

## VA's Duty to Assist Incarcerated Veterans

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The most recent government estimate as to the number of veterans incarcerated in federal and state prisons is 140,000.<sup>2</sup> Federal law and regulations limit the payment of disability compensation to veterans convicted of felonies and incarcerated for more than 60 days in a federal, state or local penal institution,<sup>3</sup> but do not limit the ability of veterans to file claims relating to disability compensation.<sup>4</sup> Given the substantial number of incarcerated veterans thus eligible to file disability compensation claims and receive at least some VA benefits, it is worthwhile to consider VA's obligations to such veterans. This Note will analyze the decisions of the United States Court of Appeals for Veterans Claims (Court) that address VA's duty to assist incarcerated veterans.<sup>5</sup>

VA's duty to assist veterans who file claims for disability compensation is a long-standing obligation.<sup>6</sup> Enactment of the Veterans Claims Assistance Act of 2000 (VCAA)<sup>7</sup> clarified and extended this duty, as discussed below. VA's duty to assist veterans requires VA to assist with

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<sup>2</sup> See Margaret E. Noonan & Christopher J. Mumola, *Veterans in State and Federal Prison*, 2004, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, at 1 (May 2007).

<sup>3</sup> 38 U.S.C. § 5313(c) (2000).

<sup>4</sup> 38 U.S.C. §§ 1110, 1131 (establishing that disability compensation is payment made pursuant to a grant of service connection). The amount of compensation is determined pursuant to VA's Rating Schedule as provided in 38 U.S.C. § 1155 and 38 C.F.R. Part 4 (2007). The only limitation as to the granting of an incarcerated veteran's claim relating to disability compensation is that no payment of total disability based on individual unemployability is permissible during the veteran's incarceration. 38 U.S.C. § 5313(c).

<sup>5</sup> The United States Court of Appeals for the Federal Circuit, which hears appeals from the Court, does not appear to have addressed this issue.

<sup>6</sup> See, e.g., 38 C.F.R. § 3.103(a) (1973) ("It is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim. . . .").

<sup>7</sup> Pub. L. No. 106-475, 114 Stat. 2096 (2000).

claims generally,<sup>8</sup> as well to assist veterans in obtaining records<sup>9</sup> and to provide medical examinations for compensation claims.<sup>10</sup>

Only three published decisions directly address VA's duty to assist incarcerated veterans, which are as follows: *Wood v. Derwinski*,<sup>11</sup> *Bolton v. Brown*,<sup>12</sup> and *Belton v. West*.<sup>13</sup> More recently, an unpublished, single judge decision, *Mercurio v. Nicholson*,<sup>14</sup> addressed this issue.

In *Wood*, an incarcerated veteran had filed a claim for service connection for post-traumatic stress disorder (PTSD).<sup>15</sup> At that time, a claim for service connection for PTSD (like other claims to establish service connection), required evidence establishing that a particular injury or disease resulting in disability was incurred coincident with service.<sup>16</sup> After finding that there was a plausible basis in the record for the Board's factual finding that there was insufficient evidence to support a claim for service connection for PTSD, the Court addressed the issue of whether VA adequately assisted the veteran in developing his claim.<sup>17</sup> In response to the veteran's description of the in-service stressful events that he had claimed caused his PTSD, the VA regional office (RO) sent this information to the appropriate military records research group (at the time, the United States Army and Joint Services Environmental Support

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<sup>8</sup> 38 U.S.C. § 5103A (2000); 38 C.F.R. § 3.159(c) (2007).

<sup>9</sup> 38 U.S.C. § 5103A(b), (c); 38 C.F.R. § 3.159(c)(1)-(3).

<sup>10</sup> VA must provide such an examination in deciding a claim for disability compensation when the evidence of record indicates that the veteran has a disability or symptoms thereof which may be associated with service, but there is insufficient medical evidence on which to render a decision on a claim. See 38 U.S.C. §5103A(d); 38 C.F.R. §3.159(c)(4).

<sup>11</sup> 1 Vet. App. 190 (1991).

<sup>12</sup> 8 Vet. App. 185 (1995).

<sup>13</sup> 13 Vet. App. 200 (1999).

<sup>14</sup> No. 05-1299, 2006 WL 3200829 (Vet. App. Aug. 31, 2006) (Hagel, J.) (unpublished table decision).

