### Section G. Benefits Under 38 U.S.C. 1151

#### Overview

|  |  |
| --- | --- |
| In This Section | This section contains the following topics: |

|  |  |
| --- | --- |
| **Topic** | **Topic Name** |
| 1 | General Information on Entitlement to Benefits Under 38 U.S.C. 1151 |
| 2 | Considering Specific Instances of Causation and Fault Under 38 U.S.C. 1151  |
| 3  | Procedures For Considering a Claim for Benefits Under 38 U.S.C. 1151  |
| 4 | Preparing a Rating Decision Under 38 U.S.C. 1151 |

#### 1. General Information on Entitlement to Benefits Under 38 U.S.C. 1151

|  |  |
| --- | --- |
| Introduction | This topic contains general information on entitlement to benefits under 38 U.S.C. 1151, including* basic criteria for entitlement to compensation under 38 U.S.C. 1151
* analysis of claims under 38 U.S.C. 1151
* determining whether additional disability exists under 38 U.S.C. 1151
* type of VA care considered under 38 U.S.C. 1151
* circumstances for VA care covered under 38 U.S.C. 1151
* vocational rehabilitation services covered under 38 U.S.C. 1151
* CWT services covered under 38 U.S.C. 1151
* definition of proximate cause
* establishing fault associated with proximate cause in 1151 claims
* determining when an event is not reasonably foreseeable in 1151 claims
* definitions of
* informed consent
* express consent
* implied consent
* establishing proximate cause associated with compensated work therapy (CWT) or vocational rehabilitation services in 1151 claims
* failure to diagnose or treat in 1151 claims
* the fault requirement and 38 CFR 3.358 vs. 38 CFR 3.361, and
* definition of hospitalization under 38 CFR 3.358 vs. hospital care under 38 CFR 3.361.
 |

|  |  |
| --- | --- |
| Change Date | December 17, 2015 |

|  |  |
| --- | --- |
| a. Basic Criteria for Entitlement to Compensation Under 38 U.S.C. 1151 | [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) provides for the payment of compensation for additional disability or death that is attributable to* Department of Veterans Affairs (VA) hospital care, medical or surgical treatment, or examination
* participation in vocational rehabilitation training, or
* participation in compensated work therapy (CWT).

Award compensation for qualifying additional disability or death under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) in the same manner as if the disability or death is service-connected (SC).***Reference***: For more information on entitlement to compensation or Dependency and Indemnity Compensation (DIC) under the provisions of [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see * [38 CFR 3.361](http://www.ecfr.gov/cgi-bin/text-idx?SID=3eda2294154393c1c0bab3e2b4821a52&node=se38.1.3_1361&rgn=div8) for claims filed on or after October 1, 1997, and
* for claims filed before October 1, 1997, see
* [38 CFR 3.358](http://www.ecfr.gov/cgi-bin/text-idx?SID=e5106d24d26bc42d6456f95d44e09227&node=se38.1.3_1358&rgn=div8), and
* [VAOPGCPREC 99-90](http://www.va.gov/ogc/docs/1990/PREC_99-90.doc).
 |

|  |  |
| --- | --- |
| **b. Analysis of Claims Under 38 U.S.C. 1151** | Claims for compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) require a five part analysis. The table below describes the facts that must be established in order to grant compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html).  |

