

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.



Statement for the Record

Before the

**House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs**

Concerning

“Supporting Survivors: Assessing VA’s Military Sexual Trauma Programs”

November 17, 2021

Chairmen Luria and Brownley, Ranking Members Nehls and Bergman, and members of the Subcommittees, the National Organization of Veterans' Advocates (NOVA) would like to thank you for the opportunity to offer our views on VA policies related to the provision of services, programs, and benefits for survivors of military sexual trauma (MST).

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents over 700 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for all persons seeking VA benefits. In 2000, the United States Court of Appeals for Veterans Claims (CAVC) recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award. NOVA operates a full-time office in Washington, DC.

NOVA members represent veterans before all levels of VA's disability claims process, and in a growing number of BVA appeals. NOVA members also litigate cases before the CAVC and United States Court of Appeals for the Federal Circuit, frequently resulting in significant precedential decisions. NOVA members across the country handle disability claims and appeals for veterans due to conditions suffered after experiencing MST. At our most recent September 2021 conference, we included a session for attendees on representing veterans in MST claims and appeals with a trauma-informed focus.

As an organization, NOVA advances important cases and files amicus briefs in others. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428 (2011) (amicus); *NOVA v. Secretary of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013) (addressing VA's failure to honor its commitment to stop applying an invalid rule); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (amicus); *NOVA v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (M21-1 rule was interpretive rule of general applicability and agency action subject to judicial review).

VA's Office of Inspector General (OIG) issued reports in August 2018 and August 2021, which highlighted VA's failure to properly adjudicate claims for conditions related to MST. In 2018, OIG determined that approximately 49 percent of MST claims denied between April 1 and September 30, 2017, were not properly processed. Department of Veterans Affairs, Office of Inspector General, *Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma*, Report No. 17-05248-241, August 21, 2018 (<https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf>). Adjudication errors included missing markers that indicate sexual trauma, failing to obtain all the necessary records before adjudicating the claim, and not requesting an examination when warranted.

Unfortunately, three years later, OIG did not find improvement in adjudication of these claims. OIG determined that approximately 57 percent of MST claims denied between October 1 and December 31, 2019, were still not properly processed. Department of Veterans Affairs, Office of Inspector General, *Improvements Still Needed in Processing Military Sexual Trauma Claims*, Report No. 20-00041-163, August 5, 2021 (<https://www.va.gov/oig/pubs/VAOIG-20-00041-163.pdf>).

Chairmen Takano, Luria, Brownley, and Levin, as well as Ranking Members Bost, Nehls, and Pappas, sent a letter to Secretary McDonough in March 2021. This letter included six policy recommendations. See Letter from Reps. Elaine Luria, Troy Nehls, Mark Takano, Mike Bost, Julia Brownley, Mike Levin, and Chris Pappas to Secretary Denis McDonough, March 29, 2021 (https://luria.house.gov/sites/luria.house.gov/files/wysiwyg_uploaded/2021-03-29%20HVAC%20DAMA%20ltr%20to%20SECVA%20re%20VBA%20MST%20Policy%20Changes.pdf) (hereinafter HVAC Letter). NOVA endorses these policy recommendations, which are rooted in prior testimony to the committee. We refer to them below and provide some additional context where appropriate.

1. VA must ensure it does not retraumatize veterans during the adjudication process.

The Department of Defense reports that two of every three sexual assaults suffered in service are never reported, often because of concerns about retaliation or that the chain of command will be unresponsive. Department of Defense, *Annual Report on Sexual Assault in the Military: Fiscal Year 2018*, April 26, 2019. Without reports, it is often difficult to obtain evidence to support claims. Although VA has relaxed its evidentiary standards when adjudicating MST claims, veterans who step forward many years after the trauma to file a claim are often retraumatized by the treatment they receive at the hands of VA. See, e.g., Leo Shane III, *'I hung up and vomited' – Veteran sexual assault survivors say VA's outreach retraumatized them*, Military Times, December 18, 2020. VA must ensure that survivors who step forward to file a claim or appeal are not retraumatized.

a. When a claimant is represented, VA should always contact the representative when additional information or assistance is needed.

Unexpected contact from VA during the MST claims and appeals process often results in survivors being retraumatized. See, e.g., Testimony of Samantha Kubek, Staff Attorney, New York Legal Assistance Group, *Examining How the Department of Veterans Affairs Supports Survivors of Military Sexual Trauma*, House Committee on Veterans Affairs, Subcommittee on Oversight and Investigation, February 5, 2020

<https://www.congress.gov/116/meeting/house/110426/witnesses/HHRG-116-VR08-Wstate-KubekS-20200205.pdf>) (hereinafter Kubek Testimony). Many claimants, however, choose an accredited attorney, agent, or VSO to represent them, and rely on these representatives to handle the process. When a claimant is represented, there is no reason VA should contact him or her when additional information or assistance is needed. In fact, NOVA has long advocated for appointed representatives to be the initial contact for **all** adjudicative activity related to claims and appeals.

