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A Disparate Impact on Female Veterans: The Unintended Consequences of Veterans Affairs Regulations Governing the Burdens of Proof for Post-Traumatic Stress Disorder Due to Combat and Military Sexual Trauma

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A DISPARATE IMPACT ON FEMALE VETERANS: THE
UNINTENDED CONSEQUENCES OF VETERANS AFFAIRS
REGULATIONS GOVERNING THE BURDENS OF PROOF
FOR POST-TRAUMATIC STRESS DISORDER DUE TO
COMBAT AND MILITARY SEXUAL TRAUMA

JENNIFER C. SCHINGLE*

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INTRODUCTION

The mission of the United States Department of Veterans Affairs (VA) is to honor and serve veterans by providing them with long term access to quality healthcare and disability benefits.¹ The process is meant to be non-adversarial and the benefit of the doubt is always resolved in the veteran's favor.² However, there are many veterans who find the process of filing for and obtaining VA disability benefits to be too complicated, long, and daunting.³ In a word, retired Navy Captain Lory Manning of the Women's Research and Education Institute (WREI) has described the process as "adversarial" to veterans.⁴ A closer look at the VA regulations suggests that Captain

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1. U.S. Dep't of Veterans Affairs, About VA Home, http://www.va.gov/about_va/ (last visited Nov. 2, 2009).

2. 38 U.S.C. § 5107(b) (2006); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 310 (1985); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56 (1990).

3. Nina A. Sayer et al., *Veterans Seeking Disability Benefits for Post-Traumatic Stress Disorder: Who Applies and the Self-Reported Meaning of Disability Compensation*, 58 SOC. SCI. & MED. 2133, 2134 (2004).

4. E-mail from Captain Lory Manning, Dir. of Women in the Military Project, The Women's Research and Educ. Inst., to author (Nov. 25, 2008, 13:41 EST) (on file with author).

Manning's characterization is correct, especially with regard to female veterans.⁵

This article will address two VA regulations that create an arduous evidentiary burden that female veterans must meet in order to qualify for disability compensation benefits; a notably more difficult burden of proof than their male counterparts.⁶ Specifically, this article will address the VA regulations governing service connection for post-traumatic stress disorder (PTSD) resulting from 1) combat exposure and 2) military sexual trauma (MST).

I. ESTABLISHING SERVICE CONNECTION FOR POST-TRAUMATIC STRESS DISORDER

A. Law

Generally, for the purpose of receiving disability benefits, a service connection classification may be granted for disability resulting from disease or injury incurred in or aggravated by active military duty.⁷ Service connection may also "be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service."⁸ Establishment of service connection for PTSD requires: 1) medical evidence diagnosing PTSD; 2) credible supporting evidence that the claimed in-service stressor actually occurred; and 3) medical evidence of a link between current symptoms and the claimed in-service stressor.⁹

A diagnosis of PTSD must be established in accordance with title 38, section 4.125(a) of the Code of Federal Regulations, which mandates that all mental disorder diagnoses must conform to the American Psychiatric Association's Diagnostic and Statistical Manual for Mental Disorders (DSM-IV).¹⁰ The United States Court of Appeals for Veterans Claims (Veterans Appeals Court) has taken judicial notice of the mental health profession's adoption of the DSM-IV to establish a diagnosis of PTSD.¹¹ The Veterans Appeals Court acknowledged the "change[] from an objective ('would evoke . . . in almost

5. Courtney E. Martin, *The Combat Within: Female Veterans and PTSD Benefits*, AM. PROSPECT, Apr. 13, 2009, http://www.prospect.org/cs/articles?article=female_veterans_and_ptsd_benefits.

6. See discussion *infra* Part II (examining the difficulties female veterans face in trying to meet the evidentiary requirements for combat-related PTSD).

7. 38 U.S.C. §§ 1110, 1131 (2006).

8. 38 C.F.R. § 3.303(d) (2008).

9. *Id.* § 3.304(f); *Cohen v. Brown*, 10 Vet. App. 128, 138 (1997).

10. 38 C.F.R. § 3.304(f); *id.* § 4.125(a).

11. *Cohen*, 10 Vet. App. at 153.

everyone') standard in assessing whether a stressor is sufficient to trigger PTSD, to a subjective standard" (for example, whether a person's exposure to a traumatic event and response involved intense fear, helplessness, or horror).¹² Thus, as noted by the Veterans Appeals Court, a more susceptible person could have PTSD under the DSM-IV criteria given his or her exposure to a traumatic event that would not necessarily have the same effect on "almost everyone."¹³

B. Procedure

In order to initiate a claim for entitlement to service connection, the veteran, or his or her representative, must file a claim with a state VA Regional Office (RO) for initial adjudication.¹⁴ If the claim for service connection is denied, the veteran may then appeal the claim to the Board of Veterans' Appeals (Board) for readjudication.¹⁵ The Board serves as the fact finder in each case before it and must, therefore, review the entire claims file including the veteran's complete service and medical history in order to determine whether he or she has met the criteria to establish a claim for service connection.¹⁶ Although in theory every veteran has the same burden of proof to establish entitlement to service connection,¹⁷ in reality the circumstances of combat and military sexual trauma make these types of claims more difficult for female veterans to prove.¹⁸

II. SERVICE CONNECTION FOR POST-TRAUMATIC STRESS DISORDER DUE TO COMBAT

The first VA regulation that imposes a difficult evidentiary standard on female veterans is the regulation governing service connection for combat-related PTSD diagnosed post-service. Generally, establishing service connection for combat-related PTSD differs slightly from the requirements for establishing service connection for non-combat PTSD as described above.¹⁹ In this regard,

12. *Id.* at 153 (Nebeker, C.J., concurring).

13. *Id.* at 141.

14. 38 U.S.C. §§ 5100-5101 (2006).

15. *Id.* § 7104(a).

16. *Id.*

17. See *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990) ("[The VA] is then responsible for determining whether the evidence supports the claim or is in relative equipoise, with the veteran prevailing in either event, or whether a fair preponderance of the evidence is against the claim, in which case the claim is denied.")

18. Rick Maze, *Bills Aim to Improve Services for Female Vets*, NAVY TIMES, available at http://www.navytimes.com/benefits/health/military_female_veterans_benefits_040709w/; see also discussion *infra* Parts II-III (examining the hurdles women face in making a successful claim for combat-related PTSD benefits).

19. *Doran v. Brown*, 6 Vet. App. 283, 289 (1994).

if the evidence [presented] establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, and provided that the claimed 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.²⁰

Therefore, corroborating evidence need not be used to prove the veteran's contentions.

The VA's General Counsel has held that "[t]he ordinary meaning of the phrase 'engaged in combat with the enemy,' as used in 38 U.S.C. § 1154(b), requires that a veteran have participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality."²¹ The issue of whether any particular set of circumstances constitutes engagement in combat with the enemy for purposes of § 1154(b) must be resolved on a case-by-case basis.²² If there is no combat experience, or if there is a determination that the veteran engaged in combat, but the claimed stressor is not related to such combat, there must be independent evidence to corroborate the veteran's statement as to the occurrence of the claimed stressor.²³ The "[veteran's] testimony, by itself, cannot, as a matter of law, establish the occurrence of a noncombat stressor," and corroborating evidence must be obtained to prove the combat stressor.²⁴ Moreover, a medical opinion diagnosing PTSD may not suffice to verify the occurrence of the claimed in-service stressors.²⁵ However, the fact that a veteran, who despite having a noncombatant military occupational specialty, was stationed with a unit that was present while enemy attacks occurred would strongly suggest that he or she was, in fact, exposed to such attacks.²⁶ In other words, the veteran's presence with the unit at the time verified attacks occurred corroborates his or her statement that he or she experienced such attacks personally. Additionally, a stressor need not be corroborated in every detail.²⁷

20. 38 C.F.R. § 3.304(f)(1) (2008) (emphasis added); *see also* 38 U.S.C. § 1154(b) (2006) (stating that the Secretary shall accept lay evidence of injuries incurred in-service as long as the injury is consistent with the service).

