In The
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOS. 2010-7136, -7139, -7142

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,
Petitioner,
v.
SECRETARY OF VETERANS AFFAIRS,
Respondent.

PARALYZED VETERANS OF AMERICA,
Petitioner,
v.
SECRETARY OF VETERANS AFFAIRS,
Respondent.

VETERANS OF MODERN WARFARE and **NATIONAL VETERANS LEGAL SERVICES PROGRAM,**
Petitioner,
v.
SECRETARY OF VETERANS AFFAIRS,
Respondent.

BRIEF ON BEHALF OF MENTAL HEALTH AMERICA, HOWARD V. ZONANA, M.D. AND MADELON BARANOSKI, PH.D. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTEREST

Counsel for amici curiae certifies the following:

1. The full name of every party represented by me is:

   Mental Health America;
   Howard Zonana, M.D.; and
   Madelon Baranoski, Ph.D.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   Mental Health America;
   Howard Zonana, M.D.; and
   Madelon Baranoski, Ph.D.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   None.

4. The names of all law firms and the partners or associates that appeared for the amici curiae now represented by me in the trial court or agency or are expected to appear in this court are:

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Dated: January 13, 2011 By: ______________________________
Jeffrey Selbin, Counsel for Amici Curiae

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STATEMENT OF INTEREST

Mental Health America ("MHA"), formerly known as the National Mental Health Association, is the oldest mental health advocacy organization in the United States. MHA's board and staff are comprised of people and family members affected by mental health conditions, experts in mental health public policy, and professionals who specialize in the diagnosis and treatment of mental illnesses, including posttraumatic stress disorder. The Chair of the MHA Board of Directors authorized the filing of this amicus brief pursuant to MHA Position Statement 62, by which the MHA Board of Directors delegates such authority to the Chair.

Dr. Howard V. Zonana is a Professor of Psychiatry at Yale Medical School and a Clinical Professor (Adjunct) of Law at Yale Law School. Dr. Zonana is a nationally-recognized expert in forensic psychiatry, and is author or co-author of numerous articles on the topic, including *AAPL Practice Guideline for the Forensic Evaluation of Psychiatric Disability* in The Journal of the American Academy of Psychiatry and the Law (2008). Dr. Zonana's professional positions have included Chair of the Judicial Action Committee of the American Psychiatric Association; President of the American Academy of Psychiatry and the Law; Chair of the Bioethics Committee at New Haven Hospital; and Director, Medical Director and President of the Medical Staff of the Connecticut Mental Health

Center, Yale. Dr. Zonana received his B.A. from Syracuse University in 1958 and his M.D. from the Johns Hopkins School of Medicine in 1962.

Dr. Madelon Baranoski is an Associate Professor in the Department of Psychiatry at Yale University. Dr. Baranoski is a nationally-recognized researcher and practitioner in the area of forensic psychology, and has lectured across the country on the topic. She is an associate editor of the Journal of the American Academy of Psychiatry and the Law Online Editorial Board. Dr. Baranoski received her B.S.N. at the University of Maryland, Walter Reed Army Institute in 1969; her M.S.N. at the Yale University School of Nursing in 1974; and her Ph.D. at the University of Pennsylvania in 1982.

MHA and Drs. Zonana and Baranoski are concerned with excellence in patient mental health care, high-quality mental health care for veterans, and promoting proper standards in the diagnosis, evaluation and treatment of posttraumatic stress disorder.

CONSENT: Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to this filing.

FUNDING: Pursuant to Federal Rule of Appellate Procedure 29(c)(5), revised December 1, 2010, counsel for amici curiae authored the brief and did not contribute money to fund preparation or submission of the brief. No other person contributed money to fund preparation or submission of the brief.

SUMMARY OF THE ARGUMENT

The Department of Veterans Affairs ("VA" or "the agency") recently finalized a new regulation that lowers the evidentiary burden on certain veterans suffering from service-connected posttraumatic stress disorder ("PTSD"). 38 C.F.R. § 3.304(f)(3) (2010). We applaud VA for assisting veterans who might otherwise face obstacles in documenting the service-related source of their PTSD. We hope VA's increased attention to this widespread and frequently debilitating disorder will reduce the negative mental health consequences of delay or denial of benefits to veterans.

