

A New Era for Establishing Service Connection for Posttraumatic Stress Disorder (PTSD): A Proposed Amendment to the Stressor Verification Requirement

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INTRODUCTION

The number of veterans filing claims for Department of Veterans Affairs (VA) disability compensation benefits for posttraumatic stress disorder (PTSD) continues to rise.² Recently, the Director of the Compensation and Pension Service at the Veterans Benefits Administration reported that the number of claims had grown from 120,000 in 1999 to 345,520 in 2008.³ While the volume of these claims promises only to increase even further as the nation's service men and women return from serving in major conflicts in Iraq and Afghanistan,⁴ so too will be the difficulty in establishing such claims with requisite evidence of a verified in-service stressor, given the unpredictable nature of these conflicts where traditional and clear battle lines are not drawn.⁵ As such conflicts and their inevitable traumatic events are of an often fluid and unpredictable nature, current

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² See Scott Simonson, *Back from War – A Battle for Benefits: Reforming VA's Disability Ratings System for Veterans with Post-Traumatic Stress Disorder*, 50 ARIZ. L. REV. 1177, 1178 (2008) (noting that "both the volume and the cost of PTSD benefits are soaring," and observing that "[f]rom 1999 to 2006, the number of veterans receiving PTSD benefits grew by 125%.").

³ Press Release, U.S. H.R., House Subcommittee Reviews Combat PTSD VA Process Overly Burdensome, Adversarial to Prove War Zone Injuries and Illnesses (Mar. 30, 2009), available at: <http://veterans.house.gov/news/PRArticle.aspx?NewsID=375>.

⁴ Researchers continue to evaluate the prevalence of PTSD among combat service persons. Nearly two million troops have served in these conflicts and studies "suggest that 10-18% of combat troops serving in [Operation Enduring Freedom and Operation Iraqi Freedom] have probable PTSD following deployment, and the prevalence does not diminish over time." Brett T. Litz & William E. Schlenger, *PTSD in Service Members and New Veterans of the Iraq and Afghanistan Wars*, 20 PTSD RESEARCH QUARTERLY 1, 3 (Winter 2009).

⁵ See Posttraumatic Stress Disorder, 74 Fed. Reg. 14,491, 14,492 (Mar. 31, 2009) (discussing the concern that a "theater of combat such as Iraq where combat is experienced by troops with varying military occupational specialties and who, because of the circumstances of their

VA regulations are not adequately equipped to address service connection claims for PTSD under these circumstances.

This Comment will outline the current and historical requirements for establishing service connection for PTSD set forth in VA regulations, with special attention to the manner in which a claimant must establish an in-service stressor. It will then discuss the perceived shortcomings of the current regulatory scheme as it relates to establishing the occurrence of an in-service stressor, especially in light of the non-traditional nature of current conflicts and conflicts of the recent past, such as Vietnam. Then, this Comment will offer a proposal to amend the current VA regulations governing service connection claims for PTSD that will provide an additional avenue for Veteran-claimants to establish the occurrence of an in-service stressor. Specifically, the authors propose that given the difficulty in documenting certain types of in-service stressors, VA should reconsider the requirement that the claimed trauma must be corroborated by evidence other than a proper medical diagnosis and the Veteran-claimant's credible account of that trauma.

I. CURRENT AND PREVIOUS REGULATORY SCHEME FOR ESTABLISHING SERVICE CONNECTION FOR PTSD

The mission of the VA compensation system is to provide for benefits when the Veteran-claimant has shown entitlement through satisfying the required elements of a claim. At its most basic, establishing such a claim requires the presence of a current disability, as well as a personal injury suffered or disease contracted in the line of duty, and a causal link between the two.⁶ That is, in order

service, may not be able to corroborate or establish the circumstances or conditions of their stressors.”); see also *The Nexus between Engaged in Combat with the Enemy and PTSD in an Era of Changing Warfare Tactics: Hearing before the House Committee on Veterans Affairs, Subcommittee on Disability Assistance & Memorial Affairs*, 111th Cong. (2009) [hereinafter *Hearings*] (statement of Ian C. De Planque, Assistant Director, Veterans Affairs and Rehabilitation Commission, American Legion), available at: <http://veterans.house.gov/hearings/hearing.aspx?newsid=356> (stating that “[d]ue to the fluidity of the modern battlefield and the nature of the enemy’s tactics, there is no defined front line or rear (safe) area.”).

