

BACK FROM WAR—A BATTLE FOR BENEFITS: REFORMING VA’S DISABILITY RATINGS SYSTEM FOR VETERANS WITH POST-TRAUMATIC STRESS DISORDER

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Federal law entitles military veterans to disability benefits for post-traumatic stress disorder (PTSD). The Department of Veterans Affairs (VA) judges the severity of each veteran’s case and decides how much to pay. However, VA has not written regulations that give specific guidance about handling PTSD cases. Instead, VA has tried the regulatory equivalent of jamming a square peg into a round hole. VA uses decades-old regulations developed for mental disorders that do not resemble PTSD. Without relevant regulations, VA lacks adequate guidance, it cannot fairly decide how much a veteran should be paid, and veterans are denied benefits they deserve. This Note proposes judicial and legislative solutions.

INTRODUCTION

According to his military occupational specialty, Sergeant Douglas Cohen was an Army power generator mechanic, but that didn’t matter much when he went to war.¹ He saw combat, rode in convoys, pulled guard duty, and dodged sniper and mortar fire.² When an explosion blew apart his friend, Cohen watched others gather the body parts.³ When he returned to his post stateside, he was sent to military funerals; when he could not handle being near the war dead, the military demoted him to private.⁴

Cohen could not control his anger.⁵ He could not sleep.⁶ His thoughts kept slipping back to the war.⁷ He was depressed and contemplated suicide.⁸

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1. Cohen v. Brown, 10 Vet. App. 128, 132 (1997).
2. *Id.* at 132–33.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 133.
7. *Id.*
8. *Id.*

Eventually, he was diagnosed with post-traumatic stress disorder (PTSD) and sought disability benefits from the military.⁹ The year was 1989, twenty years after Cohen left Vietnam.¹⁰

Today, the stories and scars from war remain much the same—only the names and battlefields have changed. Since Cohen served, the U.S. military has developed a far better understanding of PTSD, but PTSD still exacts a heavy toll. As of 2006, more than 223,000 U.S. military veterans received disability benefits for PTSD.¹¹ Veterans with PTSD receive disability benefits when they suffer from a diminished capacity to earn a living in the civilian workforce or a reduced ability to function in society.¹² As a veteran's ability to function in the workforce or in society decreases, a veteran's disability payments increase.¹³ Veterans with PTSD received payments ranging from \$115 per month to about \$2,500 per month in 2008.¹⁴ However, some veterans with PTSD do not receive the benefits to which they are entitled. This Note explains why this problem exists and suggests solutions.

Veterans with PTSD make up about 9% of all recipients of disability benefits, but they receive about 20% of all disability benefits paid.¹⁵ Even so, both the volume and the cost of PTSD benefits are soaring.¹⁶ From 1999 to 2006, the number of veterans receiving PTSD benefits grew by 125%, while the amount paid grew by 148%, to about \$4.28 billion.¹⁷

Amid the soaring costs and caseload, a sobering fact emerges: we have barely begun to calculate the price to care for veterans of Iraq and Afghanistan.¹⁸ When the number of veterans receiving PTSD benefits jumped from 1999 to 2004, the new recipients did not primarily come from Iraq or Afghanistan, but from Vietnam, Korea, or World War II.¹⁹ We have just begun to feel the toll from Iraq

9. *Id.* at 132.

10. *Id.* at 132–33.

11. INST. OF MED. AND NAT'L RES. COUNCIL OF THE NAT'L ACADS., PTSD COMPENSATION AND MILITARY SERVICE 143 (2007) [hereinafter NATIONAL ACADEMIES]. That total counts only veterans for whom PTSD is their "primary rated service-connected disability." *Id.* In other words, the figure of 223,000 does not count veterans who have PTSD but also have another physical or mental problem that is more debilitating.

12. *See* 38 U.S.C. § 1155 (2006); *Mauerhan v. Principi*, 16 Vet. App. 436, 440–41 (2002); 38 C.F.R. § 4.12(6)(a)–(b) (2008).

13. *See* DEP'T OF VETERANS AFFAIRS, DISABILITY COMPENSATION BENEFITS 1 (July 2008), available at <http://www.vba.va.gov/VBA/benefits/factsheets/> (follow "Veterans with Service-Connected Disabilities" hyperlink; then follow "Disability Compensation Benefits" hyperlink).

14. *Id.*; *see also* 38 U.S.C. § 1155.

15. NATIONAL ACADEMIES, *supra* note 11, at 2.

16. *Id.*

17. U.S. GOV'T ACCOUNTABILITY OFFICE, VETERANS' DISABILITY BENEFITS: CLAIMS PROCESSING CHALLENGES PERSIST WHILE VA CONTINUES TO TAKE STEPS TO ADDRESS THEM 6 (2008). Meanwhile, VA faces a wave of new disability benefits claims; at the end of 2007, VA had about 392,000 total claims awaiting a decision, while the average claim processing time had increased from three weeks to nineteen. *Id.* at 4.

18. NATIONAL ACADEMIES, *supra* note 11, at 21.

19. *Id.*

and Afghanistan. By late 2006, at least 1.5 million American military personnel had participated in operations in Iraq and Afghanistan, and at least 500,000 veterans had separated from the military and had become eligible for benefits.²⁰ At that time, a former analyst for the U.S. Department of Veterans Affairs (VA) estimated that at least 400,000 veterans of current conflicts would eventually apply for disability benefits.²¹

Those veterans will encounter a benefits rating system that is outdated and ill-equipped to handle disability claims related to PTSD. VA has comprehensively reviewed its general rating formula for mental disorders only once during the past sixty-three years.²² Moreover, veterans apply for benefits under rules that have not evolved to accommodate PTSD, which only gained recognition as a mental disorder in the past thirty years.²³ These obstacles drew attention in a 2007 report by the Veterans' Disability Benefits Commission, which was part of an attempt by Congress to study veterans' disability benefits.²⁴ The Commission said that VA should make reforming the disability rating system for PTSD a top priority in order to improve disability benefits for veterans.²⁵

This Note argues that the current ratings system for determining disability benefits for PTSD is ineffective and unfair, and should be reformed. Federal law promises a veteran with PTSD that he or she will receive disability benefits, and those benefits will be paid in proportion to the difficulty that the veteran faces in earning a living as a civilian.²⁶ The current system fails to fulfill these promises.²⁷ Instead, veterans with PTSD face a frustrating and unfair disability ratings process that undercompensates them for injuries sustained during military service.²⁸ Consequently, the current process dishonors this nation's tradition of care for its

20. Scott Shane, *Data Suggests Vast Costs Loom in Disability Claims*, N.Y. TIMES, Oct. 11, 2006, at A5 (reporting that about one in five soldiers discharged from Iraq and Afghanistan had been granted disability benefits, mostly at a disability rating of 30% or less).

21. *Id.*

22. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE ADM'R OF VETERANS AFFAIRS, VETERANS' BENEFITS: NEED TO UPDATE MEDICAL CRITERIA USED IN VA'S DISABILITY RATING SCHEDULE 13 (1988) [hereinafter GAO DISABILITY RATING REPORT]. VA revised its rating formula in 1996. Schedule for Rating Disabilities; Mental Disorders, 60 Fed. Reg. 54,825 (Oct. 26, 1995). VA also revised its rating formula in 1988, but this revision only updated terminology to conform to terminology used by the American Psychiatric Association, and did not "attempt to improve the specificity of definitions used to more correctly classify mental impairments." GAO DISABILITY RATING REPORT at 13.

23. NATIONAL ACADEMIES, *supra* note 11, at 46–47. PTSD gained formal recognition as a valid psychiatric diagnosis in 1980, when it was included in the third edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-III). AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81, at 236–38 (3d ed. 1980).

24. VETERANS' DISABILITY BENEFITS COMM'N, HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY 1 (2007) [hereinafter DISABILITY BENEFITS COMM'N].

25. *Id.* at 6.

26. See 38 U.S.C. § 1155 (2006).

27. See *infra* pp. 1187–97.

28. See *id.*

veterans, a tradition that dates to 1776, when the Continental Congress established veterans disability benefits.²⁹

Two main problems afflict the current system. First, VA lacks clear guidance on how to use its two authorities for assigning the ratings: (1) VA's own general rating formula and (2) the definitive medical reference guide to mental disorders, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) of the American Psychiatric Association (APA). As a result, VA's ratings process allows irrelevant criteria to outweigh relevant factors, leading VA to undercompensate veterans with valid diagnoses of PTSD.³⁰

Second, conceptual confusion in caselaw and VA regulations blurs the important difference between psychiatric symptoms and functional impairment. These are related but distinct psychiatric concepts, but the courts and VA have confused the two. The result of both of these problems is the same: The agency charged with helping veterans with PTSD denies them benefits that they have earned.

This Note is divided into three parts. Part I explains the process for assigning disability ratings to veterans with PTSD. Part II focuses on the problems with current disability benefits regulations for PTSD. Part III proposes two solutions—first a solution through the courts, and second a proposal that for PTSD, VA should discard a general rating formula and replace it with a rating formula developed specifically to address PTSD cases.

I. PTSD: FROM THE BATTLEFIELD TO DISABILITY BENEFITS

A. What Causes PTSD, and How PTSD Affects Soldiers

The APA's DSM-IV defines PTSD³¹ as an anxiety disorder identified by seven criteria.³² First, a person must experience or witness an extremely traumatic event, known as a "stressor."³³ The traumatic event usually involves a threat of death or serious injury, or news of violent death or serious injury to a relative or close friend.³⁴ The DSM-IV lists some traumatic events shown to cause PTSD.³⁵ The first listed stressor is military combat.³⁶

29. DISABILITY BENEFITS COMM'N, *supra* note 24, at 29.

30. *See infra* pp. 1187–97.

31. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, § 309.81, at 463–68 (4th ed. 2000) [hereinafter DSM-IV]. As described later, DSM-IV also plays a key role when VA assigns disability benefits.

32. *Id.* at 463. The severity of the traumatic event (usually life-threatening) differentiates PTSD from other anxiety disorders, such as adjustment disorders. *Id.* at 467.

33. *Id.* at 463.

34. *Id.*

35. *Id.* at 463–64.

36. *Id.* at 463. Other traumatic events that may cause PTSD, according to DSM-IV, include: "violent personal assault (sexual assault, physical attack, robbery, mugging), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness." *Id.* at 463–64. Harvard University psychologist Richard J. McNally said that the diagnosis of PTSD, originally limited to

The remaining six criteria explain how PTSD affects a person.³⁷ The next criterion relates to the reaction at the time of the traumatic event: a person must feel intense fear, horror, or helplessness.³⁸ Three criteria describe the symptoms that occur after the traumatic event: (1) “persistent re-experiencing” of the traumatic event through nightmares, intrusive thoughts, or flashbacks; (2) emotional numbness and avoidance of situations that might trigger re-experiencing; and (3) persistent hypervigilance.³⁹ Finally, two criteria describe the symptoms’ duration and severity: all symptoms must recur for more than a month, and symptoms must significantly impair the victim’s ability to function socially, either at work or elsewhere.⁴⁰

Re-experiencing symptoms are the hallmarks of PTSD.⁴¹ Intrusive thoughts—unwanted, unwarranted thoughts about the traumatic event—occur without warning or reason.⁴² As one clinical psychiatrist explained, a veteran whose PTSD causes intrusive thoughts “would prefer not to think about them, but they come into mind anyway. That’s why it’s a disorder.”⁴³ Nightmares also may afflict sufferers.⁴⁴ One Vietnam veteran with PTSD reported having the same nightmare every night for thirty-five years.⁴⁵

For those who serve in the military, PTSD usually arises in the aftermath of combat or other war-zone trauma.⁴⁶ Veterans who served in Iraq or Afghanistan

events outside the range of normal human experience, has fallen prey to “conceptual bracket creep” during the past twenty years. Richard J. McNally, *Conceptual Problems with the DSM-IV Criteria for Posttraumatic Stress Disorder*, in *POSTTRAUMATIC STRESS DISORDER: ISSUES AND CONTROVERSIES* 1, 1–6 (G.M. Rosen ed., 2004). As a result, under current diagnostic criteria, most Americans now experience an event that can lead to PTSD. *Id.* While critical of current diagnostic criteria as over inclusive, McNally also argues that PTSD remains a valid diagnosis for some. *Id.*

37. DSM-IV, *supra* note 31, at 463.

38. *Id.*

39. *Id.* Intrusive thoughts are recurrent, distressing recollections of the traumatic event, including images, thoughts, or perceptions. *Id.* Nightmares may replay the traumatic event. *Id.* at 468. Flashbacks, which are rare, take the person into a dissociative state where the person acts as if the traumatic event is actually happening again. *Id.* Hypervigilance may manifest in a heightened concern for one’s own safety; one Vietnam veteran reported that his hypervigilance made it difficult for him to sleep, so he would “walk around the house and check the doors and windows over and over again.” *Mauerhan v. Principi*, 16 Vet. App. 436, 438 (2002).

40. DSM-IV, *supra* note 31, at 463.

41. McNally, *supra* note 36, at 6.

42. Scott Simonson, *Wars Without End*, ARIZ. DAILY STAR, Nov. 9, 2003, at A14.

43. *Id.* (quoting Ben Jennings, a clinical psychologist working with veterans with PTSD at the VA hospital in Tucson, Arizona).

44. DSM-IV, *supra* note 31, at 468.

45. Simonson, *supra* note 42, at A1.

46. NAT’L CTR. FOR POST-TRAUMATIC STRESS DISORDER & WALTER REED ARMY MED. CTR., DEP’T OF VETERANS AFFAIRS, IRAQ WAR CLINICIAN GUIDE 11 (2d ed. 2004), available at http://www.ncptsd.va.gov/ncmain/ncdocs/manuals/iraq_clinician_guide_v2.pdf.

may develop PTSD even if they never faced life-threatening combat.⁴⁷ Soldiers may face increased risk for chronic PTSD from seeing civilians suffer, witnessing death and destruction, or having “sustained anticipatory anxiety” about imminent attack.⁴⁸ Most soldiers who suffer severe trauma in a war zone never develop PTSD, according to VA.⁴⁹ However, the Department estimates that up to 20% of Iraq war veterans, and up to 11% of Afghanistan war veterans will develop PTSD.⁵⁰ In some cases, years may elapse before a veteran experiences the onset of PTSD.⁵¹ The disorder can begin at any time after the traumatic stressor.⁵²

B. The Claims Process for Disability Benefits for Veterans with PTSD

To obtain disability benefits for PTSD, a veteran begins by filing a claim with VA.⁵³ To qualify for disability benefits, a veteran with PTSD must satisfy a three-part test.⁵⁴ First, a veteran must show that he or she incurred or aggravated PTSD during military service (an “in-service stressor”).⁵⁵ Second, the veteran must show medical evidence that he or she continues to suffer from PTSD.⁵⁶ Medical documentation must show a “clear diagnosis” of PTSD that meets the criteria of DSM-IV.⁵⁷ Finally, the veteran must show causation, which means that the veteran

47. *Id.* at 21–22.

48. *Id.* at 25–26.

49. *Id.* at 23 (noting that most soldiers who develop psychiatric symptoms from “severe trauma in war” will adapt and return to normal within months).

50. Dep’t of Veterans Affairs, Nat’l Ctr. for Posttraumatic Stress Disorder, Fact Sheet: How Common is PTSD?, http://www.ncptsd.va.gov/nctmain/nctdocs/fact_shts/fs_how_common_is_ptsd.html (last visited Sept. 17, 2008).

51. NATIONAL ACADEMIES, *supra* note 11, at 5. Currently, it is not understood why some cases develop quickly, while others lie dormant for years. *Id.*

52. *Id.*

53. 38 U.S.C. § 5101(a) (2006).

54. *Pentecost v. Principi*, 16 Vet. App. 124, 126 (2002).

55. Though a person may begin military service with a predisposition toward PTSD, or a pre-existing case of PTSD, this does not affect legal analysis. The military takes the person as it finds him, similar to the “eggshell plaintiff” rule in torts. *See Cohen v. Brown*, 10 Vet. App. 128, 141 (1997). Showing an in-service stressor is chiefly an evidentiary requirement: the veteran must meet the appropriate standard of proof that the stressor actually occurred. 38 C.F.R. § 3.304(f) (2008). If the stressor occurred during combat, a veteran only needs to offer his or her own testimony to satisfy this requirement. *Daye v. Nicholson*, 20 Vet. App. 512, 515 (2006). However, if the stressor did not occur during combat, the evidentiary requirement increases greatly, and the veteran must corroborate the stressor with “credible supporting evidence.” *Id.* Thus, veterans who suffer a “noncombat” stressor face a more difficult task in proving a disability claim. This makes the definition of “combat” a potentially critical issue in veterans’ disability benefit claims. VA considers combat to have occurred when the veteran took part in a “fight or encounter with a military foe or hostile unit or instrumentality.” *Sizemore v. Principi*, 18 Vet. App. 264, 271 (2004). While beyond the scope of this Note, courts have yet to consider whether asymmetrical warfare or counterinsurgency attacks (for instance, attacks by improvised explosive device, also known as an IED) constitute “combat” stressors, as opposed to “noncombat” stressors.

56. 38 C.F.R. § 3.304(f) (2008).

57. *Moreau v. Brown*, 9 Vet. App. 389, 394 (1996).

must show that the in-service stressor caused the veteran's current PTSD.⁵⁸ If a veteran makes a claim, then satisfies this three-part test by showing that a stressor occurred, a valid diagnosis of PTSD followed, and the stressor continues to cause PTSD, the veteran will be eligible for disability benefits.⁵⁹

By statute, the Secretary of Veterans Affairs has authority to promulgate regulations that guide VA's decisions about disability benefit ratings.⁶⁰ VA assigns the veteran a disability rating, which indicates impairment in at least one of two areas: diminished capacity to earn a living in the civilian workforce and diminished capacity to function socially.⁶¹ Current regulations recognize five disability ratings: 10, 30, 50, 70 and 100% disability.⁶² The higher the rating, the greater the amount that the veteran will receive. Monthly disability payments range from \$115 to about \$2,400.⁶³

To determine the disability rating, VA considers the frequency, severity, and duration of a veteran's PTSD symptoms.⁶⁴ To do so, VA developed a formula.⁶⁵ The formula is a general rubric that VA applies to PTSD and most other mental disorders.⁶⁶ The formula sets criteria and examples that justify a particular disability rating.⁶⁷ The general rating formula describes 50% disability from PTSD as follows:

Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attack more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances

58. *Id.*

59. *Id.* at 394 (citing 38 C.F.R. § 3.304(f) (1995)).

60. 38 U.S.C. § 1155 (2006).

61. *Id.*; *Mauerhan v. Principi*, 16 Vet. App. 436, 440–41 (2002); 38 C.F.R. § 4.126(a)–(b) (2008).

62. 38 C.F.R. § 4.130 (2008). Besides increased compensation, a rating of 100% disability makes a veteran eligible for additional benefits. These include additional benefits for spouses and children after the veteran's death, waiver of some life insurance premiums, reimbursement for most medical expenses, and vocational rehabilitation and job placement assistance (although a veteran who works twelve continuous months can no longer be rated 100% disabled). NATIONAL ACADEMIES, *supra* note 11, at 20.