Although we welcome VA's effort to help veterans suffering from PTSD, mental health literature and practice do not support the agency's categorical distinction between VA and outside medical opinions to establish the adequacy of a PTSD stressor. VA should scrutinize PTSD claims carefully, and is permitted by law to order its own examinations in all cases if it so chooses. However, VA adjudicators should continue to consider all medical evidence when deciding PTSD claims, including opinions from outside psychiatrists and psychologists. Finally, the agency should not change PTSD diagnostic criteria from those set forth in the American Psychiatric Association's *Diagnostic and Statistical Manual for Mental Disorders*.

ARGUMENT

Veterans are eligible for disability compensation if they suffer from a current impairment caused or aggravated by a service-connected injury or disease. 38 C.F.R. § 3.303(a) (2010). Veterans who suffer from PTSD and apply for compensation benefits can typically provide medical evidence to support their current diagnosis. Further, they can testify as to the occurrence of an in-service stressor which precipitated the PTSD. Until recently, however, the law required claimants to corroborate the in-service PTSD stressor with additional evidence, which has proven very difficult for many veterans. Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39,843 (July 13, 2010).

Under the new regulation, veterans seeking disability compensation for PTSD who claim an in-service stressor related to "fear of hostile military or terrorist activity" will no longer be required to provide corroborating evidence of the in-service stressor. *Id.* However, this new evidentiary standard applies only if a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that: (1) the stressor is adequate to support a PTSD diagnosis; (2) the veteran's symptoms are related to the claimed stressor (in the absence of clear and convincing evidence to the contrary); and (3) the claimed stressor is consistent with the places, types and circumstances of the veteran's

service. *Id.* That is, if the above criteria are met, "the veterans' lay testimony alone may establish the occurrence of the claimed in-service stressor." *Id.*

During the rule-making process, many individuals, veterans' organizations and mental health experts, including the American Psychiatric Association, objected to the agency's distinction between VA and non-VA medical opinions for the purpose of applying the new standard. *Id.* at 39,846-47. VA responded that it will still consider all medical evidence as required by law, but the language of the new regulation suggests that outside opinions cannot be considered by adjudicators for this subset of claimants. *Id.* at 39,849. Specifically, VA stated that "[w]e decline to expand the [lower evidentiary] rule to include the opinion of any psychiatrist or psychologist whose diagnosis conforms to DSM-IV or VA's protocol or who is certified by the APA because we believe that VA or contract examiners are *uniquely qualified*" to render such opinions. *Id.* at 39,847 (emphasis added).

VA justified the exclusion of non-VA opinions from the new standard on grounds that: (1) VA examiners are better trained than private examiners to perform PTSD examinations and to render forensic opinions; (2) VA certifies its examiners and reviews the quality of examinations by VA and contract examiners; (3) VA examiners are better informed about a veteran than private practitioners; and (4) VA examiners provide more consistent and better quality examinations

than private examiners. *Id.* at 39,847-48. Because of the lower evidentiary standard, VA states that it will accept medical opinions "only in cases on which it can depend on the quality of the medical opinion, [and] we decline to accept the opinion of any psychiatrist or psychologist." *Id.* at 39,848.

We find no evidence to support VA's stated rationale for distinguishing categorically between the opinions of VA and non-VA psychiatrists and psychologists. While VA's employees and contractors are qualified to evaluate the relationship between PTSD symptoms and causal stressors, they are not, as a group, "uniquely" qualified to make such assessments. Neither should VA privilege outside evaluations over VA evaluations. There will be many instances in which one or the other should be given greater weight based on its probative value.

All psychiatrists and psychologists, including those outside of VA's employ, receive specialized and substantial training in diagnosing and treating PTSD. They use certification and quality control measures, including credentialing in forensic and specialized areas of psychiatry and psychology, and ongoing peer review. Many non-VA psychiatrists and psychologists are well informed about veterans. They may routinely examine and treat veterans for PTSD, delivering high-quality care and providing thorough examinations to help VA make its disability determinations. Thus, the categorical exclusion of private mental health opinions is not justified on VA's stated grounds.

