

# **FLORIDA WOMEN VETERANS' PROGRAM**

**Darlene Scully**

**Women Veterans Coordinator**

**Florida Department of Veterans Affairs**

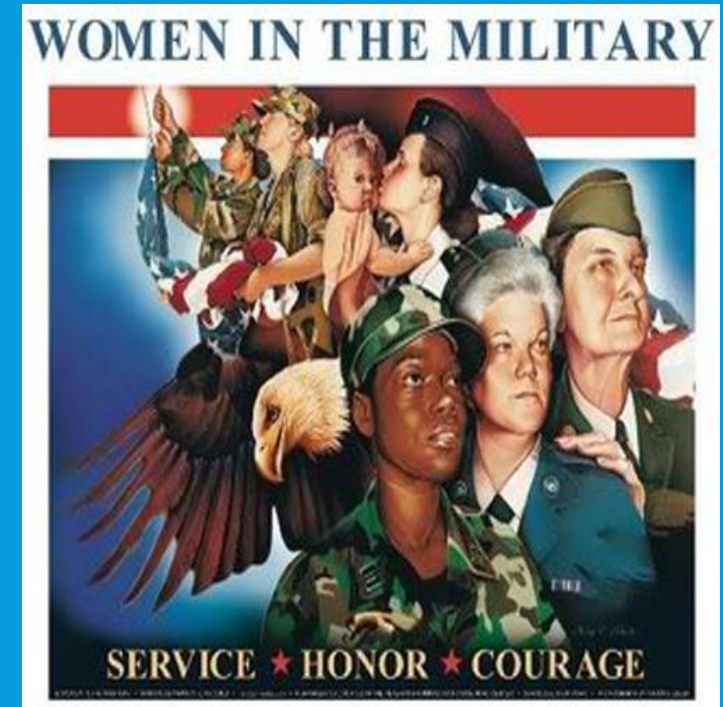


## ***State of Florida Women Veterans***

# INTRODUCTION

## Program Overview

- ❖ Perspective
- ❖ Purpose
- ❖ Population
- ❖ MST
- ❖ SC Claims PTSD and Mental Disorders other than PTSD
- ❖ Nexus Opinions
- ❖ Survivors of Sexual Assault



# PURPOSE

- ❖ To improve women veterans' awareness of eligibility for federal and state veterans' benefits and services.
- ❖ Assess the needs of women veterans and make recommendations regarding existing benefits and services.
- ❖ Participate in national and state forums, outreach and committees benefiting women veterans.

# **WOMEN VETERANS' COORDINATOR**

- ❖ Outreach with Conferences, Seminars and Workshops.
- ❖ Advocacy for women veterans through Counseling and assistance with BVA/DRO/RVSR hearings.
- ❖ Training regarding women veteran issues to county VSOs, VCEs and staff at FDVA.