63. *See* 38 U.S.C. § 1155; DEP'T OF VETERANS AFFAIRS, *supra* note 13, at 1. Another source estimates that annual benefits payments for all disabilities range from about \$1,300 to about \$32,800. DISABILITY BENEFITS COMM'N, *supra* note 24, at 56. Benefits payments may be increased for veterans with spouses or children. *Id.*

64. 38 C.F.R. § 4.126(a) (2008).

65. *Id.* § 4.130. Disability rating formulae were developed in 1917, and the present rating scheme began to take shape in 1945. DISABILITY BENEFITS COMM'N, *supra* note 24, at 57.

66. 38 C.F.R. § 4.130. VA maintains a separate rating formula for disability from eating disorders. *Id.*

67. *Id.*

of motivation and mood; difficulty in establishing and maintaining effective work and social relationships.⁶⁸

By comparison, the general rating formula describes a 70% disability rating as “[o]ccupational and social impairment, with deficiencies in most areas,” including work, school, family relations, and thinking or mood.⁶⁹ Symptoms include suicidal ideation; intermittently illogical, obscure, or irrelevant speech; near-continuous panic or depression; neglect of personal appearance and hygiene; and an inability to establish and maintain effective relationships.⁷⁰

The general rating formula is, as its name indicates, general—a single formula that VA uses in rating more than thirty mental disorders.⁷¹ Because of its general approach, the rating formula is a poor fit for determining PTSD benefits.⁷² The general rating formula makes no mention of the symptoms that form the hallmarks of PTSD: “persistent re-experiencing” of the traumatic event through nightmares, intrusive thoughts, or flashbacks.⁷³ Nevertheless, VA relies upon the rating formula to guide decisions about disability ratings for PTSD.⁷⁴

C. The Appeals Process for Benefits Decisions

If VA denies benefits to a veteran, or if a veteran believes the disability rating is too low, the veteran may seek review from the Board of Veterans Appeals, followed by the U.S. Court of Veterans Appeals for Veterans Claims⁷⁵ (also known as “Veterans Court”), and finally the Federal Circuit.⁷⁶ These courts have recognized that current law may prevent veterans from obtaining the correct level of disability benefits for PTSD, but the courts have failed to solve this problem.⁷⁷

68. *Id.*

69. *Id.*

70. *Id.*

71. *See* Mauerhan v. Principi, 16 Vet. App. 436, 442 (2002) (stating that the Secretary of Veterans Affairs, “acting within his authority to ‘adopt and apply a schedule of ratings,’ chose to create *one general* rating formula for mental disorders . . . to be used in rating more than 30 mental disorders.”).

72. *See infra* pp. 1187–97 for an explanation of problems with the general rating formula in PTSD benefits cases.

73. *Compare* DSM-IV, *supra* note 31, at 463–68, with 38 C.F.R. § 4.130. A veteran who is rated at less than 100% disabled may still qualify for 100% disability benefits if it is determined that, regardless of disability rating, the veteran’s PTSD prevents him or her from finding or keeping a “substantially gainful occupation.” 38 C.F.R. § 4.16 (2008). A separate appeals process guides decisions under this exception, known as total disability on the basis of individual unemployability (TDIU).

74. 38 C.F.R. § 4.16 (2008).

75. This court was formerly known as the U.S. Court of Veterans Appeals.

76. 38 U.S.C. §§ 7104, 7252, 7292 (2006).

77. *See, e.g.*, Mauerhan v. Principi, 16 Vet. App. 436, 442 (2002).

II. THE RELATIONSHIP BETWEEN DSM-IV AND THE GENERAL RATING FORMULA

A. Mauerhan: A Question Left Unanswered

Officials at VA must be familiar with DSM-IV and its nomenclature.⁷⁸ VA's own regulations require that its employees become "thoroughly familiar" with DSM-IV so that they "properly implement the directives" of federal regulations.⁷⁹ VA regulations require the agency to use DSM-IV to help assign disability ratings to veterans, and to reject claims when a veteran lacks a valid diagnosis of PTSD.⁸⁰ Thus, while statute does not mandate the use of DSM-IV, VA's own regulations make it integral to the disability ratings process.⁸¹ Subsequent court decisions have confirmed the importance of DSM-IV.⁸² The Veterans Court, interpreting VA regulations, presumed that medical professionals must know DSM-IV to diagnose PTSD, and that a diagnosis contrary to DSM-IV will not be valid.⁸³ Thus VA seems to agree with the APA's assertion that DSM-IV is the standard by which mental health professionals classify mental disorders in the United States.⁸⁴

Although DSM-IV must be consulted, VA also derives disability ratings by consulting its general rating formula, which is devised by the Secretary of Veterans Affairs.⁸⁵ This Note argues that the general rating formula, as interpreted under current caselaw, fails in its mission to properly assign disability benefits for veterans with PTSD. Problems with the general rating formula have been illuminated during the past six years, when veterans have asked the courts to clarify the correct role of the general rating formula in determining benefits for veterans with PTSD.⁸⁶

The Veterans Court began to clarify the relationship between DSM-IV and the general rating formula for disability benefits for PTSD in *Mauerhan v. Principi* in 2002.⁸⁷ The case was brought by a veteran whose situation typified appeals involving PTSD disability benefits. A Vietnam veteran claimed his disability rating of 30% was too low, arguing VA incorrectly applied the general rating formula to PTSD cases.⁸⁸ According to a medical evaluation, he had a valid

78. 38 C.F.R. § 4.130; *see also* *Sellers v. Principi*, 372 F.3d 1318, 1327 (Fed. Cir. 2004).

79. 38 C.F.R. § 4.130.

80. *Id.* § 4.125 (2008).

81. *Id.* §§ 4.125, 4.130; *see also* 38 U.S.C. § 1155 (2006).

82. *See, e.g.*, *Cohen v. Brown*, 10 Vet. App. 128, 140 (1997).

83. *Id.*

84. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL, <http://www.psych.org/MainMenu/Research/DSMIV.aspx> (last visited Oct. 3, 2008) (stating the Association's view of DSM-IV as authoritative, rather than any claim that appears in DSM-IV itself).

85. 38 U.S.C. § 1155; *see also* *Moreau v. Brown*, 9 Vet. App. 389, 394 (1996).

86. *See, e.g.*, *Mauerhan v. Principi*, 16 Vet. App. 436, 436 (2002).

87. *Id.*

88. *Id.* at 440.

case of PTSD.⁸⁹ However, none of his PTSD symptoms corresponded to any of the symptoms listed in the general rating formula for 50% disability.⁹⁰

Mauerhan argued that VA unfairly denied him a higher rating because he could not show that his symptoms matched those listed in the rating formula.⁹¹ He also argued that no veteran with PTSD would have any of the symptoms listed in the rating formula.⁹² Instead, a person with PTSD would have symptoms that matched those listed in DSM-IV.⁹³ Thus, appellant argued, the criteria listed in DSM-IV, not the criteria listed in general rating formula, ought to serve as the basis for a disability rating in PTSD cases.⁹⁴

A three-judge panel denied relief to Mauerhan and explained that he misrepresented how the general rating formula operated.⁹⁵ The plain language of the general rating formula did not turn the listed symptoms into requirements for a given rating.⁹⁶ By using the phrase “such symptoms as,” the general rating formula set forth the listed symptoms as representative examples.⁹⁷ Thus the formula’s listed symptoms did not automatically become requirements for a particular disability rating.⁹⁸

The court also rejected Mauerhan’s argument that DSM-IV should be the exclusive source of guidance for disability ratings.⁹⁹ Instead the court said VA must consider *all* symptoms that affect occupational and social impairment, including, if applicable, symptoms in DSM-IV.¹⁰⁰ Thus DSM-IV symptoms do not replace, but rather supplement, the symptoms listed in the general rating formula.¹⁰¹ Neither DSM-IV nor the general rating formula provides an exhaustive or exclusive basis for a disability rating.¹⁰²

Mauerhan failed to clarify how VA should use DSM-IV in disability benefits cases for PTSD. It determined that VA cannot rely solely on either DSM-IV or the general rating formula.¹⁰³ It also held that nothing in the text of the general rating formula turns the listed symptoms into requirements.¹⁰⁴ Within those broad boundaries, the rules remain hazy. VA must use both DSM-IV and the general rating formula to determine what evidence is relevant to a disability rating, but *Mauerhan* does not tell VA how to weigh that evidence.¹⁰⁵ DSM-IV and the

89. *Id.* at 439.

90. *Id.*

91. *Id.* at 440.

92. *Id.* at 442.

93. *Id.*

94. *Id.* at 441.

95. *Id.* at 442–44.

96. *Id.* at 442.

97. *Id.*

98. *Id.* at 443.

99. *Id.*

100. *Id.*

101. *Id.* at 442.

102. *Id.* at 443.

103. *Id.*

104. *Id.* at 442.

105. *See infra* pp. 1189–91.

general rating formula appear to differ dramatically in how they weigh the evidence.¹⁰⁶

After *Mauerhan*, this and other unresolved problems continued to produce unfair results under the general rating formula and DSM-IV. First, the proper relationship between the general rating formula and DSM-IV remained undefined, which allowed irrelevant criteria to outweigh relevant factors in assigning disability benefits. Secondly, *Mauerhan* and the general rating formula confused *psychiatric symptoms* with *functional impairment*. These are related but distinct psychiatric concepts, but the courts and the formula have confused the two, which adds to problems with the general rating formula. This Note next examines each of the two problems, and then offers potential solutions in Part III.

