

NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

**SERVICE CONNECTION CLAIMS
BASED ON
MILITARY SEXUAL TRAUMA**

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AGENDA




- Definition of MST
- How Common is MST
- Service Connection
- Evidence & Markers
- Nexus Opinions
- Working with Survivors of MST
- BVA & MST Claims

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DEFINITION OF MST


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PERSONAL TRAUMA

- For the purpose of VA compensation claims based on PTSD, personal trauma refers broadly to stressor events involving harm perpetrated by a person who is not considered part of an enemy force
 - *Examples:* Assault, battery, robbery, mugging, stalking, 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
 - Manual M21-1, VIII.iv.1.B.1.a (change date Mar. 17, 2023)


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DEFINITION OF MILITARY SEXUAL TRAUMA

- MST is the term used by VA to refer to experiences during military service of
 - sexual assault
 - repeated, threatening sexual harassment
 - www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf


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DEFINITION OF MILITARY SEXUAL TRAUMA


- Definition from 38 U.S.C. § 1720D(a)(1):
 - 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 Vet was serving on active duty, active duty for training, or inactive duty training

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DEFINITION OF MILITARY SEXUAL TRAUMA 

- Sexual harassment is:
 - repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character
 - 38 U.S.C. § 1720D(f)
 - www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf

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DEFINITION OF 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

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HOW COMMON IS MST? 

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DOD ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FY 2018 – SEXUAL HARASSMENT



Sexual Harassment Rates in the Military


<p>6.3% indicated an experience of sexual harassment</p> <p>Active Duty Men</p>	<p>24.2% indicated an experience of sexual harassment</p> <p>Active Duty Women</p>
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Sexual harassment is a leading factor affecting the unit climate on sexual assault. Controlling for paygrade, Service, and deployment status...

- 1 in 5 women who experienced sexual harassment also experienced sexual assault
- 1 in 12 men who experienced sexual harassment also experienced sexual assault

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DOD ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FY 2018



- Sexual assault occurred most often between junior enlisted acquaintances who are peers or near peers in rank
- The vast majority of sexual assaults of service members occurred between people aged 17 to 24 who work, train, or live in close proximity
- Military women indicated that offenders:
 - Were most often military men whom they considered to be a friend or acquaintance, acting alone
 - Rank was most often the same as the victim's or one rank higher, with most alleged incidents involving junior enlisted women in the grades E3 and E4


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VA'S NATIONAL SCREENING PROGRAM




- Every Vet seen for health care is asked whether he or she experienced MST
- National data from this program reveal that about 1 in 3 women and 1 in 50 men respond "yes," that they experienced MST
- This data speaks only to the rate of MST among Vets who have chosen to seek VA health care
- Vets who respond "yes" when screened are asked if they are interested in learning about MST-related services available
- Not every Vet who responds "yes" necessarily needs or is interested in treatment
- www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf

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SERVICE CONNECTION


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SERVICE CONNECTION FOR DISABILITIES OTHER THAN PTSD

- 3 elements for SC for physical and mental disabilities *other than PTSD*:
 1. Current diagnosis
 2. In-service event, injury, or disease
 3. A link, usually established by medical evidence, between the current diagnosis and in-service event

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SERVICE CONNECTION FOR PTSD

- 3 elements for SC for PTSD:
 1. Current diagnosis of PTSD
 2. Credible supporting evidence that a claimed in-service stressor occurred
 - Relaxed in some situations
 3. A link/nexus, established by medical evidence, between current symptoms and in-service stressor

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POLL #1

Can a Vet file a claim for service connection for MST?



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ANSWER



- A Vet cannot file for SC for MST
- MST is an event, not a disability

• Vet needs to have a DSM-5 mental health diagnosis (or diagnosis of a physical disability related to the MST)

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POSSIBLE MENTAL HEALTH DIAGNOSES

- **Potential psychiatric disabilities related to MST:**
 - PTSD
 - Major Depressive Disorder
 - Generalized Anxiety Disorder
 - Panic Disorder



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EVIDENCE & MARKERS FOR MST

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IN-SERVICE ASSAULTS AND MST

- There are no 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

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POLL #2


- Do you need credible supporting evidence of MST, no matter what the mental health diagnosis is?