# POPULATION

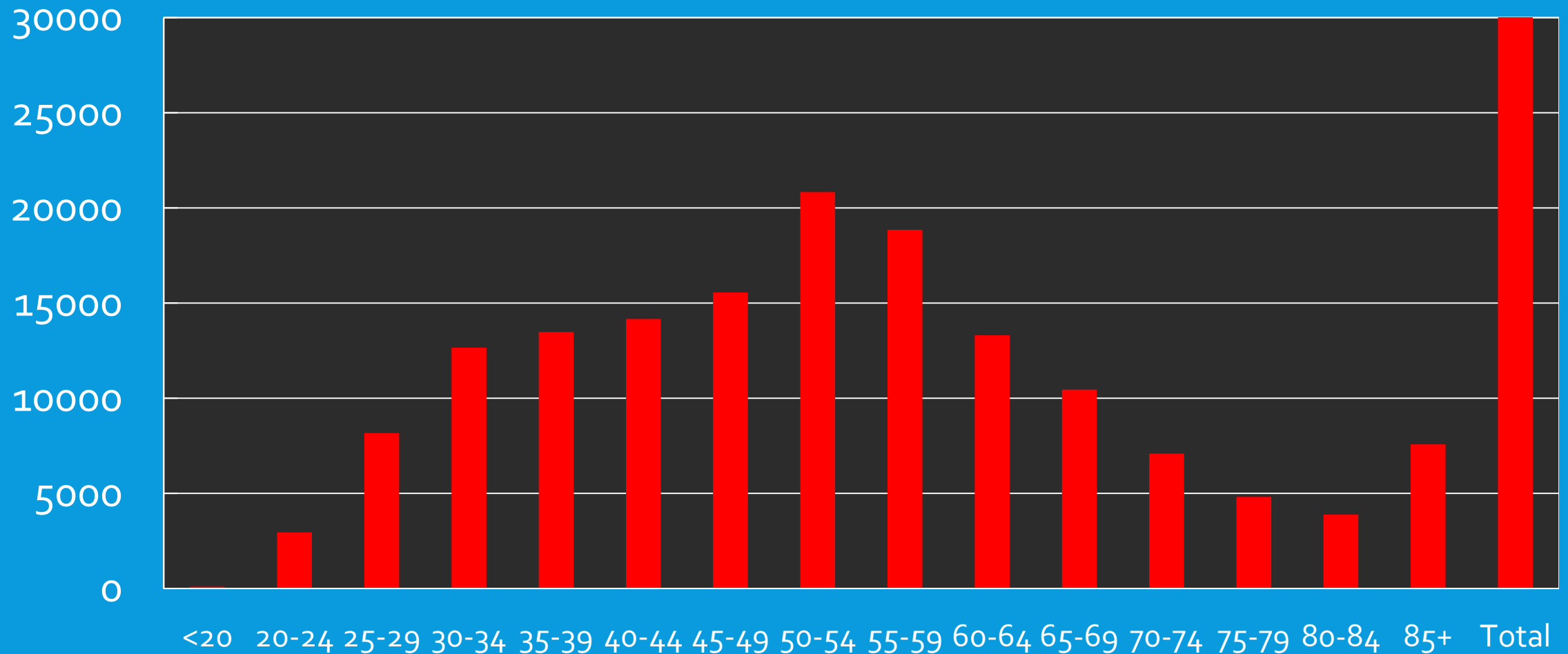
- ❖ US Veteran Population  
21.7 Million
- ❖ Women Veterans Population  
2 Million
- ❖ State of Florida Women Veterans  
153,831