<sup>15</sup> *Wood*, 1 Vet. App. at 191-92.

<sup>16</sup> *Id.* at 192 (citing 38 C.F.R. § 3.303(a) (1990)). In response to the Court's decision in *Wood*, VA's regulations were amended to provide specific criteria for establishing service connection for PTSD as opposed to other disabilities. 58 Fed. Reg. 29,109 (May 19, 1993) (codified at 38 C.F.R. § 3.304(f)).

<sup>17</sup> *Wood*, 1 Vet. App. at 193 (citing 38 U.S.C. § 3007(a) (1989)). At that time, VA was required generally by law and regulation to assist veterans in developing facts pertinent to their claims. 38 C.F.R. § 3.103(a) (1989).

Group or “ESG”).<sup>18</sup> The ESG responded that its research was unsuccessful because the lack of specific combat dates, places, and types of incidents made the research impossible.<sup>19</sup> The RO made a subsequent request to ESG, which included documents showing the units to which the veteran was assigned, his military occupation specialty, and the dates he was in Vietnam.<sup>20</sup> ESG’s response was again negative, and the RO took no further action.<sup>21</sup> The RO and the Board denied the claim.<sup>22</sup>

In assessing whether VA had satisfied its duty to assist the incarcerated veteran, the Court initially noted that when a veteran is incarcerated, the opportunity for face-to-face assistance is significantly reduced or eliminated and, under such circumstances, the VA must ensure that all of its written communications are helpful and clear in explaining to a veteran the evidence needed to support the claim along with advice and help in obtaining such evidence.<sup>23</sup> The Court noted that, in the context of a claim for service connection for PTSD, such assistance would involve helping the veteran corroborate the alleged stressful experiences in service that caused his PTSD.<sup>24</sup> As to whether VA provided such assistance, the Court wrote that VA advised the veteran, in a reasonably clear way, that independent evidence of the alleged in-service stressful experiences was needed, and that this evidence could be obtained only if the veteran could furnish some specific information regarding the time and place of the stressful experiences and the names of witnesses to it.<sup>25</sup> Noting that the duty to assist “is not always a one-way street,” the Court found that the veteran had notice that more information was required from him in order to conduct a successful search for records corroborating the alleged stressors, and that he had been insufficiently specific in responding to requests for factual data such as names, dates, and places that were straightforward and neither impossible nor onerous.<sup>26</sup> Therefore, while VA’s actions

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<sup>18</sup> *Wood*, 1 Vet. App. at 192.

<sup>19</sup> *Id.*

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

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 193.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

were “not a model to be followed,” the Court concluded that they were sufficient under the circumstances to satisfy VA’s duty to assist the veteran.<sup>27</sup> After reaching this conclusion, the Court added a two sentence paragraph cautioning that in deciding claims of incarcerated veterans, VA adjudicators should “tailor their assistance to the peculiar circumstances of confinement,” because “[s]uch individuals are entitled to the same care and consideration given to their fellow veterans.”<sup>28</sup>

Thus, the actual holding of *Wood* was fairly narrow, as it required VA to assist an incarcerated veteran but found that the assistance provided to the veteran, although not a model to be followed, was sufficient to comply with this duty. However, the broadly worded final paragraph, which was not necessary to decide the case, established that incarcerated veterans would be afforded the same treatment as non-incarcerated veterans in pursuing their disability compensation claims. With regard to VA’s duty to assist, this would in practice mean that more would be required of VA, as incarcerated veterans would be less able to take action on their own behalf by virtue of their incarceration.

The *Wood* Court did not cite to any statute or regulation in its concluding paragraph. A possible basis for the concluding paragraph’s equal treatment rule is the absence of any language in the then-applicable duty to assist statute and regulation distinguishing between incarcerated veterans and non-incarcerated veterans; however, this absence of language was not cited. Subsequent cases have cited *Wood*’s concluding paragraph with approval and adopted the rule that VA’s duty to assist applies equally to incarcerated and non-incarcerated veterans. The only discussion of whether this equal treatment is required by VA law appeared in the concurring opinions in *Bolton v. Brown*.<sup>29</sup>

In *Bolton*, the Court addressed the Board’s denial of an incarcerated veteran’s request for an increased rating for his PTSD.<sup>30</sup> In that case, after the RO initially denied the claim, the Board remanded it, instructing the RO to afford the veteran a new VA examination as to the

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

<sup>28</sup> *Id.*

<sup>29</sup> 8 Vet. App. 185, 192-97 (1995).