⁶ 38 U.S.C. §§ 1110, 1131 (2006); 38 C.F.R. § 3.303 (2008).

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to establish service connection, a Veteran-claimant must generally demonstrate that he or she: (1) has a current disability supported by medical evidence; (2) due to an in-service event or injury; and that (3) a causal relationship exists between the current disability and the in-service event or injury.⁷

Apart from these general requirements, the Secretary of VA enjoys the statutory authority to provide additional regulations that flesh out or otherwise establish distinct criteria in relation to service connection claims for certain types of disabilities.⁸ Under this broad-reaching power, the Secretary thus “has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws.”⁹ This includes, in pertinent part, the ability to prescribe “regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws.”¹⁰

With respect to claims for PTSD, VA, under the direction of the Secretary, enacted 38 C.F.R. § 3.304(f), which sets forth the specific criteria required to establish service connection for this disorder.¹¹ In this regard, VA has provided recognition that PTSD causes barriers and impairment in a Veteran’s ability to work and develop productive social relationships, as is the general purpose behind an award of VA benefits.¹² Regarding an event that causes PTSD, the Executive Director of the National Center for PTSD, Matthew J. Friedman, has stated that in its initial formulation of

⁷ 38 C.F.R. § 3.303; *see* Hupp v. Nicholson, 21 Vet. App. 342, 349 (2007), *rev’d on other grounds*, Hupp v. Shinseki, No. 2008-7059, 2009 WL 1386056 (C. A. Fed. May 19, 2009); Hickson v. West, 12 Vet. App. 247, 253 (1999).

⁸ 38 U.S.C. § 501 (2006).

⁹ *Id.* § 501(a).

¹⁰ *Id.* § 501(a)(1).

¹¹ 38 C.F.R. § 3.304(f) (2008).

¹² *See* 38 C.F.R. § 4.1 (2008). The VA disability schedule provides that “[t]he percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations.” *Id.*; *see also* Amberman v. Shinseki, 570 F.3d 1377, 1380 (Fed. Cir. 2009).

the traumatic event embodied in the Diagnostic and Statistical Manual of Mental Disorders (DSM-III), the framers of the diagnosis “had in mind events such as war, torture, rape, the Nazi Holocaust, the atomic bombings of Hiroshima and Nagasaki, natural disaster (such as earthquakes, hurricanes, and volcano eruptions), and human-made disaster (such as factory explosions, airplane crashes, and automobile accidents).”¹³ Friedman has thus remarked that a clinician cannot make a PTSD diagnosis “unless the patient has actually met the ‘stressor criterion,’ which means that he or she has been exposed to an historical event that is considered traumatic.”¹⁴ He further has commented that “[a]lthough controversial when first introduced, the PTSD diagnosis has filled an important gap in psychiatric theory and practice” and that “[t]he key to understanding the scientific basis and clinical expression of PTSD is the concept of ‘trauma.’”¹⁵

With these concepts in mind, current VA regulations require that in order to substantiate a service connection claim for PTSD a Veteran-claimant generally must: (1) obtain medical evidence diagnosing the condition in accordance with the provisions of 38 C.F.R. § 4.125 (2008); (2) provide a link, established by medical evidence, between current symptoms and an in-service stressor; and (3) submit credible supporting evidence that the claimed in-service stressor occurred.¹⁶ The United States Court of Appeals for Veterans Claims (“Court”) has determined that “credible supporting evidence” that an in-service (non-combat) stressor occurred may include buddy statements and unit histories but may not include the Veteran-claimant’s lay testimony alone.¹⁷

¹³ Matthew J. Friedman, *Posttraumatic Stress Disorder: An Overview*, <http://www.ptsd.va.gov/professional/pages/ptsd-overview.asp>.