VA's unstated concern regarding abuse of the new standard is a valid reason to scrutinize all claims carefully. VA should order additional opinions to confirm, refute or supplement private opinions in all cases if it so chooses. However, careful scrutiny can be achieved without categorically excluding outside opinions from qualified experts in the claims adjudication process, including on appeal. In fact, VA has well-established protocols for considering and weighing the probative value of all medical evidence through its adjudication process. Thus, the agency's new categorical distinction between VA and non-VA psychiatrists and psychologists is both unjustified and unnecessary. VA should continue to make individual assessments of PTSD claims based on the best available evidence.

Finally, the new regulation departs from the language of the American Psychiatric Association's *Diagnostic and Statistical Manual for Mental Disorders* ("DSM") when defining PTSD. This departure represents a change from VA's long-standing practice of applying DSM criteria when assessing mental disorders. VA provides no rationale for making this change, and it is not clear whether it will create a higher, lower or comparable disability standard. For these reasons, we urge VA to continue to conform its regulations to the latest version of the DSM. The agency should not redefine PTSD diagnostic criteria.

I. VA SHOULD CONSIDER ALL MEDICAL OPINIONS WHEN ADJUDICATING PTSD CLAIMS.

No evidence in the professional literature or in our experience supports VA's assertion that its employed or contracted examiners are "uniquely qualified" to perform PTSD examinations and to provide forensic opinions necessary to decide PTSD claims. Although any individual psychiatrist or psychologist may be better or less informed about a veteran in any particular case, all licensed mental health professionals are qualified to perform such examinations, and VA cannot justify the categorical exclusion of evaluations performed by non-VA examiners. The agency already has in place a system of individualized adjudication for weighing medical evidence, including the probative value of PTSD examinations performed by VA, contracted and outside psychiatrists and psychologists.

A. Psychiatrists and Psychologists Are Trained to Provide Competent PTSD Examinations.

VA asserts that its examiners are better skilled and better equipped to perform PTSD examinations and to render forensic opinions because they receive more training than non-VA examiners. 75 Fed. Reg. at 39,847-48. As VA noted in its rulemaking, PTSD examinations require time-consuming review of patient history, comprehensive diagnoses of comorbid mental disorders, and potentially complex judgments about possible malingering. *Id.* at 39,847. However, the complexity of the examinations does not justify distinguishing categorically

between the medical opinions of VA and non-VA examiners. On the contrary, the complexity of diagnosing and treating this disorder should encourage VA to consider more, not less, evidence. Private psychiatrists and psychologists have the training and professional resources to render informed opinions about the status of a veteran's mental health.

In alleging that its employees or contractors are better prepared to perform PTSD examinations, VA cites its own best practice manual as the source of the specialized training. *Id.* (*citing* Patricia Watson et al., *Department of Veterans Affairs, Best Practice Manual for Posttraumatic Stress Disorder (PTSD) Compensation and Pension Examinations* 13-22 (2000), *available at:* http://www.avapl.org/pub/PTSD%20Manual%20final%206.pdf). The agency also references a VA guide "designed to assist clinicians when performing compensation and pension examinations." *Id.* (*citing* Department of Veterans Affairs, C&P Service Clinician's Guide (Mar. 2002), *available at:* http://www.warms.vba.va.gov/21guides.html). Both documents are available on-line for review by any mental health professional. They each contain short chapters with general guidelines for conducting PTSD examinations, including initial evaluation and review examination worksheets.

