DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AK00

Post-Traumatic Stress Disorder Claims Based on Personal Assault

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations concerning the type of evidence that may be relevant in corroborating a veteran's statement regarding the occurrence of a stressor in claims for service connection of post-traumatic stress disorder (PTSD) resulting from personal assault. This amendment provides that evidence other than the veteran's service records may corroborate the occurrence of the stressor. This amendment also requires that VA not deny PTSD claims based on personal assault without first advising claimants that evidence from sources other than the veteran's service records may help prove the stressor occurred. These changes are necessary to ensure that VA does not deny such claims simply because the claimant did not realize that certain types of evidence may be relevant to substantiate his or her claim.

DATES: Effective Date: March 7, 2002.

FOR FURTHER INFORMATION CONTACT: Bill Russo, Regulations Staff, Compensation and Pension Service (211), Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273–7211.

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on October 16, 2000 (65 FR 61132–61133), VA proposed to amend its adjudication regulations to provide that evidence other than a veteran's service records may corroborate the veteran's assertion that a stressor occurred in claims of PTSD based on personal assault, and that VA may not deny such a claim without first advising the claimant that evidence other than the veteran's service records may be submitted to substantiate his or her claim. The comment period ended December 15, 2000. We received written comments from the Disabled American Veterans, the National Organization of Veterans' Advocates, the Vietnam Veterans of America, and two individuals. Based on the rationale set forth in the proposed rule and in this document, we are adopting the provisions of the proposed rule as a final rule with the changes discussed below.

Positive Response and Timely Efforts

One commenter stated that this amendment will be good for veterans and only wished that it had been done sooner.

Other Stressor Types

One commenter asserted that the regulations should be clarified to indicate that other types of in-service stressors (besides those listed in § 3.304(f)) could lead to PTSD. We agree and have made a clarifying change in the introductory paragraph of § 3.304(f).

Addition of Pregnancy Tests and Testing for Sexually Transmitted Diseases

One commenter recommended that evidence of pregnancy tests and testing for sexually transmitted diseases be included in the list of examples of sources other than the veteran's service records that may corroborate the veteran's assertion that a stressor occurred. The commenter stated that such testing is a logical result in the aftermath of a sexual assault and constitutes strong evidence that such an assault occurred. We agree that these types of records are relevant because they may indicate that a person has been recently assaulted. We have therefore revised the regulation to specifically mention pregnancy tests and tests for sexually transmitted diseases.

Review of Evidence by a Medical Professional

One commenter suggested adding the phrase ''mental health professional'' to the last sentence of the proposed rule, which stated, ''VA may submit any evidence that it receives to an appropriate medical professional for an opinion as to whether it indicates that a personal assault occurred.'' The commenter stated that often personal assaults, especially those of a sexual nature, go unreported. The commenter also stated that often physical injuries heal before the victim seeks assistance and that in these cases the only evidence of assault that remains lies within the victim's psyche and a mental health professional is more likely than a medical doctor to be able to discern it.

We agree that the term ''medical professional'' should include mental health professionals such as psychologists. We have therefore amended the regulation to include mental health professionals.

Another commenter asserted that whether or not a stressor occurred is a question of fact and not a medical question, and expressed concern that asking a medical professional for an opinion regarding whether a stressor occurred was in essence taking the fact-finding out of the hands of the VA decisionmaker.

We believe that a determination as to whether a stressor occurred is a factual question that must be resolved by VA adjudicators. Nonetheless, an opinion from an appropriate medical or mental health professional could be helpful in making that determination. Such an opinion could corroborate the claimant's account of the stressor incident. In certain cases, the opinion of such a professional could help interpret the evidence so that the VA decisionmaker can better understand it. Opinions given by such professionals are not binding upon VA, but instead are weighed along with all the evidence provided. Therefore, we make no change based on this comment.

Diagnosis of PTSD as Proof of Stressor

One commenter suggested that, given the nature of PTSD, 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. The commenter also stated that if a diagnosis of PTSD is accepted by VA, the existence of the stressor identified by the diagnostician must also be accepted. Finally, the commenter urged VA to revise § 3.304(f) to provide ''that a competent and credible diagnosis of PTSD due to personal assault during service will be accepted as proof of service connection in the absence of evidence to the contrary.''