<sup>30</sup> *Id.* at 187.

severity of his PTSD in light of the fact that the most recent examination had been conducted several years earlier.<sup>31</sup> However, when the RO sought to comply with the Board's instructions by requesting that a local VA clinic coordinate with the prison warden in providing the requested examination, the clinic's chief medical officer wrote that the clinic was unable to find a psychiatrist to perform the examination at the prison.<sup>32</sup> No further action was taken. The RO and the Board again denied the claim, with the RO noting that a new VA examination to assess the severity of his PTSD could not be performed due to the veteran's incarceration.<sup>33</sup>

The Court vacated the Board's decision, finding that the Board failed to adequately explain the reasons or bases for its findings and conclusions because it did not address medical evidence showing a worsening of the veteran's PTSD.<sup>34</sup> Given that the Board (in initially remanding the claim) had correctly determined that a contemporaneous VA examination was needed to ascertain whether an increased rating was warranted, the Court also found that the Board should not have "ceased in its quest" to afford the veteran a new VA examination to provide evidence on which to decide the claim.<sup>35</sup> Citing the *Wood* Court's "caution" to VA adjudicators to tailor their assistance to the circumstances of confinement and provide incarcerated veterans the same care and consideration as all others, the Court held:

Under the unique circumstances presented by this case, where the Secretary has determined that the veteran is not available to participate in a VA examination under regular conditions, and in keeping with the "caution" of *Wood, supra*, a remand is required to provide the Secretary with another opportunity to fulfill his statutory duty to assist this appellant in developing the facts of his claim.<sup>36</sup>

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<sup>31</sup> *Id.* at 187-88.

<sup>32</sup> *Id.* at 188.

<sup>33</sup> *Id.* at 188-89.

<sup>34</sup> *Id.* at 190.

<sup>35</sup> *Id.* at 191.

<sup>36</sup> *Id.*

The Court also noted that, although the RO claimed it was unable to get a fee-based physician to conduct an examination in the correctional facility, the record did not contain information about the RO's efforts in this regard and did not explain why a VA psychiatrist was not directed to perform the examination.<sup>37</sup>

While the Court "limited" its holding to the "unique facts" of the case, those "unique facts" would appear to apply to most cases involving incarcerated veterans—they will be unable to participate in a VA examination under regular conditions. In such circumstances, the Court indicated that if the RO was unable to arrange for the veteran to attend an examination outside the prison, or to have a VA physician conduct an examination at the prison, it must at least document such efforts in the claims file. The Board in turn would, if denying the claim, have to explain why the RO's documentation indicated that it was not feasible to conduct such an examination under the circumstances.

Interestingly, in *Bolton*, the veteran had also argued that VA had the authority, pursuant to VA's subpoena power under 38 U.S.C.A. § 5711(a), to require the correctional facility to release the veteran to attend an examination at the nearest VA facility.<sup>38</sup> Noting that this statute, and its implementing regulation 38 C.F.R. § 20.711, specifically authorizes subpoenas only to compel the attendance of witnesses and to aid claimants in preparing and presenting claims, the Court held that neither the statute nor the regulation authorized VA to subpoena a state prison warden to release a veteran to attend a VA examination.<sup>39</sup>

Thus, in *Bolton*, the Court required significant action on the part of VA in fulfilling its duty to assist incarcerated veterans whose claims require new VA examinations, but also declined to stretch the meaning of the statute and regulation giving VA subpoena power in order to augment this duty.

Judge Ivers wrote a concurring opinion including extensive excerpts from the House and Senate debates on the legislation later codified at 38 U.S.C.A. § 5313<sup>40</sup> limiting the compensation to be paid to

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See *supra* text accompanying note 4.