21. Op. Gen. Counsel 12-99, U.S. Dep't Of Veterans Affairs, Holdings ¶ a (1999), *available at* <http://www.va.gov/ogc/docs/1999/prc12-99.doc> [hereinafter Gen. Counsel Opinion].

22. *Id.* at Discussion ¶ 5.

23. *Doran*, 6 Vet. App. at 289.

24. *Dizoglio v. Brown*, 9 Vet. App. 163, 166 (1996).

25. *Cohen v. Brown*, 10 Vet. App. 128, 142 (1997) (citing *Moreau v. Brown*, 9 Vet. App. 389, 396 (1996)). *But see*, *Patton v. West*, 12 Vet. App. 272, 280 (1999) (stating that for personal assault-related PTSD, a medical opinion may be considered corroborating evidence).

26. *Pentecost v. Principi*, 16 Vet. App. 124, 125, 128 (2002).

27. *Suozzi v. Brown*, 10 Vet. App. 307, 311 (1997).

It is important to recognize that due to the nature and circumstances of combat, documentation that might support the presence of a combat stressor can be difficult to obtain.²⁸ Congress has acknowledged this fact by accepting a veteran's lay testimony without corroboration in order to prove a combat stressor where there is evidence of combat in service.²⁹ Documentation can be especially difficult to obtain with regard to females engaging in land combat action, as was seen in Operation Iraqi Freedom and Operation Enduring Freedom.³⁰ There are a number of reasons for these documentation challenges, the greatest being the U.S. Department of Defense (DOD) policy that prohibits the assignment of female soldiers to units whose primary mission is to engage in direct ground combat operations.³¹ Historically, women have been banned from assignment to combat roles,³² and even today the ban exists with regard to land combat operations.³³

28. See, e.g., Maze, *supra* note 18 (pointing out that a woman who did logistics work for the military in Iraq had a hard time proving war-related injuries).

29. 38 U.S.C. § 1154(b) (2006); 38 C.F.R. § 3.304(f)(1) (2008); *The Nexus Between Engaged in Combat with the Enemy and PTSD in an Era of Changing Warfare Tactics: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 111th Cong. 4 (2009) (statement of Rep. Doug Lamborn, Member, Subcomm. on Disability Assistance and Memorial Affairs) ("Congress established this broad threshold in recognition of the chaotic nature of battle, and the appropriateness of resolving every reasonable doubt in favor of the veteran.").

30. E-mail from Capt. Lory Manning, Dir. of Women in the Military Project, The Women's Research and Educ. Inst., to author (Mar. 24, 2009, 10:46 EST) (on file with author) [hereinafter Mar. 24 E-mail from Manning]; E-mail from Capt. Lory Manning, Dir. of Women in the Military Project, The Women's Research and Educ. Inst., to author (Dec. 1, 2008, 11:52 EST) (on file with author) [hereinafter Dec. 1 E-mail from Manning]; see also *Compensation Owed for Mental Health Based on Activities in Theater Post-Traumatic Stress Disorder Act: Hearing on H.R. 952 Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 111th Cong. (2009) [hereinafter *Apr. 23 Legislative Hearing*] (statement of Rep. John Hall, Chairman, Subcomm. on Disability Assistance and Memorial Affairs) ("We also know from the RAND report that one out [sic] every five service members who served in OEF or OIF suffers from symptoms of PTSD.").

31. See Memorandum from Les Aspin, Sec'y of Def., to Sec'y of the Army, Sec'y of the Navy, Sec'y of the Air Force, Chairman, Joint Chiefs of Staff, Assistant Sec'y of Def. (Personnel & Readiness), Assistant Sec'y of Def. (Reserve Affairs), Direct Ground Combat Definition and Assignment Rule 1 (Jan. 13, 1994), available at <http://cmrlink.org/cmnotes/lesaspin%20dgc%20defassign%20rule%20011394.pdf> [hereinafter Aspin Memo] (introducing the direct combat assignment rule, excluding women from "assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground"); see also NAT'L DEF. RES. INST., *ASSESSING THE ASSIGNMENT POLICY FOR ARMY WOMEN 1* (2007) [hereinafter RAND REPORT] (stating also the combat assignment rule for female soldiers); U.S. GEN. ACCOUNTING OFFICE, *INFORMATION ON DOD'S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT DEFINITION 2-3* (1998) [hereinafter GAO REPORT 1998] (same).

32. George H. Quester, *The Problem, in FEMALE SOLDIERS — COMBATANTS OR NONCOMBATANTS? HISTORICAL AND CONTEMPORARY PERSPECTIVES* 217, 218 (Nancy Loring Goldman ed., 1982).

33. Aspin Memo, *supra* note 31; GAO REPORT 1998, *supra* note 31, at 3.

However, the theaters of Iraq and Afghanistan have been unlike almost any other in the history of American war. Soldiers describe 360 degree battlefields with no clear front lines.³⁴ As a result, women have often found themselves engaging in direct land combat action.³⁵

Cultural sensitivities of the wars in Iraq and Afghanistan have created unique problems for which female soldiers have been used to solve. For example, female soldiers have been, and continue to be, recruited on missions in order to search Iraqi and Afghan women who, based on traditional custom, are not allowed to be touched by males.³⁶ These women are known as Lionesses.³⁷ The Lioness program was founded by Army Colonel William D. Brinkley in order to resolve the cultural tensions caused by male soldiers searching local women.³⁸ Colonel Brinkley stated that the Lioness program was never officially established, but was created, and continues to be used, on an *ad hoc* basis to accommodate cultural taboos with regard to performing necessary searches.³⁹ Female troops are attached to units for special missions where search techniques will be implemented.⁴⁰ These missions may require entry into combat zones and female soldiers are trained and expected to fight in combat action if necessary.⁴¹ These women are recruited from noncombat military occupational specialties, such as cook, vehicle mechanic, or supply clerk, and, as a result, have found themselves engaging in direct combat with the enemy.⁴² Despite their heroism in this capacity, these women have not received the combat recognition that they deserve.⁴³

34. LIONESS (Room 11 Productions 2008); "*Lioness: Female Soldiers' First Forays into Combat* (NPR radio broadcast June 19, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=91698225>; *The Diane Rehm Show: The Lonely Soldier* (NPR radio broadcast Apr. 1, 2009), available at <http://wamu.org/programs/dr/09/04/01.php> [hereinafter *The Lonely Soldier*].

35. RAND REPORT, *supra* note 31, at 49-50.

36. LIONESS, *supra* note 34; RAND REPORT, *supra* note 31, at 54.

37. LIONESS, *supra* note 34 (explaining that the Lionesses have been used in ground operations since 2003).

38. Interview with Colonel William D. Brinkley (May 22, 2009) (recollection of the author) [hereinafter Col. Brinkley Interview] (stating that the Lioness program is not uniform service-wide or Army-wide and not all units who recruit females for search purposes call them "Lionesses").

39. *Id.*

40. *Id.*

41. LIONESS, *supra* note 34; see RAND REPORT, *supra* note 31, at 41 ("[S]upport unit personnel were trained, prepared, and expected to defend themselves and their fellow personnel; women participated in private security teams . . . for military leadership, they provided security . . . and they took their turns at the gates and in the duty towers.").

42. LIONESS, *supra* note 34; see RAND REPORT, *supra* note 31, at 42 (reporting that female medics and signallers belonging to forward support companies would be attached to maneuver units in Iraq).

43. Helen Benedict, *The Plight of Women Soldiers*, NATION, May 5, 2009, available at <http://www.thenation.com/doc/20090518/benedict>.

