

## **“How Incarceration Affects Eligibility for VA Disability Benefits And Using the Information in Sentencing”**

By Colonel (Retired) Rick Rousseau, Criss & Rousseau Law Firm

*“The Bureau of Justice Statistics reports there are approximately 107,400 Veterans in state or federal prison. Following release, these Veterans are at increased risk of homelessness, suicide and death by drug overdose – that’s why it’s vital to reconnect Veterans to VA care and benefits to which they are entitled, post-incarceration.”<sup>1</sup>*

Almost all Criminal Defense attorneys represent some clients that are Veterans, but many are not familiar with the potential impact of criminal convictions on U.S. Department of Veterans Affairs (VA) benefits. In addition, many Criminal Defense attorneys have not considered how to present the impact of some criminal convictions on a Veteran’s VA benefits to assist the court in deciding on an appropriate sentence. Finally, many Criminal Defense attorneys have wanted to obtain copies of their client’s military service records or VA records but did not know how to go about getting the records. The purpose of this article is to provide a brief primer on assisting a Veteran client facing these issues.

Many Veterans are receiving some type of benefits from the VA. These benefits can include VA disability compensation for service-connected conditions, pension for non-service-connected conditions, educational benefits, and health care benefits. This article primarily focuses on VA disability compensation and pension for non-service-connected conditions, and to a lesser extent on educational benefits.

VA service-connected disability compensation is a monthly monetary benefit for Veterans with a current health condition that is “at least as likely as not” linked to their military service.<sup>2</sup> It is not “means tested” (the income of the Veteran does not matter), and for 2022 it can range from \$152 a month for a 10% rating to \$3,456 per month for a 100% rating.<sup>3</sup> Additional amounts may be paid monthly for spouses, children, disabled children, and for various special monthly compensation issues that may apply to the Veteran.<sup>4</sup>

Some Veterans may qualify for non-service-connected pension, which is a monthly benefit for low-income wartime Veterans who are totally and permanently disabled or elderly.<sup>5</sup> The term “VA pension” benefits are not retirement benefits, but a needs based program for Veterans with war-time service who are either totally disabled or over age 65. Non-service-connected

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<sup>1</sup> U.S. Department of Veterans Affairs News Release, *VA ingenuity afford formerly incarcerated Veterans valuable resources for rehabilitation*, April 6, 2022, found at <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5780>.

<sup>2</sup> 38 U.S.C. § 101(2), 1110, 1131. <https://www.va.gov/disability/>.

<sup>3</sup> 38 U.S.C. § 1114; *See also* <https://www.va.gov/disability/compensation-rates/veteran-rates/>.

<sup>4</sup> 38 U.S.C. § 1114, 1115, 1135 <https://www.va.gov/disability/compensation-rates/special-monthly-compensation-rates/>.

<sup>5</sup> 38 C.F.R. § 3.271, 3.272, and 3.275; *See also* <https://www.va.gov/pension/eligibility/>

pension is means-tested, and the rates are based on the difference between the Veteran's countable income and a rate set by Congress.<sup>6</sup>

VA disability compensation payments are limited if a Veteran is convicted of a felony and imprisoned for more than 60 days.<sup>7</sup> A felony is defined as "any offense punishable by death or imprisonment for a term exceeding one year, unless specifically categorized as a misdemeanor under the law of the prosecuting jurisdiction."<sup>8</sup> The VA General Counsel has opined that a felony conviction resulting in a sentence of "community control with conditions" does not amount to "incarceration."<sup>9</sup> The sixty-first day is determined as sixty-one days after guilt is pronounced by a judge or jury and the Veteran is incarcerated in a penal institution because of the determination of guilt.<sup>10</sup>

The limit on the payment of VA disability compensation benefits to a Veteran that is incarcerated does not actual lower the Veteran's service-connected disability rating level. It is only the amount of the monthly disability compensation payment to the Veteran that changes. If a Veteran is convicted of a felony and imprisoned for more than 60 days, and the Veteran is rated 20% or more by the VA they are limited to receiving a 10% disability payment instead of their actual awarded disability compensation rating. Veterans whose disability rating is 10% receive a reduction by one-half. For example, if a Veteran is receiving a 100% VA disability compensation rating (\$3,456 per month) is convicted of a felony and imprisoned for more than 60 days, his VA disability compensation would be limited to 10% (\$152 per month) on the 61<sup>st</sup> day in confinement. For that Veteran, each twelve months of confinement after the 61<sup>st</sup> day of confinement following a felony conviction would result in a loss of VA disability compensation of \$39,648 (\$3,456 per month for 100% - \$152 for 10% = \$3,304 x 12 months = \$39,648 per 12 months). If the court is considering an appropriate sentence, the potential loss of VA disability compensation benefits to the Veteran and his family should be factored into the sentencing equation. The Veteran and their family will suffer a significant financial loss if the Veteran is convicted of felony and sentenced to more than 60 days in jail. In our example, the Veteran and his family would have financial loss of VA disability compensation benefits that would be almost \$40,000 per year.