B. The Relationship Between the General Rating Formula and DSM-IV

1. The Current Dilemma

Mauerhan clarified that neither DSM-IV nor the general rating formula provided an exhaustive or exclusive basis for a disability rating.¹⁰⁷ But within those boundaries, one finds that regulations and caselaw offer little guidance about how to integrate DSM-IV and the general rating formula. This failure to explain the relationship between DSM-IV and the general rating formula has led to misapplication of the general rating formula in PTSD benefits cases because irrelevant criteria are given greater value than relevant criteria. A second look at *Mauerhan* explains the discrepancy.

On its facts, *Mauerhan* offered a typical PTSD benefits case. The veteran showed symptoms that conformed to DSM-IV, but none of the symptoms matched any of the representative symptoms listed in the general rating formula.¹⁰⁸ Unfortunately, the *Mauerhan* decision did not articulate how VA should weigh relevant evidence to determine a disability rating. Specifically, if DSM-IV and the general rating formula conflict as to the weight of evidence, *Mauerhan* does not explain which of the two should be given more weight. This is a crucial question because DSM-IV and general rating formula potentially disagree about the weight of the evidence in every PTSD case.

For example, if DSM-IV provides the primary basis for disability ratings, a veteran showing the same symptoms as appellant in *Mauerhan* could potentially be rated 70 or 100% disabled, because his symptoms match the clinical definition of PTSD. On the other hand, if the general rating formula provides the primary authority for ratings, the same veteran could be rated as low as 10% disabled, because none of his symptoms matches the criteria listed in the general rating formula.

Furthermore, *Mauerhan* leaves open the troubling possibility that VA can deny a higher rating unless a veteran shows those symptoms that he or she cannot possibly have. If VA uses the rating formula as its chief authority for weighing

106. *Id.*

107. *Id.*

108. *Mauerhan*, 16 Vet. App. at 440.

evidence, then the symptoms listed in the formula could be treated as requirements. VA has the leeway to do this for two reasons. First, the general rating formula says that symptoms listed in the formula provide “examples” for what should justify a particular rating.¹⁰⁹ Second, although the formula does not define the listed symptoms as requirements, VA has discretion to treat them as such.¹¹⁰ *Mauerhan* interprets federal regulations and finds no reason that the listed symptoms from the formula *must* be requirements, but that holding does not stop VA from deciding symptoms listed in the formula *may* be requirements in weighing evidence.

However, elevating these symptoms to a set of requirements poses a problem for a veteran with PTSD, because veterans’ symptoms will not match those listed in the formula, which excludes any mention of symptoms of PTSD.¹¹¹ This is partly because the rating formula’s list of symptoms focuses on three mental disorders, none of which is PTSD.¹¹² Post-traumatic stress disorder has a small, definite cluster of symptoms; none appears in the list of symptoms in the rating formula.¹¹³ In any event, this disconnect, combined with VA’s ability to treat the listed symptoms as requirements instead of examples, raises the threat that VA could deny a more favorable rating to a veteran with valid PTSD symptoms because he or she does not show “requirement” symptoms listed in the general rating formula. *Mauerhan* does not prevent this situation from occurring.

Thus, if VA treats listed symptoms as requirements, then veterans with PTSD may be denied a rating for failing to exhibit irrelevant symptoms that they cannot be expected to have. Similarly, it can be argued that a veteran with total social and occupational impairment from PTSD may show zero symptoms from the general rating formula, but still should receive a 100% disability rating.¹¹⁴ This

109. *Id.* at 442. See also Schedule for Rating Disabilities; Mental Disorders, 60 Fed. Reg. 54,825, 54,829 (Oct. 26, 1995) (“The symptoms indicated at each level are not intended to be comprehensive (and could not be, because of the multitude of symptoms in mental disorders), but to provide an objective framework that will enable rating boards to assign consistent evaluations for mental disorders based on signs and symptoms.”).

110. See *Mauerhan*, 16 Vet. App. at 442.

111. Compare DSM-IV, *supra* note 31, at 463–68, with 38 C.F.R. § 4.130 (2008).

112. See NATIONAL ACADEMIES, *supra* note 11, at 142 (“The rating scheme particularly focuses on symptoms from schizophrenia, mood, and anxiety disorders.”).

113. Compare DSM-IV, *supra* note 31, at 463–68, with 38 C.F.R. § 4.130.

114. This argument surfaced in *Sellers v. Principi*, 372 F.3d 1318, 1325 (Fed. Cir. 2004). The case consolidated appeals by two Vietnam War veterans. *Id.* at 1319–20. One of them, John Sellers, Jr., appealed his rating of 70%, claiming he should be rated 100% disabled. *Id.* at 1322. Sellers argued that he could be rated 100% disabled for PTSD, even if he showed none of the symptoms from the general rating formula. *Id.* Unfortunately, Sellers went further, arguing that, under 38 C.F.R. § 4.130, VA *must not* use the general rating formula to determine a disability rating to a veteran with PTSD. *Id.* The Federal Circuit ruled that *Mauerhan* controlled, sidestepping any question about whether a 100% disability rating is available for a veteran with none of the symptoms from the general rating formula. *Id.* at 1326.

is not just an abstract problem, but a real one, as a series of cases from 2007 demonstrates.¹¹⁵

Although the court in *Mauerhan* did not clarify the interplay between the general rating formula and DSM-IV, the court recognized that clarifying the relationship between DSM-IV and the general rating formula could create new problems.¹¹⁶ If DSM-IV is subordinated to the general rating formula, VA might use irrelevant criteria (the representative symptoms in the formula) to assign and deny ratings, which stacks the deck against veterans with legitimate needs. On the other hand, if the general rating formula is subordinated to DSM-IV, the role of the formula becomes even more vague and unworkable, which threatens to leave VA with even less guidance than it has now.¹¹⁷ An overreliance on DSM-IV also threatens to abrogate the role of the general rating formula, whose use is required by statute.¹¹⁸

While clarifying the interplay between DSM-IV and the general rating formula may prove problematic, silence on the issue also has caused confusion. The next Section examines a series of cases that suggest the failure to clarify the respective roles of DSM-IV and the general rating formula has led the Board of Veterans Appeals to consistently misapply the two in determining disability ratings.

2. Confusion in Recent Caselaw

In the more than five years since *Mauerhan*, the Court of Veterans Appeals has neither revisited its decision, nor given additional guidance as to the relationship between DSM-IV and the general rating formula. However, in 2007, a series of unpublished opinions from the Court of Veterans Appeals show that *Mauerhan*'s failure to offer a clear legal rule has led to confusion in PTSD disability benefits cases.¹¹⁹

As explained earlier, *Mauerhan* and the general rating formula allow VA to deny a particular rating to a veteran whose symptoms do not match those listed in the general rating formula.¹²⁰ This creates the possibility that the most important criteria in determining a disability rating for PTSD are the general rating formula symptoms, which a veteran lacks, instead of DSM-IV symptoms that a veteran has. In 2007, unpublished decisions showed that this possibility—rating veterans

115. See, e.g., *Kuhn v. Mansfield*, No. 05-3362, 2007 WL 4591249, at *5-6 (Vet. App. Dec. 14, 2007).

116. See *Mauerhan v. Principi*, 16 Vet. App. 436, 442 (2002) (“Without those [lists of example symptoms], differentiating a 30% evaluation from a 50% evaluation would be extremely ambiguous.”).

117. See NATIONAL ACADEMIES, *supra* note 11, at 142 (“Occupational and social impairment (OSI) is the central factor used in determining each level of disability for mental disorders. However, little guidance is given about how to measure either OSI or its differential impairment across different percentage ratings.”).

118. 38 U.S.C. § 1155 (2006).

119. See, e.g., *Kuhn*, 2007 WL 4591249, at *5-6.

120. See *Mauerhan*, 16 Vet. App. at 442; 38 C.F.R. § 4.130 (2008).

according to the symptoms they do not have, rather than the symptoms they have—is not just an abstract concern, but a real problem.¹²¹

In 2007, the Veterans Court vacated and remanded a series of decisions in which the Board of Veterans Appeals misapplied *Mauerhan*.¹²² In one case, a Gulf War veteran appealed after the Board denied him a disability rating of more than 50% for PTSD.¹²³ The Veterans Court vacated and remanded the case, holding that the court failed to follow *Mauerhan*.¹²⁴ The Veterans Court wrote: “It is apparent from a review of the Board decision that it focused on whether or not appellant had any of the listed symptoms as opposed to discussing what effect appellant’s many documented PTSD symptoms had on his occupational and social impairment.”¹²⁵

In another 2007 case, a Vietnam War veteran appealed a decision from the Board that denied him a disability rating of more than 50% for PTSD.¹²⁶ Again, the Veterans Court vacated and remanded, finding that the Board improperly used the general rating formula to deny a higher rating.¹²⁷ Because the Board looked only at the symptoms in the general rating formula, instead of all relevant symptoms (including those in DSM-IV), the Board misapplied the law in denying a higher rating.¹²⁸ Other recent cases have held similarly.¹²⁹ In every case,

121. See, e.g., *Kuhn*, 2007 WL 4591249, at *5–6; see also *Trice v. Mansfield*, No. 05–0835, 2007 WL 3083552, at *8 (Vet. App. Oct. 12, 2007).

122. See, e.g., *Kuhn*, 2007 WL 4591249, at *5–6.

123. *Trice*, 2007 WL 3083552, at *1.

124. *Id.* at *7–8, *10.

125. *Id.* at *8.

126. *Kuhn*, 2007 WL 4591249, at *1.

127. *Id.* at *4.

128. *Id.* at *4–5. This decision does not clarify or modify *Mauerhan*. It merely says that *Mauerhan* was misapplied in this case. Presumably, the Board could still reach the same conclusion and assign a 50% rating, provided that it looked at all symptoms (not just the general rating formula) before deciding that a higher rating could not be justified in this case.