|  |  |  |
| --- | --- | --- |
| **Element** | **Facts to be Established** | **References** |
| 1 | Additional disability or death has occurred. | For more information on determining whether additional disability has occurred, see M21-1, Part IV, Subpart ii, 2.G.1.c. |
| 2 | Additional disability or death is not due to * willful misconduct, or
* continuation or natural progression of disease or injury.
 | For more information on * willful misconduct, see
* [38 CFR 3.1(n)](http://www.ecfr.gov/cgi-bin/text-idx?SID=3eda2294154393c1c0bab3e2b4821a52&node=se38.1.3_11&rgn=div8), and
* M21-1, Part III, Subpart v, 1.D, and
* determining that the additional disability or death was not due to continuation or natural progression of disease or injury, see M21-1, Part IV, Subpart ii, 2.G.1.o.
 |
| 3 | Additional disability or death is caused by* VA care
* participation in vocational rehabilitation, or
* participation in CWT.
 | For more information on * VA care covered under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see M21-1, Part IV, Subpart ii, 2.G.1.d
* Vocational rehabilitation covered under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see M21-1, Part IV, Subpart ii, 2.G.1.f
* CWT covered under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see M21-1, Part IV, Subpart ii, 2.G.1.g, and
* establishing cause in claims under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see M21-1, Part IV, Subpart ii, 2.G.1.h.
 |
| 4 | If VA care is the cause of disability or death, the evidence must establish that* fault was involved, or
* the injury or death resulted from an event not reasonably foreseeable.
 | For more information on * establishing fault in [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) claims, see M21-1, Part IV, Subpart ii, 2.G.1.i-j
* determining whether an injury or death resulted from an event not reasonably foreseeable, see M21-1, Part IV, Subpart ii, 2.G.1.k, and
* changes in the fault requirement resulting from*Public Law(PL)* *104-204 Section 422* effective October 1, 1997, see M21-1, Part IV, Subpart ii, 2.G.1.q.
 |
| 5 | The circumstances and/or location in which the disability or death was incurred are covered under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html). | For more information on circumstances or locations in which disability or death is covered under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) for * VA care, see M21-1, Part IV, Subpart ii, 2.G.1.e
* vocational rehabilitation, see M21-1, Part IV, Subpart ii, 2.G.1.f, and
* CWT see M21-1, Part IV, Subpart ii, 2.G.1.g.
 |

|  |  |
| --- | --- |
| c. Determining Whether Additional Disability Exists Under 38 U.S.C. 1151 | To determine whether a Veteran has incurred additional disability under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), compare the Veteran’s condition immediately before the beginning of the VA medical care, training, or CWT program on which the claim is based to his/her condition afterwards.Each body part should be compared separately.***Note***: Per [VAOPGCPREC 01-99](http://www.va.gov/ogc/docs/1999/prc1-99.doc), VA may pay compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) for psychiatric disability incurred or aggravated as a result of VA hospitalization, medical or surgical treatment, examination, or vocational rehabilitation. ***Reference***: For more information on determining whether a Veteran has incurred additional disability, see [38 CFR 3.361(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=3eda2294154393c1c0bab3e2b4821a52&node=se38.1.3_1361&rgn=div8). |

|  |  |
| --- | --- |
| **d. Type of VA Care Considered Under 38 USC 1151** | For the purposes of [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), the types of VA care that can cause the disability or death include* hospital care
* medical or surgical treatment, or
* examination.

Refer to the table below for more information on these types of VA care.  |

|  |  |  |
| --- | --- | --- |
| **Type of Care** | **Definition** | **References** |
| Hospital care | The term ***hospital care*** encompasses, at a minimum, services unique to the hospitalization of patients. Whether there was hospital care for the purpose of [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) depends on a variety of factors, including the* nature of services
* degree of VA control over patient freedom
* mental and physical condition of patients, and
* foreseeability of potential harm.
 | For more information on* the definition of hospital care, see
* [38 CFR 3.361(f)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=0fd4caebac16aaa1cb35650ed0388321&mc=true&node=se38.1.3_1361&rgn=div8)
* [*Bartlett v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmb)*,* 24 Vet. App. 328 (2011)
* [*Viegas v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmv), 705 F.3d 1374 (Fed.Cir. 2013)
* [*Mangham v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm)*,* 23 Vet.App. 284, 289 (2009), and
* [VAOPGCPREC 01-99](http://www.va.gov/ogc/docs/1999/prc1-99.doc), and
* the difference between hospitalization under [38 CFR 3.358](http://www.ecfr.gov/cgi-bin/text-idx?SID=f67e3d5922c0241ec00b8dade00a4a2e&mc=true&node=se38.1.3_1358&rgn=div8) and hospital care under [38 CFR 3.361](http://www.ecfr.gov/cgi-bin/text-idx?SID=f67e3d5922c0241ec00b8dade00a4a2e&mc=true&node=se38.1.3_1361&rgn=div8), see M21-1, Part IV, Subpart ii, 2.G.1.r.
 |
| Medical or surgical treatment | The term ***treatment*** is defined as * the institution of measures or the giving of remedies designed to cure a disease, *Stedman’s Medical Dictionary* 1320 (3rd ed. 1972), or
* the management and care of a patient for the purpose of combating disease or disorder. *Dorland’s Illustrated Medical Dictionary* 1736 (28th ed. 1994).