After a Veteran is released from prison, disability compensation payments may be reinstated based on the severity of the service-connected disabilities at the time. Also, VA disability compensation payments are not reduced for Veterans participating in work release programs, residing in halfway house (including residential re-entry centers), or under community control. These types of alternative sentences should be proposed by the Defense Attorney and considered by the court to enable the Veteran to serve their sentence but also for the Veteran and their family to continue to receive VA disability compensation.

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<sup>6</sup> 38 C.F.R. § 3.271, 3.272, and 3.275; See also <https://www.va.gov/pension/veterans-pension-rates/>.

<sup>7</sup> 38 U.S.C. § 5313; also see <https://www.benefits.va.gov/persona/veteran-incarcerated.asp>.

<sup>8</sup> 38 C.F.R. § 3.665(b).

<sup>9</sup> VA. Gen. Coun. Prec. 59-91 (June 24, 1991).

<sup>10</sup> VA. Gen. Coun. Prec. 3-2005 (February 23, 2005).

Veterans should be made aware that if they fail to notify the VA of their incarceration beyond 60 days, not only will the VA eventually stop the payment of VA disability compensation but will commence to recoup the overpayment.<sup>11</sup>

The rules for VA non-service-connected pension are slightly different. Unlike disability compensation, the VA completely halts or stops VA pension payments to incarcerated Veterans.<sup>12</sup> VA pension benefits are stopped for any type of conviction (felony or misdemeanor) that results in incarceration.<sup>13</sup> Veterans receiving VA pension will have pension payments terminated on the 61<sup>st</sup> day after imprisonment for any type of conviction.

The VA does have a process where all or part of these VA *disability compensation* benefits that are not paid to an incarcerated Veteran may be apportioned to a Veteran's spouse, children, or dependent parents based upon their need.<sup>14</sup> Likewise for *pension benefits*, those benefits may be apportioned to family members.<sup>15</sup> VA apportionment is not automatic. Like most VA benefits, the Veteran and their family must apply for the benefit on VA Form 21-0788.<sup>16</sup>

Incarceration also impacts the ability to receive some VA educational benefits. Veterans that are incarcerated for convictions that are not felonies can receive their full monthly VA educational benefits for which they would normally be entitled. Veterans that are convicted of a felony, but residing in a halfway house, residential re-entry center, or participating in work-release program can also receive the full VA educational benefits for which they would normally be entitled to receive. Veterans that are incarcerated for a felony conviction cannot receive the monthly VA educational living subsistence allowance but can be paid by the VA for the costs of tuition, fees, books, and supplies if they are not receiving payment for these items from another Federal, state, or local program.<sup>17</sup>

When a Veteran is facing sentencing, it is important to make sure the court is aware of the potential benefits that could be lost from a conviction and confinement over 60 days. For these Veterans, a sentencing case may be crafted to present information and evidence to the court on the impact of certain sentences on VA benefits. In preparing for sentencing, the Defense Attorney should obtain various documents from the Veteran that will be helpful to present to the court. This includes a copy of the Veteran's discharge paperwork, known as a DD214.<sup>18</sup> The Veteran can download a VA Benefit Summary Letter. This is also called a VA award letter which shows the Veteran's VA disability rating and the amount they are receiving each month from the VA.<sup>19</sup> Current VA disability compensation rates can be found online and be used to show the court the difference in the Veteran's benefit if he was limited to a 10% rating due to confinement beyond 60 days.<sup>20</sup> The VA provides a Fact Sheet on incarcerated Veterans that can

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<sup>11</sup> 38 U.S.C. § 5314.

<sup>12</sup> 38 U.S.C. § 1505(a); 38 C.F.R. § 3.66.

<sup>13</sup> 38 C.F.R. § 3.66.

<sup>14</sup> 38 U.S.C. § 5313(b); 38 C.F.R. § 3.665(e).

<sup>15</sup> 38 U.S.C. § 1505(b); 38 C.F.R. § 3.666.

<sup>16</sup> <https://www.va.gov/find-forms/about-form-21-0788/>.

<sup>17</sup> 38 C.F.R. § 21.276

<sup>18</sup> <https://www.archives.gov/personnel-records-center/dd-214>.

<sup>19</sup> <https://www.va.gov/records/download-va-letters/>.

<sup>20</sup> <https://www.va.gov/records/download-va-letters/>.

be used to explain to the court the impact of a conviction and confinement over 60 days.<sup>21</sup> In summary, present evidence and educate the court on the financial impact on the Veteran per month or per year based upon the loss of VA disability compensation or pension. A sentence of ten years or more could result in almost half a million dollars in loss VA benefits. If possible, argue for a sentence that is less than 60 days confinement or includes work release to allow the Veteran and their family to continue to receive VA benefits at their regular scheduled rate.