¹⁴ *Id.*

¹⁵ *Id.*; see also Direct Service Connection (Post-Traumatic Stress Disorder), 64 Fed. Reg. 32,807, 32,807 (June 18, 1999) (setting forth the DSM-IV definition of PTSD).

¹⁶ See *Daye v. Nicholson*, 20 Vet. App. 512, 515 (2006); accord *Posttraumatic Stress Disorder*, 73 Fed. Reg. 64,208, 64,209 (Oct. 28, 2008).

¹⁷ *Daye*, 20 Vet. App. at 515, 518 (stating that “[w]hen a claim for PTSD is based on a noncombat stressor, the noncombat veteran’s testimony alone is insufficient proof of a stressor.”) (internal quotation marks omitted).

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The current version of 38 C.F.R. § 3.304(f) exists as the end-product of numerous amendments and modifications dating back to 1993, when this regulation was first enacted. In its original form, the general PTSD portion of the regulation consisted only of one paragraph, which provided that service connection for PTSD required “medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed in[-]service stressor actually occurred, and a link, established by medical evidence, between current symptomatology and the claimed in[-]service stressor.”¹⁸ Incorporating a special and relaxed evidentiary standard of proof for documented combat veterans, the original regulation further provided that “[i]f the claimed stressor is related to combat, service department evidence that the veteran engaged in combat or that the veteran was awarded the Purple Heart, Combat Infantryman Badge, or similar combat citation will be accepted, in the absence of evidence to the contrary, as conclusive evidence of the claimed in[-]service stressor.”¹⁹ The regulation also contained a provision that provided, in essence, that a finding that the Veteran had been prisoner of war, “in the absence of evidence to the contrary,” would constitute “conclusive evidence of the claimed in[-]service stressor.”²⁰ Thus, for some veterans, namely those who served in combat or who were documented prisoners-of-war, establishing service connection for PTSD would be simpler with more relaxed standards, while for non-combat or non-prisoner-of-war veterans, establishing a claim for this disability would require additional proof that a claimed in-service stressor actually occurred.²¹

VA’s 1993 final rule additionally addressed one commentator’s interpretation that the Court had issued an “edict preventing VA from establishing service connection for PTSD in any case *unless it is able*

¹⁸ Direct Service Connection (Post-Traumatic Stress Disorder), 58 Fed. Reg. 29,109, 29,110 (May 19, 1993) (outlining the original version of 38 C.F.R. § 3.304(f)).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *Hearings*, *supra* note 5 (statement of Ian C. De Planque) (recognizing that “[c]ombat veterans have a huge advantage when attempting to establish service-connection for PTSD . . . [as] [c]laims for service-connection of a combat-related condition receive special treatment under law and regulation administered by [VA].”).

to obtain absolute proof that the claim[ed] in-service stressor[] occurred.”²² VA responded that such an interpretation was “clearly erroneous,” noting that the Court had observed that the “sine qua non of establishing a PTSD claim is ‘some corroboration’ of the claimed stressor, but [that] Congress has undisputably granted the Secretary of Veterans Affairs the authority to prescribe regulations with respect to the nature and extent of proof and evidence required in order to establish entitlement to benefits.”²³ VA thus observed that, pursuant to this authority, “the Secretary has determined that in claims for PTSD involving stressors which occurred under specific circumstances such as combat or being held as prisoner-of-war where events can never be fully documented, evidence establishing the claimed circumstances is sufficient to substantiate the occurrence of the claimed stressor.”²⁴

Since this initial regulation, and as observed above, VA has amended 38 C.F.R. § 3.304(f) multiple times in order to set forth additional provisions that would aid in establishing other stressors that proved to be difficult for Veteran-claimants to provide objective verification, such as in-service personal assault. In March 2002, VA issued a final rule that added a new paragraph to 38 C.F.R. § 3.304(f),²⁵ which outlined special considerations and defined additional types of evidence that could be used in service connection claims for PTSD based on personal assault. At this time, VA recognized the need to allow “evidence other than the veteran’s service records [to] corroborate the occurrence of the stressor.”²⁶ In promulgating this amendment, VA provided that lay statements could

²² Direct Service Connection (Post-Traumatic Stress Disorder), 58 Fed. Reg. at 29,110 (emphasis added).

