<sup>20</sup> Second, it will recommend unification of the veterans' disability application process to provide equal treatment of PTSD claims regardless of claimed stressor.<sup>21</sup> Third, it will encourage reform of the BVA fact-finding process to ensure the Board does not delegate its fact-finding responsibilities to the medical professionals it turns to for evidence.<sup>22</sup> Fourth, it will advocate for elimination of the contemporaneous proof requirement from the stressor element to ensure claims with a sound clinical basis are not rejected for want of long-lost or never-created proof.<sup>23</sup>

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<sup>16</sup> See § II.B. *infra* at 9.

<sup>17</sup> See § II.C. *infra* at 15.

<sup>18</sup> See § II.D. *infra* at 18.

<sup>19</sup> See § III. *infra* at 25.

<sup>20</sup> See § III.A. *infra* 25.

<sup>21</sup> See § III.B. *infra* 26.

<sup>22</sup> See § III.C. *infra* 26.

<sup>23</sup> See § III.D. *infra* 28.

## 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.<sup>24</sup> By statute, veterans of the United States armed forces are entitled to compensation for disabilities or diseases acquired during wartime service.<sup>25</sup> This entitlement also exists for peacetime service.<sup>26</sup> A claim for veterans benefits has five elements.<sup>27</sup> First, status as a veteran.<sup>28</sup> Second, the existence of a disability.<sup>29</sup> Third, a connection between the veteran's military service and the disability.<sup>30</sup> Fourth, the degree of disability, which is expressed as a percentage representing decrease in work capacity.<sup>31</sup> Fifth, the effective date of the disability.<sup>32</sup> When a veteran does not manifest a disability until after his or her service has ended, the veteran may still demonstrate that the disability was acquired during service by evidence, or by discovery of the disability within the "presumption period."<sup>33</sup>

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<sup>24</sup> DEPARTMENT OF VETERANS AFFAIRS, A SUMMARY OF VA BENEFITS VA Pamphlet 21-00-1 (2009) (detailing variety of benefits and programs available to veterans through VA).

<sup>25</sup> 38 U.S.C. § 1110 (2006) (authorizing compensation for service-connected disability caused by personal injury or disease in wartime).

<sup>26</sup> § 1131 (authorizing compensation for service-connected disability caused by personal injury or disease in peacetime).

<sup>27</sup> *D'Amico v. West*, 209 F.3d 1322, 1326 (Fed. Cir. 2000) (listing five elements of claim for veterans' disability benefits).

<sup>28</sup> *Id.* (describing requirement of other than dishonorable discharge to obtain veteran status).

<sup>29</sup> *Id.* (requiring disability for claim).

<sup>30</sup> *Id.* (listing degree of disability as required element). This degree is expressed as a percentage. 38 C.F.R. § 4.130 (listing criteria for various disability ratings expressed in percentages).

<sup>31</sup> 38 C.F.R. § 4.130 (2009) (listing criteria for disability percentage dependent on symptoms described in DSM-IV).

<sup>32</sup> *D'Amico*, 209 F.3d at 1326 (requiring effective date of disability as element of claim).

<sup>33</sup> *Caluza v. Brown*, 7 Vet. App. 498, 505 (1995), *superseded by statute on unrelated grounds*, Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat.

The presumption period is a variable length of time after a veteran's service has officially ended.<sup>34</sup> If a disability is discovered during that time, the VA will consider it as if it was discovered during service for purposes of the service connection element.<sup>35</sup> This is significantly important because it affects the burden on each party in a dispute over benefits.<sup>36</sup> 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.<sup>37</sup> To rebut that presumption, the VA must "show clear and unmistakable evidence of both a preexisting condition and a lack of in-service aggravation to overcome the presumption of soundness for wartime service."<sup>38</sup>

The fourth element, the degree of disability, is determined by reference to standard criteria and reflected as a percentage.<sup>39</sup> The amount of compensation for a veteran is then determined from a table that varies by disability percentage and

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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).

<sup>34</sup> *Id.* (collecting authority describing different presumption periods for various maladies).

<sup>35</sup> *See Caluza*, 7 Vet. App. at 505 (describing impact 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* VA 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. 10867, 10871 (Mar. 9, 2010) (rejecting presumption of service connection warranted between illnesses and Gulf War-era exposure to depleted uranium).

<sup>36</sup> *See Patrick v. Principi*, 103 Fed. App'x. 383, 384 (Fed. Cir. 2004) (unpublished) (describing burden of proof on VA when disability discovered during service).

<sup>37</sup> *Id.* (citing "presumption of soundness" codified in 38 U.S.C. § 1111).

<sup>38</sup> *Id.* (quoting *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004) (construing § 1111)).

<sup>39</sup> *See* 38 C.F.R. § 4.130 (2009) (listing diagnostic criteria for each level of impairment for various mental disorders).

number of dependents.<sup>40</sup> The amount is generally increased annually to account for changes in cost of living.<sup>41</sup> Each veteran's disability percentage and family pattern will vary, but some examples illustrate the possible pension amount: a veteran 30% disabled alone will receive \$4,512 annually, a veteran 50% disabled with a spouse and a child will receive \$10,788, a veteran 100% disabled with that family pattern will receive \$35,184.<sup>42</sup> By way of comparison, the 2009 federal poverty guideline level for a family of three was \$18,310.<sup>43</sup> Thus, the income of such a family solely supported by a 100% disabled veteran is just under 200% of the poverty line.<sup>44</sup> An applicant for veterans' disability benefits is seeking this income as a disability pension.<sup>45</sup>

Veterans face a complex process for challenging adverse decisions.<sup>46</sup> The Board of Veterans' Appeals (BVA) is an entity within the VA charged with hearing appeals from preliminary decisions concerning awards of benefits.<sup>47</sup> The vast majority of the BVA's decisions concern claims for disability compensation or

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<sup>40</sup> See VETERANS BENEFIT ADMINISTRATION, VETERANS COMPENSATION BENEFITS RATE TABLES (2009), <http://www.vba.va.gov/bln/21/Rates/comp01.htm> (listing disability pension payments in dollars by percentage and dependents).

<sup>41</sup> *Id.* (noting there was no cost of living increase for 2010).

<sup>42</sup> *Id.* (listing compensation rates for variety of disability percentages and family patterns)

<sup>43</sup> Department of Health and Human Services Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4199, 4200 (Jan. 16, 2009).