This lack of combat recognition not only damages a female soldier's pride and future military career,⁴⁴ it damages her potential to prove service connection should she later be diagnosed with PTSD as a result of the combat action.⁴⁵ Lack of recognition may result in the failure to receive a combat action award or lack of notation of the combat action in her file.⁴⁶ Either way, it represents a lack of documentation that may ruin any future disability claim with the VA.⁴⁷

Currently, each Lioness must show a diagnosis of PTSD related to combat action and provide evidence that she was engaged in combat.⁴⁸ Such evidence may be in the form of an award indicating combat action such as a Purple Heart, Combat Infantryman Badge, or Combat Action Badge.⁴⁹ The problem with this type of evidence is that combat action must be precisely and accurately documented in order to receive a combat award.⁵⁰ When soldiers are authorized to receive the Combat Action Badge (CAB), officers work diligently to remember who participated in each unit operation.⁵¹ However, there is always the potential for deserving soldiers to fall through the cracks.⁵² If there is no evidence of a combat action award in the service records, there will be less, if any, evidence that the veteran engaged in combat, thus requiring corroborating evidence to meet a higher burden of proof.⁵³

44. *Combat Exclusion Laws for Women in the Military: Hearing Before the Subcomm. on Military Personnel and Compensation of the H. Armed Services Comm.*, 100th Cong. 14 (1987) [hereinafter *Combat Exclusion Laws for Women*] (statement of Martin Ferber, Senior Associate Director, National Security and International Affairs Division) (stating that a major impact of the policy has been to "inhibit the career progression of women in the military by excluding them from some jobs they are capable of filling").

45. See 38 C.F.R. § 3.304(f)(1) (2008) (allowing the veteran to use lay testimony alone to prove the in-service stressor if the veteran can show that he or she engaged in combat).

46. *Apr. 23 Legislative Hearing*, *supra* note 30 (statement of Richard Cohen, Executive Director, National Organization of Veterans' Advocates, Inc.).

47. *Id.* (noting that "the VA views the absence from a veteran's service records of any 'ordinary indicators of combat service' as sufficient to 'support a reasonable inference that the veteran did not engage in combat'").

48. See 38 C.F.R. § 3.304(f)(1).

49. *Apr. 23 Legislative Hearing*, *supra* note 30 (statement of Richard Cohen, Executive Director, National Organization of Veterans' Advocates, Inc.).

50. Col. Brinkley Interview, *supra* note 38 (recollection of the author).

51. E-mail from Col. William Brinkley, to author (May 19, 2009, 08:58 EST) (on file with author).

52. *Id.*

53. *Legislative Hearing on H.R. 1197, H.R. 3008, H.R. 3795, H.R. 4274, H.R. 5155, H.R. 5448, H.R. 5454, H.R. 5709, H.R. 5954, H.R. 5985, and H.R. 6032 Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 113 (2008) (statement of Paralyzed Veterans of America) (noting that "while VA recognizes the receipt of certain medals as proof of combat, only a fraction of those who participate in combat receive a qualifying medal. Further, military personnel records do not document combat experiences except for those who receive certain medals. As a result, veterans . . . are forced to try to provide evidence that does not exist or wait

Another type of evidence that can be used to identify combat action includes unit verification.⁵⁴ However, if a female soldier was attached to a combat unit as part of a classified mission, it would not be documented in her service records.⁵⁵ An investigation into the battalion or unit history may show that Lioness support operations were used, but it would not show the individual names of each Lioness who participated and, therefore, could not be used to verify combat action.⁵⁶ Thus, documentation in a Lioness's service records would only show her non-combat military occupational specialty and would not reflect her activity in the unit to which she was attached during a mission. Currently, there is no way to document service as a Lioness.⁵⁷

Testimony from two Lionesses who engaged in combat action while serving in Iraq indicated that service records did not show any evidence of her service as a Lioness, much less any evidence of participation in combat activity. Specifically, Army Staff Sergeant Ranie Ruthig stated that her service records show no evidence that she ever served as a Lioness.⁵⁸ She also stated that without the documentary film *Lioness*, which featured her as a combat soldier, she believes that she may not have had the documentation necessary to prove combat action.⁵⁹ Similarly, Shannon Morgan left the Army just before it began awarding CABs to soldiers who engaged in combat outside of infantry units; therefore, she received no combat award to serve as evidence that she was a combat veteran.⁶⁰ The Army implemented the CAB in May 2005, several years after many soldiers had already deployed and returned home.⁶¹ Although the CAB may be awarded retroactively to September 18, 2001,⁶² it requires detailed paperwork recalling the specifics of the combat action that is increasingly difficult to obtain as time passes.⁶³ Retired Navy Captain Lory Manning believes

a year or more while the Department Of Defense conducts research to determine whether a veteran's unit engaged in combat").

54. See *Pentecost v. Principi*, 16 Vet. App. 124, 128 (2002) (finding that the fact that the veteran was stationed with a unit that was involved in combat was sufficient evidence that he personally experienced the attack).

55. Col. Brinkley Interview, *supra* note 38 (recollection of the author).

56. *Id.* (recollection of the author).

57. *Id.* (recollection of the author).

58. Panel Discussion Prior to Recording of The Lioness Interview (Mar. 31, 2009) (recollection of the author).

59. *Id.*

60. See Henry Cunningham, "Lioness" Show Sheds Light on Female Soldiers' Role in Iraq, VIETNAM VETERANS OF AMERICA CHAPTER 885, <http://www.vva885.org/cms/content/view/311/2/> (last visited Aug. 23, 2009).

61. U.S. Army, Combat Action Badge Information, <http://www.army.mil/symbols/combatabdges/action.html> (last visited Nov. 2, 2009).

62. *Id.*

63. Col. Brinkley Interview, *supra* note 38 (recollection of the author). Colonel Brinkley stated that a retroactive award required sworn signatures from supervisors

that lack of combat documentation may be an especially significant problem for female veterans serving in Iraq and Afghanistan between 2003 and 2004 due to a lack of awareness that women were engaging in combat at that time.⁶⁴

Not only may female veterans have difficulty finding documentation of combat action in their service records, they may have difficulty obtaining a medical diagnosis of PTSD related to that combat action.⁶⁵ In Shannon Morgan's experience, male VA doctors tend not to believe female veterans' stories of combat.⁶⁶ At a 2009 press event for the *Lioness* documentary, she stated, "Women are questioned [about combat] whereas men are not. We shouldn't have to prove ourselves. We've done it already."⁶⁷ Morgan is a former *Lioness* with a one hundred percent disability rating for PTSD after serving in Iraq.⁶⁸

Lack of combat documentation is an issue for every veteran filing claims because a combat action situation does not lend itself to paperwork.⁶⁹ However, accurate documentation of combat action poses an extra challenge for women due to the congressional policy banning the assignment of women to combat units or combat specialties.⁷⁰ The reasons for the ban will not be addressed in this article, but there is anecdotal evidence that the ban is harmful to females, because it creates internal pressure to exclude documentation of combat with regard to female soldiers⁷¹ and serves to promote an outdated belief that women do not engage in combat.⁷² Therefore, the same congressional policy that tries to protect women from the dangers of combat

who often could not remember the event, very specific details of the incident, and months of processing paperwork. He also stated that each unit approaches this differently. Some have stricter standards for receiving the award than others. *Id.* (recollection of the author).

64. Mar. 24 E-mail from Manning, *supra* note 30.

65. Maze, *supra* note 18.

66. *Id.*

67. DVD: *The Lioness Interview* (VA Office of Public Affairs 2009) [hereinafter *The Lioness Interview*].

68. Maze, *supra* note 18.

69. See *Apr. 23 Legislative Hearing*, *supra* note 30 (statement of Barton F. Stichman, Joint Executive Director, National Veterans Legal Services Program) ("VA expends a relatively great deal of time attempting to obtain corroborative evidence in PTSD cases, and . . . after these extensive efforts, VA ends up denying many claims that are truly meritorious simply because no evidence exists to corroborate the stressful events.").