²³ *Id.* (citing to 38 U.S.C. § 501(a)).

²⁴ *Id.*; see also Direct Service Connection (Post-Traumatic Stress Disorder), 64 Fed. Reg. at 32,807, 32,808 (recognizing that certain circumstances, such as prisoner-of-war confinement, constitute a “type of situation where events often can never be fully documented and therefore warrants the same relaxed adjudication requirements for service connection of PTSD as for those veterans who engaged in combat.”).

²⁵ Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. 10,330 (Mar. 7, 2002).

²⁶ *Id.*

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help to corroborate the occurrence of such an in-service stressor, and in some circumstances, such statements could constitute the sole source of the corroboration. The new paragraph provided, in part, that “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,”²⁷ and in the final rule, VA expressly commented that “whether a stressor occurred is a factual question that must be resolved by VA adjudicators.”²⁸ It determined, however, that “an opinion from an appropriate medical or mental health professional could be helpful in making that determination” and that “[s]uch an opinion could corroborate the claimant’s account of the stressor incident.”²⁹

In implementing this new paragraph in cases of PTSD based on in-service personal assault, VA signaled an intention that lay testimony, including a Veteran-claimant’s, could corroborate the occurrence of a stressor, and thus substantiate a claim for PTSD in conjunction with the submission of evidence of a current diagnosis attributable to the corroborated stressor.

At the time of the 2002 amendment, VA also responded to another suggestion that a “diagnostician’s acceptance of a veteran’s account of the claimed in-service stressor should be probative and sufficient evidence that the claimed in-service stressor occurred.”³⁰ VA replied that the current regulation was consistent with current case law, noting that there needed to be some corroborating evidence.³¹ It noted further, however, that “[i]f . . . VA finds that a doctor’s diagnosis of PTSD due to a personal assault is, as the commenter suggests, ‘competent and credible’ and there is no evidence to the contrary in the record, in all likelihood, such an opinion would constitute competent medical evidence.”³² Thus, in cases of

²⁷ 38 C.F.R. § 3.304(f) (2008).

²⁸ Post-Traumatic Stress Disorder Claims Based on Personal Assault, 67 Fed. Reg. at 10,330.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*, at 10,331.

PTSD claims based on in-service personal assault, a Veteran's statement, filtered through the opinion of a clinician, may constitute valid corroborating evidence of the in-service stressor in and of itself.

VA appears to have left open the question of whether a lay statement in such cases would be sufficient where no interpreting medical evidence exists. In response to a comment that the discussion of lay evidence in VA statutes 38 U.S.C. § 1154(a) and § 102 led to the conclusion that “credible lay evidence alone is sufficient to meet a veteran’s burden of proof if not rebutted by a preponderance of evidence,”³³ VA did not indicate wholesale disagreement with this proposition in *every* circumstance, but rather, it conveyed disagreement that such a proposition must *always* be the case: “We do not agree with the commenter’s conclusion that the referenced statutes and regulation support the proposition that a veteran’s sworn statement is sufficient in *all* cases to establish that an alleged personal assault occurred.”³⁴ Instead, VA commented that “[w]hile a veteran’s statement regarding an assault is certainly evidence that must be considered by VA in adjudicating a PTSD claim, VA is obligated to ‘review . . . the entire evidence of record,’ including ‘all pertinent medical and lay evidence,’ when making a determination regarding service connection. . . . [and] [t]herefore . . . must look to see whether other evidence in the record supports the occurrence of an in-service stressor.”³⁵

More recently, in March 2009, VA issued another final rule that amended 38 C.F.R. § 3.304(f) by adding a paragraph to address the situation where PTSD is actually diagnosed during active service.³⁶ The amendment provides that if evidence establishes a diagnosis of posttraumatic stress disorder during service and “the claimed stressor is related to that service, in the absence of clear and convincing evidence to the contrary, and provided that the claimed

³³ *Id.*

³⁴ *Id.* (emphasis added).