- A. Yes
- B. No
- C. Maybe



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ANSWER

- NO! Diagnosis will determine what evidence is required
- PTSD: 38 C.F.R. § 3.304(f)(5)
 - **Must have credible supporting evidence of MST (i.e. corroboration)**
- Other mental disabilities: 38 C.F.R. § 3.303
 - Do not need credible supporting evidence of MST
 - If Vet's statement found competent and credible by VA, there is no requirement for corroboration


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CREDIBLE SUPPORTING EVIDENCE

- To establish SC for PTSD based on MST or other personal assault, there must be some believable evidence that tends to support Vet's assertion
 - Vet's statement alone not enough
- VA considers
 - Plausibility
 - Consistency with other evidence in the case
 - Source

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CREDIBLE SUPPORTING EVIDENCE

- VA may NOT treat the absence of documentation of MST or in-service assault 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)


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CREDIBLE SUPPORTING EVIDENCE

- Because Vets face unique problems documenting claimed stressor in personal assault cases, VA provides for special evidentiary-development procedures in these 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


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CREDIBLE SUPPORTING EVIDENCE

- A **marker** is an indicator of the effect or consequences of a personal trauma on a Vet
- A marker could be one or more behavioral events, or a pattern of changed behavior around the time of, and after, the incident(s)
- Even if there is no reference to the personal trauma, evidence of certain behavior changes may circumstantially support the possibility that the claimed stressor occurred
 - Manual M21-1, VIII.iv.1.E.1.d (change date July 29, 2021)


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ALTERNATIVE SOURCES OF EVIDENCE OF IN-SERVICE PERSONAL TRAUMA

- Police records
- Medical records
- STD or pregnancy tests
- Statements from family members, friends, roommates, clergy

• 38 C.F.R. § 3.304(f)(5)




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ALTERNATIVE SOURCES OF EVIDENCE OF IN-SERVICE PERSONAL TRAUMA 

- Rape crisis center or center for domestic abuse
- Counseling facility or health clinic
- Civilian police reports
- Faculty member
- Personal diaries or journals
- Medical reports from civilian physicians or caregivers who treated the Vet immediately following the incident or sometime later
- Fellow service members
 - Manual M21-1, VIII.iv.1.E.1.c (change date July 29, 2021)

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EXAMPLES OF MARKERS FOR MST CASES 

- Evidence of behavioral changes
 - Episodes of depression
 - Drug/alcohol use
 - Fights
 - Requests for transfer
 - Unexplained economic changes
 - Deterioration of work performance



- 38 C.F.R. § 3.304(f)(5)

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EXAMPLES OF MARKERS FOR MST CASES 

- Increased use or abuse of leave without an apparent reason, such as family obligations or family illness
- Episodes of depression, panic attacks, or anxiety without identifiable reasons
- Visits to a medical or counseling clinic or dispensary without a specific diagnosis or specific ailment
- Use of, or increased interest in, pregnancy tests or tests for STDs (including the HIV) around the time of the incident
- Sudden requests that the Vet's MOS or duty assignment be changed without other justification
- Manual M21-1, VIII.1.E.1.d (change date July 29, 2021)

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EXAMPLES OF MARKERS FOR MST CASES


- Changes in performance and performance evals
- Increased or decreased use of prescription medications
- Increased use of OTC medications
- Obsessive behavior such as overeating or undereating
- Increased disregard for military or civilian authority
- Treatment for physical injuries around the time of the claimed trauma, but not reported as a result of the trauma
- Unexplained economic or social behavior changes
- The breakup of a primary relationship
- Manual M21-1, VIII.1.E.1.d (change date July 29, 2021)

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POLL #3


- For PTSD claims based on personal assault/MST, can after-the-fact medical opinions corroborate the claimed stressor?

A. Yes
B. No
C. Maybe




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ANSWER



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MENEGASSI V. SHINSEKI,
638 F.3D 1379 (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

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CONSIDER NON-MST STRESSORS




- Main goal is to obtain SC for Vet's mental health conditions
 - Ask if Vet had any other military-related stressors
 - A non-MST stressor 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



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STRESSOR: VA'S OBLIGATIONS UNDER ITS DUTY TO ASSIST



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

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MOLITOR V. 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

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MOLITOR V. SHULKIN



- 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

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MOLITOR HOLDINGS



- 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 C.F.R. § 3.159(d)


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MOLITOR HOLDINGS

- 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:
 - Seeking written consent of 3rd party on behalf of 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


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MOLITOR TAKEAWAYS


- Records from other service members could aid in substantiating Vet's claim
- Assailant may have sustained injuries that could be reflected in assailant's service records
- Women stationed in Germany with Vet may have filed VA claims for SC for residuals of MST and have service records that establish rape culture at base
- For more on this issue, see VA General Counsel Precedent Opinion 05-14

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PTSD NEXUS


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NEXUS: MULTIPLE TRAUMAS

- Some Vets have experienced multiple traumas or stressors that may make SC more difficult to establish
 - 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