129. See *Singer v. Mansfield*, No. 05–2648, 2007 WL 4110984, at *3–5 (Vet. App. Oct. 30, 2007) (vacating and remanding decision by Board of Veterans Appeals and holding the Board erred in denying a veteran a higher rating for PTSD because the Board required the veteran to show his specific symptoms matched ones in the general rating formula); *Johnson v. Nicholson*, No. 06–0527, 2007 WL 2789477, at *1 (Vet. App. Sept. 19, 2007) (vacating and remanding decision by Board of Veterans Appeals and holding that the Board erred by denying a higher disability rating because the veteran’s symptoms did not match those listed in the general rating formula); *Decesare v. Nicholson*, No. 05–3304, 2007 WL 2120045, at *3–4 (Vet. App. July 17, 2007) (noting that, though the issue was not raised upon appeal, the Board misapplied the general rating formula in denying a claim for a higher rating for PTSD, through “a hunt for particular symptoms” in the general rating formula, instead of an evaluation of all symptoms of impairment); *Baro v. Nicholson*, No. 05–1834, 2007 WL 1976665, at *2–3 (Vet. App. June 29, 2007) (vacating and remanding decision by Board of Veterans Appeals and holding that the Board erred by denying a higher disability rating for PTSD through “a hunt for particular symptoms” in the general rating formula, instead of an evaluation of all symptoms of impairment).

the standard of review allowed the Veterans Court only to vacate a decision that was clearly erroneous.¹³⁰

Through these cases, two trends emerge. The first trend is that VA seems to be using *Mauerhan* to deny higher disability ratings because PTSD symptoms do not match symptoms listed in the general rating formula, rather than looking at all symptoms of impairment.¹³¹ This suggests that VA is treating symptoms in the general rating formula as requirements, not examples, despite the fact that they are irrelevant to PTSD cases. The second trend is that the Veterans Court repeatedly blames the Board for the errors¹³² without attempting to correct this narrow construction or misapplication of *Mauerhan* that turns symptoms into requirements. The Veterans Court clearly saw a problem in 2007, but it failed to seek a solution. And, not surprisingly, ignoring the problem did not make it go away.

Taken together, these cases seem to interpret *Mauerhan* as rejecting any “requirements approach” to the general rating formula in disability ratings. On the other hand, none of the decisions was published.¹³³ Meanwhile, a growing number of cases have indicated that VA has continued to deny higher disability ratings because veterans with PTSD lack irrelevant symptoms listed in the general rating formula.¹³⁴ By focusing on symptoms not present, one judge said, VA ignores “the ultimate question” of total occupational and social impairment.¹³⁵

C. Conceptual Confusion: Symptoms and Impairment

In addition to the unclear relationship between the general rating formula and DSM-IV, a second problem, more conceptual than legal, confronts VA in its attempts to fairly compensate veterans with PTSD. The general rating formula and

130. See *Johnson*, 2007 WL 2789477, at *3; see also *Johnston v. Brown*, 10 Vet. App. 80, 84 (1997).

131. See, e.g., *Singer*, 2007 WL 4110984, at *3.

132. Though the Veterans Court frequently has criticized the Board of Veterans Appeals, it occasionally has praised the Board as well. See, e.g., *Hand v. Peake*, No. 06–1616, 2008 WL 570594, at *2–3 (Vet. App. Jan. 30, 2008) (unpublished decision) (affirming Board’s decision in assigning a 50% disability rating to a veteran with PTSD). The court said the Board correctly stated that the general rating formula does not serve as “requirements for a particular rating but are examples providing guidance as to the type and degree of severity, or their effects on social and work situations,” and “any analysis should not be limited solely to whether the symptoms listed in the rating scheme are exhibited.” *Id.* at *2.

133. See *Kuhn v. Mansfield*, No. 05–3362, 2007 WL 4591249, at *1 (Vet. App. Dec. 14, 2007); *Singer*, 2007 WL 4110984, at *1; *Trice v. Mansfield*, No. 05–0835, 2007 WL 3083552, at *1 (Vet. App. Oct. 12, 2007); *Johnson*, 2007 WL 2789477, at *1; *Decesare*, 2007 WL 2120045, at *1; *Baro*, 2007 WL 1976665, at *1. Furthermore, only three of seven judges—Judges Schoelen, Moorman, and Lance—have raised concerns about *Mauerhan*, making it unclear whether the entire court shares this view. See *Kuhn*, 2007 WL 4591249, at *1 (Schoelen, J.); *Singer*, 2007 WL 4110984, at *1 (Moorman, J.); *Trice*, 2007 WL 3083552, at *1 (Schoelen, J.); *Johnson*, 2007 WL 2789477, at *1 (Lance, J.); *Decesare*, 2007 WL 2120045, at *1 (Lance, J.); *Baro*, 2007 WL 1976665, at *1 (Lance, J.).

134. See, e.g., *Kuhn*, 2007 WL 4591249, at *1.

135. *Baro*, 2007 WL 1976665, at *2–3.

subsequent caselaw confuse *psychiatric symptoms* with *functional impairment*. Symptoms and impairment form related but distinct psychiatric concepts.¹³⁶ By understanding the differences between symptoms and impairment, one may better define the relationship between DSM-IV and the general rating formula. Thus a clearer distinction between symptoms and impairment may repair some of the injustices in disability benefits cases for veterans with PTSD.

1. Psychiatric Terminology: A Brief Lesson

Psychiatric symptoms describe the result of biological or psychological dysfunction.¹³⁷ By contrast, functional impairment measures how symptoms limit a person's ability to perform important tasks.¹³⁸ Symptoms correlate with impairment, but not all symptoms cause impairment: a person must have symptoms to be impaired, but a person with symptoms is not necessarily impaired, because some symptoms cause little or no impairment.¹³⁹

For example, a headache is a symptom of illness. However, having a headache does not determine whether a person is too sick to go to work (a temporary disability). Information about duration and intensity of the headache might give a better answer about disability, but a better answer still would be found by looking at the person's level of impairment—for instance, whether the pain prevents a person from concentrating long enough to do one's job. Accordingly, impairment, not symptoms, provides the more accurate measure to rate disability.

Despite indications that impairment offers the superior measure of disability, VA seems to hold the opposite view. In adopting the current general rating formula, VA announced a preference for ratings based upon “specific signs and symptoms rather than on a subjective determination as to whether a disorder results in total, severe, considerable, definite, or mild social and industrial impairment.”¹⁴⁰ VA said that it should be “symptoms that the examiner documents rather than his or her assessment of their level of severity that will determine the evaluation that the rating specialist assigns.”¹⁴¹ This policy directly opposes the 2007 unpublished decisions of the Veterans Court, which renewed focus on “the ultimate question” of total occupational and social impairment.¹⁴²

Additionally, some commentators have pointed out that mental disability ratings based on symptoms are inherently less reliable than symptom-based ratings for physical disorders because symptoms of mental disorders in general, and PTSD

136. Andrew F. Lehman et al., *Mental Disorders and Disability: Time to Reevaluate the Relationship*, in A RESEARCH AGENDA FOR DSM-V 201, 201 (David J. Kupfer et al. eds., 2002).

137. *Id.*

138. *Id.*

139. *Id.*

140. Schedule for Rating Disabilities; Mental Disorders, 60 Fed. Reg. 54,825, 54,826 (Oct. 26, 1995).

141. *Id.*

142. *See, e.g.*, *Baro v. Nicholson*, No. 05-1834, 2007 WL 1976665, at *2-3 (Vet. App. June 29, 2007).

in particular, are often invisible.¹⁴³ Moreover, VA's preference for ratings based upon symptoms runs contrary to the federal statute that authorizes the general rating formula.¹⁴⁴ Federal statute states that the general rating formula must measure "impairments of earning capacity."¹⁴⁵ The statute does not require that symptoms be used to measure impairment.¹⁴⁶

Despite these factors, VA's own regulations seem to blur the distinction between symptoms and impairment. By regulation, VA must evaluate all evidence relevant to "occupational and social impairment."¹⁴⁷ Once VA looks at all evidence of impairment, though, it must not assign a rating solely based on impairment.¹⁴⁸ Rather, VA must also consider symptoms and their frequencies, and severities.¹⁴⁹ So although the statute charges VA with measuring impairment, VA itself also declares that impairment should not be measured by impairment alone, but also by looking at symptoms.¹⁵⁰ By focusing on symptoms, VA erases the distinction between symptoms and impairment, which undermines the fairness of disability benefits ratings.

2. How the General Rating Formula Confuses Symptoms and Impairment

The general rating formula consists of six disability rating categories.¹⁵¹ Each rating is designated by a percentage, a description of the level of impairment, and a list of representative symptoms.¹⁵² Consider again the 50% rating from the general rating formula, which signifies "occupational and social impairment with reduced reliability and productivity." (By contrast, 100% disability is "total occupational and social impairment").¹⁵³ The 50% rating includes a list of representative "symptoms."¹⁵⁴ Yet not all of the representative symptoms are, in fact, symptoms.¹⁵⁵ Recall that symptoms describe the result of biological or psychological dysfunction. The last five items listed are, "impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships."¹⁵⁶ Four of the five appear to be measures of impairment, not symptoms.

143. NATIONAL ACADEMIES, *supra* note 11, at 8 ("Determining ratings for mental disabilities in general and for PTSD specifically is more difficult than for many other disorders because of the inherently subjective nature of symptom reporting.").

144. 38 U.S.C. § 1155 (2006).

145. *Id.*

146. *See id.*

147. 38 C.F.R. § 4.126(a) (2008).

148. *Id.* § 4.126(b).

149. *Id.* § 4.126(a).

150. *See id.* § 4.126(a)–(b).

151. *Id.* § 4.130.

