



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

[REDACTED]

Represented by

Gordon A. Graham, Agent

SS [REDACTED]

Docket No. 201116-127300

DATE: April 19, 2024

ORDER

Entitlement to service connection for posttraumatic stress disorder (PTSD) based on military sexual trauma (MST) is granted.

FINDING OF FACT

Resolving all doubt in favor of the Veteran, her PTSD is related to her in-service MST.

CONCLUSION OF LAW

The criteria for service connection for PTSD based on MST have been met. 38 U.S.C. §§ 1110, 5107; 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304(f), 4.125(a).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran had active service from September 1985 to October 1988.

Following an August 2020 rating decision, the Veteran submitted a February 2021 VA Form 10182, Decision Review Request: Board Appeal, and elected the Evidence Submission docket. Therefore, the Board may only consider

the evidence of record at the time of the agency of original jurisdiction (AOJ) decision on appeal, as well as any evidence submitted by the Veteran or her representative with, or within 90 days from receipt of, the VA Form 10182. 38 C.F.R. § 20.303.

In the August 2020 rating decision, the AOJ determined that the Veteran had a diagnosis of PTSD from private physician E.T., and there were PTSD markers of military sexual trauma in the Veteran's service treatment records noted as stomach problems dated November 1986 and a pregnancy test dated November 1986. The Board is bound by these favorable findings. 38 C.F.R. § 20.801 (a).

1. Entitlement to service connection for PTSD based on MST.

Service connection for PTSD has unique evidentiary requirements. It generally requires: (1) medical evidence diagnosing the condition in accordance with 38 C.F.R. § 4.125 (a) (i.e., DSM-5); (2) credible supporting evidence that the claimed in service stressor actually occurred; and (3) medical evidence of a link between current symptomatology and the claimed in service stressor. 38 C.F.R. § 3.304 (f). *See also Cohen v. Brown*, 10 Vet. App. 128 (1997).

If VA determines either that the veteran did not engage in combat with the enemy or that the veteran did engage in combat, but that the alleged stressor is not combat related, the veteran's lay testimony, by itself, is not sufficient to establish the occurrence of the alleged stressor. Instead, the record must contain credible supporting evidence that corroborates the veteran's testimony or statements. 38 C.F.R. § 3.304 (f); *Stone v. Nicholson*, 480 F.3d 1111 (Fed. Cir. 2007); *Cohen v. Brown*, 10 Vet. App. 128, 147 (1997); *Moreau v. Brown*, 9 Vet. App. 389, 395 (1996).

With regard to an actual diagnosis of PTSD, lay persons are not categorically incompetent to speak on matters of medical diagnosis or etiology. *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009). The Board must consider the type of condition specifically claimed and whether it is readily amenable to lay diagnosis or probative comment on etiology. *See Woehlaert v. Nicholson*, 21 Vet. App. 456, 462 (2007). In this regard, the Federal Circuit has held that "PTSD is not the type of medical condition that lay evidence... is competent and sufficient to

identify.” *Young v. McDonald*, 766 F.3d 1348, 1352-53 (Fed. Cir. 2014). Regardless, the Board acknowledges the Veteran is competent to report psychiatric symptoms and stressors both during and after service. *See* 38 C.F.R. § 3.159 (a)(2); *Jandreau*, 492 F.3d at 1377 (discussing that Veteran is competent to report a contemporaneous medical diagnosis); *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) (discussing general competency of a Veteran to report psychiatric symptoms).

Effective August 4, 2014, VA amended the portion of its Schedule for Rating Disabilities dealing with mental disorders and its adjudication regulations that define the term “psychosis” to remove outdated references to the DSM-IV and replace them with references to the recently updated Diagnostic and Statistical Manual (Fifth Edition) (the DSM-5). *See* 79 Fed. Reg. 45,094 (August 4, 2014). Changes brought by the DSM-5 also involved modifications to diagnostic criteria, including how to determine qualifying stressors or onset of PTSD. Therefore, when adjudicating service connection claims based on mental health disabilities that were pending before the AOJ on or after August 4, 2014, the Board must ensure that the Veteran received an adequate VA examination or medical opinion in light of the DSM-5. *See Molitor v. Shulkin*, 28 Vet. App. 397, 410-11 (2017).

VA adopted as final, without change, this interim final rule and clarified that the provisions of this interim final rule do not apply to claims that have been certified for appeal to the Board or are pending before the Board on or before August 4, 2014. *See* Schedule for Rating Disabilities - Mental Disorders and Definition of Psychosis for Certain VA Purposes, 80 Fed. Reg. 14,308 (March 19, 2015). In the present case, the AOJ certified the Veteran’s service connection for PTSD appeal to the Board on November 16, 2020; thus, the amended 38 C.F.R. § 4.125 conforming to the DSM-5 is applicable in the present case for the PTSD issue on appeal.