The American Psychiatric Association ("APA") offers guidance to all of its members on diagnosing PTSD in a 61-page manual, including specific instruction

about patients with military and war-related trauma. American Psychiatric Association, *Practice Guideline for the Treatment of Patients with Acute Stress Disorder and Posttraumatic Stress Disorder* 8-9 (2004), *available at:* http://www.pbhcare.org/Guidelines/Guidelines/Blurb/Tree/Adult%20Mental%20Health/Acute%20Stress%20And%20PTSD/PTSD%20Algorithm.pdf . The American Academy of Psychiatry and the Law ("AAPL") has published comprehensive guidance to assist psychiatrists and other clinicians who perform disability evaluations, including evaluations for "specialized compensation and pension programs (e.g., military veterans' benefits)." Liza H. Gold et al., *AAPL Practice Guideline for the Forensic Evaluation of Psychiatric Disability*, 36 J. Am. Acad. Psychiatry & L. (Supplement) S3 (2008), *available at:* http://www.jaapl.org/cgi/reprint/36/Supplement_4/S3. AAPL has also promulgated ethical guidelines for psychiatrists who perform forensic examinations for legal purposes. American Academy of Psychiatry and the Law, *Ethics Guidelines for the Practice of Forensic Psychiatry* (2005), *available at:* http://www.aapl.org/pdf/ETHICSGDLNS.pdf. Finally, when diagnosing PTSD, the DSM advises all mental health practitioners to rule out malingering "in those situations in which financial remuneration, benefit eligibility, and forensic determinations play a role." American Psychiatric Association, *Diagnostic and*

Statistical Manual for Mental Disorders, Fourth Edition, Text Revision 467 (2000).

Such guidance from VA, APA and AAPL is important and instructive, but cannot serve as the basis for drawing distinctions between the training, skill or expertise of any particular subset of psychiatrists or psychologists.

B. Board Certified Psychiatrists and Licensed Psychologists Are Qualified to Diagnose PTSD.

VA argues that its examiners alone should assess veterans' PTSD claims because VA certifies them and performs quality control reviews. 75 Fed. Reg. at 39,847. VA cites for this proposition a Veterans Health Administration directive establishing training and certification for clinicians performing compensation and pension ("C&P) examinations for all types of illness. Veterans Health Administration, Department of Veterans Affairs, *Certification of Clinicians Performing Compensation and Pension Examinations* 1 (VHA Directive 2008-005) (2008), *available at* http://www1.va.gov/vhapublications/ViewPublication.asp?pub_ID=1643. This directive, however, is not specific to PTSD examinations, and VA offers no further explanation of the certification requirements or review protocols for PTSD examiners. Certification procedures may act as useful internal controls for VA. Without more, however, they should not justify a distinction between the opinions of VA and non-VA examiners.

VA already recognizes, without distinction between employment source inside or outside the agency, that all "board certified psychiatrists and licensed psychologists have the requisite qualifications to conduct compensation and pension examinations for PTSD." C&P Service Clinician's Guide, *supra*, at 203. In the current system, some VA psychiatrists and psychologists work only for VA, while many others perform examinations for VA under contract. Others have little or no prior relationship with VA but perform an occasional examination. Even VA-certified psychiatrists and psychologists may conduct examinations for veterans in their non-VA private practice. Under the new regulation, an opinion offered by a psychiatrist or psychologist in an outside capacity – although presumably reviewable by a subsequent VA employed or contracted examiner – appears to be unavailable to adjudicators applying the relaxed evidentiary standard, even though the outside examiner may be certified by VA and already subject to the same quality control.

For example, a single psychiatrist could examine two veterans alleging PTSD stemming from the same traumatic incident. One examination could be conducted under contract with VA and therefore reviewed under the lower evidentiary standard. The other might be performed by the psychiatrist in a private capacity, leaving the veteran ineligible to qualify for the new standard based on the psychiatrist's opinion. The psychiatrist could find that both veterans' symptoms are

related to the identical in-service stressor, and that the stressor is adequate to support a PTSD diagnosis in both cases. Assuming the claimed stressor is consistent with the places, types and circumstances of service, the psychiatrist's opinion will likely be sufficient to support a finding of disability for the first veteran. For the second veteran, however, the opinion can at best be reviewed by a subsequent VA examiner, and apparently cannot be considered by VA adjudicators under the new standard.

C. VA and Non-VA Psychiatrists and Psychologists Can Be Equally Informed about Veterans' Military Service and Medical Histories.