Therefore, VA should adopt the recommendation of this committee: “VA, as in any other legal proceeding, should respect veteran-appointed representatives and inform them of scheduled communication between VA employees and the veteran (e.g., an informal conference or VBA MST coordinator phone call). VA should also allow representatives, upon consent of the veteran, to participate in proceedings where the veteran may be asked to provide oral testimony related to their claim.” HVAC Letter at 3 (It should be noted that representatives do routinely participate with the veteran in the hearing process). Even further, however, VA should treat veteran-appointed representatives as the first line of contact when seeking **any** additional information in an MST claim or appeal.

b. VA should adopt trauma-informed language in exam and decision letters.

Retraumatization is not limited to unexpected phone calls or contact from VA MST coordinators. Most contact from VA takes the form of written communication, and current letters are not designed specifically for MST survivors. VA must implement trauma-informed language and protocols for all its written communication to MST survivors. Both the HVAC Letter and Kubek Testimony contain critical recommendations for how this goal should be accomplished, to include the following: (1) coordination with VHA to provide materials on existing resources to support survivors in the claims process, e.g., VHA MST coordinators, mental health resources, Veteran Crisis Line; (2) an audit of all language in VBA denial letters, in consultation with VSOs and other stakeholders, to ensure that insensitive language is removed and rewritten; and (3) a review of all communication by VBA trauma-informed staff before it is sent to ensure it meets appropriate standards. HVAC Letter at 2 and 4; Kubek Testimony at 8. NOVA welcomes the opportunity to work with VA on such efforts.

c. VA should develop a peer support specialist role within VBA.

In October 2021, the Subcommittee on Disability Assistance and Memorial Affairs held a legislative hearing. One of the bills discussed at that hearing was H.R. 2724, the *VA Peer Support Enhancement for MST Survivors Act*. Peer support specialists are used in other areas within VA and adding them to VBA for MST claims is important to help prevent retraumatization. Several VSOs testified in support of this legislation, including Disabled

American Veterans and Wounded Warrior Project. While NOVA also supports the bill, it seems this program could be instituted by VA without legislation. Such a program also was endorsed by this committee: “This individual would support the veteran throughout the claims process and would not be responsible for processing or adjudicating the survivor’s claim. Veterans may ‘opt out’ rather than need to ‘opt in.’ HVAC Letter at 2. Of course, as noted above in subsection a, these specialists should work in conjunction with the veteran’s chosen representative.

d. BVA should adopt trauma-informed protocol for its hearings.

At the October 2021 hearing referenced above, a discussion draft bill was considered to improve the way BVA conducts hearings involving MST claims. As with the peer support program, however, it appears such protocols could be adopted without legislation. For example, BVA could adopt components of that draft through policy, e.g., honoring a veteran’s request for a Veterans Law Judge (VLJ) of a specific gender and requiring every VLJ conducting a hearing involving MST to have fully reviewed personal statements in advance of the hearing to avoid unnecessary questioning. The committee supported this concept in its March 2021 letter, stating that BVA “should conduct additional oversight of Veterans Law Judges to assess protocols to ensure that they conduct hearings related to a[n] MST claim in a trauma-sensitive manner.” HVAC Letter at 4-5. Such measures should be adopted by BVA without delay.

2. VA should improve the MST examination process.

a. Examiners conducting MST examinations must be properly trained.

Over the past few years, VA has moved to using more contract examiners. Putting aside the question of whether this decision was wise, there are many examiners outside of VA conducting compensation and pension examinations. VA must ensure that both VA and contract examiners receive trauma-informed training on an ongoing basis to provide adequate examinations. When VA fails to provide an adequate examination, the claim or appeal is remanded for a new examination, creating more likelihood of retraumatization **and** lengthening the adjudication period unnecessarily. This training should emphasize the need for examiners to review the veteran’s statement and medical records prior to the examination, and to avoid soliciting information about the stressor that has already been provided. HVAC Letter at 4; Kubek Testimony at 7-8.

b. VA should not schedule unnecessary examinations.

NOVA members report frequent instances, not limited to MST claims, where VA orders additional examinations when sufficient, credible private medical evidence is already of record. Ordering unnecessary examinations also increases the likelihood of

retraumatization **and** lengthens the adjudication period unnecessarily. VA should highlight in training that ordering a VA examination when the record supports granting a claim is inappropriate.

3. VA must provide ongoing training for its MST claims processors.

VA does require MST claims to be handled by specially-trained adjudicators. For example, VA states in its M21-1 Adjudication Manual: “All development actions on claims involving MST must *only* be taken by an individual who has completed the required MST Training Performance Support System module(s), and been designated by a regional office (RO) as an MST claims processor.” M21-1, VIII.iv.1.B.1.d. This training must be ongoing, with quality review occurring after trainings to ensure these adjudicators are properly processing claims. And, as with training for medical examiners, emphasis should be placed on the need for claims processors to carefully review the veteran’s claims file and avoid unnecessarily soliciting information that has already been provided.

Conclusion

NOVA is committed to continue working on behalf of veterans wrongly denied benefits they have earned due to military sexual trauma. We again thank the Subcommittees for allowing us to provide our views on this important issue. For questions regarding this testimony or if you would like to request additional information, please contact:

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