

## Progress Toward Procreative Preservation for Service Members and Veterans: One Step Back – One Step Forward

by  
Jody Ollyver DeSmidt\*

In January 2016, Defense Secretary Ash Carter announced that the Pentagon would start covering costs for freezing gametes<sup>1</sup> of military personnel who wished to do so to protect their future ability to procreate.<sup>2</sup> It seemed to be a forward thinking move on the part of the Pentagon, and although Carter recognized that “[w]e are not Google. We are not Walmart. We’re war fighters,”<sup>3</sup> it was still an acknowledgement of the competition to get and retain the best individuals for military service. Preservation of gametes prior to exposure to significant risk makes sense, because it decreases the likelihood of an injury eliminating all possibility of procreation with the service member’s own genetic material. Secretary Carter referred to this new benefit as part of his “Force of the Future” initiative.<sup>4</sup> He indicated the intent was

---

\* Ms. DeSmidt practices at DeSmidt Rabuse in Minneapolis.

<sup>1</sup> Gametes are human reproductive cells (cells from the male parent are referred to as spermatozoa and cells from the female parent are referred to as oocytes). VHA Directive 1332, Infertility Evaluation and Treatment 2 ¶ 3.d (June 20, 2017). They can be harvested and then frozen, or cryopreserved. Cryopreservation is the freezing or vitrification of gametes to allow storage for future reproduction. *Id.* at ¶ 3.b.

<sup>2</sup> U.S. Dep’t of Defense, Department of Defense Press Briefing by Secretary Carter on Force of the Future Reforms in the Pentagon Press Briefing Room (Jan. 28, 2016), <https://www.defense.gov/News/Transcripts/Transcript-View/Article/645952/departments-of-defense-press-briefing-by-secretary-carter-on-force-of-the-future/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* Notably, in June 2013 the Office of the Secretary of Defense took a significantly different approach in which the Department of Defense (DoD), in its report to Congress stated that it did not support cryopreservation of sperm or eggs as a benefit to military personnel. *See* Office of the Secretary of Defense, Report to Congress, Availability of Certain Fertility Preservation Treat-

to protect service members' interest in having a family, thus providing "peace of mind" to those who wanted to take advantage of this new benefit.<sup>5</sup> This new policy also encompassed a recognition that women service members have had to make difficult choices about career and family with the hope that this benefit might provide them with greater flexibility.<sup>6</sup> Coming on the heels of Google, Facebook, and other companies offering a benefit to employees for gamete cryopreservation,<sup>7</sup> this offer seemed, if nothing else, fair, especially given the risks taken by service members.<sup>8</sup>

Notably, the majority of service members are considered to be in the "prime of their child-bearing or fathering years: Nearly half of all enlisted personnel are under age 26, with the next largest group, 22 percent, being ages 26 to 30."<sup>9</sup> In addition to the benefits to individual service members, given the size of the Department of Defense, the medical data collected as a result would aid research on issues related to gamete retrieval, storage, and

---

ments for Members of the Armed Services on Active Duty ii, 7-8 (June 2013). This report also analyzed cost and ethics concerns regarding gamete preservation. *Id.* at ii.

<sup>5</sup> U.S. Dep't of Defense, *supra* note 2.

<sup>6</sup> Natalie Lampert, *New Fertility Option for Female Soldiers*, ATLANTIC <http://www.TheAtlantic.com/health/archive/2016/02/fertility-women-soldiers/471537> (Feb. 29, 2016).

<sup>7</sup> See Dara Kerr, *Egg Freezing, So Hot Right Now*, CNET (May 22, 2017), <https://www.cnet.com/news/egg-freezing-so-hot-right-now/>; Stephanie M. Lee, *These Tech Companies Have the Most Generous Fertility Benefits, Poll Says*, BUZZ FEED NEWS (Nov. 15, 2016), <https://www.buzzfeednews.com/article/stephaniemlee/tech-companies-fertility-benefits>; Laura Sydell, *Silicon Valley Companies Add New Benefit For Women: Egg Freezing*, NPR (Oct. 17, 2014), <https://www.npr.org/sections/alltechconsidered/2014/10/17/356765423/silicon-valley-companies-add-new-benefit-for-women-egg-freezing>; Chris Weller, *What You Need to Know About Egg-freezing, the New Perk at Google, Apple, and Facebook*, BUS. INSIDER (Sept. 17, 2017), <https://www.businessinsider.com/egg-freezing-at-facebook-apple-google-hot-new-perk-2017-9>.

<sup>8</sup> For a discussion of posthumous reproduction issues related to service members, see Maria Doucettperry, *To Be Continued: A Look at Posthumous Reproduction as It Relates to Today's Military*, ARMY LAW. 1 (May 2008).