<sup>44</sup> See VETERANS BENEFIT ADMINISTRATION, VETERANS COMPENSATION BENEFITS RATE TABLES (2009), <http://www.vba.va.gov/bln/21/Rates/comp01.htm>; Department of Health and Human Services Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4199, 4200 (Jan. 16, 2009) (\$35,184/\$18,310 = approximately 1.92).

<sup>45</sup> 38 U.S.C. 1155 (2006) (authorizing Secretary of Veterans Affairs to create a schedule of reductions in earning capacity resulting from disability).

<sup>46</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009) (statement of Anuradh P. Bhagwati, Executive Director, Service Women's Action Network) (mentioning courage, stamina, and financial assistance necessary to pursue and appeal reconsideration of a denied claim).

<sup>47</sup> DEPARTMENT OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES § 1.03(a)(6) (describing job description and appointment process for BVA members).

survivor benefits.<sup>48</sup> Board decisions may be appealed to the Court of Appeals for Veterans Claims, the decisions of which may then be appealed to the Court of Appeals for the Federal Circuit.<sup>49</sup> The Federal Circuit is the first Article III court in this chain.<sup>50</sup>

Veterans' benefit law continues to evolve as 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.<sup>51</sup> In 2009, the court considered the claim of a veteran who injured his back while serving in the military.<sup>52</sup> The court chronicled the veteran's attempts to obtain a disability payment beginning in 1974.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> The Federal Circuit held a veteran's entitlement to disability benefits is a property interest protected by the

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<sup>48</sup> JAMES P. TERRY, FISCAL YEAR 2008 REPORT OF THE CHAIRMAN, BOARD OF VETERANS' APPEALS 3 (2009) (noting although Board has wide jurisdiction, 94.4% of appeals involve disability compensation or survivor benefits). The BVA conducted more personal hearings in 2008 than any year since 1991. *Id.*

<sup>49</sup> DEPARTMENT OF VETERANS AFFAIRS, M21-1 ADJUDICATION PROCEDURES § 1.03(b) (describing appellate review process of BVA decisions).

<sup>50</sup> Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315 (renaming United States Court for Veterans Claims).

<sup>51</sup> *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009) (ruling on question of first impression).

<sup>52</sup> *Id.* at 1291 (describing Cushman's injury while in Vietnam when sandbag fell damaging spine).

<sup>53</sup> *Id.* at 1292-93 (recounting partial disability award and subsequent dispute with VA lasting more than 30 years).

<sup>54</sup> *Id.* at 1293 (noting doctor's language in medical record had been altered to make disability appear less serious).

<sup>55</sup> *Id.* at 1294-95 (detailing procedural history and refusal of Court of Appeals for Veterans Claims to reverse Board).

Due Process Clause of the Fifth Amendment.<sup>56</sup> The court reasoned each regional circuit that had considered the issue found an applicant, as well as a recipient, possessed a property interest protected by due process when government benefits were nondiscretionary.<sup>57</sup> The court continued to find the veteran's right to a fair hearing was tainted by the consideration of the erroneous medical record.<sup>58</sup> This decision has the potential to alter the veteran's disability framework by providing new grounds to challenge decisions of the BVA.<sup>59</sup> 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.<sup>60</sup>

The military justice system is criticized for its institutional hostility to sexual assault victims, sometimes in harsh terms.<sup>61</sup> 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

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<sup>56</sup> *Cushman*, 576 F.3d at 1298 (finding veterans benefits are "nondiscretionary [and] statutorily mandated").

<sup>57</sup> *Id.* at 1297-98 (referencing regional circuit decisions on due process protections for applicants for various government benefits); *see, e.g.*, *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 489-90 (3d Cir. 1980) (considering applicant for a disabled child's annuity); *Mallette v. Arlington Cnty. Employees' Supplemental Ret. Sys. II*, 91 F.3d 630, 634-35 (4th Cir. 1996) (considering applicant for retirement benefits); *Hamby v. Neel*, 368 F.3d 549, 559-60 (6th Cir. 2004) (considering applicants for Medicaid benefits).

<sup>58</sup> *Id.* at 1299 (rejecting government's argument that process afforded was sufficient due process).

<sup>59</sup> *See Edwards v. Shinseki*, 582 F.3d 1351, 1357 (Fed. Cir. 2009) (Rader, C.J., additional views) (criticizing majority's opinion in *Cushman* as exceeding Supreme Court precedent).

<sup>60</sup> *See Id.* at 1358 (characterizing *Cushman* as inconsistent with Supreme Court precedent) (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

<sup>61</sup> *See* Major 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 characterizes permissible cross-examination tactics of sexual assault victim as "part of an overall campaign to revictimize a sexual assault survivor during the legal process." *Id.*

process.”<sup>62</sup> Prosecutions under the Uniform Code of Military Justice (UCMJ) can be particularly traumatic for victims, more so than in a civilian court system.<sup>63</sup> While statistics on VA decisions are difficult to obtain, the VA reports the majority of denials of disability claims for PTSD are because of lack of evidence of service-connection.<sup>64</sup>

## 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).<sup>65</sup> PTSD is a clinical diagnosis resulting from exposure to certain types of stressful incidents, called stressors, which result in specific diagnostic criteria.<sup>66</sup> The symptoms include, in short, intrusive recollections of the event, avoidant or numbing behavior, and hyper-arousal, all lasting more than a month.<sup>67</sup>

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.<sup>68</sup> Women who were sexually assaulted exhibited a statistically significant 18.9% increase in

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<sup>62</sup> *Id.* (quoting from confrontational cross-examination of sexual assault victim at Article 32 hearing).

<sup>63</sup> See Schimpf, *supra* n. 61, at 150 (portraying UCMJ proceeding defense tactics as targeting sexual assault victim with “psychological warfare”).

<sup>64</sup> See CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE OF H.R. 5892 VETERANS DISABILITY BENEFITS CLAIMS MODERNIZATION ACT OF 2008 2 (July 28, 2008) (reporting 50% approval rate for PTSD disability claims).

<sup>65</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR 467-68 (4th ed.) (Washington D.C., 2000) (detailing six-part test and multi-symptom diagnostic criteria).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Jessica Wolfe, et al, *Sexual Harassment and Assault as Predictors of PTSD Symptomatology Among U.S. Female Persian Gulf War Military Personnel*, 13 JOURNAL OF INTERPERSONAL VIOLENCE February 1998, at 40, 48 (1998) (responding to paucity of empirical analysis of military sexual assault cases).