70. Aspin Memo, *supra* note 31.

71. Dec. 1 E-mail from Manning, *supra* note 30 ("I've heard rumor [sic] that some unit commanders haven't [documented women's combat experiences] because the things women have been doing violate Army and/or Marine Corps policies on women's utilization.").

72. See *LIONESS*, *supra* note 34 (noting that this concept comes from a lack of awareness about the fact that the wars in Iraq and Afghanistan are wars in which there are no clear front lines).

action⁷³ may actually stifle their entitlement to much needed disability compensation later in life. Today, the reasons behind the ban are moot because women are already on the front lines engaging in combat everyday in Iraq and Afghanistan.⁷⁴ At this point, the ban only serves to promote a lack of documentation of their combat action in their service records, which may in turn extinguish a veteran's potential future disability claim for PTSD.⁷⁵ Therefore, the ban is more harmful than helpful and must be lifted in order for female veterans to get the recognition and the care that they deserve.

Creating a form of recognition specifically for female combat veterans could provide relief where there is otherwise no evidence of their combat service. Recognition, such as a Lioness Service Ribbon, would help prove that a Lioness engaged in combat, but it would not help others who were not specifically Lionesses, yet also engaged in combat.⁷⁶ For example, it would not help female soldiers who engaged in ground combat, but were not recruited for Lioness missions or who are not specifically named as Lionesses.⁷⁷ Women who serve as medics,⁷⁸ cooks, armor carriers and mechanics are often attached to units for special missions.⁷⁹ These women are not Lionesses, because they are not recruited to search the local female population, but, like the Lionesses, their experiences are the same as their unit and they are expected to fight if a combat situation arises.⁸⁰ Therefore, the creation of a Lioness ribbon alone will not solve the problem regarding lack of combat documentation for female service members. In a practical sense, the ribbon must be established in conjunction with lifting the ban against females in combat roles. This is the only way to ensure that female combat veterans are recognized for combat service and are awarded their earned VA disability benefits.

73. *Combat Exclusion Laws for Women*, *supra* note 44, at 13 ("The impact is to preclude women from front line fighting roles and to provide some degree of protection."); *see also id.* at 11 ("The common theme in the application of the combat exclusion provisions seems to be an effort to preclude women from the most frequent or severe exposure to the risks of war.").

74. Col. Brinkley Interview, *supra* note 38 (recollection of the author); LIONESSES, *supra* note 34.

75. *Apr. 23 Legislative Hearing*, *supra* note 30 (statement of Barton F. Stichman, Joint Executive Director, National Veterans Legal Services Program).

76. Such a service ribbon has been suggested by ranking members of the military.

77. The Lioness Interview, *supra* note 67 (stating that both the Army and Marines use women in Lioness-type roles, but not all are named Lionesses).

78. RAND REPORT, *supra* note 31, at 52 ("The importance given to respecting the Iraqi culture also meant that female medics were sought out on a regular basis to interact with Iraqi women in their capacity as health care providers.").

79. *Id.* at 51-52.

80. *Id.* at 49-50 (noting that women on a convoy are "subject to direct combat with the enemy" and have to react because they are "in the midst of anything that would come up").

Not only must Congress lift the ban and establish a Lioness Service Ribbon, but VA adjudicators must thoroughly investigate claims of combat action when a female veteran is claiming PTSD due to land combat action. VA adjudicators must not dismiss a claim simply because a veteran is female and thus technically banned from combat roles. Adjudicators also must not deny a claim or require corroborating evidence simply because a woman's military occupational specialty was non-combat related. They should also order any and all records possible to determine whether a female soldier served as a Lioness or was attached to a separate unit or battalion other than that which is reported in her service records.⁸¹

III. SERVICE CONNECTION FOR POST-TRAUMATIC STRESS DISORDER DUE TO MILITARY SEXUAL TRAUMA

The second regulation under which female veterans face a different and more difficult evidentiary standard than male veterans is the VA regulation governing service connection for PTSD due to personal assault.⁸² In sum, in order to establish service connection for PTSD due to military sexual trauma, the veteran must show: 1) a diagnosis of PTSD; 2) that the PTSD is related to a military sexual trauma that occurred during active service; and 3) corroborating evidence of the trauma.⁸³

Personal assault is defined as personal trauma that threatens or inflicts harm.⁸⁴ Specifically, the VA's definition of personal assault includes military sexual trauma (MST).⁸⁵ Military sexual trauma includes any type of sexual assault or sexual harassment that happens on active duty.⁸⁶ It can occur during peacetime, war time and during

81. The "VA expends a relatively great deal of time attempting to obtain corroborative evidence in PTSD cases, and . . . after these extensive efforts, VA ends up denying many claims that are truly meritorious simply because no evidence exists to corroborate the stressful events." *Apr. 23 Legislative Hearing, supra* note 30 (statement of Barton F. Stichman, Joint Executive Director, National Veterans Legal Services Program).

82. U.S. DEPT OF VETERANS AFFAIRS, ADJUDICATION PROCEDURES MANUAL REWRITE, M21-1MR, P.4, subpt. II, ch.1, § D(17)(a) (2008), available at http://www.warms.vba.va.gov/M21_1MR.html#c (follow "Section D" hyperlink under "Part 4. Compensation DIC, and Death Compensation benefits: Subpt II — Compensation: Chapter 1 — Development") (last visited Nov. 2, 2009) [hereinafter M21-1MR] (defining the term "personal trauma" as an "event of human design that threatens or inflicts harm" and noting that examples of personal trauma include "rape, physical assault, domestic battering, robbery, mugging, stalking and harassment").

83. 38 C.F.R. § 3.304(f) (2008).

84. *See supra* note 82.

85. M21-1MR, *supra* note 82, at P.4, subpt. II, ch.1, § D(17)(g).

86. Nat'l Ctr. For PTSD, Military Sexual Trauma, <http://www.ptsd.va.gov/public/pages/military-sexual-trauma-general.asp> (last visited Nov. 2, 2009) [hereinafter MST Fact Sheet].

training activities.⁸⁷ Congress defines sexual trauma as “physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty or active duty for training.”⁸⁸ Although the VA regulations governing PTSD due to MST do not provide a clear definition of rape, sexual assault, sexual battery, or sexual harassment, the DOD defines sexual assault as:

[I]ntentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. It includes rape, nonconsensual sodomy (oral or anal sex), indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts. Sexual assault can occur without regard to gender or spousal relationship or age of victim. “Consent” shall not be deemed or construed to mean the failure by the victim to offer physical resistance. Consent is not given when a person uses force, threat of force, coercion, or when the victim is asleep, incapacitated, or unconscious.⁸⁹

Unlike PTSD due to combat, PTSD due to personal assault, including MST, requires corroborating evidence that supports the veteran’s claim.⁹⁰ However, much like combat, the circumstances of MST often do not lend themselves to documentation.⁹¹

Since MST is an extremely personal and sensitive issue, many incidents are not officially reported, which makes proving the occurrence of the claimed stressor difficult.⁹² It is not unusual for there to be an absence of service records documenting the events the veteran has alleged as the source of the claim.⁹³ Therefore, when a veteran files a claim for PTSD based on MST, evidence from sources other than the veteran’s service records may be used to corroborate an account of a stressor incident.⁹⁴ Examples of acceptable corroborating evidence

87. *Id.*; SUGATI PUBLICATIONS, COPING WITH MILITARY SEXUAL TRAUMA: A RESOURCE GUIDE FOR VETERANS, THEIR LOVED ONES AND PROFESSIONALS WHO WORK WITH VICTIMS, http://www.sugati.org/files/2009_Product_10_Vets.pdf (last visited Nov. 2, 2009).