incarcerated veterans for their service-connected disabilities.<sup>41</sup> These debate excerpts showed that the House bill had contained a provision limiting payment of compensation to incarcerated veterans while the Senate bill did not, and a compromise was reached whereby compensation to incarcerated veterans was limited only in certain circumstances.<sup>42</sup> Although he speculated that, based on the legislative history, the Court's application of VA's duty to assist incarcerated veterans under the facts of *Bolton* "was, perhaps, not contemplated by Congress when it enacted 38 U.S.C. § 5313," Judge Ivers nevertheless concluded that the Court could not "lightly infer that the duty to assist a veteran in developing his claim applies any less to an incarcerated veteran than to a non-incarcerated veteran," particularly in light of the decision to allow compensation to be paid to incarcerated veterans, albeit significantly reduced.<sup>43</sup> In response, Judge Steinberg wrote a separate concurrence providing additional legislative history showing the reluctance of several Senators to include the provision limiting compensation to incarcerated veterans, and indicating that he did not share Judge Ivers' desire to have Congress reconsider the statute limiting compensation to veterans incarcerated for felonies.<sup>44</sup> He did not, however, challenge the conclusions of Judge Ivers and the Court that VA's duty to assist applied equally to incarcerated veterans as to non-incarcerated veterans.<sup>45</sup>

The most recent precedential Court decision on this issue, *Belton v. West*, arose in an unusual procedural context. After the RO and Board denied the veteran's claims for disability compensation, the Court granted a joint motion for remand,<sup>47</sup> which included an agreement that VA would arrange to provide the incarcerated veteran with all medical examinations necessary to properly evaluate his claims.<sup>48</sup> After the requested examinations did not occur for some time, the veteran moved for issuance of a writ ordering VA to explain why it had not expeditiously

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<sup>41</sup> *Bolton*, 8 Vet. App. at 192-94 (Ivers, J., concurring).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 193-94.

<sup>44</sup> *Id.* at 194-97 (Steinberg, J., concurring).

<sup>45</sup> *Id.*

<sup>46</sup> 13 Vet. App. 200 (1999).

<sup>47</sup> A joint motion for remand is a motion by VA's General Counsel, on behalf of VA, and the veteran's representative agreeing that a case appealed to the Court should be remanded to the Board and instructing the Board as to how to remedy the defects in its decision.

<sup>48</sup> *Bolton*, 13 Vet. App. at 201.

complied with the joint motion, and to sanction VA for such failure.<sup>49</sup> The Court's recitation of the facts indicated that the examination was conducted at some point during the pendency of the appeal and that the veteran's claims were granted.<sup>50</sup> The Court therefore denied the petition as moot, but went on to consider whether sanctions were warranted.<sup>51</sup> In doing so, the Court cited *Bolton* and *Wood*, and found that VA had not followed the holdings of these two cases.<sup>52</sup> The Court noted that VA's compliance with the joint motion had been "neither a model of efficiency nor a model of effective communication."<sup>53</sup> The Court ultimately denied the motion for sanctions because there was no evidence that VA had acted in bad faith.<sup>54</sup>

Thus, as the petition for relief was denied as moot and the motion for sanctions was denied, there is no holding in *Belton* as to VA's duty to assist incarcerated veterans. However, *Belton* is significant because its discussion of the instructions in the joint motion requiring the provision of VA examinations to the incarcerated veteran and its citation of *Wood* and *Bolton* reflects that it is now the view of both the Court and VA that the duty to assist incarcerated veterans includes providing them with VA examinations when warranted.

The only subsequent Court decision to squarely address the issue of VA's duty to assist incarcerated veterans is *Mercurio v. Nicholson*.<sup>55</sup> While such single judge dispositions carry no precedential weight and do not bind the Court or VA (other than in that particular case), such cases may be cited or relied on for their persuasiveness or reasoning.<sup>56</sup> *Mercurio* is significant because it is the only post-VCAA Court case to address the issue of VA's duty to assist incarcerated veterans, and may provide insight as to how the Court will handle future cases involving incarcerated veterans.

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 203.

<sup>51</sup> *Id.* at 204.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 204.

<sup>55</sup> No. 05-1299, 2006 WL 3200829 (Vet. App. Aug. 31, 2006).

<sup>56</sup> See *Betha v. Derwinski*, 2 Vet. App. 252, 254 (1992) (discussing the precedential value of a single-judge action); see also vet. app. r. 30(a) (noting rules for citation of a nonprecedential authority).