PTSD symptoms, compared to women who did not report harassment.<sup>69</sup> Still, female service members frequently do not report these crimes, which means they have limited documentary evidence to substantiate a claim for benefits later.<sup>70</sup> 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.<sup>71</sup> Two years later, Congress extended the same benefit to male veterans.<sup>72</sup>

An applicant who claims benefits for PTSD must provide proof of the stressor that caused the disorder.<sup>73</sup> By statute, the lay testimony of combat veterans is sufficient to establish a combat experience an in-service stressor.<sup>74</sup> The disparity in treatment of combat veterans as compared to non-combat veterans has been noted by commentators and criticized without specifically focusing on victims of military sexual assault as a particularly vulnerable class of non-combat veterans.<sup>75</sup>

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<sup>69</sup> *Id.* (using statistical analysis methods to generate reliable estimates).

<sup>70</sup> *Veterans Disability Benefits Claims Modernization Act of 2008: Hearing on H.R. 5894 Before the Subcomm. on Disability Assistance And Memorial Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 16-17 (2008) (opening statement of Chairman John J. Hall) (describing incidence of sexual harassment and subsequent barriers to benefits).

<sup>71</sup> *See Women Veterans Health Programs Act of 1992*, Pub. L. No. 102-585, 106 Stat. 4943, 4845 (authorizing counseling for female veterans who sustained sexual assault or harassment while on active duty).

<sup>72</sup> *See Veterans Health Programs Extension Act of 1994*, Pub. L. No. 103-452, 108 Stat. 4783, 4784 (amending statute by replacing "women" with "individuals").

<sup>73</sup> 38 C.F.R. § 3.304 (2009) (describing regulatory criteria for PTSD disability claims).

<sup>74</sup> 38 U.S.C. § 1154(b) (2006) (mandating acceptance of lay testimony absent clear and convincing evidence to the contrary).

<sup>75</sup> *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 to rectify non-combat veteran benefit disparity in light of modern combat realities).

The VA has recently taken steps to broaden the definition of combat veteran for purposes of accepting lay testimony.<sup>76</sup> At present, only the testimony of veterans who engaged in combat with the enemy or who were prisoners of war is sufficient to establish an in-service stressor.<sup>77</sup> Combat veteran status is typically shown by assignment to a combat unit or award of combat medals.<sup>78</sup> Under a proposed regulation currently under consideration by the VA, the lay testimony of a veteran whose stressor was fear of hostile military or terrorist activity will be sufficient to establish the service connection element of a PTSD claim.<sup>79</sup> 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.<sup>80</sup> 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, and do, target all members of the military.<sup>81</sup> This change would not affect the evidentiary requirement for veterans who were victims of MSA.<sup>82</sup>

Under the current system, which requires non-combat veterans to present evidence of a stressor, the veteran's testimony that a sexual assault occurred when corroborated by some evidence created contemporaneously with the alleged event is

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<sup>76</sup> Stressor Determinations for Posttraumatic Stress Disorder, 74 Fed. Reg. 42617, 42617 (proposed Aug. 24, 2009) (to be codified at 38 C.F.R. Part 3) (announcing proposed rule liberalizing evidentiary standard for in-service stressor element of PTSD claim).

<sup>77</sup> 38 C.F.R. § 3.304(f) (2009) (detailing PTSD claims service-connection presumptions for prisoners of war, combat veterans, and MSA victims).

<sup>78</sup> *West v. Brown* 7 Vet. App. 70, 76 (1994) (noting military citations are one means of proof of combat service).

<sup>79</sup> Stressor Determinations for Posttraumatic Stress Disorder, 74 Fed. Reg. 42617, 42617 (proposed Aug. 24, 2009) (to be codified at 38 C.F.R. Part 3) (detailing proposed changes to 38 C.F.R. § 3.304(f) by creating new category for these veterans). The comment period for the proposed rule closed in October of 2009. *Id.*

<sup>80</sup> *Id.* (requiring confirmation by VA psychiatrist or psychologist of claimed stressor "to ensure standardization and consistency").

<sup>81</sup> *Id.* (citing increase in guerilla warfare and insurgent activities as prompting need for rule change).

<sup>82</sup> *Id.* (noting paragraph (4), the MSA section, would become paragraph (5) without change).

not necessarily sufficient to ensure a positive result.<sup>83</sup> Even if a record exists that suggests a veteran reported distress during military service, the evidence might not be sufficient if the distress was attributed to another cause when the record was written.<sup>84</sup> In either case, the investigation requires significant fact-finding on the part of the veteran and the VA.<sup>85</sup> Pre-military sexual abuse may pose an obstacle to obtaining benefits for PTSD caused by sexual assault during military service.<sup>86</sup> This abuse may allow the VA to satisfy its clear and unmistakable evidentiary burden.<sup>87</sup>

This obstacle arose in Congressional hearings considering the Veterans Disability Benefits Claims Modernization Act of 2008.<sup>88</sup> Amongst other provisions, the bill considered would have required a study on adjusting the disability compensation schedule to better account for the effects of mental disabilities.<sup>89</sup> The Secretary of Veterans Affairs would have been required to better align the disability

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<sup>83</sup> See *Farrell v. Peake*, 2008 WL 2962679, \*5 (Vet. App. 2008) (unpublished memorandum decision) (affirming denial of benefits when BVA found discipline records insufficient to corroborate MST claim).

<sup>84</sup> See *Lambert v. Peake*, 2008 WL 2128053 (Vet. App. 2008) (unpublished memorandum decision) (holding SMRs do not corroborate MST claim because author attributed stress to routine military duty)

<sup>85</sup> See *Title Redacted by Agency*, Bd. Vet. App. 0318972 (2003) (remanding and requiring veteran to furnish extensive information concerning private mental health treatment).

<sup>86</sup> See *Title Redacted by Agency*, Bd. Vet. App. 0206615 (2002) (noting VA examiner attributed veteran's mental health symptoms to childhood abuse and denying claim).

<sup>87</sup> See *Patrick v. Principi*, 103 Fed. App'x. 383, 384 (Fed. Cir. 2004) (unpublished) (describing VA's burden of proof in undetected pre-existing disability cases).

<sup>88</sup> *Veterans Disability Benefits Claims Modernization Act of 2008: Hearing on H.R. 5894 Before the Subcomm. on Disability Assistance And Memorial Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 16-17 (2008) (statement of Kerry Baker, Associate National Legislative Director, Disabled American Veterans).