88. 38 U.S.C. § 1720D(a)(1) (2006).

89. U.S. DEP’T OF DEF., FY08 REPORT ON SEXUAL ASSAULT IN THE MILITARY 9 (2009), available at http://www.sapr.mil/contents/ResourcesReports/AnnualReports/DoD_FY08_Annual_Report.pdf [hereinafter DOD REPORT 2008].

90. See *Moreau v. Brown*, 9 Vet. App. 389, 396 (1996), *overruled in part by Patton v. West*, 12 Vet. App. 272, 280 (1999) (stating that for personal assault-related PTSD, a medical opinion may be considered corroborating evidence); see also *Doran v. Brown*, 6 Vet. App. 283, 288-89 (1994).

91. *Patton*, 12 Vet. App. at 278.

92. *Id.* at 279.

93. *Id.*

94. *Id.* at 277.

“include, but are not limited to: records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians; pregnancy tests or tests for sexually transmitted diseases; and statements from family members, roommates, fellow service members, or clergy.”⁹⁵ Additionally, the Code of Federal Regulations states that:

Evidence of behavior changes following the claimed assault is one type of relevant evidence that may be found in these sources. Examples of behavior changes that may constitute credible evidence of the stressor include, but are not limited to: a request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes . . . 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.⁹⁶

Females are more likely to experience MST than their male counterparts.⁹⁷ The National Center for PTSD reports that, among veterans currently using VA healthcare, roughly twenty-three percent of women reported sexual assault in the military and fifty-five percent reported experiencing sexual harassment, whereas only thirty-eight percent of men reported sexual harassment.⁹⁸ According to DOD’s 2007 Report on Sexual Assault in the Military, in that year, sexual assault reports showed that over ninety percent of the victims were female (in both unrestricted and restricted reports).⁹⁹ Sexual assault reports filed in 2004, 2005, and 2006 showed that almost ninety-five percent of victims were women.¹⁰⁰ Restricted reports of sexual assault filed in 2007 showed that ninety-two percent of the victims were female and 5.8% of the victims were male.¹⁰¹ According to DOD’s aggregate report of sexual assault incidents for 2008, there were 2265

95. 38 C.F.R. § 3.304(f)(3) (2008).

96. *Id.*

97. MST Fact Sheet, *supra* note 86.

98. *Id.* The figures for reported male sexual assault could not be located in this source.

99. U.S. DEP’T OF DEF., FY07 REPORT ON SEXUAL ASSAULT IN THE MILITARY tbl.1(D),(E) (2008), available at <http://www.sapr.mil/contents/references/2007%20Annual%20Report.pdf>.

100. *Id.* tbl.1(K). While the report states that these statistics from 2004, 2005, and 2006 should not be used in comparison with the statistics from 2007, this percentage is used for illustrative purposes.

101. *Id.* at tbl.1(E).

unrestricted reports of sexual assault involving military service members, in which approximately seventy percent of the reports indicated a military service member as the victim.¹⁰² In approximately eighty-nine percent of those cases, the victim was female.¹⁰³

It is important to keep in mind that all of these statistics show only the *reported* assaults and do not include any unreported assaults that may have occurred.¹⁰⁴ DOD has indicated that under-reporting poses a serious challenge to getting an accurate count of the number of attacks occurring each year.¹⁰⁵ A September 2005 news release by the U.S. House of Representatives indicated that, when considering non-reported assaults, MST in the National Guard and Reserve components may be as high as sixty percent among females and twenty-seven percent among males.¹⁰⁶ Other sources estimate that between thirty percent and seventy percent of women in the military are sexually assaulted and up to ninety percent are sexually harassed.¹⁰⁷ Although DOD has implemented a restricted reporting process which allows victims to report attacks anonymously without pressing charges,¹⁰⁸ some victims' advocates say that these attacks are still underreported even though the number of reports has generally increased.¹⁰⁹

Females are highly likely to develop PTSD after a military sexual trauma has occurred, more so than after a non-military sexual trauma.¹¹⁰ According to the National Center for PTSD, women are more likely than men to experience PTSD due, in part, to the fact that women are more likely to experience sexual assault.¹¹¹ PTSD

102. DOD REPORT 2008, *supra* note 89, at 6.

103. *Id.* at tbl.1(G).

104. *Id.* at 33, 51.

105. *Id.* at 51 ("The Department estimates that less than [ten percent] of the sexual assaults that occur annually are reported to the DoD.").

106. News Release: Evans Releases Military Sexual Trauma Report Suppressed by Administration, House Comm. on Veterans' Affairs (Sept. 29, 2005), <http://veterans.house.gov/democratic/press/109th/9-29-05mst.htm>.

107. Military Rape Crisis Center, Facts, <http://www.stopmilitaryrape.org/facts> (last visited Nov. 2, 2009); *The Lonely Soldier*, *supra* note 34.

108. DOD REPORT 2008, *supra* note 89, at 9.

109. Ann Scott Tyson, *Reported Cases of Sexual Assault in Military Increase*, WASH. POST, May 7, 2005, at A3; see *The Lonely Soldier*, *supra* note 34 (emphasizing that despite the eight percent increase in reports of sexual assault, there is no mechanism for determining the total number of assaults in the military).

110. Naomi Himmelfarb, Deborah Yaeger & Jim Mintz, *Posttraumatic Stress Disorder in Female Veterans with Military and Civilian Sexual Trauma*, 19 J. TRAUMATIC STRESS 837, 838 (2006).

111. Dawne Vogt, Nat'l Ctr. for PTSD, Research on Women, Trauma and PTSD, <http://www.ptsd.va.gov/professional/pages/women-trauma-ptsd.asp> (last visited Nov. 2, 2009) [hereinafter RESEARCH ON WOMEN, TRAUMA AND PTSD]; Dawne Vogt, Nat'l Ctr. for PTSD, Women, Trauma and PTSD, <http://www.ptsd.va.gov/public/pages/women-trauma-and-ptsd.asp> (last visited Nov. 2, 2009) [hereinafter Women, Trauma and PTSD].

studies show that between forty percent and sixty percent of female victims of MST develop PTSD.¹¹² There are many explanations for this. Victims must continue to live and work closely with their perpetrators while in service.¹¹³ Victims often must rely on their perpetrators to provide basic needs in service.¹¹⁴ Often the attacker is someone that the victim respected.¹¹⁵ According to one study, the victim's one-time "safe haven is now a place of anxiety and bad memories."¹¹⁶ In a 2007 report by the VA Women's Center MST Support Team, eighty-nine percent of women who were treated for MST-related encounters were also treated for mental health problems such as PTSD.¹¹⁷

Despite the frequency of MST and the mental anguish that victims cope with, female victims are unlikely to report MST for numerous reasons including fear of being ridiculed by peers, ostracized, retaliated against,¹¹⁸ humiliated,¹¹⁹ or forced to discharge early.¹²⁰ For example, in *YR v. West*, the victim of an in-service rape stated that she did not report the attack for fear of retribution and losing her security clearance.¹²¹ Furthermore, the process for prosecuting an attacker can be very difficult due to lack of evidence¹²² and unwillingness among soldiers to speak as witnesses.¹²³ As a result, many

112. Why Military Sexual Trauma May Cause Post Traumatic Stress Disorder: Post Traumatic Stress Disorder & Military Sexual Trauma, Casa Palmera, <http://www.casapalmera.com/articles/symptoms-of-post-traumatic-stress-disorder-and-military-sexual-trauma/> (last visited Nov. 2, 2009) [hereinafter PTSD & MST].

113. Diana Mahoney, *MST: Fighting a War Within a War*, ENTREPRENEUR MAGAZINE, June 2009, available at <http://www.entrepreneur.com/tradejournals/article/203195895.html>.

