

## Helping Right a “Terrible Wrong” to the Nation’s War Veterans

Abraham Lincoln, in his second inaugural address, said that our Nation will always endeavor to “care for him who shall have borne the battle.” Ever since, Americans have sought to ensure that veterans injured in combat are properly cared for upon return to civilian life. This article describes one way that contemporary lawyers can help – and are helping – to make Lincoln’s pledge a reality.

Countless veterans who served in Afghanistan or Iraq have developed post-traumatic stress disorder (“PTSD”) from their exposure to life-threatening violence in the combat zone. For many of these veterans, their PTSD is evaluated as severe enough to require honorable discharge from service. When a veteran is discharged from service due to PTSD, by regulation (38 C.F.R. § 4.129), the veteran is entitled to an initial disability compensation rating of 50%.

For thousands of veterans of Afghanistan and Iraq, however, this has not been the case. In 2008, the National Veterans Legal Services Program (“NVLSPP”), a non-profit veterans’ service organization, filed a class action lawsuit, *Sabo, et al. v. United States*, on behalf of scores of veterans medically discharged for PTSD without the benefits to which they are legally entitled. The July 2011 settlement in *Sabo* was a tremendous win for these veterans, but it was not a full victory. One-hundred lawyers from across Reed Smith’s domestic offices, including thirty-five in Pennsylvania, have stepped in on a pro bono basis to bridge the benefits gap that remains.

Specifically, Reed Smith is partnering with NVLSPP to assist members of the *Sabo* class in obtaining proper PTSD disability compensation from the Department of Veterans Affairs (the “VA”). This article describes how the project began, its ultimate goal, and some of the lawyers and veterans participating. It then addresses recent changes in how the VA approaches PTSD from a benefits perspective, and how these shifts have created a need and an opportunity for lawyers to help. This article starts, however, with a brief look at *Sabo* and its settlement.

### *Sabo v. United States*

NVLSPP, working with Morgan, Lewis & Bockius LLP as co-counsel, filed the *Sabo* class action in the Court of Federal Claims on December 17, 2008 (Case No. 08-899C). The premise of the suit is compelling: a veteran honorably discharged from military service due to a medical condition that occurs in service is statutorily entitled to a commensurate disability rating and compensation from both the service and the VA for that condition. In the case of PTSD, the requisite disability rating upon discharge is 50%. Nevertheless, thousands of veterans of the operations in Afghanistan and Iraq were found medically unfit for continued active-duty service due, at least in part, to PTSD, but were assigned disability ratings below 50%. In fact some members of the *Sabo* class received no disability rating or compensation for PTSD at all.

The July 2011 settlement, approved in December, corrected this situation by affirming the class members’ entitlement to PTSD compensation from the military services. In announcing the settlement, Bart Stichman, NVLSPP’s co-executive director, noted: “These veterans have served our country in time of war, but have waited 3 to 8 years to receive the disability benefits

which they've earned for their service. Today, a terrible wrong to our nation's war veterans is being righted."

But as indicated, a full "righting" would require further work: the VA was not a settling party in *Sabo*, and because of the rigid procedures for setting and changing a veteran's VA disability benefits, the determination by a military service that a veteran is retroactively entitled to a certain rating and level of compensation for PTSD does not automatically trigger that same rating and level of compensation from the VA. Thus in order to obtain the VA benefits for PTSD to which they are statutorily entitled, members of the *Sabo* class would have to file formal appeals to the VA.

### **Reed Smith's Project to Correct VA PTSD Underpayments**

This is how Reed Smith's current partnership with NVLSP began. NVLSP identified roughly fifty members of the *Sabo* class who require assistance in appealing their PTSD disability ratings and benefits to the VA. Reed Smith's Washington, D.C., partner and Vietnam veteran Tom Fox, together with former partner Steve Murphy and associate Joelle Laszlo, then spearheaded a multi-office effort to provide assistance with all fifty cases. The pro bono coordinators in ten of the firm's U.S. offices, from Los Angeles and San Francisco, to New York and Pittsburgh, and points in between, helped to solicit interest in the project, and a training session with NVLSP was scheduled for the summer of 2011. Just over one hundred attorneys attended the training, and case assignments began in the fall.

Reed Smith's veteran clients include members of the Army, Navy, Air Force, and Marines separated from service between 2004 and 2008. In the majority of cases Reed Smith attorneys have paired up to assist individual clients. Any attorney who assists a veteran in preparing and filing a claim for disability benefits must be accredited by the VA. Once accredited, Reed Smith attorneys must obtain their client's complete claims file ("C-File") from the VA Regional Office in the state where the veteran lives. The attorneys review the C-File in detail to determine the PTSD rating their client received from the VA immediately upon discharge, whether and how the rating has changed over time, and the evidence in the C-File upon which the client's rating is based. Reed Smith attorneys also interview the veteran and his or her friends and family for information about the impact PTSD has had on their lives.