<sup>89</sup> H.R. 5894, 110th Cong. § 2 (2008) § 102(a) (mandating study on compensation schedule's potential disparity between mental and physical disability compensation).

claims process for mental disabilities with current medical knowledge.<sup>90</sup> The bill also would have modified the jurisdiction of the Court of Appeals for Veterans Claims to allow remand without disposition of all issues when benefits are ordered.<sup>91</sup> Although the Veterans Disability Benefits Claims Modernization Act of 2008 passed the House of Representatives, it died in the Senate.<sup>92</sup>

The VA first promulgated the current version of 38 C.F.R. § 3.304(f) in 2002, which sets the requirements to establish the occurrence of a stressor in claims for service connected-PTSD resulting from sexual assault.<sup>93</sup> The National Organization of Veterans' Advocates, Inc. ("NOVA") subsequently petitioned the U.S. Court of Appeals for the Federal Circuit for review of the regulation's conformity to its statutory basis.<sup>94</sup> The court denied NOVA's petition for review.<sup>95</sup> The court accepted the VA's argument that 38 U.S.C. § 1154(a) creates a gap by failing to define the types of evidence necessary to substantiate the service connection of a

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<sup>90</sup> H.R. 5894, 110th Cong. § 2 (2008) § 102(b)(1)(A) (making specific reference to current editions of medical manuals such as DSM).

<sup>91</sup> H.R. 5894, 110th Cong. § 2 (2008) § 202 (proposing changes to modify court's jurisdiction).

<sup>92</sup> H.R. 5894, 110th Cong. § 2 (2008), <http://hdl.loc.gov/loc.uscongress/legislation.110hr5892> (describing final status as "Received in the Senate and Read twice and referred to the Committee on Veterans' Affairs").

<sup>93</sup> 38 C.F.R. § 3.304 (as subsequently amended in 2005, 2008, and 2009).

<sup>94</sup> See *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 330 F.3d 1345, 1346 (Fed. Cir. 2003) [hereinafter *NOVA*] (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 Procedures 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." *Paralyzed Veterans of America v. Secretary 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).

<sup>95</sup> *NOVA*, 330 F.3d at 1346 (holding 38 C.F.R. § 3.304 valid because not arbitrary, capricious, or contrary to law).

non-combat PTSD claim.<sup>96</sup> The VA, then, was free to fill that gap by regulating the nature and extent of proof necessary to substantiate a claim.<sup>97</sup> The court construed the VA's treatment of claims based on a combat stressor as an exception to the rule requiring credible evidence of a stressor in PTSD claims.<sup>98</sup> The court did reiterate the requirement that the VA consider the veteran's lay testimony concerning an in-service personal 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.<sup>99</sup> The court also held § 3.304 did not conflict with 38 U.S.C. § 5107(b).<sup>100</sup> The court reasoned section 5701(b), which mandates that the VA consider all evidence, including lay evidence, did not preclude § 3.304(f)'s "credible supporting evidence" requirement.<sup>101</sup> The effect of the ruling was to clarify that the inclusion of a requirement to consider lay testimony did not abrogate the need for other credible evidence other than that testimony.<sup>102</sup>

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<sup>96</sup> *Id.* at 1350 (noting § 1154(a) mandates VA give "due consideration ... to all pertinent medical and lay evidence"). The court found § 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. *Id.* at 1351.

<sup>97</sup> *Id.* at 1351 (relying on VA's 38 U.S.C. § 501(a) authority to regulate veterans benefit entitlement proof and evidence).

<sup>98</sup> *Id.* (construing § 3.304(f) as requiring credible supporting evidence of stressor in PTSD claims excepting combat and imprisonment during war).

<sup>99</sup> *NOVA*, 330 F.3d at 1351 (noting § 3.304 does not abrogate § 3.303 requirement that VA consider "all pertinent medical and lay evidence," when making service connection determination). The court found the combat rule was simply a legislated exception to the general rule precluding the exclusive use of lay evidence. *Id.*

<sup>100</sup> *Id.* (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. *Id.* "The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits . . . ." *Id.*

<sup>101</sup> *Id.* at 1152 (holding § 3.304(f) consistent with § 5701(b) in not precluding lay evidence).

<sup>102</sup> *Id.* (finding lay testimony must still meet "credible supporting evidence" standard).

### 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.<sup>103</sup> Sir Matthew Hale's oft-quoted warning regarding accusations of rape is no longer a part of accepted judicial practice:

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"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."<sup>104</sup>

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Although better known for his opinion on accusations of rape, Sir Hale was also concerned by the prospect of an indignant jury wrongly believing "confident testimony sometimes of malicious and false witnesses."<sup>105</sup>

Very few estimates of the rates of false reports of sexual assault are based on credible research.<sup>106</sup> Most research articles published on the subject do not include

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<sup>103</sup> 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 in society and within juries as barrier to justice for rape victims).

<sup>104</sup> See *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"); see also *State v. Schmidt*, 750 N.W.2d 390, 404-05 (Neb. Ct. App. 2008) (Cassel, J., concurring) (recalling judicial birth of rape corroboration requirement in 1886 decision quoting Sir Hale's warning and legislative death of doctrine in 1989). SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 634 (Sollom Emlyn ed., Robert H. Small 1847) (1736) "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." *Id.*

<sup>105</sup> HALE, *supra* note 104, at 635 (urging caution and vigilance by courts to avoid hasty wrongful convictions driven by perjured testimony).

<sup>106</sup> Dr. Kimberly A. Lonsway, Sgt. Joanne Archambault (Ret.) & Dr. David Lisak, *False Reports: Moving Beyond The Issue To Successfully Investigate And Prosecute*

the information about their methodology necessary to evaluate their reliability.<sup>107</sup> A few rely on solely anecdotal evidence.<sup>108</sup> The percentage of false reports found by methodologically rigorous research converges around 2-8%.<sup>109</sup> 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%.<sup>110</sup> Yet stigma appears to remain, as one victim of MST did not report three years of abuse by a superior until 20 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,” she said.<sup>111</sup>

Perhaps also frustrating for Lord Hale’s formulation, sexual assault is quite common.<sup>112</sup> In one study, twenty percent of female college students reported non-consensual forced sexual intercourse during their lifetime.<sup>113</sup> The risk factors for sexual assault in the military population are similar to those in the civilian world.<sup>114</sup> Barriers to reporting sexual assault are also similar to those faced by civilians, but military service members face their own unique challenges as well.<sup>115</sup>

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*Non-Stranger Sexual Assault*, 43-MAR PROSECUTOR 10, 10 (2009) (recognizing perception as barrier to successful prosecution of sexual assault cases).