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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"

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NEXUS: MULTIPLE TRAUMAS

- If examiner finds that MST contributed in any way to the development of a mental disability, VA should grant service connection
- 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 incident, the entire disability must be attributed to service
 - *Mittleider v. West*, 11 Vet.App. 181 (1998); see 38 U.S.C. § 5107(b)

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NEXUS: 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 people (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

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NEXUS: OPINIONS



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

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WORKING WITH SURVIVORS OF MST




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STRATEGIES FOR WORKING WITH SURVIVORS OF MST 

- Assisting a veteran with a claim for VA benefits associated with MST should be undertaken with a special level of care due to the sensitive nature of the case
- When interviewing a veteran to prepare a claim and develop supporting evidence, certain strategies may be help you be more effective and minimize the hardship and stress on the veteran

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BE TRUSTWORTHY 


- Reassure Vet that information shared for the purpose of obtaining assistance with VA claim will remain confidential
- Maximize trustworthiness
 - First build rapport. Ask less personal questions before asking more personal questions.
- Give Vet breaks as needed during the interview process, due to the stressful nature of the interview

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BE COGNIZANT 


- Try not to trigger your client by talking about very sensitive information
- Find out if Vet feels uncomfortable talking about any particular topics
 - Try to get needed info without talking about that topic
- Try not to make your client uncomfortable, be aware of their comfort zone
 - Pay attention to Vet's behavior and what Vet says, and tailor your actions and words accordingly

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BE SENSITIVE 


- Let them know that you are on their side and there to support them
- Be sensitive to any accommodations or other needs they might have

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BE SENSITIVE 

- Use validation language throughout the interview
 - For example, phrases such as "I can only imagine" and "you're very brave"
- Avoid posing questions or using language in a way that sounds judgmental
- Be aware of and sensitive to victim-blaming
 - Remember that many Vets will blame themselves. Assure them it is not their fault!
 - Amara Legal Center's "Best Practices when Interviewing a Survivor of Sexual Assault"

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DON'T LABEL 

- Try not to use words like "crazy," "unstable," or "sick"—they might use these words talking about themselves, but you should refrain

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POSSIBLE INTERVIEW SCRIPT 


- Introduce yourself and explain what you will be arguing to the VA, and why you will need information from the Vet
- Ask Vet to walk you through what happened
- Reassure them that you know it is difficult, but you appreciate their strength

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POSSIBLE INTERVIEW SCRIPT 

- If Vet needs a break, ask what you can do to help
- See if Vet needs a minute or two to breathe
- Consider asking if Vet would rather answer specific questions via e-mail

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REFERRALS 

- Hopefully, your client is already receiving mental health treatment, but it's important to have referrals available
- Some important ones are:
 - Suicide Prevention Hotline: 1-800-273-8255
 - Veterans Crisis Line: Dial 988 and press 1
 - VA's website: www.mentalhealth.va.gov/gethelp.asp
- Research resources available in the Vet's state / locality


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BVA & MST CLAIMS




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BVA & MST CLAIMS

- Appeal must be assigned to a VLJ who has completed BVA's most recent annual training on MST
- If Vet requests a hearing on an MST claim, it must be expedited
- BVA decision must use trauma-informed language and not re-traumatize Vet through insensitive language
 - "Trauma-informed language" is language that "is based on a knowledge of the awareness of the prevalence and impact of trauma on the physical, emotional, and mental health of an individual, the behaviors of the individual, and the engagement by the individual to services; . . . and . . . do[es] not retraumatize the individual."
 - Dignity for Military Sexual Trauma Survivors Act, § 2(d)(5); 38 U.S.C. § 7112(b)


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ADVOCACY ADVICE

- No motion to advance the case on the docket is required to expedite cases that concern a claim for compensation based on MST if the claimant has requested a hearing
- However, you should ensure that it is clear to BVA, preferably on the VA Form 10182, that the claim is based on MST
- You should determine if BVA has acted to expedite the appeal by checking VBMS, calling BVA at 1-800-923-8387, or calling VA at 1-800-827-1000


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ADVOCACY ADVICE 

- If BVA has not expedited the case, file a motion to advance the case on the docket
- Explain that the case concerns a claim for compensation based on MST, the Vet elected the hearing docket, and cite 38 U.S.C. § 7112(b)
- **NOTE:** BVA is not required to automatically expedite cases involving MST if the claim is:
 - In the direct review lane
 - In the evidence submission lane
 - A legacy appeal



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QUESTIONS 



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