³⁵ *Id.*

³⁶ Posttraumatic Stress Disorder, 74 Fed. Reg. 14,491 (Mar. 31, 2009) (final rule); *see* Posttraumatic Stress Disorder, 73 Fed. Reg. 64,208 (Oct. 29, 2008) (interim final rule).

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stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor."³⁷ This new paragraph was expressly intended to "relax" the requirements for establishing PTSD that was diagnosed in-service by dispensing with the requirement of any stressor corroboration.³⁸

In the interim final rule, VA again supported the basis for requiring corroborating evidence in other instances, however. In this regard, VA cited to the traditional delay between the occurrence of an in-service stressor and the post-service onset of PTSD as well as the subjective nature of a person's response to an event, and concluded that when it first promulgated § 3.304(f) it was reasonable to require corroboration of the in-service stressor, a conclusion with which the courts have agreed.³⁹ VA also opined that a Veteran-claimant may experience amnesia regarding the event and thus it "was reasonable for § 3.304(f) to require corroboration of the occurrence of the stressor in order to substantiate aspects of the event that a veteran may not remember."⁴⁰

As its decades-long regulatory history demonstrates, 38 C.F.R. § 3.304(f) has evolved over time to meet various interests and circumstances in relation to service connection claims for PTSD. Overall, this history reflects a trend towards loosening the standards for establishing service connection for this disorder, especially when documentation of in-service stressors is perceived to be a difficult, if not impossible, task.

³⁷ Posttraumatic Stress Disorder, 74 Fed. Reg. at 14,492.

³⁸ *Id.*; see Posttraumatic Stress Disorder, 73 Fed. Reg. at 64,209.

³⁹ Posttraumatic Stress Disorder, 73 Fed. Reg. at 64,209 (citation omitted).

⁴⁰ *Id.*

II. PROBLEMS WITH THE CURRENT SCHEME AND A PROPOSED SOLUTION

As it stands, the current regulatory scheme leaves a Veteran-claimant whose in-service traumatic event has not been documented in the service records, or who lacks contact with other service members who witnessed the same event or who could corroborate its occurrence, in an untenable position: No matter how solid the medical diagnosis of PTSD, and no matter how thorough, persuasive and/or numerous the medical nexus opinion(s), he or she will be unable to establish service connection for PTSD because of the lack of a verified stressor, and therefore will be precluded from obtaining benefits for this disorder.⁴¹

As is well-known, the type of untraditional warfare, such as that which occurred during Vietnam and in the current wars in Iraq and Afghanistan, does not lend itself to complete or accurate documentation of the often-times covert or random types of traumatic events that could serve as stressors and therefore lead to PTSD. Indeed, as one Congressman has observed: “The nature of wartime service has changed . . . Warfare encompasses acts of terrorism, insurgency, and guerilla tactics. No place is safe and the enemy may not be readily identifiable.”⁴² In addition, another commentator has noted that “[i]t is simply a reality of today’s warfare that servicemembers in traditional non-combat occupations and support roles are subjected to enemy attacks such as mortar fire, sniper fire, and improvised explosive devices (IED) just as their counterparts in combat arms-related occupational fields.”⁴³ In this regard, the present VA regulation governing service connection

⁴¹ See *Hearings*, *supra* note 5 (opening statement of Hon. Doug Lamborn, Ranking Republican Member, Subcommittee on Disability Assistance and Memorial Affairs) (noting that “[u]nfortunately, circumstances could conceivably arise in which an individual, who is not a combat veteran . . . is exposed to an overwhelming stressor, but he or she is unable to provide evidence of the occurrence.”).