<sup>107</sup> *Id.* at 10 (describing research not considered credible due to lack of background information).

<sup>108</sup> *Id.* at 10-11 (mentioning non-scientific methods and/or personal beliefs and accounts as sources of research not considered credible).

<sup>109</sup> *Id.* at 11 (comparing to non-rigorous studies reporting false reporting rates as high as 41%).

<sup>110</sup> *Id.* at 12 (citing Kelly, Lovett, & Regan 2005 British study).

<sup>111</sup> 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).

<sup>112</sup> Nancy D. Brener, Pamela M. McMahon, Charles W. Warren, & Kathy A. Douglas, *Forced Sexual Intercourse and Associated Health-Risk Behaviors Among Female College Students in the United States*, 67 J. CONSULTING & CLINICAL PSYCHOL. 252, 254 (1999).

<sup>113</sup> *Id.* (reporting data from 1995 National College Health Risk Behavior Survey).

<sup>114</sup> U.S. DEP'T OF DEFENSE, TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 22 (Apr. 2004) (detailing risk factors, such as youth, and comparing to civilian population).

<sup>115</sup> *Id.* at 28 (reporting findings regarding barriers to reporting). Some barriers unique to the military identified by the Task Force include victim concern that

Current military policy, modified in an attempt to encourage reporting of sexual assault,<sup>116</sup> allows a victim of sexual assault to choose between two reporting methods: restricted and unrestricted.<sup>117</sup> 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.<sup>118</sup> A commanding officer, however, is given some information about the assault.<sup>119</sup> In contrast, an unrestricted report will be disseminated to command and law enforcement for investigation.<sup>120</sup> In contrast to the limited disclosure following a restricted report, details of the incident are made available to the commanding officer and law enforcement.<sup>121</sup> The unrestricted reporting can lead to inaction or even retaliation by military superiors.<sup>122</sup> Yet, some veteran's advocates are concerned that a restricted report will not be accessible by the VA in a future claim for benefits for PTSD resulting from the sexual assault.<sup>123</sup> In addition, the military may need to

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reporting would damage unit cohesion or delay victim's future deployment or transfer. *Id.*

<sup>116</sup> DEPARTMENT OF DEFENSE 2008 REPORT ON SEXUAL ASSAULT IN THE MILITARY 8 (2008) (encouraging reporting of sexual assault as part of broader goal of eliminating conduct).

<sup>117</sup> *Id.* at 9-10 (describing two reporting options for sexual assault within military).

<sup>118</sup> *Id.* (stating prohibition on release of information beyond medical professionals and victim advocate absent applicable exception).

<sup>119</sup> *Id.* (explaining information given to command to ensure others are kept safe).

<sup>120</sup> *Id.* (contrasting reporting options).

<sup>121</sup> *Id.* (noting victims receive the same treatment and care under either option).

<sup>122</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009) (statement of Anuradh P. Bhagwati, Executive Director, Service Women's Action Network) (criticizing DoD for failing to enforce its own policies against this conduct).

<sup>123</sup> *Veterans Disability Benefits Claims Modernization Act of 2008: Hearing on H.R. 5894 Before the Subcomm. on Disability Assistance And Memorial Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 16-17 (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).

refine the restricted reporting option to ensure victims' confidentiality is protected.<sup>124</sup>

MSA may be more devastating to a victim than the experience of sexual assault as a civilian.<sup>125</sup> One study found poorer psychological functioning and poorer quality of life in MSA victims.<sup>126</sup> The study's authors opined that the disparity may result from the nature of military service.<sup>127</sup> For example, active duty military personnel generally have less ability to distance themselves from a perpetrator following a sexual assault, especially if the two work together.<sup>128</sup>

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

If a woman is assaulted in the military, she is nine times more likely to suffer from PTSD than a woman who was not.<sup>129</sup> VA benefit statistics indicate that as of 2008, 17,075 female veterans have established service connection for PTSD and obtained benefits.<sup>130</sup> Of those, 5,774 designated personal trauma as the source of

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<sup>124</sup> See Lieutenant Commander 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, 220-233 (2007) (offering suggestions to improve confidentiality and efficiency of restricted reporting option).

<sup>125</sup> 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, 192-93 (2007) (reporting results of comparative study of sexual assault in civilian and military populations).

<sup>126</sup> *Id.* (reporting disparity, but noting difference no longer statistically significant following statistical adjustments).

<sup>127</sup> *Id.* at 194 (describing traumatization resulting from continuing to share work-environment with MSA perpetrator).

<sup>128</sup> *Id.* (describing difficulty in swiftly obtaining transfer to another work site within military system).

<sup>129</sup> Alina Suris, et. al., *Sexual Assault in Women Veterans An Examination of PTSD Risk, HealthCare Utilization, and Cost of Care*, 66 PSYCHOSOMATIC MEDICINE 749, 755 (2004) (analyzing results of survey study of female VA healthcare patients).

<sup>130</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009)

their PTSD, as contrasted with combat experience or other stressors.<sup>131</sup> In contrast, 22,283 have been denied service connection for PTSD.<sup>132</sup> No comprehensive data exists on the extent to which female veterans are denied disability compensation.<sup>133</sup>

The Department of Defense has taken significant steps within the last decade to prevent MSA.<sup>134</sup> Part of the Department's efforts include a website designed to provide guidance on sexual harassment policy and resources for sexual assault victims.<sup>135</sup> The DOD's Sexual Assault Prevention and Response Office is rapidly fulfilling its mission, holding its first training session in March of 2010.<sup>136</sup>

Veterans advocacy groups have expressed concern at the difficulties of the VA process for substantiating a PTSD claim based on a military sexual assault.<sup>137</sup> A representative of Disabled American Veterans (DAV) characterized the process when a sexual assault is not officially reported during service as "very challenging."<sup>138</sup> She raised concern with the compatibility of VA evidence

(statement of Bradley G. Mayes, Director, Compensation and Pension Service, Veterans Benefit Administration) (listing data subsequently provided by VA following hearing).