Within the past year, the U.S. Court of Appeals for the Federal Circuit addressed the issue of whether a Veteran being held in a State Hospital was in confinement for purposes of 38 U.S.C § 5313(c), which limits the payment of VA disability compensation to persons that are incarcerated for a conviction of a felony. In *Philbrook v. McDonough*, F.3d, No. 2020-2233 (October 8, 2021)<sup>22</sup>, the Veteran was remanded to the custody of the Oregon State Hospital. Initially, the VA, the Board of Veterans Appeals, and the Court of Appeals for Veterans Claims found that the Veteran was “incarcerated” in a “correctional facility” per the statutory language prohibiting an award of VA disability compensation. The Federal Circuit held that the plain language of 38 U.S.C § 5313(c) did not apply to the Veteran’s confinement in a “mental institution”. It held the Veteran was not confined to a “penal institutional or correctional facility.” The court held that a “correctional facility” cannot encompass a hospital that treats civil patients, and a hospital cannot be a correctional facility for some patients and not others. The Court held that the Veteran was not barred from receiving VA disability compensation.

In representing a Veteran, it is often helpful to obtain various documents about their military service, military service treatment records, VA medical records, and VA claims records. Below are some useful links to obtain these documents.

The Veteran’s Official Military Personnel File can be requested online at <https://www.archives.gov/veterans/military-service-records> or by submitting a Standard Form 180 to the National Personnel Records Center.<sup>23</sup>

The Veteran’s military service treatment records can be obtained by submitting a DD Form 2870 to the military treatment facility that provided the medical services.<sup>24</sup> If the Veteran received Alcohol and Drug Treatment you need to specifically request those records. Each service has a separate form for those specific records. For the Army, it is DA Form 5018-R.<sup>25</sup>

The Veteran’s VA medical records can be obtained from each VA Medical Center seen by the Veteran at no cost, usually within a few weeks. If the Veteran was seen by various VA medical centers, a request needs to be submitted to each one. The records can be requested by the Veteran, or the attorney can request with written consent of the Veteran. The Veteran can

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<sup>21</sup> <https://www.va.gov/HOMELESS/nchav/resources/docs/justice-involved/incarcerated/incarcerated-VBA-fact-sheet.pdf>.

<sup>22</sup> <https://www.govinfo.gov/content/pkg/USCOURTS-ca13-20-02233/pdf/USCOURTS-ca13-20-02233-0.pdf>.

<sup>23</sup> <https://www.archives.gov/personnel-records-center/military-personnel/ompf-archival-requests>.

<sup>24</sup> <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2870.pdf>.

<sup>25</sup> [https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB\\_ID=50264](https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=50264)

request his own records by using VA Form 10-5345a.<sup>26</sup> The Veteran's attorney can request the medical records with the Veteran's consent using VA Form 10-5345.<sup>27</sup>

The Veteran's complete VA Claims File can be obtained by using VA Form 3288.<sup>28</sup> However, be aware that due to shutdowns during COVID-19, requests for VA Claims Files were backlogged. If the VA Claims File is needed, submit the request as soon as possible.

Finally, when requesting records from the military services and the VA, be aware that they will not recognize a state court subpoena unless it is signed by a Judge. As a general rule, the military services and the VA will not produce employee witnesses or experts unless the subpoena has been processed through the VA Office of General Counsel.<sup>29</sup> However, the VA can provide business records affidavit if requested for VA medical records.

In conclusion, by being familiar with the basic rules that impact VA benefits, the Defense Attorney can properly advise their client about the potential impact of a criminal conviction on those benefits. By factoring in the potential impact of a criminal conviction on VA benefits and presenting the information to the court during sentencing, the Defense Attorney can possibly obtain a more favorable sentencing result for the Veteran.

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Colonel (Retired) Rick Rousseau is a partner in the Criss & Rousseau Law Firm. He served on active duty for 27 years as a U.S. Army Judge Advocate until his retirement in 2015. Rick served in various positions while on active duty, including twice as a Staff Judge Advocate (Senior Legal Advisor) for Fort Hood, Regional Defense Counsel, prosecutor, Special Assistant U.S. Attorney, and legal assistance attorney. He was a full-time law professor at The Judge Advocate General's (JAG) School in Charlottesville, Virginia, where he taught veterans & survivor benefits. He deployed three times as part of Operation Iraqi Freedom and Operation Enduring Freedom. Today, the focus of his practice is VA disability appeals and he is VA accredited attorney. He can be reached at [rick.rousseau@crissrousseau.com](mailto:rick.rousseau@crissrousseau.com) or 254-699-9999.

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<sup>26</sup> <https://www.va.gov/find-forms/about-form-10-5345a/>

<sup>27</sup> <https://www.va.gov/find-forms/about-form-10-5345/>.

<sup>28</sup> <https://www.va.gov/find-forms/about-form-3288/>.

<sup>29</sup> See link for contact information for VA OGC: <https://www.va.gov/OGC/DistrictOffices.asp>.