# POPULATION

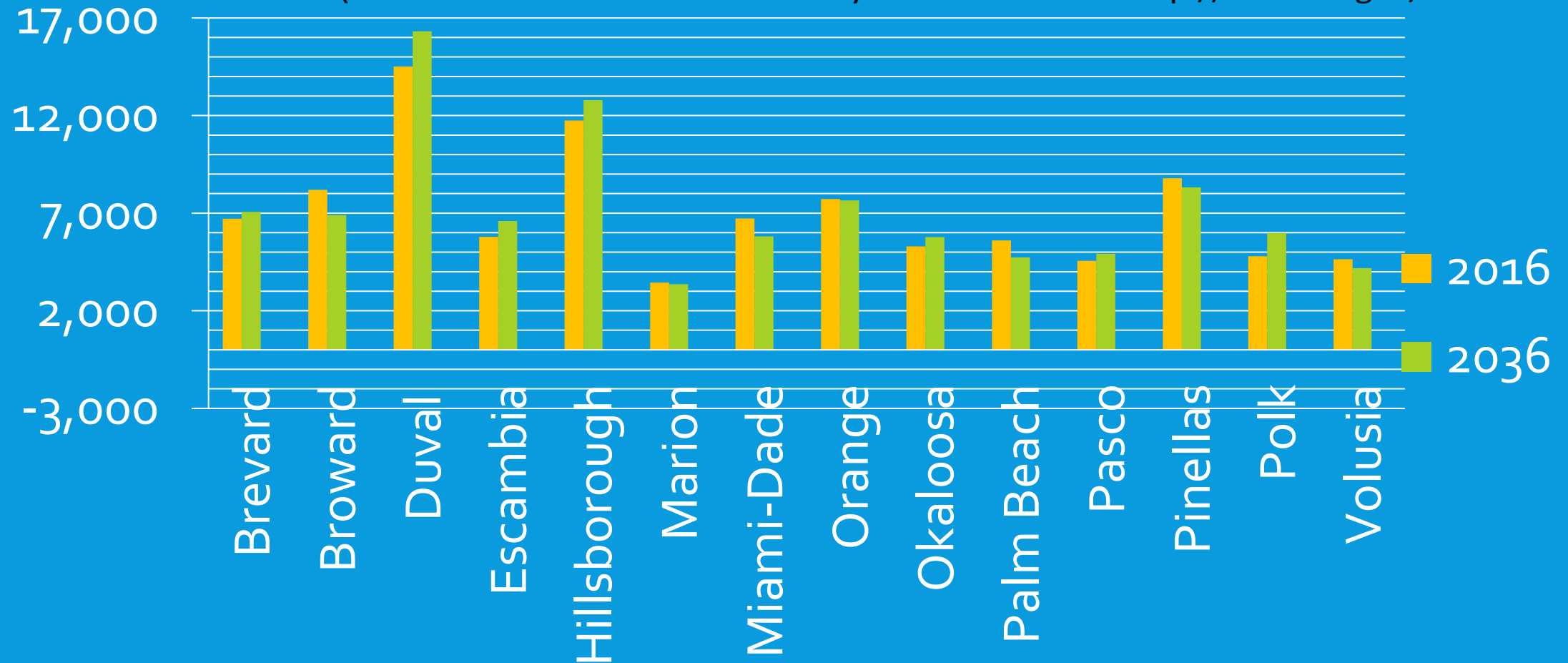
## Woman Veteran Population by Age

Source: NCVAS (National Center for Veterans Analysis and Statistics)- <http://www.va.gov/vetdata>



# POPULATION BY COUNTY

• NCVAS (National Center for Veterans Analysis and Statistics- <http://www.va.gov/vetdata>)





# WHAT IS SEXUAL TRAUMA

- ❖ MST is defined by Title 38 U.S. Code 1720D as psychological trauma resulting 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
- ❖ " Sexual harassment is defined as "repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character."

# MILITARY SEXUAL TRAUMA

- ❖ MST includes any sexual activity where a service member is involved against his or her will
- ❖ Pressured into sexual activities
- ❖ Unable to consent to sexual activities
- ❖ Physically forced into sexual activities
- ❖ Subjected to sexual harassment

# THE GOAL?

- ❖ “Service-connected” means that a disability has been found to be incurred in, caused by, or aggravated by military service
- ❖ The General Rating Formula for Mental Disorders gives one overall rating for all of the Vet’s mental disorders
- ❖ Even if Vet has two or more separate mental disorders (e.g. PTSD and bipolar disorder), Vet can only receive a single rating

# SC CLAIMS FOR MENTAL CONDITIONS

- ❖ Even though Vet claimed SC for a specific disorder (e.g. PTSD), VA must consider SC for other diagnosed disorders (e.g. major depressive disorder, anxiety disorder, etc.)
  - *Clemons v. Shinseki*, 23 Vet. App. 1 (2009)
- ❖ When filing SC claim, it is better to state the condition in broad terms, rather than specific diagnosis
- ❖ Use: “mental condition” or “all acquired psychiatric disorders”
- ❖ As opposed to: “PTSD” or “major depressive disorder”

# RATING CONSIDERATIONS FOR MENTAL DISORDERS

- ❖ When rating a mental disorder, VA must consider:
  - ✓ Frequency, severity, and duration of psychiatric symptoms
  - ✓ Length of remissions
  - ✓ Capacity for adjustment during periods of remission
  - ✓ VA must assign an evaluation based on all evidence of record that bears on occupational and social impairment
  - ✓ Not just examiner's assessment of the level of disability at the moment of the exam

# POSSIBLE MENTAL HEALTH DIAGNOSES

- ❖ Potential DSM-5 diagnoses:
  - ✓ PTSD
  - ✓ Major Depressive Disorder
  - ✓ Generalized Anxiety Disorder
  - ✓ Panic Disorder

# **CONSIDERATIONS RELATED TO SERVICE CONNECTION FOR PTSD - PER 38 CFR 3.304**

- ❖ Medical evidence establishing a clear diagnosis of the condition.
- ❖ Credible supporting evidence that the claimed in-service stressor actually occurred, and
- ❖ A link/nexus, established by medical evidence, between current symptomatology and the in-service stressor.

