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Military Sexual Trauma: Survivors & VA Disability Benefits

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Military Sexual Trauma: Survivors & VA Disability Benefits
Military Sexual Trauma: Defined

Military sexual trauma ("MST") is the term used by VA to refer to experiences of sexual assault or repeated, threatening sexual harassment that a vet experienced during his/her military service.

Military Sexual Trauma: Defined

The definition used by the VA comes from federal law and is defined as “psychological trauma, which in the judgment of a VA mental health professional, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the Veteran was serving on active duty, active duty for training, or inactive duty training.”

- See 38 U.S.C. § 1720D(a)(1)
Military Sexual Trauma: Unreported

In-service assaults pose a challenge as a stressor because incidents often go unreported

1) DoD believes that a large majority of MSTs are not reported.

2) DoD estimated that approximately 18,900 instances of unwanted sexual contact took place in the military in FY 2014

3) However, that same year, only 4,768 service members made a report for an incident that occurred during military service

• Statistics Department of Defense, Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2014 (Apr. 29, 2015)
Military Sexual Trauma: Unreported

• VA has a national screening program in which every vet seen for health care is asked whether he/she experienced MST

• National data from this program reveals that about
  • 1 in 4 women and
  • 1 in 100 men
  • respond “yes,” that they experienced MST, when screened by their VA provider.
MST Affects Both Mental and Physical Health

- Posttraumatic Stress Disorder (PTSD)
- Depressive Disorders
- Anxiety Disorders
- Headaches
- Gastrointestinal difficulties
- Sexual Dysfunction
- Chronic Pain
- Chronic Fatigue

Sexual assault is more likely to result in symptoms of PTSD than are most other types of trauma.
The VA Disability Benefits System

2 Major VA Disability Benefits

• Service-connected compensation (service connection)

• Needs-based, non-service-connected pension (pension will not be addressed in this webinar)
Entitlement to Compensation:
General Requirements

- Entitled to compensation for disabilities incurred in or aggravated during active military, naval, or air service

- Service department findings are binding on VA

  - Service records authoritative of whether individual served & dates of service
Entitlement to Compensation: General Requirements

5 General Requirements of Disability Compensation Claim

- Veteran Status
- Existence of current disability
- Connection between service & disability
- Degree of disability
- Effective Date of benefits (the date VA starts paying the benefits)
Veteran Status

- A veteran is defined as “a person who served in the **active military, naval, or air service**, and who was discharged or released therefrom under conditions other than dishonorable”

38 U.S.C. § 101(2)
Veteran Status

• “active military, naval, or air service” includes:

(1) Active duty

(2) Any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty

(3) Any period of inactive duty training during which the individual was disabled or died (i) from an injury incurred or aggravated in line of duty; or (ii) from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident occurring during such training

38 U.S.C. § 101(24)
Three Elements of Service Connection Claim

(1) Current disability;

(2) In-service injury or event; and

(3) A medical link or nexus between the current disability and the in-service injury or event
First of Three Requirements: Evidence of Current Disability

• Record must contain diagnosis by medical professional (in most cases)

• Claimant must have the disability at time of filing or during pendency of claim
  • Disability may resolve prior to adjudication

• VA has duty to assist the veteran with his/her claim – may be obligated to provide free VA examination
Second of Three Requirements: 
Evidence of Incident, Injury, or Event

• Great weight on vet’s military personnel and medical records

• Must consider lay evidence
  • No requirement that injury be confirmed in military records

• Relaxed evidentiary standard for combat vets
Third of Three Requirements: Nexus/Linkage

- A link between the vet’s current disability and his or her in-service incident, injury, or event
  - A medical opinion is usually required
Five Ways to Establish Service Connection

• Direct Service Connection

• Aggravation

• Statutory Presumption

• Secondary Service Connection

• Caused by VA Medical Treatment or Vocational Rehabilitation
Five Ways to Establish Service Connection

• VA must consider all 5 theories when adjudicating a claim for service connection as long as a theory is reasonably raised by the record

• Must make reasonable efforts to assist in development, unless there is no reasonable possibility assistance would aid in substantiating claim
Presumption of Soundness

• When vet was provided with an entrance exam upon his/her entry into the military, unless the entry exam indicates otherwise, VA is required to presume vet was in sound condition when he or she entered service.

• Rebutting Presumption of Soundness: VA must show clear & unmistakable evidence that condition pre-existed service & was not aggravated during service.
Service Connection for PTSD

• 3 required elements (slight variation from establishing service connection for other disabilities):

  ➢ Current diagnosis of posttraumatic stress disorder (PTSD) in accordance with DSM-5 (Diagnostic and Statistical Manual for Mental Disorders, 5th Edition);
    • If possible, vets should submit a private medical diagnosis of PTSD

  ➢ Credible supporting evidence of an in-service stressor; and

  ➢ Medical evidence of a link between the current symptoms and the stressor
Current Diagnosis of PTSD

• VA must accept a competent medical diagnosis of PTSD, unless:

  • Other medical evidence in the claims file supports the VA’s contention that the vet does not have PTSD, and

  • VA gives an adequate statement of the reasons for its decision not to accept the PTSD diagnosis

• Medical evidence must show that it is as likely as not that the vet has PTSD. A “clear diagnosis” of PTSD is no longer required, effective March 7, 1997.
Requirement of In-service Stressor: In-service Personal Assault (38 C.F.R. § 3.304(f)(5))

• Because "veterans face unique problems documenting their claimed stressor in personal assault cases," the VA has “provided for special evidentiary-development procedures in those cases.”