In *Mercurio*, after the RO's initial denial of the veteran's service connection claim, the Board remanded the claim to the RO with detailed instructions as to the steps to be taken to obtain any medical records relating to treatment of the veteran at the correctional facility and to provide the incarcerated veteran with a VA examination as to the etiology of the hand and knee disabilities for which he claimed service connection.<sup>57</sup>

With regard to the medical examination, the Board instructed the RO to first try to afford the veteran a VA examination at a VA facility outside of the prison, and then, if this was not possible, to attempt to arrange for an examination at the prison.<sup>58</sup> The Board noted that cooperation with the Virginia Department of Corrections would be necessary in carrying out the remand instructions.<sup>59</sup> On remand, the RO contacted the correctional facility where the veteran was incarcerated and was informed that the veteran would be unable to leave the correctional facility to receive an examination.<sup>60</sup> The RO asked if a VA examiner would be able to conduct an examination at the correctional facility, but received no response.<sup>61</sup>

With regard to the medical records, the veteran provided authorization for the release of his records from the state department of corrections, and the RO sent a letter to the correctional facility at which the veteran was incarcerated.<sup>62</sup> The RO's letter was addressed generally to the prison's post office box, and it did not receive a response.<sup>63</sup> The RO subsequently sent a second request for medical records with the same address but with the added heading of "medical record," and again did not receive a response.<sup>64</sup>

After the case was returned to the Board, the Board denied the claims, concluding that the development requested in the Board's prior remand had "been completed to the extent possible."<sup>65</sup>

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<sup>57</sup> *Mercurio*, 2006 WL 3200829, at \*1.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*2.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

In vacating the Board’s decision, Judge Hagel noted that VA had conceded that a remand was required for compliance with the Board’s initial remand instruction to arrange for a VA examination at the correctional facility.<sup>66</sup> Judge Hagel cited *Bolton* and *Wood* in agreeing with the parties that such a remand was required and noted that the RO failed to follow up on its inquiries as to how to arrange for a VA examination at the correctional facility.<sup>67</sup> Judge Hagel ordered the Board to instruct the RO to expend further efforts to schedule the examination at the correctional facility and to document such efforts.<sup>68</sup> Judge Hagel specified that the RO should determine which state official had authority to respond to its request and obtain a definitive answer from that official.<sup>69</sup> As to the medical records, Judge Hagel noted that the veteran had specifically identified the correctional facility treatment records, and found that the RO had failed to comply with the VCAA’s requirement that, if VA is unable to obtain identified records, it must describe further action to be taken with respect to the claim.<sup>70</sup> In his conclusion, Judge Hagel instructed that, on remand, VA should determine whether the veteran was treated for the relevant conditions, obtain an answer as to whether records of such treatment exist, and make appropriate attempts to obtain them.<sup>71</sup> Judge Hagel noted that in order to perform these tasks, VA needed the cooperation of state officials, but concluded that “it is difficult to believe that state cooperation could not be obtained if inquiries were made to appropriate officials in more than a perfunctory manner.”<sup>72</sup>

Thus, VA’s concession in *Mercurio*, as in *Belton*, reflects that it has accepted that the duty to assist includes the duty to provide a medical examination to an incarcerated veteran when one is required under the VCAA. In addition, *Mercurio* reflects that the Court will expect VA to fully comply with the VCAA’s duty to assist in obtaining relevant medical records from the facility where an incarcerated veteran is held, and to work with state or prison officials both in obtaining such records and in providing medical examinations when warranted.

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at \*3.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (citing 38 U.S.C. § 5103A(b)(2)).

<sup>71</sup> *Id.* at \*4.

<sup>72</sup> *Id.*

The above Court cases reflect that, in fulfilling its duty to assist incarcerated veterans, VA is required to provide medical examinations when warranted under the VCAA's duty to assist, either by arranging for release of an incarcerated veteran to attend such examination or by making arrangements with the relevant state or prison official to conduct an examination at the facility where the veteran is incarcerated. VA, through its General Counsel, has indicated that it is fully aware of this responsibility and will concede that a remand for such an examination is warranted where the record does not contain evidence of substantial efforts to conduct such examination, including identifying and requesting the assistance of the appropriate state or prison official. The Court has also indicated that it will require VA to fully comply with the VCAA's duty to assist in obtaining relevant medical records in cases involving incarcerated veterans. Given the broad language used in *Wood*, cited with approval by both the *Bolton* and *Belton* courts, as well as by Judge Hagel in *Mercurio*, holding that incarcerated veterans are owed the same duty to assist as non-incarcerated veterans and that VA should tailor its assistance to the circumstances of the confinement of these veterans, the Court is likely to continue to be vigilant in its oversight of VA's actions with regard to its duty to assist incarcerated veterans.