We believe that § 3.304(f)(3) is consistent with current case law. The U.S. Court of Appeals for Veterans Claims (CAVC) has held that VA is not ''bound to accept [the claimant's] uncorroborated account'' of a stressor, nor to ''accept the social worker's and psychiatrist's unsubstantiated * * * opinions that the alleged PTSD had its origins in appellant's [military service].'' *Wood* v. *Derwinski*, 1 Vet. App. 190, 192 (1991). More recently, the CAVC stated that VA ''is not required to accept doctors' opinions that are based upon the appellant's recitation of medical history.'' *Godfrey* v. *Brown*, 8 Vet. App. 113, 121 (1995). In diagnosing PTSD, doctors typically rely on the unverified stressor information provided by the patient. Therefore, a doctor's recitation of a veteran-patient's statements is no more probative than the veteran-patient's statements made to VA. Therefore, VA is not required to accept a doctor's diagnosis of PTSD due to a personal assault as proof that the stressor occurred or that the PTSD is

service connected. If, however, 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. For all of these reasons, we have made no change to the regulatory language based on these comments.

Corroboration of Stressor

One commenter also expressed belief that the proposed rule is contrary to 38 U.S.C. 1154(a) and 5107(b), 38 CFR 3.102, 3.303(a), and 3.304(b)(2), and *Cartright* v. *Derwinski,* 2 Vet. App. 24 (1991), because it requires corroboration of the claimed stressor. The commenter stated that, by statute, ''credible lay evidence alone is sufficient to meet a veteran's burden of proof if not rebutted by a preponderance of evidence.''

Section 1154(a) requires that VA regulations pertaining to service connection provide that ''due consideration shall be given to the places, types, and circumstances of [a] veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence.'' Section 5107(b) provides that VA must consider all information and lay and medical evidence of record in adjudicating a claim for veterans benefits and that ''[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.'' Section 3.102 states that ''[t]he reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions * * *.''

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. Section 501(a) of title 38, United States Code, authorizes the Secretary of Veterans Affairs to promulgate regulations with respect to the nature and extent of proof and evidence in order to establish entitlement to veterans benefits. Consistent with that authority, VA has promulgated 38 CFR 3.304(f) requiring corroborating evidence of the occurrence of the stressor in PTSD claims except in certain circumstances in which the claimed stressor is related to combat or to the veteran's prisoner-of-war experience. Further, the CAVC held in *Dizoglio* v. *Brown,* 9 Vet. App. 163, 166 (1996), that, if the claimed stressor is not related to combat, a ''[veteran's] testimony, by itself, cannot, as a matter of law, establish the occurrence of a noncombat stressor.'' While 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. 38 CFR 3.303(a); *see* 38 U.S.C. 1154(a); *see also* 38 CFR 3.304(b)(2). Therefore, VA must look to see whether other evidence in the record supports the occurrence of an in-service stressor. The reasonable doubt doctrine referenced in 38 U.S.C. 5107(b) and 38 CFR 3.102 comes into play when an approximate balance of positive and negative evidence exists that does not satisfactorily prove or disprove the claim. Thus, there must be a balance of positive and negative evidence on an issue, including the issue of whether an in-service stressor occurred, before the reasonable doubt doctrine is relevant to a claim.

Combat Claims

As noted above, this final rule retains existing provisions concerning the establishment of PTSD claims related to combat or prisoner-of-war experience. Two commenters suggested changes to the regulations concerning the establishment of PTSD claims related to combat. These comments are beyond the scope of this rulemaking proceeding since the proposed rule did not propose any substantive changes concerning the combat provisions.

Authority Cited

In the proposed rule, we cited 38 U.S.C. 501(a) and 1154(b) as authority for § 3.304(f). One commenter was concerned with the citation of 38 U.S.C. 1154(b), which relates to claims by veterans who have engaged in combat with the enemy, as authority for the proposed § 3.304(f). The commenter suggested that using section 1154(b) as authority for this regulation could have negative implications, such as misleading veterans into believing they can only file combat-related PTSD claims. The commenter suggested instead that 38 U.S.C. 1154(a) should serve as authority for the rulemaking.

As explained above, 38 U.S.C. 1154(a)(1) authorizes the Secretary to promulgate regulations requiring that in adjudicating a claim for service connection, consideration must ''be given to the places, types, and circumstances of [a] veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence.''