114. *Id.*

115. Amy Herdy & Miles Moffeit, *Betrayal in the Ranks*, DENVER POST, Nov. 6, 2003, at 11, available at http://extras.denverpost.com/justice/tdp_betrayal.pdf [hereinafter *Betrayal in the Ranks*].

116. PTSD & MST, *supra* note 112.

117. MILITARY SEXUAL TRAUMA SUPPORT TEAM, U.S. DEP'T OF VETERANS AFFAIRS, SUMMARY OF MILITARY SEXUAL TRAUMA-RELATED OUTPATIENT CARE tbl.1 (2007).

118. Walter Goodman, *Tailhook Scandal's Long Shadows*, N.Y. TIMES, Oct. 15, 1996, at C16; *Betrayal in the Ranks*, *supra* note 115, at 4.

119. *Betrayal in the Ranks*, *supra* note 115, at 3-4.

120. *Id.* at 10, 14.

121. *YR v. West*, 11 Vet. App. 393, 396 (1998). In this case the victim reported that her attackers had threatened to kill her if she reported the attack. *Id.* She also stated that she believed that reporting the in-service sexual assault would have compromised her security clearance. *Id.* The victim's sister stated that she did not report the assault due to her sister's fear of retribution and losing her security clearance. *Id.*

122. *Patton v. West*, 12 Vet. App. 272, 279 (1999) (citing MANUAL OF ADJUDICATION PROCEDURES M21-1, Part III, ¶ 5.14(b)(3)).

123. *See, e.g.*, U.S. DEP'T OF DEFENSE, REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY 33 (2003), available at <http://www.defenselink.mil/news/Sep2003/d20030922usafareport.pdf> (stating that cadet witnesses at the U.S. Air Force Academy were reluctant to report assaults because they

attackers go unpunished and those that are punished are often merely demoted in rank or docked in pay and do not spend any time in prison.¹²⁴ According to Dr. Betty Moseley-Brown, Associate Director for the VA Center for Women Veterans, most sexual attacks happen to lower ranking females and are not punished as severely as attacks on female officers.¹²⁵ This provides little incentive for victims of MST to report an attack, which ultimately leads to a lack of documentation in the service records. The lack of documentation in a veteran's service records makes the evidentiary burden a difficult hurdle to overcome.¹²⁶ Although the VA has tried to take documentation issues into consideration when writing the regulation for granting service connection for PTSD,¹²⁷ it failed to consider that documentation post service may be very difficult to find as well.¹²⁸

According to Dr. Moseley-Brown, it is common for women who experience MST to have experienced an attack by a non-service member prior to service.¹²⁹ Due to these past experiences, women may be so afraid or ashamed that they learn to live with sexual trauma instead of reporting it.¹³⁰ Dr. Moseley-Brown also stated that it is not uncommon for women to cover up an attack after it has occurred or hide it for decades.¹³¹ Michael MacDonald, Deputy Director for VA Benefits, confirmed that a lack of documentation is the number one issue when it comes to handling claims for MST-related PTSD.¹³² Therefore, it can be concluded that many women who suffer from PTSD due to MST do not report the incident during or for many years after service, which leads to a lack of documentation of the trauma. Despite recognizing the problem of lack of documentation, the VA

feared repercussions based on their own activities, such as drinking or fraternizing, at the time they witnessed the assault).

124. Miles Moffeit, *GI Sex Cases From Iraq Often Stall*, DENVER POST, Apr. 12, 2004, at A-01; see also *Betrayal in the Ranks*, *supra* note 115, at 6 (describing accused sex offenders who have faced administrative action rather than prosecutions).

125. Interview with Dr. Betty Moseley-Brown, Dir. of VA Women's Center (Nov. 7, 2008) (recollection of the author) [hereinafter Interview with Moseley-Brown]; see *The Lonely Soldier*, *supra* note 34 (discussing the possibility that a greater number of sexual attacks and harassment happen to lower ranking females, as opposed to female officers).

126. Interview with Michael MacDonald, Deputy Dir. for Benefits, U.S. Dep't of Veterans Affairs (Mar. 23, 2009) [hereinafter Interview with MacDonald].

127. See 38 C.F.R. § 3.304(f)(3) (2008) ("If a post-traumatic stress disorder claim is based on in-service personal assault, evidence from sources other than the veteran's service records may corroborate the veteran's account of the stressor incident.").

128. *Patton v. West*, 12 Vet. App. 272, 279 (1999) (citing MANUAL OF ADJUDICATION PROCEDURES M21-1, Part III, ¶ 5.14(b)(3)).

129. Interview with Moseley-Brown, *supra* note 125.

130. *Id.*

131. *Id.*; see *YR v. West*, 11 Vet. App. 393, 396 (1998) (noting that the victim reported covering injuries with make-up after an assault).

132. Interview with MacDonald, *supra* note 126.

still requires a veteran to present corroborating evidence of MST in order to prove her case.¹³³

The first hurdle in establishing PTSD due to MST is presenting a medical diagnosis of PTSD.¹³⁴ After a veteran has presented the diagnosis, she must then provide evidence linking the diagnosis to an in-service sexual assault.¹³⁵ However, there is yet another hurdle to surmount, which requires corroborating evidence proving that the assault occurred.¹³⁶ Since such evidence is often not found in the veteran's service records,¹³⁷ the adjudicator is required to consider evidence outside the service records, such as documentation from "mental health counseling centers, hospitals, or physicians; pregnancy tests or tests for sexually transmitted diseases; and statements from family members, roommates, fellow service members, or clergy."¹³⁸ However, as indicated above, such documentation may be difficult to obtain.¹³⁹ Additionally, they may seek treatment for mental problems or other disorders not realizing that current mental health issues are related to, or the result of, a past military sexual trauma.¹⁴⁰

Where there is no documentation of MST, adjudicators may also consider evidence of behavioral changes following the claimed assault, such as "a request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes."¹⁴¹ However, Dr. Moseley-Brown indicated her belief that adjudicators look for obvious, blatant, and concrete evidence, rather than subtle, nuanced evidence that is more likely to be in the claims file.¹⁴² This makes the burden of proof even more difficult for victims to overcome. For example, after an attack, a victim may experience physical or emotional problems, and each victim manifests symptoms differently.¹⁴³

133. See 38 C.F.R. § 3.304(f)(3) (2008) (requiring corroboration and giving a non-inclusive list of potential corroborating evidence).

134. 38 C.F.R. § 3.304(f).

135. *Id.*

136. *Id.*

137. *YR v. West*, 11 Vet. App. 393, 398 (1998).

138. 38 C.F.R. § 3.304(f)(3).

139. *Patton v. West*, 12 Vet. App. 272, 279 (1999) (citing MANUAL OF ADJUDICATION PROCEDURES M21-1, Part III, ¶ 5.14(b)(3)).

140. See *YR*, 11 Vet. App. at 395 (stating that the victim of an in-service assault was treated for various maladies including alcoholism, nerves, anxiety and flashbacks in conjunction with PTSD).

141. 38 C.F.R. § 3.304(f)(3); see also Brief of Petitioner-Appellee at 8, *Veterans for Common Sense v. Shinseki*, No. 08-16728 (9th Cir. Mar. 31, 2009) (stating, in essence, when working on veteran's claim for benefits, an adjudicator must make his motto "Grant if you can, Deny [sic] if you must").