# STRESSOR: CREDIBLE SUPPORTING EVIDENCE



- ❖ In some cases, VA presumes an in-stressor occurred and VA waives the “credible supporting evidence” requirement. 38 C.F.R. § 3.304(f)(1)-(4)
  - Combat vets
  - Stressor due to fear of hostile military or terrorist activity
- ❖ There are no such evidentiary presumptions for in-service assaults or MST
  - Vets who allege an in-service assault or MST must still provide credible supporting evidence that the incident occurred



# CREDIBLE SUPPORTING EVIDENCE

- ❖ The requirement for credible supporting evidence means that there must be some believable evidence that tends to support the Vet's assertion
  - Vet's statement alone not enough
- ❖ To determine if evidence is credible, VA considers
  - Plausibility
  - Consistency with other evidence in the case
  - Source

# CREDIBLE EVIDENCE

- ❖ Incidents of MST often go unreported
  - DoD estimates that approximately 14,900 service members experienced sexual assault in FY 2016
  - But, that same year, only 6,172 incidents of sexual assault were reported to DoD authorities
  - DoD Fiscal Year 2016 Annual Report on Sexual Assault in the Military
- ❖ In previous years, DOD estimated only 20-25% of incidents of sexual assault were reported

# CREDIBLE SUPPORTING EVIDENCE

- VA has a national screening program in which every Vet seen for health care is asked whether he or she experienced MST
  - About 1 in 4 women have responded yes
  - About 1 in 100 men have responded yes

# CREDIBLE SUPPORTING EVIDENCE

- ❖ A may not treat the absence of documentation of the MST in service records as negative evidence
  - Because MST often goes unreported, it is not reasonable to expect that the event would be reported and/or recorded
  - VA may not find Vet's statements not credible simply because an injury was not recorded in service records
    - Exception: cases where it is reasonable to expect that the event would be recorded
- ❖ *AZ v. Shinseki*, 731 F.3d 1303 (Fed. Cir. 2013)

# CREDIBLE SUPPORTING EVIDENCE

- ❖ Because Vets face unique problems documenting their claimed stressor in personal assault cases, VA has provided for special evidentiary-development procedures in those cases.
  - ❖ Bradford v. Nicholson, 20 Vet. App. 200 (2006)
- ❖ Under 38 C.F.R. § 3.304(f)(5), evidence from sources other than Vet's service records may be used to corroborate the existence of an in-service personal assault stressor.

# MILITARY-RELATED DISABILITY COMPENSATION & MST

**MST is an experience not a diagnosis**

- ❖ Veterans cannot receive Service Connection for MST alone.
- ❖ Veterans may receive SC for conditions that began or were aggravated by their military service, to include conditions caused by or aggravated by MST

# **MILITARY RELATED DISABILITY COMPENSATION & MST (CONTINUED)**

- ❖ MST that occurred during NAT'L Guard Or Reservist training (either active or inactive duty for training) is treated the same as regular active duty for purposed of SC for a condition secondary to MST.
- ❖ Travel to and from Nat'l Guard or Reservist active/inactive duty for training is generally considered to be part of the training.

# VBA REGULATIONS GOVERNING MST-RELATED DISABILITY COMPENSATION

- ❖ 38 CFR 3.305 (Service connecting any claimant disability)
  - Evidence of current chronic disability
  - Evidence of injury, disease, or event in service
  - Medical nexus or association between (1) and (2)
- ❖ Note: Evidence must support occurrence or aggravation in service or continuity of symptoms following.



# VBA REGULATIONS GOVERNING MST-RELATED DISABILITY COMPENSATION (CONTINUED)

- ❖ 38 CFR 3.304 (f)(5) (Service connecting personal assault/MST-related PTSD claims).
  - General PTSD requirements
  - Notice to claimant that evidence outside service records or evidence of behavior changes may corroborate claimant stressor incident and examples provide (called “markers”)
  - VBA may submit marker evidence to qualified clinician for an opinion as to whether the claimant stressor occurred.

# MARKERS

- ◆ 38 C.F.R. §3.304(f)(5) lists the following markers (this list is not exhaustive):
  - Police records
  - Medical records
  - STD or pregnancy tests
  - Statements from family members, friends, roommates, clergy
  - “Is there anyone you confided in?”

# EVIDENCE OF BEHAVIOR CHANGES – MARKERS (CONT.)

## ❖ Observed behavior changes from:

- ✓ Performance appraisals, clergy, friends and family.
- ✓ Request to transfer to another military duty assignment or job location.
- ✓ Substance abuse: Alcohol, Drugs
- ✓ Increased or decreased use of prescription medication
- ✓ Panic Attacks
- ✓ Mental health difficulties
  - ❖ Depression
  - ❖ Anxiety
  - ❖ Anger
- ✓ Changes in interpersonal relationships