• Under 38 C.F.R. § 3.304(f)(5), evidence from sources other than the vet’s service records may be used to corroborate the existence of an in-service personal assault stressor.
Requirement of In-service Stressor: In-service Personal Assault (38 C.F.R. § 3.304(f)(5))

- “Credible supporting evidence” under 38 C.F.R. § 3.304(f)(5) includes, but is not limited to the following MARKERS:
  - Police records
  - Medical records
  - STD or pregnancy tests
  - Statements from family members, friends, roommates, clergy
  - Behavioral changes (drugs/alcohol; requests for transfers; unexplained economic changes; personality changes; deterioration of work performance)
Medical Linkage Between PTSD and Stressor

• Finally, to establish service connection for PTSD, there must be medical evidence linking the veteran’s current diagnosis of PTSD to his or her in-service stressor

  • The standard of proof for a linkage opinion: at least as likely as not

  • It is not uncommon for service connection for PTSD to be granted many years (or decades) after the veteran left the service
Advocacy Advice

• Be creative when looking for markers in the claims file or personnel records. Think of whether the evidence is analogous to the examples of markers listed in 38 C.F.R. § 3.304(f)(5).

• Even though a vet claimed service connection for PTSD, the VA may be obligated to consider service connection for other mental disorders. See Clemons v. Shinseki, 23 Vet. App. 1 (2009).

• It is often harder to establish service connection for PTSD than it is for other mental disorders (do not limit the scope of the claim)
Advocacy Advice

• Especially in cases of military sexual trauma, which are often hard to corroborate, ask the veteran if he or she experienced any other stressors while in service that may be easier to corroborate

• Argue each stressor -> the goal is to get the veteran benefits one way or the other

• File early to preserve the effective date
  • Submit an intent to file (VA Form 21-0966)
Assign % of Disability Once SC Granted

• The method of establishing appropriate percentage of disability

• Establishing the appropriate disability evaluation involves application of the VA “rating schedule” set forth in 38 C.F.R. Part 4. Part 4 is called VA SCHEDULE FOR RATING DISABILITIES.

• Determining symptoms vet is experiencing
Establishing Appropriate % of Disability Once SC Granted

• % of disability is designed to reflect average impairment in earning capacity caused by disability.

• If vet has multiple SC disabilities, %’s are not added but combined via Combined Ratings Table
  • Ex: 30% & 20% combine to 40%

• %’s set in increments of 10, may be 0% (called non-compensable)
VA Compensation Rates

These rates are effective December 1, 2014 (paid monthly)

• 10% = $133.17
• 20% = $263.23
• 30% = $407.75
• 40% = $587.36
• 50% = $836.13

• 60% = $1,059.09
• 70% = $1,334.71
• 80% = $1,551.48
• 90% = $1,743.48
• 100% = $2,906.83

These rates are increased if the vet has dependents (spouse and/or children)

Disability compensation is not taxable & usually not subject to garnishment or attachment.
General Rating Considerations for Mental Disorders

- 38 C.F.R. § 4.126 Evaluation of disability from mental disorders.

- (a) When evaluating a mental disorder, the rating agency shall consider the frequency, severity, and duration of psychiatric symptoms, the length of remissions, and the veteran's capacity for adjustment during periods of remission. The rating agency shall assign an evaluation based on all the evidence of record that bears on occupational and social impairment rather than solely on the examiner's assessment of the level of disability at the moment of the examination.
Rating Criteria for Mental Disorders (Including PTSD)

38 C.F.R. § 4.130

• 100% - Total occupational & social impairment

• 70% - Occupational & social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood

• 50% - Occupational & social impairment with reduced reliability and productivity

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Rating Criteria for Mental Disorders (Including PTSD)

- 30% - Occupational & social impairment w/ occasional decrease in work efficiency & intermittent periods of inability to perform occupational tasks

- 10% - Occupational & social impairment due to mild/transient symptoms which decrease work efficiency & ability to perform occupational tasks only in periods of significant stress OR symptoms controlled by continuous medication

- 0% - diagnosis but no interference with occupational and social functioning
Assigning Disability Ratings for Mental Disorders

• VA assigns the rating most closely reflecting level of social & occupational impairment

• Vet doesn’t need to have every symptom listed in the rating criteria to get that rating

• VA must consider work history & job difficulties
Advocacy Advice

Proving Entitlement to a Rating

- Point out symptoms specifically mentioned in 38 C.F.R. § 4.130, but remember this list is not exhaustive

- Review lay statements for evidence of occupational and social impairment - while listing symptoms mentioned in 38 C.F.R. § 4.130 is very important, a PTSD rating should be decided based on the extent that the veteran’s symptoms affect occupational and social impairment
  - For example, a veteran could have many of the symptoms listed for a 30% rating, but if there are psychiatric examinations that state the veteran’s PTSD causes “occupational and social impairment with reduced reliability and productivity,” you have a strong case for a 50% rating
Advocacy Advice

Raise the issue of Total Disability based on Individual Unemployability (TDIU)

• Total disability ratings may be assigned where schedular rating is less than total, when vet is unable to get or keep substantially gainful occupation (SGO) b/c of service-connected disabilities
TDIU - 38 C.F.R. § 4.16

• Vet cannot be engaged in & must be unable to engage in substantially gainful occupation & must have

  • One SC disability rated 60% or more; or

  • Two or more SC disabilities, one of which is rated at least 40% & sufficient additional SC disabilities to combine to 70% or more; or

  • VA can approve extra-schedular TDIU (if above %’s not met)
Client Story

- Case placed under NVLSP’s MST Program

- Veteran represented by Volunteer Pro Bono Attorney
  - Attorney submitted written brief to VA with supporting evidence of PTSD due to MST

- Veteran awarded 100% VA disability compensation for mental condition related to MST

- Challenges
Questions?

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