152. *Id.*

153. *Id.*

154. *Id.*

155. *See id.*

156. *Id.*

This misclassification of impairment as symptoms appears elsewhere in the general rating formula.¹⁵⁷ In one way, intermingling of symptoms and impairments inadvertently may be helpful. VA arguably produces a more accurate measure of disability if, in looking to lists of symptoms, it examines impairment listed as examples of symptoms, because the rating relies more on impairment, and less on symptoms. Of course, this holds true only if the listed impairment corresponds to an actual impairment that the veteran suffers. Otherwise, the listed impairment becomes one more irrelevant factor that can be misused as a “requirement” that allows a reduction in benefits.

Overall, though, intermingling symptoms and impairment does more harm than good, because it perpetuates the misconception that symptoms and impairment can be equally effective in measuring disability. In 2007, the Veterans’ Disability Benefits Commission, appointed by Congress to review the veterans’ disability benefits system, criticized the confusion between symptoms and impairment in the general rating formula.¹⁵⁸ The Commission concluded, “The fundamental problem with the general rating scale for mental disorders is the weak nexus between severity of symptoms and degree of social and occupational disability, which makes the inclusion of symptoms in the criteria problematic in terms of determining disability.”¹⁵⁹

As long as symptoms and impairment remain conceptually indistinct, the ratings process suffers. By not recognizing that impairment offers the superior method to gauge disability, VA may place too much emphasis on symptoms.¹⁶⁰ And, as recent caselaw suggests, the result may be “a hunt for particular symptoms” that obscures the true purpose of the formula.¹⁶¹

This also magnifies the problem caused by treating some symptoms as requirements for a particular rating. A proper conceptual distinction discourages treating symptoms as requirements, because even representative symptoms offer, at best, a poor measurement of disability. Only impairment offers a reliable gauge. This principle has been followed in the United Kingdom, where ratings for mental disorders for veterans do not derive from lists of symptoms, but from a scale measuring “functional limitation and restriction.”¹⁶²

Finally, one can argue that because federal regulations impose special rules for PTSD disability benefits cases, a clearer distinction between symptoms and impairment would uphold those special rules and simplify the rest of the benefits process. Before a veteran can obtain a disability rating for PTSD, a veteran must first show a “clear diagnosis” that meets criteria of DSM-IV.¹⁶³ Thus

157. *Id.*

158. DISABILITY BENEFITS COMM’N, *supra* note 24, at 71.

159. *Id.*

160. *See id.*

161. *Baro v. Nicholson*, No. 05–1834, 2007 WL 1976665, at *2–3 (Vet. App. June 29, 2007).

162. *See, e.g., THE ARMED FORCES AND RESERVE FORCES (COMPENSATION SCHEME) ORDER 2005*, at art. 14, sched. 4, tbl. 3, S.I./2005 No. 439 (U.K.), available at <http://www.opsi.gov.uk/SI/si2005/20050439.htm>.

163. *Moreau v. Brown*, 9 Vet. App. 389, 394 (1996).

a veteran cannot obtain *any* benefits without first proving *all* symptoms needed for a diagnosis of PTSD.¹⁶⁴ By the time VA applies the general rating formula, the question of symptoms has been asked and conclusively answered.¹⁶⁵ To then rate disability by examining symptoms a second time seems both to frustrate the purpose of “the clear diagnosis” requirement and to complicate the process unnecessarily.

As a result of this conceptual confusion between symptoms and impairment, along with the unclear relationship between DSM-IV and the general rating formula, the ratings process for PTSD disability benefits has become uncertain and unfair. Were this merely one more muddled legal doctrine, there would not be much reason for outcry; the world is full of muddled legal doctrines. The injustice here is not the muddled doctrine. The injustice is that federal law promises disability benefits to military veterans with PTSD, and it promises that these benefits will be paid based on a veteran’s inability to work or function in society, but federal law does not deliver on these promises. Instead, veterans are denied money they deserve and need. Part III of this Note explores how this problem may be solved.

III. SOLVING THE PROBLEMS PRESENTED BY *MAUERHAN*

Solving the problems of *Mauerhan* may be accomplished by two methods. One is change through caselaw. The other is change through statute or regulation. This Part identifies a judicial solution but then suggests a legislative change, based upon a proposal initially made a decade ago, as the optimal resolution.

A. Judicial Solution

Part II explained how two unresolved problems continue to cause unjust results under the general rating formula and *Mauerhan*. First, the proper relationship between the general rating formula and DSM-IV remains undefined, which allows irrelevant criteria to outweigh relevant factors in assigning disability benefits. Secondly, *Mauerhan* and the general rating formula confuse psychiatric symptoms with functional impairment. Both problems may be solved in a way that respects precedent, as well as current statutes and regulations.

A solution to both problems is found by adopting a clearer line between impairment and symptoms, and instructing how both may be used. The statute indicates that the general rating formula should measure impairment.¹⁶⁶ *Mauerhan* holds that VA should consider “*all symptoms of a claimant’s condition that affect the level of occupational and social impairment*, including, if applicable, those identified in the DSM-IV.”¹⁶⁷

164. *See id.*

165. *See id.*

166. 38 U.S.C. § 1155 (2006).

167. *Mauerhan v. Principi*, 16 Vet. App. 436, 443 (2002) (citing 38 C.F.R. § 4.126 (2001)) (emphasis added).

Without overturning precedent or contradicting any current statute or regulation, the Veterans Court could clarify precedent while addressing both major problems facing the disability benefits system for PTSD. The proposed rule could read as follows: “All symptoms that affect occupational and social impairment” include those symptoms that demonstrate impairment in the case at hand. “All symptoms” do not arbitrarily include any symptom that may be relevant to determining a disability rating in any case. Rather, symptoms that do not affect “occupational and social impairment” in the case at hand should not be used to determine a disability rating unless DSM-IV lists those symptoms as criteria for the mental disorder that causes the veteran’s impairment.¹⁶⁸

This rule would alleviate the problem of using irrelevant symptoms as requirements in the ratings process.¹⁶⁹ It would clarify that DSM-IV should be used to determine relevant symptoms, and counteract any exclusion based upon irrelevant ones. The rule would also properly focus the rating process on impairment instead of a hunt for symptoms.

This rule would concededly leave some problems unresolved. Most seriously, it would reduce the importance of the lists of representative symptoms.¹⁷⁰ These lists of symptoms form the majority of the formula; without them, the formula would offer even less guidance than it currently does.¹⁷¹ However, a bad system does not deserve preservation just because a good system may require more work. The general rating formula does not offer the perfect tool for the job of measuring disability through impairment. However, it may be adequate for the task, if construed in greater detail.

Still, this proposed judicial solution, or any other, may not be possible. After *Mauerhan*, two cases potentially limited the jurisdictional reach of the Veterans Court with regard to the general rating formula.¹⁷² A judicial challenge to *Mauerhan* and the general rating formula may now be out of reach due to changes in jurisdiction.¹⁷³ This Section examines whether, in jurisdictional decisions after *Mauerhan*, the courts have foreclosed any future challenges to the general rating formula.

1. The Jurisdictional Puzzle, Part 1: Statutory Limits

Traditionally, veterans received no judicial review of decisions by VA, and Congress did not establish judicial review for VA decisions until 1988.¹⁷⁴

168. See *supra* pp. 1193–97.

169. See *id.*

170. See *supra* pp. 1195–97.

171. See *id.*

172. See *Sellers v. Principi*, 372 F.3d 1318, 1324 (Fed. Cir. 2004); *Wanner v. Principi*, 370 F.3d 1124, 1128 (Fed. Cir. 2004).

173. See *Sellers*, 372 F.3d at 1324.

174. *Brown v. Gardner*, 513 U.S. 115, 122 (1994); see also Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 486 (2007).

Currently, the scope of judicial review for benefits claims remains limited.¹⁷⁵ By statute, the Veterans Court cannot hear appeals that challenge the substance or content of the general rating formula, because the court has no jurisdiction over these claims.¹⁷⁶

In recent years, the courts may have further limited the jurisdiction of the Veterans Court over disability benefits claims. In 2004, the Federal Circuit reaffirmed that the Veterans Court cannot review the *content* of the general rating formula.¹⁷⁷ That same year, though, the Federal Circuit asserted that the Veterans Court may review the federal regulation that encompasses the general rating formula to help define the relationship between the rating formula and DSM-IV.¹⁷⁸ This Subsection examines whether these decisions eliminate the possibility that the courts can help improve the current system for disability benefits ratings.

By statute, the Veterans Court “may not review” the “schedule of ratings for disabilities,” effectively denying the court jurisdiction over the schedule of ratings.¹⁷⁹ The Veterans Court can only review the schedule of ratings to determine whether it is contrary to “constitutional right, power, privilege, or immunity.”¹⁸⁰

Were those the only guidelines for jurisdiction, one could argue that the Veterans Court had no jurisdiction to interpret the general rating formula, and thus did not have authority to decide the issue in *Mauerhan*.¹⁸¹ However, the question of jurisdiction is not so clear, because the statute also gives the Veterans Court jurisdiction “to the extent necessary [to] decide all relevant questions of law, interpret . . . statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary.”¹⁸² Thus the Veterans Court may review whether a regulation is contrary to law; whether a regulation exceeds statutory jurisdiction, authority, or limitations; or whether the regulation violates a statutory right.¹⁸³

Perhaps problematically, the general rating formula falls within a regulation, so it seems possible that the Veterans Court’s powers of regulatory review act as an exception to the general rule that the court cannot review the general rating formula. At this point, it is worth pausing to explain how federal regulations present the general rating formula. To find the formula, one looks to 38 C.F.R. § 4.130, titled “Schedule of ratings—mental disorders,” which begins with the following instructions:

175. See 38 U.S.C. §§ 7104, 7252, 7292 (2006).

176. *Id.* § 7252(b).

177. *Wanner*, 370 F.3d at 1129.