In the instant case, the Veteran’s PTSD claim is predicated on allegations of a sexual assault and sexual harassment while she was in the military. The Court has set a relatively low bar for interpreting a claim for PTSD as one involving a personal assault stressor for which the provisions of 38 C.F.R. § 3.304 (f)(5) are applicable. In this regard, VA has defined “personal trauma” in a broad sense. Personal trauma for the purpose of VA disability compensation claims based on PTSD refers broadly to stressor events involving harm perpetrated by a person who

is not considered part of an enemy force. Examples include assault, battery, robbery, mugging, stalking, and harassment. Military sexual trauma (MST) is a subset of personal trauma and refers to sexual harassment, sexual assault, or rape that occurs in a military setting.

As personal assault is an extremely personal and sensitive issue, many incidents are not officially reported which creates a proof problem with respect to the occurrence of the claimed stressor. In such situations, it is not unusual for there to be an absence of service records documenting the events the veteran has alleged surrounding the assault. The victims of such trauma may not necessarily report the full circumstances of the trauma for many years after the trauma.

Therefore, the Federal Circuit has held that VA cannot use the absence of service record documentation or a veteran's lack of report of in-service sexual assault to military authorities as evidence to conclude that a sexual assault did not occur. *AZ v. Shinseki*, 731 F.3d 1303, 1318 (Fed. Cir. 2013). For PTSD claims in general, corroboration of every detail of a claimed stressor, including the veteran's personal participation, is not required; rather, a veteran only needs to offer independent evidence of a stressful event that is sufficient to imply his or her personal exposure. *See Pentecost v. Principi*, 16 Vet. App. 124, 128 (2002) (quoting *Suozzi v. Brown*, 10 Vet. App. 307 (1997)).

When a PTSD 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. 38 C.F.R. § 3.304 (f)(5); *see also Patton v. West*, 12 Vet. App. 272, 277 (1999). Examples of such alternative 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. 38 C.F.R. § 3.304 (f)(5). Personal diaries and journals can also be relevant.

If primary evidence, such as service treatment records and service personnel records, contain no explicit documentation that personal trauma occurred, and alternative sources of evidence do not provide credible supporting evidence of the trauma, evidence of behavioral changes around the time of, and after, the

incident(s), may constitute a “marker” of a personal trauma PTSD stressor. The term “marker” means an indicator of the effect or consequences of the personal trauma on the Veteran. A marker could be one or more behavioral events, or a pattern of changed behavior. Even if there is no reference to the personal trauma, evidence of behavior changes may circumstantially support the possibility that the claimed stressor occurred. Evidence of behavior changes or “markers” following the claimed assault, which 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. 38 C.F.R. § 3.304 (f)(5).

In addition, other relevant behavior changes or “markers” include increased use of leave with no apparent reason; medical treatment at a clinic without any specific diagnosis; use of or increased interest in pregnancy or STD tests around the time of the incident; changes in prescription usage and over-the-counter usage; increased disregard for any type of authority; treatment for physical injuries around the time of the alleged trauma, but without mention of the actual trauma; and the breakup of a primary relationship. Notably, behavior changes can be verified through both documentary evidence and lay statements. *Id.*

For personal assault PTSD claims, an after-the-fact medical opinion can also serve as the credible supporting evidence of the stressor. That is, VA examiners can interpret the evidence of record to confirm the occurrence of in-service sexual assaults, personal trauma, and harassment. 38 C.F.R. § 3.304 (f)(5); *Menegassi v. Shinseki*, 638 F.3d 1379, 1383 (Fed. Cir. 2011). In fact, evidence of behavioral changes typically needs interpretation by a clinician in personal trauma claims. The VA examiner should determine whether credible factual evidence of behavior changes demonstrated by the Veteran is consistent with the expected reaction or adjustment of a person who has been subjected to an assault. If the VA examiner offers a credible, unequivocal, and non-speculative assessment that the evidence of record is consistent with the occurrence of the claimed assault, that opinion can constitute credible supporting evidence that the claimed in-service stressor actually occurred. If the opinion is merely speculative, equivocal, contradictory, or otherwise insufficient for rating purposes, it should be returned for clarification. If

the VA examiner determines that a personal assault did occur, the VA examiner should then opine whether or not the Veteran has PTSD due to the confirmed personal assault.

The Veteran asserts that she was drugged and raped by fellow soldiers while she was stationed in Germany during active service. While she does not remember the specific dates of the attack, she asserts that the attack took place in late August 1986.