142. Interview with Moseley-Brown, *supra* note 125.

143. MST Fact Sheet, *supra* note 86.

Some victims may show more obvious signs such as an exaggerated startle response or edginess with outbursts of anger.¹⁴⁴ Others may experience symptoms that are more ambiguous, such as lack of appetite or trouble sleeping.¹⁴⁵ Furthermore, interpretation of these symptoms is completely subjective and the determination whether such symptoms are considered evidence of PTSD due to MST is ultimately dependent on the VA rating specialist, attorney, and judge who review the case.¹⁴⁶

Although VA adjudicators are required to weigh the credibility and probative value of evidence and provide adequate rationale for denying a claim,¹⁴⁷ even cases with strong corroborating evidence may still be denied. For example, in *YR v. West*, there was substantial corroborating evidence, including multiple medical reports showing treatment for mental illness after service, several diagnoses of PTSD linked to an in-service assault, and detailed testimony from the victim's sister reporting observable physical injuries just two days after the assault.¹⁴⁸ Yet the claim was denied for lack of corroborating evidence at both the Regional Office (RO) and Board levels.¹⁴⁹ This case differs from many cases in which the victim cannot offer much, if any, corroborating evidence and has an even greater chance of being denied disability benefits by the RO or the Board.¹⁵⁰ Due to subjectivity in interpreting corroborating evidence, the standard for determining the credibility and probative value of such evidence is likely to vary between adjudicators.

Though an argument might be made for characterizing corroborating evidence more precisely, Dr. Moseley-Brown contends that the VA should accept the veteran's testimony and a diagnosis of PTSD without requiring any corroboration of the attack, because "currently, MST victims are re-victimized by VA claims process."¹⁵¹ Anticipating concerns of an inundation of fraudulent claims if corroborative

144. Nat'l Ctr. for PTSD, What is PTSD?, <http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp> (last visited Nov. 2, 2009) [hereinafter What is PTSD?].

145. *Id.*

146. *Apr. 23 Legislative Hearing* (statement of Rep. John J. Hall, Chairman, Subcomm. on Disability Assistance and Memorial Affairs), *supra* note 30 ("[T]he process to adjudicate disability claims is complex, legalistic and protracted, and particularly difficult for veterans because of the stresses and uncertainties involved while facing skeptical and cynical attitudes of VA staff.").

147. *YR v. West*, 11 Vet. App. 393, 398-99 (1998).

148. *Id.* at 395-96.

149. *Id.* at 396-97.

150. *See, e.g., Bexley v. Shinseki*, No. 07-3372, 2009 U.S. App. Vet. Claims LEXIS 1503, at *7-*9, *10 (finding that without more corroborating evidence than lay testimony, the veteran's claim for benefits based on MST-induced PTSD should be denied).

151. Interview with Moseley-Brown, *supra* note 125.

evidence were no longer required by the VA, Dr. Moseley-Brown refutes such likelihood.¹⁵² She points out that because MST is such a shameful experience that can cause professional and social hardship, veterans would be unlikely to file fraudulent claims in order to receive VA disability benefits.¹⁵³ However, presently, “Congress, who writes VA regulations, would rather prevent ten deserving veterans from getting the help they need, than risk one undeserving veteran beating the system.”¹⁵⁴ This is in direct contrast to the VA’s policy giving the benefit of the doubt to the veteran in each case.¹⁵⁵

Currently, the VA’s PTSD regulations disparately impact female veterans, because they require female veterans to meet a higher evidentiary standard than male veterans.¹⁵⁶ These regulations are more burdensome to female veterans than male veterans due to a higher evidentiary standard in the MST regulation that affects female veterans in large majority.¹⁵⁷ More specifically, the evidentiary burden for proving PTSD due to combat is lower than the evidentiary burden for proving PTSD due to MST, yet both regulations govern circumstances that are commonly undocumented.¹⁵⁸

Although the VA regulations were designed to be gender neutral, addressing the disability category of the veteran rather than the sex of the veteran,¹⁵⁹ the numbers show a disparate impact on female veterans.¹⁶⁰ Generally, male veterans tend to suffer from PTSD due

152. *Id.*

153. *Id.* (recollection of the author).

154. Interview with Captain Lory Manning, Dir. of Women in the Military Project, The Women’s Research and Educ. Inst. (Nov. 13, 2009) (recollection of the author).

155. 38 U.S.C. § 5107(b) (2006); *see, e.g.*, *Gilbert v. Derwinski*, 1 Vet. App. 49, 54-55 (1990) (citing 38 U.S.C. § 3007 (1988) as the controlling statutory standard of proof for cases dealing with veterans benefits).

156. *See* discussion *supra* Parts II, III (examining the VA regulations that impose difficult evidentiary standards on female veterans).

157. *See* AMY STREET & JANE STAFFORD, NAT’L CTR FOR PTSD, MILITARY SEXUAL TRAUMA: ISSUES IN CARING FOR VETERANS, <http://www.ptsd.va.gov/professional/pages/military-sexual-trauma.asp> (last visited Nov. 2, 2009) [hereinafter ISSUES IN CARING FOR VETERANS] (finding that seventy-eight percent of women in active service have experienced sexual harassment, as opposed to thirty-eight percent of men, while six percent of women and one percent of men have been sexually assaulted); *see also* discussion *supra* Part III (examining the VA regulation governing the service connection for PTSD due to MST).

158. *Compare* 38 C.F.R. § 3.304(f)(1) (2008) (allowing lay testimony to prove PTSD due to combat), *with id.* § 3.304(f)(3) (requiring more corroborating evidence for PTSD due to personal assault).

159. ISSUES IN CARING FOR VETERANS, *supra* note 157 (defining sexual harassment and sexual assault, and describing the expansion of PTSD benefit laws to include male veterans).

160. *See* Nat’l Ctr. for PTSD, How Common is PTSD?, <http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp> (last visited Nov. 2, 2009) (indicating that women are more likely to experience PTSD than men); Women, Trauma and PTSD, *supra* note 111 (“Women are more than twice as likely to develop PTSD than men.”).

to combat whereas female veterans tend to suffer from PTSD due to MST.¹⁶¹ Statistics show that veterans who file claims for MST-related PTSD are mostly female,¹⁶² whereas veterans who file claims for combat-related PTSD are mostly males.¹⁶³ Since 2002, for example, nearly ninety percent of all combat-related PTSD claims were filed by male veterans and over sixty-five percent of all MST-related PTSD claims were filed by female veterans.¹⁶⁴ Therefore, among female veterans, PTSD due to MST is much more prevalent than PTSD due to combat.¹⁶⁵ The combat regulation requires no corroborative evidence to show combat-related PTSD.¹⁶⁶ The only evidence required is 1) a diagnosis of PTSD related to combat and 2) any evidence of combat service without corroboration of the occurrence of the veteran's specific combat stressor.¹⁶⁷ The evidence need only show, for example, that the veteran was awarded a combat medal, or that his unit was stationed in the vicinity of a verified combat incident in order to show that the in-service stressor he claims actually occurred.¹⁶⁸ By contrast, a woman suffering from MST-related PTSD must, essentially, present proof that the sexual attack actually occurred.¹⁶⁹ Therefore, a combat veteran, who is typically male, need not present evidence of his specific involvement in the fire fight that he claims as his stressor, but the MST veteran, who is almost always female, must provide evidence that she was attacked. As a result, the evidentiary standards are inherently unequal for male and female veterans, yet the reasoning behind the differing evidentiary standards is unclear.

161. See Research on Women, Trauma, and PTSD, *supra* note 111 (stating that women are both more likely to be sexually assaulted and more likely to develop PTSD).

162. VETERANS BENEFITS ADMINISTRATION, U.S. DEP'T OF VETERANS AFFAIRS, POST TRAUMATIC STRESS DISORDER (PTSD) CLAIMS AND DECISIONS BY GENDER, COMBAT INDICATOR, AND MILITARY SEXUAL TRAUMA INDICATOR (May 27, 2009) (on file with author) [hereinafter VETERANS BENEFITS ADMINISTRATION].

163. *Id.* (noting that in 2008, male veterans filed 91.64% of all combat-related PTSD claims).

164. *Id.*

165. It should be noted that females were not traditionally assigned to combat roles. See GAO REPORT 1998, *supra* note 31, at 3 (acknowledging that many military positions are closed to women because they involve combat).

166. See 38 C.F.R. § 3.304(f)(1) (2008) (allowing veterans to use lay testimony to prove the in-service stressor when the veteran has engaged in combat related to the claimed stressor).