<sup>131</sup> *Id.* (listing rates of personal trauma by type including sexual harassment and assault).

<sup>132</sup> *Id.* (describing PTSD as one of top ten disability claims).

<sup>133</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009) (statement of Anuradh P. Bhagwati, Executive Director, Service Women's Action Network) (referencing overwhelming odds to substantiate claim and lack of data on successful claims).

<sup>134</sup> DEPARTMENT OF DEFENSE 2008 REPORT ON SEXUAL ASSAULT IN THE MILITARY 5-6 (2008) (detailing variety of policy initiatives and programs aimed at reducing MSA).

<sup>135</sup> See SAPR Home Page available at <http://www.sapr.mil/> (listing resources on policy and victims' programs).

<sup>136</sup> ALL HANDS RADIO NEWS PODCAST (UNITED STATES NAVY Mar. 1, 2010).

<sup>137</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009) (statement of Joy J. Ilem, Deputy National Legislative Director, Disabled American Veterans) (pointing out VBA policy manuals lack procedure for obtaining restricted reports of sexual assault).

<sup>138</sup> *Id.*

requirements and the restricted sexual assault reporting option in the military.<sup>139</sup> Sexual assaults reported through the restricted process may not be as easily accessible for future evaluation in the VA benefit process if steps are not taken to ensure better communication between the Department of Defense office tasked with retaining the reports and the VA.<sup>140</sup> A spokeswoman for the Service Women's Action Network lamented the "overwhelming odds" against female veterans seeking a disability rating for PTSD caused by MST.<sup>141</sup> A representative for the Wounded Warrior Project urged Congress to take affirmative steps to encourage victims of sexual assault who have not reported to seek counseling.<sup>142</sup>

There are obstacles within the VA health care system to appropriate medical care for victims of MST.<sup>143</sup> One veterans' advocate highlighted the lack of female

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<sup>139</sup> *Id.*

<sup>140</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009) (prepared statement of Joy J. Ilem, Deputy National Legislative Director, Disabled American Veterans) (noting SAPRO training does not appear to include VA coordination procedure).

<sup>141</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009) (statement of Anuradh P. Bhagwati, Executive Director, Service Women's Action Network) (characterizing application of standard of proof of MST as "unjust and grossly irresponsible").

<sup>142</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009) (statement of Dawn Halfaker, Vice President of the Wounded Warrior Project) (describing VA medical facility institutional barriers to encouraging female veterans to seek care).

<sup>143</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009) (statement of Anuradh P. Bhagwati, Executive Director, Service Women's Action Network) (identifying barriers to VA's effectively delivery of care to MST victims).

clinicians, culturally conservative administrative staff, and poorly trained or apathetic medical staff as barriers to effective delivery of care.<sup>144</sup>

Even in the face of seemingly overwhelming contemporaneous 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.<sup>145</sup> For example, one veteran claimed to have been sodomized while stationed in Germany during the Vietnam era; however, he could not recall the exact date of the assault.<sup>146</sup> He subsequently developed PTSD and applied for disability benefits from the VA's regional office in 2006.<sup>147</sup> 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 stool and a contagious sexually-transmitted disease.<sup>148</sup> The veteran identified his attackers and produced a letter from his sister stating he told her about the incident.<sup>149</sup> Although the BVA's decision acknowledged that the evidence submitted satisfied 38 C.F.R. § 3.304(f)(4), 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."<sup>150</sup> As a result, the veteran's claim was denied and the case was remanded for a decision by a medical professional as to whether or not

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<sup>144</sup> *Id.* (arguing deficiencies contribute to lack of understanding concerning how to treat female victims of MST).

<sup>145</sup> *Title Redacted by Agency*, Bd. Vet. App. 0927683 (2009) (remanding PTSD claim for VA medical professional's determination as to if sexual assault occurred).

<sup>146</sup> *Id.* (discussing veteran's military service from February 1968 to May 1970).

<sup>147</sup> *Id.* (describing procedural history of case and Michigan field office's denial of claim).

<sup>148</sup> *Id.* (Condylomata acuminata (genital or anal warts)).

<sup>149</sup> *Title Redacted by Agency*, Bd. Vet. App. 0927683 (pointing out sister did not indicate if veteran told her when event occurred).

<sup>150</sup> *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)(4).

the sexual assault actually occurred.<sup>151</sup> On remand, the BVA instructed the medical professional to determine if it was “as likely as not” that the assault took place.<sup>152</sup> The ultimate finding of the medical professional in this case is not available because the litigant’s name is redacted from BVA decisions.<sup>153</sup>

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 authority.<sup>154</sup> In publishing the final version of § 3.304, the VA acknowledged a commentator to the final rule who asserted concern that implementing § 3.304(f)(4) meant instructing a medical professional to make a factual finding, not a medical opinion.<sup>155</sup> The VA did not revise the rule.<sup>156</sup> Instead, the VA pointed out that the opinion of the medical professional was not binding on the VA.<sup>157</sup> The VA rule drafters envisioned the role of the medical professional as helping to interpret evidence to assist VA decision makers in understanding it.<sup>158</sup>

In contrast, the BVA believes that accepting a medical professional’s opinion that the stressor occurred is tantamount to accepting the veteran’s unsubstantiated testimony.<sup>159</sup> 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

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<sup>151</sup> *Id.* (instructing medical professional “to determine the likelihood that the Veteran’s claimed personal assault actually took place”).

<sup>152</sup> *Title Redacted by Agency*, Bd. Vet. App. 0927683 (indicating the term “as likely as not” meant more than “within the realm of possibility”).

<sup>153</sup> *Id.* (showing redacted title and use of “veteran” in place of litigant’s name).

<sup>154</sup> *Post-Traumatic Stress Disorder Claims Based on Personal Assault*, 67 Fed. Reg. 10,330, 10,330 (Mar. 7, 2007) (to be codified at 38 C.F.R. pt. 3) (describing the medical professional’s opinion as part of all evidence weighed).

<sup>155</sup> *Id.* (describing concern that “essence” of rule took fact-finding from VA).

<sup>156</sup> *Id.* (declining revision because medical professional’s opinion “could be helpful” to VA adjudicators).

<sup>157</sup> *Id.* (emphasizing VA adjudicator’s role as fact-finder).

<sup>158</sup> *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).