Review of the Veteran's military personnel records reflects no behavior changes or markers as outlined in 38 C.F.R. § 3.304 (f)(5). Specifically, the records reflect no request for reassignment, deterioration in work performance, substance abuse, or any other professional or behavioral change. Though the Veteran noted in several VA medical examinations that following the sexual assault she had a decline in performance evaluations and received an article 15 citation, personnel records reflect only that the Veteran was cited for inability to conform to weight standards years after the alleged sexual assault. However, favorable findings noted in the August 2020 rating decision note PTSD markers of military sexual trauma in the Veteran's service treatment records noted as stomach problems dated November 1986 and a pregnancy test dated November 1986. The Veteran also submitted a birth certificate for her daughter, J.T., born in June 1987 in Frankfurt, Germany.

Similarly, the evidence is mixed as to diagnosis of PTSD. An October 2017 VA examination report reflects the examiner's opinion that the Veteran did not meet the criteria for PTSD under the DSM-5. The examiner further noted that the Veteran first reported symptoms of depression and PTSD to medical professionals in 1994, and her VA medical treatment records had a positive PTSD and MST screening in April 2017, but opined that after review of all of the Veteran's records there were no behavioral markers to support the occurrence of a sexual assault.

An August 2020 VA examination report reflects the examiner's opinion that the Veteran did not have a mental disorder diagnosis. Although the examiner did find the Veteran had criteria that would be an adequate stressor for the diagnosis of PTSD, he opined that as she did not report of exhibit symptoms requisite of a PTSD diagnosis, the claimed condition was less likely than not related to her active service.

Private psychologist E.T. submitted both a June 2020 and an October 2020 examination and assessment report of the Veteran. The private psychologist noted that she had reviewed the Veteran's medical records and service treatment records, and she noted that the Veteran exhibited symptoms of PTSD to include irritability, anger outbursts, difficulty concentrating, hypervigilance, and an exaggerated startle response. The private psychologist diagnosed the Veteran with PTSD and opined that the Veteran's PTSD was directly linked to her sexual assault. In her October 2020 report, the private psychologist again diagnosed the Veteran with PTSD. She opined that the certification of birth report as to the Veteran's daughter, J.T., was an MST marker as the daughter was born within the nine months after the alleged sexual assault, and she again linked the Veteran's claimed assault to her PTSD diagnosis.

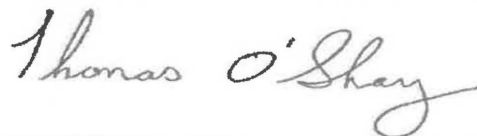
Post-service medical treatment records dated February 2017 and April 2017 note a positive screening for PTSD. There is no other evidence of record concerning the Veteran's post-service treatment or diagnosis of PTSD.

After review of the record, the Board finds that service connection for PTSD based on MST is warranted. While the evidence is both in support and against the finding of a diagnosis of PTSD, the Board notes that the AOJ has already made a favorable finding in its August 2020 rating decision that the Veteran has a diagnosis of PTSD. 38 C.F.R. § 20.801 (a). **Indeed, even without the AOJ's favorable finding, the Board finds that the October 2017 VA examiner's opinion was based on the lack of behavioral markers in the Veteran's record to support allegations of sexual assault, which is contradictory to recognized law. See *Patton v. West*, 12 Vet. App. 272, 281 (1999); *YR v. West*, 11 Vet. Ap. 393, 399 (1998).** The Board also finds that the August 2020 VA examiner's opinion which found the Veteran had no diagnosis of any mental health disability failed to consider the Veteran's past positive PTSD screenings and other relevant medical records. Thus, both the October 2017 and August 2020 VA examiner reports are unreliable and unpersuasive, and the Board instead relies on the June 2020 and October 2020 private psychologist's report which provided thorough review of the claims file, discussion of the relevant evidence (including the disability in question), a consideration of the lay contentions of the Veteran, and clear conclusions with a

reasoned supporting rationale. *See Owens v. Brown*, 7 Vet. App. 429, 433 (1995); *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007).

Further, there is little controversy as to whether or not the alleged sexual assault occurred and is related to the Veteran's claimed PTSD. The August 2020 rating decision made a favorable finding that the Veteran had several recognized markers of military sexual trauma in the Veteran's service treatment records noted as stomach problems dated November 1986 and a pregnancy test dated November 1986. 38 C.F.R. § 20.801 (a). The Board also notes that in addition to the positive nexus opinion from private psychologist E.T, the August 2020 VA examiner found that the Veteran did have the criteria for an adequate PTSD stressor and detailed the Veteran's alleged sexual assault. *Menegassi*, 628 F.3d 1379, (under 38 C.F.R. § 3.304 (f)(5), medical opinion evidence may be submitted for use in determining whether a claimed stressor occurred, and such opinion evidence should be weighed along with the other evidence of record in making this determination).

Thus, following a full review of the record, and applying the benefit of the doubt doctrine, all doubt is resolved in favor of the Veteran. *See* 38 C.F.R. § 3.102. The Veteran's claim for service connection for PTSD as due to MST, is warranted. 38 C.F.R. §§ 3.102, 3.310.



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The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.