<sup>9</sup> Patricia Kime, *Military's New Fertility Benefit Will Let Troops Freeze Their Sperm and Eggs*, MILITARY TIMES (Jan. 29, 2016), <https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2016/01/29/military-s-new-fertility-benefit-will-let-troops-freeze-their-sperm-and-eggs/>.

future viability.<sup>10</sup> Unfortunately, in June of 2016 the Senate voted down the portion of the bill that provided funding for the two-year pilot program.<sup>11</sup> Without funding, the experimental program could not go forward and there is currently no such benefit provided to preserve gametes prior to deployment.<sup>12</sup>

Though this result appears shortsighted, a positive change regarding procreative assistance for veterans did occur in January of 2017 when in vitro fertilization (IVF)<sup>13</sup> treatment became available to a veteran who “has a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment.”<sup>14</sup> Prior to this change, there had been a difference in coverage benefits available to active duty service members and veterans.<sup>15</sup> Active duty service members were able to get fertility treatment, including in vitro fertilization, if, as a result of a serious service-related injury, the service member could not reproduce.<sup>16</sup> However, such benefits had not been available for veterans<sup>17</sup> – even if the veteran suffered a similar catastrophic injury in the line of duty resulting in the veteran’s

---

<sup>10</sup> Lampert, *supra* note 6.

<sup>11</sup> Rob Hotakainen, *GOP Objection Kills Senate Funding for Military Fertility Program*, McCLATCHY WASH. BUREAU (June 14, 2016), <https://www.mcclatchydc.com/news/politics-government/congress/article83811887.html>. Democratic Senator Murphy called the funding removal “a truly shameful mistake.” *Id.*

<sup>12</sup> “Cryopreservation of gametes in anticipation of deployment,” is specifically excluded from coverage. *See* U.S. Dep’t. of Defense, Implementing Guidance Memorandum, Policy for Assisted Reproductive Services for the Benefit of Seriously or Severely Ill/Injured (Category II or III) Active Duty Service Members (ADSMs), 4 at ¶ V. A (Apr. 3, 2012) [hereinafter Implementing Guidance Memorandum].

<sup>13</sup> In vitro fertilization (IVF) is the process of manually fertilizing an egg and then transferring the embryo to the uterus. Fertility Counseling and Treatment for Certain Veterans and Spouses, 82 Fed. Reg. 6273 (Jan. 19, 2017).

<sup>14</sup> 38 C.F.R. § 17.412 (Feb. 21, 2017).

<sup>15</sup> 82 Fed. Reg. 6273.

<sup>16</sup> *See* U.S.C. § 1074(c)(4)(A). *See also* Implementing Guidance Memorandum, *supra* note 12.

<sup>17</sup> 38 C.F.R. 17.38(c)(2). *See also* Eleanor Nicoll, Comment on the Dept. of Veterans Affairs Rule: AP94-Interim Final Rule – Fertility Counseling and Treatment for Certain Veterans and Spouses (Mar. 21, 2017) (on behalf of the American Society for Reproductive Medicine (ASRM)) (VA previously prohibited by law from providing IVF – “precisely the care needed by some of those who have been most severely injured”).

inability to reproduce without the assistance of IVF. Therefore, veteran inclusion is an important expansion of benefits since it allows for continuity of care should a service member become a veteran during treatment. Simply put, there is no reason for these similarly situated individuals to be treated differently. In recognition of the time sensitivity regarding fertility issues and treatment, the rule became effective prior to the end of the rulemaking comment period, thereby making these benefits immediately available.<sup>18</sup> This veterans' benefit is in place until September 30, 2018, which leaves veterans a relatively small window of time to take advantage of it.<sup>19</sup> The rule provides as follows:

**§17.380 In vitro fertilization treatment.**

- (a)(1) In vitro fertilization may be provided when clinically appropriate to—
  - (i) A veteran who has a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment; and,
  - (ii) The spouse of such veteran, as provided in §17.412.
- (2) For the purposes of this section, “a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment” means, for a male veteran, a service-connected injury or illness that prevents the successful delivery of sperm to an egg; and, for a female veteran with ovarian function and a patent uterine cavity, a service-connected injury or illness that prevents the egg from being successfully fertilized by sperm.
- (3) In vitro fertilization treatment will be provided under this section when clinically appropriate and to the same extent such treatment is provided to a member of the Armed Forces who incurs a serious injury or illness on active duty pursuant to 10 U.S.C. 1074(c)(4)(A), as described in the April 3, 2012, memorandum issued by the Assistant Secretary of Defense for Health Affairs on the subject of “Policy for Assisted Reproductive Services for the Benefit of Seriously or Severely Ill/Injured (Category II or III)

---

<sup>18</sup> 82 Fed. Reg. 6273, Fertility Counseling and Treatment for Certain Veterans and Spouses (Jan. 19, 2017). Secretary of Veterans Affairs concluded there was good cause to publish an interim final rule without prior comment. “[I]t is impracticable and contrary to the public interest to delay this rule . . .” *Id.*

<sup>19</sup> *Id.* at (b).