VA alleges that its examiners and contract examiners "are often better informed about a veteran being examined than private practitioners," because they have access to the veteran's claims file and to VA's C&P worksheet for an initial PTSD examination. 75 Fed. Reg. at 39,847. According to VA, "[a] private psychiatrist or psychologist would not have access to such documentation before opining about whether a claimed stressor is adequate to support a PTSD diagnosis and whether the veteran's symptoms are related to the claimed stressor." *Id.* at 39,847-48. However, outside examiners have access to documentation related to their patients, and the professional standard of care requires them to pursue and consider it when rendering opinions about veterans.

First, a VA study of PTSD compensation claims revealed that its own examiners had access to the veteran's claims file in less than half of all cases

(44%). Watson et al., *supra*, at 5. Veterans also have a right to their own service and medical records from VA, including their claims file. 38 C.F.R. § 1.577(a) (2010). With one form, veterans can request all documents in their personnel file and any in-service medical records. They may request these records be sent directly to another individual, including a mental health professional. Department of Veterans Affairs, Standard Form 180, (Rev. 10/10, OMB No. 3095-002), *available at* http://www.archives.gov/research/order/standard-form-180.pdf.

Second, best practice within and outside VA requires obtaining a full patient history, including all relevant military records. Most VA forms, including the C&P worksheet for PTSD claims, are available on-line as part of VA's best practices manual. Watson et al., *supra*. VA's clinical guide instructs examiners to review a veteran's military history and claims file. C&P Service Clinician's Guide, *supra*, at 207. Similarly, the APA instructs its members to obtain a description of stressor location and events, adding that these descriptions can sometimes be verified by obtaining copies of service records. American Psychiatric Association, *supra*, at 9. The AAPL provides extensive guidance on the importance of record review and collateral information in performing comprehensive disability evaluations. Gold et al., *supra*, at S13-S15.

D. All Psychiatrists and Psychologists Should Perform Examinations of High Quality and Consistency.

VA claims that it can ensure the quality and consistency of its own examinations due to the sheer number of examinations performed and the internal quality control review. However, VA does not provide meaningful data to support its contention that the volume of examinations correlates to quality. Further, VA offers no explanation about how it measures such outcomes. Finally, though similar problems can arise with non-VA examiners, VA's pay structure for C&P examinations incentivizes speed over quality.

VA reports the aggregate number of C&P examinations performed every year by employees (700,000) and by contractors (120,000) to argue that volume ensures standardization and consistency. 75 Fed. Reg. at 39,848. However, VA does not offer any data about the specific number of PTSD examinations performed annually, the distribution of those examinations among individual examiners, or what metrics it uses to measure quality or consistency. Likewise, VA does not report how many PTSD examinations for disability compensation cases are performed outside the agency and by whom. The lone PTSD-specific statistic provided during the rule-making process – that PTSD was diagnosed in 77% of C&P examinations for initial PTSD claims – is drawn from a study of 143 cases (97 with examinations), which the agency acknowledges was "not statistically valid." Watson et al., *supra*, at 5. These statistics tell us nothing about VA's

assertion that its employees and contractors as a group outperform their non-VA counterparts with respect to quality or consistency of examinations.

The current VA practice of paying contractors a total of $250-300 per PTSD examination has caused some concern within the mental health profession. VA best practices suggest that a patient interview alone should take nearly two hours. *Id.* at 22. In addition to the examination, the psychiatrist or psychologist should review a complete claims file, including military service records and all health care records, before writing a detailed report with findings. According to VA, comprehensive initial PTSD examinations require approximately three to four hours. C&P Service Clinician's Guide, *supra*, at 202. Yet paying examiners a capped fee at a rate that would generally cover only one to two hours of their time incentivizes speed over accuracy, potentially undermining the quality of examinations.

Amici are primarily concerned that good evidence be available for the adjudication. PTSD cannot be diagnosed by a blood test or brain imaging techniques. Detailed history is important and assessment of functioning is required. The standardized questionnaires in use today require a half-day to administer in addition to the interview. Collateral information from treatment providers is also important to verify symptomatology.