# COMPLICATION FOR MST: REASONS FOR NO DEFINITIVE EVIDENCE THE MST OCCURRED

- As in the civilian world, only a small percent of Service members make a formal report or have documentation that their experiences occurred
  - Shame, guilt, disbelief
  - Do not think they will be believed
  - Do not think anything will be done
  - Afraid of retaliation or punishment
  - Concerned that others will think they have mental health problems
  - Concerns about unit cohesion

## ***SIZEMORE V. PRINCIPI, 18 VET. APP. 264 (2004)***

- ❖ Vet's service connection claim for PTSD was denied
  - VA examiner: "The veteran's stressors in Vietnam apparently have not been substantiated and although it is likely that he was involved in combat activities, it seems a bit unusual that an artillery man would have personally killed eleven enemy soldiers unless they were being overrun."
  - The psychiatrist overreached by making a determination on whether the stressor occurred

***MENEGASSIV. SHINSEKI, 638 F.3D 1379,  
1382(FED. CIR. 2011)***

- ❖ For PTSD claims based on personal assault/MST, after-the-fact medical opinions can corroborate the claimed stressor and must be considered by VA in determining whether the evidence establishes that the claimed stressor occurred
- ❖ 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 MST occurred

# NON- MST STRESSORS

- ❖ Main goal is to obtain SC for Vet's mental health conditions
  - Ask if veteran had any other military- related stressors
    - Sometimes, a stressor other than MST may be easier to prove
- ❖ If Vet has another stressor that will make it easier to obtain SC, use that stressor to the Vet's advantage

# DUTY TO ASSIST

- ❖ Under what circumstances does the duty to assist require the VA to attempt to obtain records of service members, other than the claimant, to aid to corroborating a claimed personal assault for a claim for a SC mental disorder



## ***MOLITORV. SHULKIN, 28 VET. APP. 397 (2017)***

- 
- ❖ Vet filed a claim for SC for PTSD due to MST
  - Reported she was sexually assaulted in Germany during an initiation/hazing ceremony, but did not report incident due to fear of retribution
  - Provided details about the date, location, unit, and last names and ranks of several witnesses (including the name of one of her assailants)
  - Stated that she fought back and injured a sergeant during the attack
  - Provided names of other women she served with in Germany whom she thought were also sexually assaulted by the same assailant

# MOLITER

- ❖ The BVA found Vet's statements about in-service sexual assaults not credible
- ❖ Vet appealed BVA's denial of claim and argued:
  - BVA did not adequately explain how VA satisfied the duty to assist, since VA did not attempt to obtain records from other service members she specifically identified, including one of her alleged assailants, that may have aided in corroborating the MST

## **MOLITER CONT.**

- ❖ VA may not refuse to provide assistance in obtaining records simply because it believes the claimant is not credible
- ❖ The claim must be “inherently incredible or clearly lack merit” in order for VA to refuse assistance.
  - - 38 CFR §3.159(d)

## MOLITER CONT.

- ❖ When Vet identifies another service member's records as relevant to a claim, and those records would aid in substantiating the claim, VA's reasonable efforts to obtain those records under its duty to assist may include (determined case-by-case):
  - ❖ Seeking written consent of third party on behalf of the claimant
  - ❖ Obtaining a court order to disclose the records
  - ❖ VA thinks that, in most cases, this would be beyond the scope of "reasonable" efforts
  - ❖ Soliciting written statements from adequately identified service members

# NVLSP SCENARIO

- ❖ Sept. 1969 in-service psych exam:
  - Diagnosis of schizoid personality disorder
  - Examiner noted complaints of homosexual tendencies, death threats, and an attempted suicide
  - Examiner recommended that Vet be medically separated

# CONT.

- Separation exam recorded no mental defects
- ❖ VA exams from March 2007 to Sept. 2009 contain diagnoses of PTSD, mostly attributed to the in-service assault
- ❖ BVA denied SC for PTSD
  - Found that the evidence did not show that Vet experienced a stressor during active duty
  - Noted the psych exam, but rejected it as corroborating evidence because Vet did not allege being assaulted in service during the exam
  - Noted that there was no official report of Vet having been assaulted

# VET'S ARGUMENT

- ❖ BVA did not consider markers under 38 C.F.R. § 3.304(f)(5)
- ❖ BVA did not adhere to regulations requiring consideration of the evidence in light of the fact that many in-service assaults are never reported
  - Vet reported that his life had been threatened, and he was too intimidated to report the assault