<sup>159</sup> *Id.* (evaluating commenter’s suggestion to accept diagnostician’s judgment of patient’s credibility).

connection in the absence of evidence to the contrary.”<sup>160</sup> The VA criticized the proposed change as inconsistent with current case law.<sup>161</sup> The VA pointed out that it is not bound to accept a veteran’s uncorroborated account of a stressor nor “social worker’s and psychiatrist’s unsubstantiated opinions that the alleged PTSD had its origins in appellant’s [military service].”<sup>162</sup> The VA also noted it need not accept doctors’ opinions that were based on an unsubstantiated history given by a patient.<sup>163</sup> Because doctors typically rely on their patient’s 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.<sup>164</sup> Of course, this medical inquiry is unnecessary for combat veterans whose lay testimony is sufficient to establish the stressor element.<sup>165</sup> The VA predicted that if the adjudicator found the doctor’s opinion to be “competent and credible,” the opinion would be accepted as competent medical evidence.<sup>166</sup>

The onerous evidentiary requirements to substantiate claims have led to calls for reform.<sup>167</sup> One such reform would make a physician’s diagnosis of MST related

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<sup>160</sup> *Id.* (rejecting commenter’s proposed revision to § 3.304(f)).

<sup>161</sup> *Id.* (citing *Wood v. Derwinski*, 1 Vet. App. 190, 192 (1991) (holding VA not bound to accept unsubstantiated opinions of social workers that PTSD was caused by military service); *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)).

<sup>162</sup> *Id.* (citing *Wood v. Derwinski*, 1 Vet. App. 190, 192 (1991)).

<sup>163</sup> Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,330 (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.”)).

<sup>164</sup> *Id.* (characterizing doctor’s opinion as simply reciting patient’s statement).

<sup>165</sup> 38 U.S.C. § 1154(b) (stating lay testimony of combat veteran sufficient proof of stressor).

<sup>166</sup> Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,331 (expressing belief that doctor’s opinion would be accepted when no contrary evidence in record).

<sup>167</sup> *Eliminating the Gaps: Examining Women Veterans’ Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans’ Affairs*, 111th Cong. (2009) (statement of Anuradh P. Bhagwati, Executive Director, Service Women’s Action Network) (urging acceptance of lay testimony as sufficient to establish MST stressor).

conditions sufficient to obtain VA care.<sup>168</sup> Another would require the VA to provide same-sex counselors to victims of MST.<sup>169</sup> A third would allow victims of MST to receive VA-paid care outside the VA system if MST qualified VA counselors were not locally available.<sup>170</sup>

The VA's actions indicate it has recognized the problem.<sup>171</sup> The report found barriers unique to women in effectively seeking proper psychological care post-deployment.<sup>172</sup> The report made a number of suggestions for improving this and other problems related to health care delivery by the VA to female veterans.<sup>173</sup> Whether or not the VA will obtain sufficient funding to implement these recommendations remains an open question.<sup>174</sup> At present, more progress is required.<sup>175</sup>

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<sup>168</sup> *Id.* (listing recommendations to bridge gap between treatment of male and female veterans).

<sup>169</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009) (statement of Dawn Halfaker, Vice President of the Wounded Warrior Project) (criticizing current VA practice of only "strongly encouraging" this practice).

<sup>170</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009) (statement of First Sergeant Delilah Washburn, USAF (Ret.), Spokeswoman for National Association of State Women Veterans Coordinators) (suggesting option of fee-based or contract care when VA resources are inadequate).

<sup>171</sup> *Veterans Disability Benefits Claims Modernization Act of 2008: Hearing on H.R. 5894 Before the Subcomm. on Disability Assistance And Memorial Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 16-17 (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).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* (questioning ability of VA to implement change without increased funding).

<sup>175</sup> *Eliminating the Gaps: Examining Women Veterans' Issues: Joint Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs and the Subcomm. on Health of the H. Comm. on the Veterans' Affairs*, 111th Cong. (2009) (statement of Anuradh P. Bhagwati, Executive Director, Service Women's Action Network) (characterizing award of disability rating to female veterans as "grossly inadequate").

### III. Analysis

#### A. Leaving Behind the Stereotypes of Sexual Assault

The Pentagon has taken important steps to end sexual assault in the military.<sup>176</sup> In establishing a command devoted to ensuring compliance with anti-sexual harassment policies and procedures, the military has demonstrated its commitment to lowering the rate of incidence.<sup>177</sup> Until that goal is achieved, however, there will be veterans who were victimized by MSA.<sup>178</sup> Some will develop PTSD.<sup>179</sup> When these victims seek disability compensation, the VA should treat them equitably and avoid an overly burdensome process premised on societal mistrust of sexual assault accusations.<sup>180</sup>

Methodically rigorous studies of the veracity of sexual assault claims place the false reporting rate at 2.5%, similar to other crimes.<sup>181</sup> Still, stigma remains as victims of MST decline to report incidents for decades, if ever.<sup>182</sup> The Pentagon can reduce stigma and encourage victims to report MSA by ensuring their claims are treated seriously by officials.<sup>183</sup>

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<sup>176</sup> See, e.g., 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”).

<sup>177</sup> See SAPR Home Page available at <http://www.sapr.mil/> (listing resources on policy and victims’ programs as part of Pentagon’s efforts).

<sup>178</sup> See Suris, *supra* note 129, at 755 (finding woman assaulted in military nine times more likely to suffer from PTSD).

<sup>179</sup> *Id.*

<sup>180</sup> See Lonsway, Archambault, & Lisak, *supra* note 105, at 11.

<sup>181</sup> *Id.*

<sup>182</sup> See Goldman, *supra* note 111 (reporting Navy veteran’s disclosure of military sexual assault 20 years after incident).

<sup>183</sup> See U.S. DEP’T OF DEFENSE, *supra* note 114, at 28 (detailing barriers to effective sexual assault reporting).

## B. A Bridge Too Far: The Disparity in the BVA's Treatment of Veterans with PTSD Based on the Purported Stressor

The disparity in the VA's treatment of combat veterans as compared to non-combat veterans is controversial.<sup>184</sup> 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.<sup>185</sup> The VA can require the veteran to furnish extensive information concerning private mental health treatment.<sup>186</sup> Non-combat veterans are tasked with providing proof of an in-service stressor.<sup>187</sup> VA examiners can deny claims upon concluding the veteran's PTSD is attributable to childhood abuse.<sup>188</sup> The VA can choose to ignore the conclusions of the veteran's long-time physician in favor of an opinion formed based on a single visit and record review by a VA physician.<sup>189</sup>

## 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 activity commentators to the § 3.304(f) changes feared it would.<sup>190</sup> The language in the § 3.304 can be interpreted in the manner suggested by the VA

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<sup>184</sup> See Atwater, *supra* note 75 (urging Congressional reform to eliminate combat vs. non-combat distinction in light of contemporary combat realities).