A recent report by the Institute of Medicine ("IOM") found that VA examiners spend anywhere from twenty minutes to more than three hours in C&P examinations for PTSD. Institute of Medicine, Committee on Veteran's Compensation for Post-traumatic Stress Disorder, *PTSD Compensation and Military Service* 205 (2007). The IOM report criticizes VA's PTSD examination system for its variable quality, crude rating system, and failure to account properly for co-morbid disorders. *Id*. at 92-97. Although the IOM focused on VA's PTSD examinations, similar challenges exist for non-VA examiners. Neither setting is immune from pressures to perform quick examinations. VA adjudicators should thus consider the breadth and depth of the PTSD examination when weighing the probative value of opinions from all sources.

E. VA's Adjudication System is Well Equipped to Weigh the Probative Value of PTSD Opinions from All Psychiatrists and Psychologists.

VA's new regulation is not in accordance with existing law that requires claims adjudicators to consider all relevant medical evidence, including reports of private examiners. 38 U.S.C. § 1154(a) (2010). VA states that it "has no control over the quality of examinations performed by private health care providers." 75 Fed. Reg. at 39,848. Yet, VA considers outside medical evidence in all other cases. This concern over control seems to exist only for this narrow subset of veterans suffering from PTSD. According to the IOM report, VA already orders an additional examination as a matter of course in most PTSD cases. Institute of

Medicine, *supra*, at 85. We do not object to any VA examination as a matter of course, as long as outside opinions can be considered as part of the evidence.

VA's existing adjudication system allows it to assign different weight to medical evidence with varied probative value. VA ratings officers weigh medical evidence from outside sources using the same criteria for evidence from a VA examiner. Adjudicators are required to ensure that examinations use "sufficient facts and data" and "reliable principles and methods." *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 302, 304 (Vet. App. 2008). Facts can come from the claims file, but also from other sources "not the least of which is by treating the claimant for an extended period of time." *Id.* at 303.

By statute, the agency must consider "all evidence and material of record and applicable provisions of law and regulation." 38 U.S.C. § 7104(a) (2010). VA regulations further require that "[d]eterminations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case." 38 C.F.R. § 3.303(a) (2010). Although VA need not accept a private opinion alone as sufficient for rating purposes, VA cannot "act in an arbitrary and capricious manner in not crediting a claimant's medical evidence." *Nieves-Rodriguez*, 22 Vet.

App. at 302 (*quoting Kowalski v. Nicholson*, 19 Vet. App. 171, 177 (Vet. App. 2005)).

The probative value of any psychiatrist's or psychologist's opinion depends upon the extent and persuasiveness of the examiner's analysis of the patient's situation. *Nieves-Rodriguez*, 22 Vet. App. at 295. A rater can assess the reliability of the private examiner's methods based on its "factually accurate, fully articulated, sound reasoning." *Id.* at 304. VA "may attribute less probative value to a private opinion," but it must "provide[] an adequate statement of reasons or bases for doing so." *Id.* at 302. Should VA have doubts about the probative value of any given medical opinion – because of lack of training, certification, lack of review of the service record, access to information or quality – VA claims adjudicators can assign a lower weight to the evidence as is the current practice in any other case.

VA's new regulation offers an important opportunity to improve the disability compensation adjudication process for veterans suffering from PTSD. PTSD is a complex disorder, and VA should continue to ensure quality and consistency of PTSD ratings decisions by considering all medical evidence of probative value. VA should also continue to state the rationale for its reliance on one or another medical examination in its final decision. Because VA already has the ability to reject or give less weight to unsupported opinions, its apparent

categorical rejection of outside opinions by adjudicators is unnecessary to ensure the integrity of claims adjudication.