We believe that section 1154(a) provides sufficient authority for this rulemaking with regard to paragraph (f)(3) of § 3.304. However, the authority for paragraph (f)(1) of § 3.304 is 38 U.S.C. 1154(b). Therefore, in order to avoid any potential confusion, the citation of authority for the newly amended § 3.304(f) should be 38 U.S.C. 501(a) and 1154. Accordingly, we have made this change in the final rule.

In this final rule, we are also making in § 3.304(f)(3) other nonsubstantive changes from the proposed rule for purposes of clarity.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Regulatory Flexibility Act

The Secretary hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule would not directly affect any small entities. Only individuals would be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers are 64.100, 64.101, 64.104, 64.105, 64.106, 64.109, and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: February 27, 2002.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.304, paragraph (f) is revised to read as follows:

§ 3.304 Direct service connection; wartime and peacetime.

* * * * *

(f) *Post-traumatic stress disorder.* Service connection for post-traumatic stress disorder requires medical evidence diagnosing the condition in accordance with § 4.125(a) of this chapter; a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred. Although service connection may be established based on other in-service stressors, the following provisions apply for specified in-service stressors as set forth below:

(1) If the evidence 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.

(2) If the evidence establishes that the veteran was a prisoner-of-war under the provisions of § 3.1(y) of this part and the claimed stressor is related to that prisoner-of-war experience, 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.

(3) 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. Examples of such evidence 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. 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 will not deny a post-traumatic stress disorder claim that is based on in-service personal assault without first advising the claimant that evidence from sources other than the veteran's service records or evidence of behavior changes may constitute credible supporting evidence of the stressor and allowing him or her the opportunity to furnish this type of evidence or advise VA of potential sources of such evidence. 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.

(Authority: 38 U.S.C. 501(a), 1154)

[FR Doc. 02–5376 Filed 3–6–02; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[CS Docket No. 98–132; FCC 01–314]

1998 Biennial Review—Multichannel Video and Cable Television Service

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: This document announces the effective date of an amendment to our rules pertaining to the public file, notice, recordkeeping, and reporting requirements adopted in the Second Report and Order in CS Docket No. 98–132 in the Commission's biennial review of the public file and notice requirements concerning cable television. Section 76.1700(a) relieves cable systems serving 1000 or more, but fewer than 5000 subscribers, from certain recordkeeping requirements associated with maintaining the public file, requiring public file information to be provided only upon request. A summary of the Second Report and Order was published in the **Federal Register** at 66 FR 67115 on December 28, 2001.

DATES: Section 76.1700(a), published at 66 FR 67115 (December 28, 2001) became effective on January 28, 2002.

FOR FURTHER INFORMATION CONTACT: Sonia Greenaway-Mickle, Cable Services Bureau, (202) 418–1419.

SUPPLEMENTARY INFORMATION: On March 26, 1999, the Commission released a Report and Order in CS Docket No. 98–132, 65 FR 53610, regarding the Commission's 1998 biennial regulatory review of its regulations conducted pursuant to section 11 of the Telecommunications Act of 1996 and streamlined and reorganized part 76 public file, recordkeeping, and notice requirements. In the Second Report and Order in CS Docket No. 98–132, the Commission adopted section 76.1700(a). Section 76.1700(a) relieves cable systems serving 1000 or more, but fewer than 5000 subscribers, from certain recordkeeping requirements associated with maintaining the public file, requiring public file information to be provided only upon request. A summary of the Second Report and Order was published in the **Federal Register** at 66 FR 67115 on December 28, 2001. On June 7, 2001, OMB approved the information collection contained in the part 76 rule. OMB 3060–0981. This publication satisfies the statement in the Second Report and Order that the Commission would publish a document in the **Federal Register** announcing the effective date of that rule.

List of Subjects in 47 CFR Part 76

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 02–5470 Filed 3–6–02; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1002

[STB Ex Parte No. 542 (Sub–No. 8)]

Regulations Governing Fees For Services Performed in Connection With Licensing and Related Services—2002 Update

AGENCY: Surface Transportation Board, DOT.

ACTION: Final rules.

SUMMARY: The Board adopts its 2002 User Fee Update and revises its fee schedule at this time to recover the costs