Ruling promises to help military sexual trauma survivors

Nicholas L. Phinney - **RI Lawyers Weekly (May 2014 Edition)**

Proving the occurrence of a sexual assault can be a serious challenge in both the civilian and military judicial systems. Many such assaults initially go unreported to authorities, and Department of Defense studies have revealed that servicewomen and men who suffer sexual attacks face "unique" disincentives to report.

Recognizing the problem, in 2002 the secretary of Veterans' Affairs added what is now 38 C.F.R. §3.304(f)(5) to the regulations governing claims for conditions incurred on active duty. See Post-Traumatic Stress Disorder Claims Based on Personal Assault, 65 Fed. Reg. 61,132, 61,132 (Oct. 16, 2000). The subsection allows claimants to use evidence outside of their service records to prove sexual assault in service, including records from rape crisis centers, pregnancy tests, tests for sexually transmitted diseases, and statements from family members, roommates, fellow service members and clergy.

However, one question not addressed by the regulation was whether the absence of indication of a sexual assault in a claimant's service records could be used as evidence that the attack did not occur. The U.S. Court of Appeals for the Federal Circuit recently addressed that important question in AZ v. Shinseki, 731 F.3d 1303 (Fed. Cir. 2013).

In AZ, a veteran seeking compensation for her post-traumatic stress disorder contended that she was sexually assaulted by a superior officer numerous times while on active duty and that one of the instances caused her to become pregnant with a daughter.

On appeal from a decision by the Department of Veterans' Affairs denying her claim, the Board of Veterans' Appeals noted that she had presented statements from family members indicating how she reported the assault to them during her pregnancy.

However, the board held that the statements were not as probative as her service records, which failed to indicate any sexual assault took place. Essentially, the board gave greater weight to the veteran's failure to report the assault during service than it gave to all the evidence submitted after service — and denied the claim on that basis.

The claimant appealed to the Court of Appeals for Veterans' Claims, which affirmed the board's denial.

The claimant then appealed the decision to the Federal Circuit. In considering whether the lack of evidence in the service records could support a finding that no sexual assault happened, the court noted that, frequently, the victims of sexual assaults that take place in the military do not report the incidences due to fear of retribution.

The court also noted that the absence of a record of an event is generally not admissible to prove the event did not occur where one would not expect for it to have been recorded. The court held that neither the absence of service records documenting an assault nor a claimant's failure to report an assault can be pertinent evidence that the attack did not occur.

Thus, now, not only can claimants use evidence outside of their service records to show they were sexually assaulted, but a lack of documentation of such an assault in the service records cannot be used as evidence that no such assault actually took place.

While the credibility of claimants will still be an issue of dispute and something for the VA and board to assess, it can no longer be attacked on the basis that a credible person would have reported an assault at the time it took place.

That is a huge victory for veterans who suffer from PTSD as a result of sexual assaults that occurred during their active duty. The decision will make it easier for veterans who are sexual assault survivors to obtain the benefits to which they are entitled.