⁴² *Id.* (opening statement of Hon. John J. Hall, Chairman, Subcommittee on Disability Assistance and Memorial Affairs).

⁴³ *Id.* (statement of Ian C. De Plaque).

for PTSD does not adequately match the current state of military exchanges and the more modern military climate.

With this reality in mind, VA should consider amending 38 C.F.R. § 3.304(f) to adapt to these unique circumstances. VA should modify its controlling regulation so that if an in-service stressor cannot be verified through a search of the service records, or by buddy statements and the like, an adjudicator (at the Regional Office or Board of Veterans' Appeals level) who is ultimately, and always, charged with the responsibility of making credibility assessments, will be permitted to grant service connection for PTSD based on a positive PTSD diagnosis, a favorable medical nexus opinion, and testimony by the Veteran-claimant, which the adjudicator deems to be credible, that the in-service stressor in fact occurred.⁴⁴ Such an amendment would continue to require claimants to attempt to verify the alleged in-service stressor or stressors through traditional means, where possible, while also giving the claims adjudicator the freedom and leeway to grant service connection for this disease when outside or objective corroboration of stressors cannot be obtained or supplied. Thus, as with PTSD cases based on personal assault, combat status, or prisoner-of-war confinement, where "veterans face unique problems documenting their claimed stressor,"⁴⁵ this proposed amendment, too, would establish a special avenue to aid in helping a Veteran-claimant establish service connection for this disorder.⁴⁶

⁴⁴ See *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006) (discussing the Board's obligations in assessing credibility of lay statements); see also *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (holding that "[w]hether lay evidence is competent and sufficient in a particular case is a fact issue to be addressed by the Board"); *Washington v. Nicholson*, 19 Vet. App. 362, 367-68 (2005) (noting that it is the Board's responsibility to "assess the credibility of, and weight to be given to," the evidence of record).

⁴⁵ *Bradford v. Nicholson*, 20 Vet. App. 200, 204 (2006).

⁴⁶ At the time this Comment went to publication, VA issued a new proposed rule to again amend 38 C.F.R. § 3.304(f). See *Stressor Determinations for Posttraumatic Stress Disorder*, 74 Fed. Reg. 42,617 (proposed Aug. 24, 2009). As stated in the proposed rule, the amendment seeks to "liberaliz[e] in some cases the evidentiary standard for establishing the required in-service stressor." *Id.* That is, this new proposed rule "would eliminate the requirement for corroborating that the claimed in-service stressor occurred

CONCLUSION

VA must weigh the pros and cons of modifying the current PTSD stressor verification requirement by considering the virtue of better ensuring that all valid claims for PTSD are compensated, (acknowledging that some questionable claims may be granted more often under the new, liberalized proposed system), with the vice of a system that often times allows legitimate PTSD claims arising in a new era of military conflicts to remain uncompensated. In the context of veterans benefits law, an area specifically designed “to care for him, who shall have borne the battle,”⁴⁷ it is better to have a system that may over-compensate for PTSD to the benefit of a Veteran-claimant than a system that erroneously under-compensates to his detriment.

if a stressor claimed by a veteran is related to the veteran’s fear of hostile military or terrorist activity and a VA psychiatrist or psychologist confirms that the claimed stressor is adequate to support a diagnosis of PTSD, provided that the claimed stressor is consistent with the places, types, and circumstances of the veteran’s service and that the veteran’s symptoms are related to the claimed stressor.” *Id.* While this proposed rule appears to fall in line, in some respects, with the liberalized spirit of the suggested changes advanced by the authors, a final rule and codification of this proposed change in the C.F.R. still remain forthcoming.

⁴⁷ Abraham Lincoln, Second Inaugural Speech (Mar. 4, 1865).