# MARKERS?

- ❖ Sept. 1969 psychological evaluation, vet stated he had attempted suicide because he want “to end it all”.
  - NVLSP made the argument was made that the evidence demonstrated the Vet’s escape his situation, similar to an attempt to transfer.
- ❖ Vet’s work performance decreased
  - In 1968, Vet was “an adequate worker” who needed “routine supervision” due to “careless appearance”
  - After Vet’s 1969 psych exam and in-service assault, he was a “poor worker” who should be “closely supervised”



# NEW BVA DECISION

- ❖ On remand, BVA granted SC for PTSD
  - The record contained credible supporting evidence of the claimed in-service stressor
  - Key pieces of evidence were the performance evaluations and attempted suicide .
  - Think outside of the box
- Initial BVA decision found against the Vet not because it ignored evidence, but because **it did not consider whether the situations were *analogous* to the ones listed in 38 C.F.R. § 3.304(f)(5).**
- ©

# NEXUS: MULTIPLE TRAUMAS

- ❖ More challenging cases involve multiple traumas or stressors
  - Childhood physical and/or sexual abuse
  - Post-service domestic abuse
  - Other current stressors
  - Death in family or other family situations
  - Financial situations
  - Co-morbid disorders

## **NEXUS: MULTIPLE TRAUMAS**

- ❖ Examiner may opine that the disability was caused by pre-service stressors, but “exacerbated” and/or “aggravated” by MST
- ❖ Important to figure out what examiner means by “aggravated” or “exacerbated”

# NEXUS: MULTIPLE TRAUMAS

- ❖ If examiner finds that MST contributed in any way to the development of a mental health disorder, VA should grant service connection
- ❖ 38 U.S.C. §5107(b) –benefit of doubt goes to Vet
  - When it is not possible to determine what portion of the current disability is related to service and what portion is related to pre-service, the entire disability must be attributed to service.
  - *Mittleider v. West*, 11 Vet.App. 181 (1998)

# SC FOR OTHER MENTAL DISORDERS

- ❖ Diagnosis will determine what evidence is required
  - ✓ Diagnosis will determine what evidence is required
    - ✓ PTSD: 38 C. F. R. 30304 (f) (5) of MST
      - ✓ Must have credible supporting evidence
    - ✓ Other mental disorders: 38 C. F. R. 30303
      - ✓ Do not necessarily need credible supporting evidence of MST

# SC FOR OTHER MENTAL DISORDERS

- ❖ SC mental disorders other than PTSD has 3 requirements:
  - ✓ Evidence of a current diagnosis
  - ✓ In-service event, injury, or disease
  - ✓ A link, established by medical evidence, between the current diagnosis and in-service event.

# DEVELOPING EVIDENCE TO SUPPORT CLAIM

- - ❖ Have Vet draft a statement about continuous mental symptoms since separation from service
  - ❖ Obtain additional lay evidence of continuity of symptoms from other individuals (family members, friends, fellow service members, etc.)
  - ❖ Obtain medical evidence that documents symptoms following service (closer in time to service the better)
  - ❖ Obtain a nexus opinion linking symptoms to service

# MEDICAL OPINIONS

- ❖ When obtaining a private opinion, advocates should ask the following questions:
  - “Is it as likely as not that the veteran has a current mental disorder?”
  - “If so:
    - Assuming that the MST event(s) in service occurred based on the markers the veteran has presented,
    - is it as likely as not that the mental disorder(s) is/are linked to any event in service (including the MST), or to service itself?”



# STANDARD OF PROOF

- ❖ Criminal cases: beyond a reasonable doubt
- ❖ Defendant's freedom is at stake
- ❖ Civil cases: preponderance of the evidence
- ❖ Defendant's property is at stake

# STANDARD OF PROOF

- ❖ VA claims: as likely as not (50%)
  - Government money is at stake
  - A perpetrator need not even be identified
- ❖ If there is an equal balance of positive and negative evidence, Vet gets the benefit of the doubt and claim should be granted
  - Tie goes to the Vet

## **SCENARIO – SC PTSD DUE TO MST**

- ❖ Vet filed a claim for SC for PTSD due to MST, which was denied in a May 2014 rating decision
- ❖ Vet requested reconsideration in August 2014, due to favorable medical nexus opinion from a licensed clinical social worker

## **SCENARIO – SC PTSD DUE TO MST**

- ❖ VA requested an exam of the Vet with the following instructions:
  - Please review the veteran's entire claims file and medical records and provide an opinion as to whether it is at least as likely as not that the **VETERAN'S RECORDS SUPPORT THE OCCURRENCE** of a military sexual assault.