Active Duty Service Members,” and the guidance issued by the Department of Defense to implement such policy, including any limitations on the amount of such benefits available to such a member.

- (b) Authority to provide in vitro fertilization treatment to covered veterans under this section expires September 30, 2018.<sup>20</sup>

A follow-up regulation available for the same time frame allows IVF treatment for the spouse of a veteran who meets the above criteria, thus enabling a spouse of a seriously injured veteran to receive IVF treatment to enable the veteran and spouse to have a genetic child.<sup>21</sup> These two provisions expanded benefits relating to assisted reproductive technology to veterans in equal measure to those available to service members on active

---

<sup>20</sup> *Id.*

<sup>21</sup> § 17.412 Fertility counseling and treatment for certain spouses.

(a)

(1) VA may provide fertility counseling and treatment to a spouse of a veteran described in § 17.380 to the extent such services are available to a veteran under § 17.38, and consistent with the benefits relating to reproductive assistance provided to a member of the Armed Forces who incurs a serious injury or illness on active duty pursuant to 10 U.S.C. 1074(c)(4)(A), as described in the April 3, 2012, memorandum issued by the Assistant Secretary of Defense for Health Affairs on the subject of “Policy for Assisted Reproductive Services for the Benefit of Seriously or Severely Ill/Injured (Category II or III) Active Duty Service Members,” and the guidance issued by the Department of Defense to implement such policy, including any limitations on the amount of such benefits available to such a member.

(2) VA may provide in vitro fertilization to a spouse of a veteran described in § 17.380 when clinically appropriate and consistent with the benefits relating to reproductive assistance provided to a member of the Armed Forces who incurs a serious injury or illness on active duty pursuant to 10 U.S.C. 1074(c)(4)(A), as described in the April 3, 2012, memorandum issued by the Assistant Secretary of Defense for Health Affairs on the subject of “Policy for Assisted Reproductive Services for the Benefit of Seriously or Severely Ill/Injured (Category II or III) Active Duty Service Members,” and the guidance issued by the Department of Defense to implement such policy, including any limitations on the amount of such benefits available to such a member.

(b) Authority to provide fertility counseling and treatment, including in vitro fertilization under this section, expires September 30, 2018.

82 Fed. Reg. 6276 (Jan. 19, 2017) as amended at 81 Fed. Reg. 11153 (Feb. 21, 2017).

128 *Journal of the American Academy of Matrimonial Lawyers*

duty. The provision for spouses parallels the main rule in that these benefits are only available through September 30, 2018.<sup>22</sup>

It is appropriate to have these benefits available to military members and veterans. According to research regarding trauma incurred during the wars in the Middle East, the occurrence of genitourinary<sup>23</sup> wounds have significantly increased due to the nature of these conflicts and greater exposure to “improvised explosive devices.”<sup>24</sup> Approximately 12% of the injuries sustained during these conflicts involve damage to the genitourinary system.<sup>25</sup> These injuries can and do result in an inability to reproduce without medical intervention including IVF.<sup>26</sup> “Fertility problems are common in those with GU [genitourinary] inju-

---

<sup>22</sup> 38 C.F.R. §§ 17.380(b), 17.412(b).

<sup>23</sup> The genitourinary tract is “the system of organs comprising those concerned with the production and excretion of urine and those concerned with reproduction.” MERIAM WEBSTER MEDICAL DICTIONARY, <https://www.merriam-webster.com/dictionary/genitourinary> (last visited Sept. 12, 2018).

<sup>24</sup> Peter S. Lund, Report of the Council on Medical Service, Infertility Benefits for Veterans 2 (Jan. 1, 2016), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjC5OCehLvcAhUKca0KHTv7BMwQFggrMAA&url=https%3A%2F%2Fwww.ama-assn.org%2Fsites%2Fdefault%2Ffiles%2Fmedia-browser%2Fpublic%2Fabout-ama%2Fcouncils%2FCouncil%2520Reports%2Fcouncil-on-medical-service%2Finterim-2016-council-on-medical-service-report-1.pdf&usg=AOvVaw2BlnDGtOg19cbdkTbUhtcZ>. “Genitourinary combat wounds have occurred at the highest frequency ever seen in any U.S. military operation throughout American history.” Janice R. Bray, *Genitourinary Trauma: A Battle Cry for Integrated Collaborative Veteran – Centric Care*, 10 J. MEN’S HEALTH 121 (Dec. 2013). See also Fertility Counseling and Treatment for Certain Veterans and Spouses, 82 Fed. Reg. 6273; Jud C. Janak et al., *Epidemiology of Genitourinary Injuries among Male U.S. Service Members Deployed to Iraq and Afghanistan: Early Findings from the Trauma Outcomes and Urogenital Health (TOUGH) Project*, 197 J. UROLOGY 414-19 (2017).