178. *Sellers*, 372 F.3d at 1324.

179. 38 U.S.C. § 7252(b).

180. *Id.* § 7261(a)(3)(B); see also *Villano v. Brown*, 10 Vet. App. 248, 250 (1997).

181. See *Sellers*, 372 F.3d at 1328–29 (Linn, J., dissenting).

182. 38 U.S.C. § 7261(a)(1). The Veterans Court has defined its role as reviewing the record to decide whether the Board of Veterans Appeals committed any error, a role that stops short of any concept of sweeping statutory review. See *Schroeder v. Brown*, 6 Vet. App. 220, 226 (1994).

183. 38 U.S.C. § 7261(a)(3); see also *Villano*, 10 Vet. App. at 250.

The nomenclature employed in this portion of the rating schedule is based upon the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, of the American Psychiatric Association (DSM-IV). Rating agencies must be thoroughly familiar with this manual to properly implement the directives in § 4.125 through § 4.129 and to apply the general rating formula for mental disorders in § 4.130.¹⁸⁴

The remainder of 38 C.F.R. § 4.130 contains the general rating formula. Thus, while 38 C.F.R. § 4.130 encompasses the general rating formula, it also contains instructions about the use of the general rating formula.¹⁸⁵ The jurisdictional question becomes whether the Veterans Court's jurisdiction over regulatory interpretation allows the court to interpret the regulation that encompasses the general rating formula without reviewing the general rating formula itself. The courts have tried to find an answer.

2. *The Jurisdictional Puzzle, Part 2: One View from the Federal Circuit*

Given the statutory limitations on the Veterans Court, it seems surprising that the *Mauerhan* court never paused to consider whether it had jurisdiction to interpret the general rating formula. At no point does the *Mauerhan* court specify where it found jurisdiction to interpret the general rating formula.¹⁸⁶ In 2004, however, the Federal Circuit held that the Veterans Court has limited authority to hear challenges to the regulation that encompasses the general rating formula.¹⁸⁷

The Federal Circuit in *Sellers v. Principi* held that the Veterans Court has jurisdiction to interpret the relationship between DSM-IV and the general rating formula, because the statute gives the Veterans Court authority to interpret VA regulations, including 38 C.F.R. § 4.130.¹⁸⁸ Under *Sellers*, the Veterans Court may interpret a regulation that guides application of the general rating formula, but it cannot hear a challenge to the substance of the general rating formula.¹⁸⁹ As a result, the court in *Sellers* indicates the Veterans Court can examine the correct *application* of the general rating formula with relation to DSM-IV, but it cannot examine the *content* of the general rating formula itself.¹⁹⁰

184. 38 C.F.R. § 4.130 (2008).

185. *Id.*

186. *See Mauerhan v. Principi*, 16 Vet. App. 436 (2002).

187. *Sellers v. Principi*, 372 F.3d 1318, 1324 (Fed. Cir. 2004).

188. *Id.* However, one member of the three-judge panel dissented, arguing that the Veterans Court had no jurisdiction. *Id.* at 1328 (Linn, J., dissenting). The dissent argued that although the Veterans Court can interpret regulations, the court cannot do so if its interpretation seeks to change the content of the general rating formula. *Id.* at 1329. The dissent also argued that Federal Circuit precedent required the court to find that the Veterans Court lacked jurisdiction to review an interpretation of 38 C.F.R. § 4.130. *Id.* at 1328 (citing *Fugere v. Derwinski*, 972 F.2d 331, 335 (Fed. Cir. 1992)). This disagreement between the majority and the dissent hinges on a question of whether the court was engaging in regulatory interpretation or determining rights under substantive law.

189. *Id.*

190. *Id.* at 1324.

This decision seemed to settle the matter of jurisdiction. However, in the same month that the Federal Circuit decided *Sellers*, the court offered a potentially different view of the same issue.

3. *The Jurisdictional Puzzle, Part 3: The Federal Circuit Speaks Again*

The Federal Circuit seemed to offer a second (apparently contradictory) answer to the jurisdiction question the same month that it decided *Sellers*, when the court held that the Veterans Court lacks jurisdiction over a case involving ratings schedules unless the case presents a constitutional issue.¹⁹¹ *Wanner v. Principi* did not involve disability benefits for PTSD.¹⁹² Instead, it addressed disability benefits for tinnitus, which uses a rating formula specific to auditory disorders.¹⁹³ This same statute, however, establishes jurisdiction for the Veterans Court for both the auditory rating formula and general rating formula for mental disorders.¹⁹⁴ As a result, although *Wanner* involved auditory disorders, the case may have written new rules for jurisdiction over PTSD disability benefits decisions. Furthermore, *Wanner* did not expressly limit its holding to auditory disability cases.¹⁹⁵

Wanner held that the Veterans Court lacks jurisdiction over “all review involving the content of the rating schedules.”¹⁹⁶ The only exception is a constitutional challenge to a rating schedule.¹⁹⁷ Thus, *Wanner* and *Sellers* apparently disagree about whether the Veterans Court has jurisdiction over a challenge to *Mauerhan*. Under *Wanner*, the Veterans Court lacks jurisdiction because its bright-line rule appears to bar any review affecting interpretation of the general rating formula. On the other hand, under *Sellers*, the Veterans Court has jurisdiction over a challenge to *Mauerhan* because the Veterans Court can define the relationship between federal regulation and DSM-IV by interpreting the regulation and leaving the content of the general rating formula undisturbed.¹⁹⁸

4. *The Jurisdictional Puzzle, Part 4: Can Sellers and Wanner Be Reconciled?*

Professor Michael P. Allen called *Wanner* and *Sellers* contradictory, and said they may be irreconcilable.¹⁹⁹ Since 2004, neither the Veterans Court nor the

191. *Wanner v. Principi*, 370 F.3d 1124, 1131 (Fed. Cir. 2004).

192. *Id.* at 1126.

193. *See id.*; *see also* 38 C.F.R. § 4.87 (2008).

194. *See Wanner*, 370 F.3d at 1129 (asserting jurisdiction by the Veterans Court to review the auditory rating formula under 38 U.S.C. § 7252(b), subject to limits of 38 U.S.C. § 7261); *Sellers*, 372 F.2d at 1324 (finding jurisdiction by the Veterans Court to review the auditory rating formula under 38 U.S.C. §§ 7252(a)–(b), subject to limits of 38 U.S.C. § 7261).

195. *See Wanner*, 370 F.3d at 1128.

196. *Id.* at 1130.

197. *Id.* To complicate matters further, *Sellers* was decided about three weeks after *Wanner*, but *Sellers* neither mentions *Wanner* nor attempts to distinguish the two cases.

198. *Sellers*, 372 F.2d at 1324.

199. Allen, *supra* note 174, at 504.

Federal Circuit has spoken again about the Veterans Court's jurisdiction with regards to disability benefits.²⁰⁰

Can *Sellers* and *Wanner* be reconciled? Possibly. The Federal Circuit could potentially reconcile *Sellers* and *Wanner* in two ways. The first would be to distinguish *Wanner* from *Sellers*—because *Sellers* involves PTSD disability ratings, but *Wanner* does not, *Wanner* does not apply to PTSD cases. The second way—which is discussed below—would be to argue that the two cases do not actually conflict. Instead, *Sellers* elaborates on *Wanner* without contradicting it because the PTSD ratings system presents a unique problem of regulatory interpretation that does not exist in other ratings formulas for other disorders.

5. Can *Sellers* and *Wanner* Be Distinguished?

The same statutes and regulations determine jurisdiction for both PTSD disability benefits cases and other disability benefits cases.²⁰¹ Even so, the relevant regulations for PTSD disability benefits differ in one critical way because PTSD ratings regulations require VA to refer to a source outside federal statute and regulations: DSM-IV.²⁰² According to 38 C.F.R. § 4.130, rating agencies must be “thoroughly familiar” with the DSM-IV to *implement* and *apply* the general rating formula.²⁰³ As a result, the general rating formula for mental disorders does not stand alone. It must be read in conjunction with DSM-IV.²⁰⁴

By contrast, the disability rating formula in *Wanner* (for hearing disorders) stands alone.²⁰⁵ It lacks any reference to medical reference manuals analogous to DSM-IV.²⁰⁶ No instructions accompany the rating formula.²⁰⁷ To interpret and apply the hearing disorders formula, rating agencies need no outside help.²⁰⁸

Thus the jurisdictional limits of *Wanner* may not apply to PTSD disability benefits regulations, because PTSD benefits ratings present a unique situation. The requirement that rating agencies use DSM-IV to *implement* and *apply* the rating formula forms part of a regulation but not part of the rating formula.²⁰⁹ As a result, the courts should have jurisdiction to interpret the part of the regulation that is not

200. In a different context, in 2007 the Veterans Circuit asserted that, under *Sellers*, the court can review a regulation that defines the content of a rating formula. *See Martinak v. Nicholson*, 21 Vet. App. 447, 453 (2007). However, this assertion appears to be dicta. *See id.* at 452–53. The issue in the case did not involve jurisdiction to review disability ratings; it involved VA's policy for medical examinations for disability claims for hearing disorders. *Id.* at 450–51.

201. *See, e.g.*, 38 U.S.C. §§ 502, 7252(b), 7292(a) (2006).

202. 38 C.F.R. § 4.130 (2008).

203. *Id.* (“Rating agencies must be thoroughly familiar with this manual [DSM-IV] to properly *implement* the directives in § 4.125 through § 4.129 and to *apply* the general rating formula for mental disorders in § 4.130.” (emphases added)).

204. *Id.*

205. *Id.* § 4.87.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* § 4.130.

part of the rating formula. In this way, *Sellers* and *Wanner* may be distinguished so that *Wanner* does not apply to PTSD cases and does not prevent the Veterans Court from hearing a challenge to *Mauerhan*.