II. VA SHOULD NOT REDEFINE PTSD DIAGNOSTIC CRITERIA.

In 1995, VA proposed new regulations to adopt the Diagnostic and Statistical Manual as the basis for its claims adjudication. VA's stated goal in adopting the Manual was "to update the section of the rating schedule on mental disorders to ensure that it uses current medical terminology and unambiguous criteria, and that it reflects medical advances which have occurred since the last review." Schedule for Rating Disabilities, Mental Disorders, 60 Fed. Reg. 54,825 (Oct. 26, 1996). A year later, VA finalized its regulations, revising its mental health ratings schedule to conform to the DSM-IV, the latest version of the manual. 38 C.F.R. § 4.130 (2010); 38 C.F.R. § 4.125 (2010); 38 C.F.R. § 4.125(a) (2010) ("[i]f the diagnosis of a mental disorder does not conform to DSM-IV or is not supported by the findings on the examination report, the rating agency shall return the report to the examiner to substantiate the diagnosis."). In the 2010 rulemaking for its new PTSD regulation, VA without explanation modified the defined stressor criterion. 75 Fed. Reg. 39,852. The new regulation, therefore, is at odds with VA's underlying regulatory scheme. It also conflicts with the agency's own best practices and standard mental health practice. Watson et al., *supra*, at 13.

The DSM is published by the American Psychiatric Association and sets forth uniform language and standardized criteria for diagnosing mental disorders. The most recent version is the DSM-IV-TR. Among other things, the DSM-IV-TR sets forth the criteria to diagnose PTSD, including the definition of a stressor that is adequate to support such a diagnosis. DSM-IV-TR, *supra*, at 467-68.

According to the DSM-IV-TR, a person who develops PTSD must have experienced "*intense* fear, helplessness, or horror" during the event that precipitated the development of the disorder. *Id.* at 467 (emphasis added). The new regulation generally tracks the language used in the DSM-IV-TR to identify stressors adequate to support a diagnosis of PTSD. However, the regulation changes one term used to define the stressor that led to the patient's development of PTSD. Where the DSM-IV-TR describes "*intense* fear, helplessness, or horror" as a required response to the PTSD stressor, *id.*, the new regulation requires that a veteran's response to the stressor involve "a *psychological or psycho-physiological state of* fear, helplessness, or horror." 38 C.F.R. § 3.304(f)(3) (2010) (emphasis added).

The origin and meaning of the new terms is not clear. This new language does not appear in the DSM-IV-TR, and these new terms are not terms of art in diagnosing PTSD. Likewise, they are not found in the proposed revisions to the DSM currently in progress, and they do not appear in the DSM's international

counterpart, the *International Statistical Classification of Diseases and Related Health Problems*, 10th Revision (2007).

Therefore, the regulatory change is inconsistent both with VA's stated desire to avoid ambiguity in diagnostic and adjudicatory criteria and with VA's own best practice manual for PTSD, which states that "the objective of trauma assessment is to document whether the veteran was exposed to a traumatic event . . . of sufficient magnitude to meet the DSM-IV stressor criterion." Watson et al., *supra*, at 15. Tracking the DSM-IV-TR verbatim, the manual lists the stressor criterion, which requires that "[t]he person's response [to the stressor] involved *intense* fear, helplessness, or horror." Watson, *et al.*, *supra*, at 13 (emphasis added); DSM-IV-TR, *supra*, at 467.

Without further explanation from VA, it is unclear whether the agency's new standard is higher, lower, or the same as the DSM-IV-TR standard. Therefore, VA's new regulation redefines a diagnostic criterion for PTSD with no apparent purpose or guidance as to how it should be interpreted and applied by examiners and adjudicators. VA is entitled to set disability thresholds, just as states do for competency or insanity, but the agency should not change medical diagnostic criteria.

CONCLUSION

Amici respectfully request this Court grant the consolidated petitions with respect to severing the clause in the new regulation which appears to exclude consideration of outside medical opinions by VA adjudicators and ordering the agency to conform its diagnostic criteria to the latest version of the DSM.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Procedure 29(d). The brief contains 4,782 words according to the Microsoft Word count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman type.

Dated: January 13, 2011 By: ______________________________
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CERTIFICATE OF SERVICE

I certify that on January 13, 2011, I transmitted by pre-paid Federal Express one original and eleven copies the foregoing Brief on Behalf of Mental Health America, Howard V. Zonana, M.D. and Madelon Baranoski, Ph.D. as Amici Curiae in Support of Petitioners and one Entry of Appearance to the following address:

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