<sup>25</sup> Sherrie L. Wilcox et al., *Genitourinary Trauma in the Military: Impact, Prevention, and Recommendations*, USC Social Work Center for Innovation and Research on Veterans and Military Families, CIR Policy Brief (Mar. 2015), citing Cal Woodward & Laura Eggerston, *Homemade Bombs and Heavy Urogenital Injuries Create New Medical Challenges*, 182 CANADIAN MED. ASS’N. J. 1159-60 (Nov. 2010).

<sup>26</sup> Lund, *supra* note 24 at 2 (emphasis added) (“Approximately 1,400 service members returned from Iraq and Afghanistan with severe injuries to their reproductive organs. It is estimated that thousands more sustained paralysis, brain injuries or other conditions that make IVF their best option to conceive.”).

ries due to the nature of the injury.”<sup>27</sup> An inability to reproduce as a result of these injuries also adds to the psychological harm suffered by these service members and veterans.<sup>28</sup>

While this change in benefits for veterans is positive, there is certainly more to be done for those who do and have served this nation. First, the time constraint of September 2018 should be eliminated – the injuries have not stopped so why should the benefits? Second, expansion of benefits to include coverage for sperm and egg donations should be considered for service members and veterans who have lost their ability to produce and/or provide gametes for procreation as a result of serious service-related injury.<sup>29</sup> Third, benefits for female service members who have lost their ability to carry a pregnancy should also take into consideration surrogacy so the female service member so situated, may have a genetic child when her ability to do so has been eliminated as a result of a service-related injury. Coming full circle, finally, the provision of a benefit allowing for pre-deployment gamete cryopreservation for service members before injury occurs<sup>30</sup> would eliminate at least some concern for these individuals who sacrifice so much for the benefit of their country and would give them at least some assurance that they may have a genetic child even if serious injury is incurred during deployment.<sup>31</sup>

This benefit is important not only because it is fair to provide care to those who have given so much, but also it brings them closer to making up for such a substantial loss. Inability to create a family as a result of a service-connected injury when the

---

<sup>27</sup> *Id.*

<sup>28</sup> Poonam L. Alaigh, Infertility Evaluation and Treatment, VHA Directive 1332 at 1 (June 20, 2017) (“Those who desire to but are unable to conceive children themselves may experience feelings of depression, grief, and inadequacy; poor adjustment; and reduced quality of life”).

<sup>29</sup> “[M]en who have lost testicles or otherwise cannot produce sperm are limited in their options to reproduce, as sperm donation is not covered. The same is true to [sic] women who have lost ovaries or cannot produce eggs; donor eggs and surrogacy are not covered. Wilcox, *supra* note 25, at 4.

<sup>30</sup> The Council of Medical Service recommends that service members be “offered pre-deployment fertility counseling and information on the relevant health care benefits provided through TRICARE . . .” Lund, *supra* note 24, at 4.

<sup>31</sup> *See id.* at 5.

service member desires to do so, and when the medical technology is able and capable of meeting that desire, is wrong. There is no reason to deny these benefits to veterans who are similarly situated – having sustained a service-connected injury by which they are rendered incapable of procreation without IVF. Without this benefit, IVF could be and likely would be cost-prohibitive for veterans. This rule change enables continuity of care for veterans who have commenced fertility treatment while still considered active duty service members and then transferring to veteran status.

What more can be done? The timeframe and funding for these regulations' effective periods should be expanded indefinitely<sup>32</sup> so that proper help can be provided where treatment need is met under the definitions of injury provided by the Department of Defense. Funding should be provided for gamete collection, cryopreservation, and storage while a service member is on active duty and for a reasonable time thereafter when he or she is considered a veteran. Providing cost coverage for storage for a time period after separation from service would allow the veteran to reacclimate to civilian life rather than forcing an immediate decision at discharge about continuing storage or use. Such a limitation puts all veterans in the same position regardless of age or sex and leaves it to the former service member to decide if, when and how to use their genetic material. The provision of a benefit for service members and veterans to receive donor gametes or be able to use surrogacy as a means of procreating should also be considered. Advance gamete storage may also increase the likelihood that less medical intervention would be necessary after injury to enable an injured service member to have a genetic child. As Secretary of Defense Carter Ash stated, it would provide peace of mind to those who desire to have a family someday.

---

<sup>32</sup> See *Lund, supra* note 24; *Nicoll, supra* note 17 (commenting on behalf of ASRM and advocating that IVF be a permanent part of veterans' medical benefits).