To summarize, under *Sellers* and *Wanner*, a judicial challenge to the general rating formula remains possible if the court may review the relevant enabling regulation without reviewing the content of the general rating formula itself. Thus if the relationship between DSM-IV and the general rating formula could be clarified without considering the content of the general rating formula, a judicial challenge appears possible. As a result, it remains possible to reform the disability benefits process through the courts.

B. Legislative or Regulatory Solution

Federal statute requires that the Secretary of Veterans' Affairs "from time to time readjust this schedule of ratings in accordance with experience."²¹⁰ This requires VA to adjust its ratings schedule to reflect medical advances as well as social and economic progress.²¹¹

The United States has a long tradition of caring for its veterans, stretching back at least as far as 1776, when the Continental Congress approved a pension for disabled veterans.²¹² By and large, we maintain this tradition today: veterans' benefits may be more extensive than any other benefits program in the United States today, with offers of compensation, pension, comprehensive medical care, vocational rehabilitation, employment counseling, education and training, home loans, and housing assistance.²¹³ Despite this legacy, the current rules that govern PTSD disability benefits disserve both the tradition of care for veterans and veterans themselves.

The Department of Veterans Affairs has comprehensively reviewed its general rating formula for mental disorders once during the past sixty-three years.²¹⁴ That review began in 1991 and concluded in 1996.²¹⁵ During that review, one comment from the public proposed that PTSD be evaluated under a rating formula specific to PTSD, instead of under the general rating formula.²¹⁶ VA rejected this proposal.²¹⁷ Nonetheless, it is time to reconsider a separate rating

210. 38 U.S.C. § 1155 (2006).

211. GAO DISABILITY RATING REPORT, *supra* note 22, at 9 (1988). Though not within the scope of this article, the general rating formula also has been criticized as inadequate to rate disability from craniocerebral trauma, more commonly known as Traumatic Brain Injury. DISABILITY BENEFITS COMM'N, *supra* note 24, at 71.

212. DISABILITY BENEFITS COMM'N, *supra* note 24, at 29.

213. NATIONAL ACADEMIES, *supra* note 11, at 13.

214. Schedule for Rating Disabilities; Mental Disorders, 60 Fed. Reg. 54,825, 54,825 (Oct. 26, 1995).

215. Schedule for Rating Disabilities; Mental Disorders, 56 Fed. Reg. 20,170 (May 2, 1991).

216. Schedule for Rating Disabilities; Mental Disorders, 61 Fed. Reg. 52,695, 52,697 (Oct. 8, 1996) (codified at 38 C.F.R. §§ 4.16, 4.125–4.132).

217. *Id.*

formula for PTSD. To address the problems in the law that have emerged since 1996, a separate rating formula should be developed.²¹⁸

During VA's revision of its mental disability ratings, it was proposed that VA develop a PTSD rating formula based on the frequency of symptoms particular to PTSD.²¹⁹ VA explained why it would not adopt a separate formula for PTSD:

Although certain symptoms must be present in order to establish the diagnosis of PTSD, as with other conditions it is not the symptoms, but their effects, that determine the level of impairment. For example, it is not the presence of "flashbacks," per se, but their effects, such as impaired impulse control, anxiety, or difficulty adapting to stressful situations, that determine the evaluation. We have, therefore, made no changes based on this suggestion.²²⁰

If nothing else, this explanation bolsters the argument that symptoms should not be the primary criteria used to gauge disability ratings. VA correctly decided to reject this proposal. A PTSD rating formula "based on the frequency of symptoms particular to PTSD" would offer no great improvement over the current general rating formula, because that PTSD formula would adopt the same imprecise distinction between symptoms and impairment that the current rating formula uses. On the other hand, a PTSD formula that focused on impairment, rather than symptoms, could offer a dramatic improvement over the general rating formula.

VA should consider a PTSD rating formula for five reasons. First, VA ratings policies suggest no preference for general rating formulas over specific ones. With regard to physical disability, VA has adopted specific rating formulas for hearing disorders, eye and vision disorders, the need for prosthetics, the amputation of multiple fingers, the amputation of a single finger, injuries to the skull, injuries to the ribs, injuries to the tailbone, and so on.²²¹ VA has already developed one exception to its general rating formula for mental disorders—a rating formula for disability from eating disorders.²²² Thus the general rating formula does not seem sacrosanct. If eating disorders receive specialized treatment, there is no reason not to do the same for PTSD.

218. In February 2008, members of the U.S. Senate and the House of Representatives introduced legislation to improve "rating and compensation of service-connected disabilities in veterans." America's Wounded Warriors Act, S. 2674, 110th Cong. (2008); Noble Warrior Act, H.R. 5509, 110th Cong. (2008). Neither bill proposes specific changes regarding the general rating formula for mental disorders, or ratings for PTSD. Instead, both bills propose that VA study its benefits system and suggest changes. S. 2674 § 201; H.R. 5509 § 201.

219. S. 2674; H.R. 5509.

220. Schedule for Rating Disabilities; Mental Disorders, 61 Fed. Reg. 52,695, 52,698 (Oct. 8, 1996) (codified at 38 C.F.R. §§ 4.16, 4.125–4.132).

221. 38 C.F.R. §§ 4.71a, 4.75–87 (2008) (separate ratings schedules for prosthetics, amputation of multiple fingers, amputation of single finger (which vary in rating according to which finger and the amount of bone lost), injury to skull, injury to ribs, injury to tailbone, eye and vision, and hearing).

222. *Id.* § 4.130.

Second, with only one revision to its ratings of mental disabilities since World War II, VA may face criticism that its approach to psychiatric disorders has grown antiquated and lags behind the considerable progress in psychiatry during the past sixty years. The detailed, individualized approach to physical disability ratings may have arisen partly because, in comparative terms, physical disabilities were much easier to classify and understand in the 1940s. Continued adherence to the general rating formula for PTSD seems to be a product of convenience or tradition rather than belief in its superiority as a ratings process.

The 2007 Veterans' Disability Benefits Commission report recommended that VA create specific rating criteria for PTSD.²²³ The Commission, which consisted largely of veterans, concluded that "having one set of criteria for rating all mental disorders has been ineffective."²²⁴ The Commission criticized the general rating formula as "at best crude and overly general for the assessment of PTSD disability."²²⁵ The Commission urged development of a separate PTSD rating formula after the Institute of Medicine and National Research Council of the National Academies in 2007 also recommended a separate PTSD rating system.²²⁶

The third reason VA should consider a PTSD-specific rating formula is the prevalence of PTSD among veterans. The volume of cases warrants specialized treatment consideration. Between 1999 and 2004, VA faced an average of 19,000 new claims for PTSD disability benefits each year.²²⁷ A PTSD rating formula would simplify the task of assigning ratings for PTSD, and it would simplify the judicial task for the Board and the courts that review these ratings cases. As explained, *Mauerhan* and the general rating formula have created considerable confusion about how to handle PTSD cases. VA and the courts that hear these cases are doing their best with limited resources. A clearer rating formula would produce not only more just results, but a more efficient expenditure of taxpayers' money.

The fourth reason to adopt a PTSD rating formula is that it would resolve the problems with the current rating formula and caselaw. By eliminating the use of the general rating formula and starting anew, the problematic relationship between the general rating and DSM-IV could be resolved. Additionally, a PTSD rating formula would make it less likely that VA could use irrelevant criteria to outweigh relevant factors in assigning disability benefits. A new formula would

223. DISABILITY BENEFITS COMM'N, *supra* note 24, at 7.

224. *Id.* The Commission found that bureaucratic obstacles also hindered the disability benefits process, saying, "There is little interaction between the Veterans Health Administration, which examines veterans for evaluation of severity of symptoms and treats veterans with PTSD, and the Veterans Benefits Administration, which assigns disability ratings." *Id.*

225. *Id.* at 144. The Commission advocated at least ten other changes in how VA assesses disability benefits for PTSD. *Id.* at 144–45. One of those changes was to discard one of the main diagnostic tools that VA uses to assess PTSD disability, the Global Assessment of Functioning (GAF). *Id.* at 144. The Commission said the GAF "has limited usefulness" in assessing PTSD disability. *Id.* Interestingly, it also criticized the GAF for failing to properly distinguish between symptoms and impairment. *Id.* at 145.

226. NATIONAL ACADEMIES, *supra* note 11, at 6–7.

227. *Id.* at 21.

correctly focus on impairment, and the confusion between symptoms and impairment and their respective roles could be put to rest.

Fifth, and finally, a PTSD rating formula would promote more humane and more just treatment of veterans who deserve a nation's help. Putting veterans with PTSD through a potentially protracted, frustrating, and ultimately unfair disability ratings and appeals process with a poorly tailored general rating formula shows no respect to those who served their country. The current process disrespects veterans and their contributions to this nation. Further, it is difficult to imagine how the frustration of trying to appeal an unfair benefits rating can aid the recovery of veterans with PTSD. Veterans with PTSD, while in volunteer service to their country, have been profoundly scarred by war. A fair benefits ratings process conforms to our ideals about how we should recognize veterans for serving in combat.

CONCLUSION

The current ratings system for disability benefits for PTSD needs reform or repair. VA lacks clear guidance about the interplay between the general rating formula and DSM-IV. This creates persistent problems about the correct criteria that should be used to determine a disability rating, as well as the appropriate weight that should be placed upon the general rating formula and DSM-IV. Irrelevant criteria still may outweigh the more relevant factors, leading VA to undercompensate veterans with valid diagnoses of PTSD. Furthermore, the confusion of psychiatric symptoms and functional impairment hinders VA from accurately assessing a veteran's true level of disability. Both judicial and legislative solutions exist. In keeping with this nation's long tradition of caring for its veterans, now is the time to act.