167. *Id.* § 3.304(f).

168. See, e.g., *Pentecost v. Principi*, 16 Vet. App. 124, 125, 128 (2002) (accepting a verified combat incident as evidence that an in-service stressor occurred); Gen. Counsel Opinion, *supra* note 21, at ¶ 8 (stating that certain military citations can be conclusive evidence of participation in the in-service stressor event).

169. See 38 C.F.R. § 3.304(f)(3) (requiring corroborating evidence of in-service personal assault); see also M21-1MR, *supra* note 82, at P.4, subpt. II, ch.1, § D(17)(b) (requiring "an approximate balance of positive and negative evidence that the event did occur").

Like combat, the circumstances of MST are often undocumented. Therefore, the VA regulations require adjudicators to look for alternative supporting evidence of an assault outside of service records.¹⁷⁰ However, just as the VA requires that combat veterans provide only the approximate location, date, and time of the combat stressor,¹⁷¹ it should require no more from victims of MST. The female veteran should not have to meet a higher burden of proof than a combat veteran when her situation is equally likely to go undocumented.¹⁷² Some might argue that the lesser burden of proof for the combat regulation is out of honor and respect for those who served in combat, but female veterans who served in the military, despite statistics showing a high probability of sexual assault, deserve to be honored as well. Although unintentional, these regulations present different and unequal standards for male and female veterans and must be revised. The VA regulations governing MST-related PTSD must be changed in order to lessen the burden of proof for victims of MST. The VA should ask for no more than the veteran's testimony of the attack and a medical diagnosis of PTSD connected to MST.

Although this article focuses primarily on the disparate impact on female service members, it must be noted that the VA's MST regulation is not only unfavorable to female veterans who are victims of MST; it is also unfavorable to male victims. Evidence shows that males are more likely than females to experience PTSD after a sexual attack,¹⁷³ though they are not as frequently victimized.¹⁷⁴ Although it is generally more common for male soldiers to develop PTSD as a result of a combat experience,¹⁷⁵ they have a higher chance of developing PTSD from MST due to the shame and taboo of such an attack.¹⁷⁶ Research indicates that men have about a sixty-five percent chance of developing PTSD after a sexual assault, whereas they only have about a thirty-nine percent chance of developing PTSD after combat exposure.¹⁷⁷ Yet the burden of proof for MST veterans is higher than

170. M21-1MR, *supra* note 82, at P.4, subpt. II, ch.1, § D(13)(K).

171. *Id.* § D(14) states:

At a minimum, the veteran *must* provide the following:

- a stressor that can be documented
- the location where the incident took place
- the approximate date . . . of the incident, and
- the unit of assignment at the time the stressful event occurred.

172. See ISSUES IN CARING FOR VETERANS, *supra* note 157 (indicating that victims hesitate to report their attacks, leading to a lack of documentation).

173. *Id.*

174. Women, Trauma and PTSD, *supra* note 111.

175. *Id.*

176. ISSUES IN CARING FOR VETERANS, *supra* note 157 (noting that "the experience of sexual victimization may be even more stigmatizing for men than it is for women because these victimization experiences fall so far out of the proscribed male gender role").

177. *Id.*

for combat veterans.¹⁷⁸ Therefore, the proposed changes in the VA regulations would help male MST victims as well as female victims.

In light of the discussion above, the current PTSD regulation for MST should be revised so that it no longer requires corroborating evidence. The requirement of such evidence presents an unduly difficult burden of proof for victims, mostly female, to meet when presenting a claim for disability benefits.¹⁷⁹ Such evidence, during or after service, is unlikely to exist and forces a victim to relive the attack all over again.¹⁸⁰ Furthermore, the evidentiary standard for MST victims, though intended to be gender neutral, discriminates against female veterans, because it imposes a higher evidentiary burden for entitlement to service connection for PTSD than regulations affecting mostly male veterans.¹⁸¹ Eliminating the requirement for corroborative evidence would equalize the effect of the PTSD regulations on male and female veterans as well as free adjudicators from relying on subjective interpretations of evidence presented in the claims file. The VA should simply do away with the requirement for corroboration and accept a medical diagnosis of PTSD linked to MST and the veteran's testimony to show service connection for PTSD due to MST. Considering the sensitive nature of MST, the common problem of lack of documentation of an attack, and the hesitancy to seek treatment, the evidentiary burden placed on victims, who are mostly female, is too high.

CONCLUSION

The VA regulations affecting female veterans are a major concern for both the VA and Congress. Currently, female veterans constitute the fastest growing subgroup of the total veteran population, comprising seven percent.¹⁸² The number of PTSD claims filed by female veterans is growing as well. In 2008, female veterans filed 5.5% of all PTSD claims, up from 2.73% in 2002.¹⁸³ By contrast, the number of PTSD claims filed by males decreased from almost ninety-six percent

178. Compare 38 C.F.R. § 3.304(f)(1) (2008) (allowing a veteran's lay testimony without corroboration as evidence of a combat stressor), with *id.* § 3.304(f)(3) (requiring credible evidence as evidence of an in-service personal assault stressor).

179. See discussion *supra* Part III (examining the burden that requiring corroborating evidence for MST puts on female veterans).

180. M21-1MR, *supra* note 82, P.4, subpt. II, ch.1, § D(15)(a) (directing that some stressors may be impossible to document); What is PTSD?, *supra* note 144 (describing situations which cause a victim to relive an attack).

181. See notes 178-79 and accompanying text.

182. OFFICE OF POL'Y & PLANNING, WOMEN VETERANS: PAST, PRESENT AND FUTURE 9 (2007), available at http://www1.va.gov/womenvet/docs/womenvet_history.pdf; Maze, *supra* note 18.

183. VETERANS BENEFITS ADMINISTRATION, *supra* note 162.

in 2002 to nearly ninety-two percent in 2008.¹⁸⁴ Since 2002, over 600,000 disability claims filed with the VA have been for PTSD.¹⁸⁵

In order to ensure equal treatment of male and female veterans, the VA regulations should be tailored to treat male and female veterans equally. Based on the arguments set forth in this article, it is not enough for the VA to write regulations based on the veteran's disability; the VA also must consider the disparate impact that seemingly gender neutral regulations have on female veterans and adjust these regulations accordingly. Congress should alleviate the female combat veteran's unduly heavy evidentiary burden for proving combat stressors due to a lack of combat documentation in her service records. Specifically, Congress should 1) create a special service ribbon for Lionesses¹⁸⁶ and 2) lift the ban restricting female soldiers from combat duties to ensure that female veterans get the same disability benefits as male veterans. With regard to claims for MST-related PTSD, Congress should treat these claims differently than other personal assault claims by lowering the evidentiary standard. Congress should not require MST victims to provide corroborating evidence of an attack, but should require only a valid diagnosis of PTSD¹⁸⁷ linked to a sexual trauma which occurred during service. More specifically, Congress¹⁸⁸ should rewrite the current PTSD personal assault statute¹⁸⁹ to exclude claims based on MST and write a separate regulation governing claims exclusively for MST-related PTSD. As noted above, this regulation should require only a diagnosis of PTSD linked to MST. These recommended changes will ensure that our female veterans get the medical care and disability benefits they deserve.

184. *Id.*

185. *Id.*

186. In creating this ribbon, Congress must officially establish the Lioness program and require uniform implementation between all service branches that use the program.

187. The statute currently requires medical evidence of PTSD, a link between the symptoms and the in-service stressor, and corroborating evidence of the in-service stressor. 38 C.F.R. § 3.304(f) (2008).

188. The VA could accomplish this as well by revising the regulation 38 C.F.R. § 3.304(f) per Congress's authority as set forth in 38 U.S.C. § 1154(b) (2006).

189. 38 U.S.C. § 1154(b).