<sup>185</sup> See § II.D *supra* at 18 (detailing barriers unique to MST victims).

<sup>186</sup> *Title Redacted by Agency*, Bd. Vet. App. 0318972 (remanding disability claim for PTSD).

<sup>187</sup> See Atwater, *supra* note 75

<sup>188</sup> *Title Redacted by Agency*, Bd. Vet. App. 0206615 (2002) (demonstrating obstacle posed by pre-military sexual abuse).

<sup>189</sup> Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,330 (citing *Wood v. Derwinski*, 1 Vet. App. 190, 192 (1991) (holding VA not bound to accept unsubstantiated opinions of social workers that PTSD was caused by military service); *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)).

<sup>190</sup> Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,330 (describing concern that "essence" of rule took fact-finding from VA).

rule-makers at the time they rejected the commentator's suggestion.<sup>191</sup> In their response, the rule-makers stated their belief that information provided by the medical professional "could be helpful" to the VA factfinder.<sup>192</sup> 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 factfinder.<sup>193</sup>

In practice, just the opposite role seems to have developed.<sup>194</sup> In one case, the veteran presented medical evidence consistent with sexual assault in the form of diagnosis of sexual transmitted diseases.<sup>195</sup> The BVA required a medical evaluation of whether or not this evidence was consistent with sexual assault despite the presence of sexual transmitted diseases, which is one example of acceptable evidence of PTSD caused by MST in § 3.304.<sup>196</sup> 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.<sup>197</sup>

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<sup>191</sup> 38 C.F.R. § 3.304(f) (allowing the 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").

<sup>192</sup> Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,330 (declining revision).

<sup>193</sup> *Id.* (emphasizing VA adjudicator's fact-finding role in rejecting concern that medical expert could supplant that role).

<sup>194</sup> *See Title Redacted by Agency*, Bd. Vet. App. 0927683 (remanding PTSD claim for evaluation by medical professional as to whether it was "as likely as not" that assault occurred).

<sup>195</sup> *Id.* (describing veteran's treatment for hemorrhoids, blood in stool and a contagious sexually-transmitted disease).

<sup>196</sup> 38 C.F.R. § 3.304(f) (listing types of evidence that may be used to corroborate veteran's account of the stressor incident).

<sup>197</sup> *Id.* (including non-exclusive list of types of evidence that may be used to corroborate veteran's account).

The BVA's reasoning is astonishing considering that the rule-makers described a different interpretation of the regulation.<sup>198</sup> First, the rule-makers have determined some types of evidence corroborate a veteran's account of in service sexual assault, such as diagnosis of sexually transmitted diseases or pregnancy.<sup>199</sup> Second, should a veteran offer evidence not included in the list, the VA may submit the evidence to a medical expert to determine if the type of evidence offered supports the conclusion that a sexual assault occurred.<sup>200</sup> This appears to be the result of a misunderstanding between the BVA adjudicators and the VBA rule-makers.<sup>201</sup>

#### 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 MST must produce contemporaneous evidence that the sexual assault occurred during their military service to substantiate their stressor.<sup>202</sup> Still, certain types of contemporaneous evidence are not enough.<sup>203</sup> The Federal Circuit has characterized the MST claims process as an exception to the general rule created for combat veterans.<sup>204</sup> A better solution would be to make the acceptance of veteran's

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<sup>198</sup> Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,331 (predicting VA adjudicator would accept physicians findings when found "competent and credible").

<sup>199</sup> See 38 C.F.R. § 3.304(f) (listing types of evidence that may be used to corroborate veteran's account of the stressor incident).

<sup>200</sup> *Id.* (providing BVA may submit evidence to medical expert for opinion).

<sup>201</sup> See § II.D. *supra* at 18.

<sup>202</sup> 38 C.F.R. § 3.304 (as subsequently amended in 2005, 2008, and 2009).

<sup>203</sup> See, e.g., *Farrell v. Peake*, 2008 WL 2962679, 5 (Vet. App. 2008) (unpublished memorandum decision) (affirming denial of benefits when BVA found discipline records insufficient to corroborate MST claim).

<sup>204</sup> *National Organization of Veterans' Advocates, Inc.*, 330 F.3d at 1350-51 (upholding VA regulation requiring credible evidence of stressor in all claims except combat and imprisonment during war).

lay testimony the rule and not the exception.<sup>205</sup> While this change would seem to open the floodgates to improper claims, it is important to recall the various requirements to establish the existence of PTSD in the first instance.<sup>206</sup>

Substantiating a PTSD claim requires a clinical diagnosis—a requirement that does not need to be abrogated.<sup>207</sup> 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 guidelines.<sup>208</sup>

#### IV. Conclusion

Long dead, and officially repudiated, Lord Hale and his oft-quoted warning about the veracity of sexual rape accusations live on in the form of societal distrust of sexual assault claims.<sup>209</sup> One way this distrust manifests itself is through the disparity in treatment, through policy and practice, of veterans who claim benefits for PTSD caused by MSA. This disparity begins with the statutory distinction between combat and non-combat veterans. That disparity should be corrected with a unified system. 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

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<sup>205</sup> See Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,330 (rejecting commenter's proposed revision to § 3.304(f) to provide lay testimony with medical support sufficient to substantiate claim).

<sup>206</sup> See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV-TR # (4th ed.) (Washington D.C., 2000) (detailing six-part test and multi-symptom diagnostic criteria)

<sup>207</sup> See 38 C.F.R. § 3.304(f)(4) (requiring clinical diagnosis in PTSD claim).

<sup>208</sup> See *supra* notes 44-45 and accompanying text on pages **Error! Bookmark not defined.-Error! Bookmark not defined.** (describing VA disability pension in relation to federal poverty guidelines).

<sup>209</sup> See, HALE, *supra* at note 105.

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 the taxpayers money and their disbursements must be closely controlled to prevent graft and misuse. 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 injury while serving in the Armed Forces deserve appropriate care for those injuries 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 not. 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 and persons with psychological disorders. Reforming the disability system for veterans with PTSD caused by MSA provides a unique opportunity to do both.