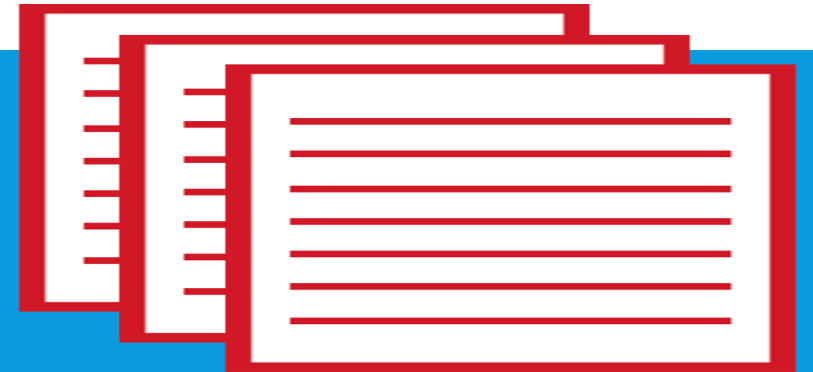
## **SCENARIO – SC PTSD DUE TO MST**

❖ What is wrong with the exam?

# SCENARIO – SC PTSD DUE TO MST

- ❖ The examination request was solely for PTSD
  - Although the DBQ form does ask the examiner to identify other mental health conditions, the exam request could be seen as limiting
- ❖ The examination request also appears to require that the MST appear in the Vet's "records"
  - "Credible supporting evidence" under 38 C.F.R. §3.304(f)(5) includes evidence that may not necessarily be found in a Vet's service records (ex. markers)

# COMPENSATION AND PENSION PSTD/MST CLAIMS FORMS



- ❖ What forms may be needed and why?
  - ✓ VA Form 21-526EZ – Compensation & Pension Application.
    - Used to apply for Compensation benefits.
  - ✓ VA Form 21-4138 – Statement in support of veteran's disability claim for benefits.
    - Used to obtain evidence in support of a Veteran's claim for benefits.

# COMPENSATION AND PENSION PSTD/MST CLAIMS FORMS (CONTINUED)

- ❖ VA Form 21-4142, Authorization and Consent to Release Information to the Department of Veterans Affairs (VA).
  - ✓ Used for authorization to obtain the Veteran's private treatment records
- ❖ VA Form 21-0781a, Statement in Support of Claim for Service Connection for PTSD secondary to Personal Assault.
  - ✓ Lists the stressful incident(s) that occurred in service that the veteran feels contributed to his/her condition.



# **RATINGS (CONTINUED)**

## **❖ Current Medical Diagnosis**

The following can perform **REVIEW** exams for **PTSD**:

- A board-certified or board eligible psychiatrist or licensed doctorate-level psychologist,**
- A doctorate-level mental health provider under close supervision of the above; a psychiatry resident under close supervision of the above.**

# RATINGS (CONTINUED)

- A clinical or counseling psychologist completing a one-year internship or residency (for purpose of a doctorate-level degree) under close supervision of above/
- A licensed clinical social worker (LCSW), a nurse practitioner, a clinical nurse specialist, or a physician assistant under close supervision of the above.

## **WORKING WITH SURVIVORS OF SEXUAL ASSAULT**

- ❖ Reassure Vets that information they share for the purpose of obtaining assistance with their VA claim will remain confidential
- ❖ Maximize trustworthiness
- ❖ Work on first building rapport. Start by asking less personal questions before asking more personal questions
- ❖ Give Vet breaks as needed during the interview process, due to the stress-producing nature of the interview

# RESOURCES

- ❖ Center for Women Veterans- <http://www.va.gov/womenvet/>
  - Employment, Entrepreneurship, Homeless, Public Service and Community Engagement, Research, Reserves and National Guard, Rural areas
- State of Florida DVA- <http://floridavets.org/our-veterans/women-veterans/>
- NCVAS (National Center for Veterans Analysis and Statistics)-  
<http://www.va.gov/vetdata>
- Veterans Crisis Line- 1-800-273-8255 (press 1)
- Women Veterans Hotline 1-855-VA-WOMEN (829-6636)
- WIMSA (Women In Military Service For America Memorial)-  
<http://www.womensmemorial.org>



# QUESTIONS?