Reed Smith attorneys will use the information they gather to file a written appeal to the VA on their client's behalf seeking a 50% PTSD rating for at least the first six months following the veteran's discharge from service. By regulation, during that six-month period the VA is required to maintain a veteran's PTSD rating at 50%, unless a comprehensive mental examination is conducted and the results conclusively support reducing the rating. For many of Reed Smith's clients, no such examination has ever been conducted. Thus in addition to arguing for an initial 50% PTSD rating, Reed Smith attorneys will appeal in writing any subsequent VA decision that set their client's PTSD rating and compensation below that supported by the evidence in the veteran's C-File.

For a veteran client who received a 0% rating for PTSD upon discharge, the result of these appeals could be several thousand tax-free dollars of overdue compensation. A retroactive

increase to the proper disability rating will also help carry out Lincoln's pledge to care for those who have borne the battle.

One individual who has unquestionably borne the battle is a former Marine Sergeant currently represented by two of Reed Smith's Philadelphia attorneys. While deployed in Iraq in 2007 he was wounded by a gunshot to the leg during an attack that resulted in the deaths of eighteen members of his unit. Shortly after being honorably discharged from the Marine Corps with a Purple Heart, he reported having frequent slow-motion flashbacks of the attack and similar traumatic events. The VA granted him a disability rating of 40% for his leg wound, but only 10% for PTSD.

Another Iraq veteran, being represented by Philadelphia partner and Army veteran John DiNome, along with associate Michael Jones, also suffered a range of injuries. These include a piece of shrapnel lodged in his skull when the humvee in which he was riding struck an improvised explosive device. With NVLSP's guidance and oversight, DiNome and Jones are appealing a number of their client's VA disability ratings, in addition to his rating for PTSD. Says DiNome, "We are all very proud to do our small part to help these brave men and women who put their lives on the line for us."

### **The VA's Changing Approach to PTSD Compensation, and Opportunities for Lawyers to Help**

Research published by the Rand Institute in 2008, the year the *Sabo* class action was filed, estimated that 300,000 veterans returning from Iraq and Afghanistan suffered from PTSD or major depression. A different study cited last year by the *National Journal* in an interview with Secretary of Veterans Affairs and former Army Chief of Staff General Eric Shinseki sets the number of veterans suffering from PTSD alone closer to 400,000. In that interview, General Shinseki said the VA estimates that between eighteen and twenty percent of combat veterans will develop full-blown PTSD.

Yet in 2010, according to former New York Congressman John Hall, then Chairman of the House Veteran's Affairs Subcommittee on Disability Assistance and Memorial Affairs, fewer than half of the veterans of the operations in Afghanistan and Iraq who had been diagnosed with PTSD were receiving benefits from the VA. Congressman Hall sponsored a bill that, along with General Shinseki's leadership, led the VA in 2010 to liberalize its rules about the amount and type of evidence a veteran must provide when filing for benefits associated with PTSD.

Nevertheless, as General Shinseki acknowledged in an editorial announcing the VA's rule change, although it can be "as debilitating as any physical battlefield trauma," PTSD remains largely an "invisible" wound. Thus a bureaucracy already overwhelmed with claims for benefits (in 2011, the VA's estimated backlog was more than 800,000 cases) has been slow to fully recognize the rule change. As a result, lawyers representing veterans before the VA on PTSD claims must be particularly adept at client advocacy, connecting symptoms that may vary starkly from VA rating criteria that have until recently included almost no gray area. Lawyers like Reed Smith's, who don't normally practice veterans benefits law and take these cases on a pro bono basis, may find the task especially daunting.

Fortunately, no lawyer representing a veteran on a pro bono basis practices alone. NVLSP provides its partners with well-developed programs that train and mentor lawyers new to veterans advocacy in navigating the VA's claims and appeals systems. For other attorneys, NVLSP training materials include the 1,900-page *Veterans Benefits Manual* and other references, available from the organization's website at [www.nvlsp.org](http://www.nvlsp.org).

Reed Smith's partnership with NVLSP has been groundbreaking for the firm; indeed, it may be the largest multi-office pro bono effort in the firm's history. Each lawyer involved will face unique challenges in making and presenting their veteran's case to the VA, but there is no doubt that the endeavor will be a satisfying one – both for the client and the lawyer.