For the purpose of authorizing compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), the term medical or surgical treatment applies to disability caused by procedures or remedies administered by VA for the purposes of combating a disease or injury.  | For more information on the definition of medical or surgical treatment see [VAOPGCPREC 01-99](http://www.va.gov/ogc/docs/1999/prc1-99.doc). |
| Examination | The term ***examination*** is defined as * any investigation made for the purpose of diagnosis, *Stedman’s Medical Dictionary* 440 (3d ed. 1972), or
* inspection, palpitation, auscultation, percussion, or other means of investigation, especially for diagnosing disease.
 | For more information on the definition of examination, see * [VAOPGCPREC 01-99](http://www.va.gov/ogc/docs/1999/prc1-99.doc)
* [*Loving v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/DADS/2005dads/Loving.doc), 19 Vet.App. 96, 102-03 (2005), and
* [*Sweitzer v. Brown*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bms), 5 Vet.App. 503 (1993).
 |

|  |
| --- |
| ***Reference***: For more information on determining whether the circumstances and/or location of hospital, medical or surgical treatment, or examination is covered under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see M21-1, Part IV, Subpart ii, 2.G.1.e. |

|  |  |
| --- | --- |
| **e. Circumstances for VA Care Covered Under 38 U.S.C. 1151** | VA hospital care, medical or surgical treatment, or examination must be furnished to the Veteran* by a VA employee, and/or
* in a VA facility.

Per [38 CFR 3.361](http://www.ecfr.gov/cgi-bin/text-idx?SID=f9742e644e244a44666181ea37670277&mc=true&node=se38.1.3_1361&rgn=div8), a VA employee is defined as an individual* who is appointed by the Department in the civil service under title 38 United States Code, or title 5, United States Code, as an employee as defined in [5 U.S.C. 2105](https://www.law.cornell.edu/uscode/text/5/2105)
* who is engaged in furnishing hospital care, medical or surgical treatment, or examinations under authority of law, and
* whose day-to-day activities are subject to supervision by the Secretary of VA.

Per [38 CFR 3.361](http://www.ecfr.gov/cgi-bin/text-idx?SID=f9742e644e244a44666181ea37670277&mc=true&node=se38.1.3_1361&rgn=div8), a VA facility is a facility over which the Secretary of VA has direct jurisdiction. The following activities are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility within the meaning of [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html)* hospital care or medical services furnished under a contract made under [38 U.S.C. 1703](https://www.law.cornell.edu/uscode/text/38/1703)
* nursing home care furnished under [38 U.S.C. 1720](https://www.law.cornell.edu/uscode/text/38/1720),
* hospital care or medical services, including examination, provided under [38 U.S.C. 8153](https://www.law.cornell.edu/uscode/text/38/8153) in a facility over which the Secretary does not have direct jurisdiction, or
* domiciliary care, per [*Mangham v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm)*,* 23 Vet.App. 284, 289 (2009).

***Important***: For the purposes of compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), the disability or death must result from the medical treatment or examination itself and not from independent causes occurring coincidentally with the treatment or examination.***Note***: Disability compensation may not be paid under [38 U.S.C. 1151](https://www.law.cornell.edu/uscode/text/38/1151) for additional disability incurred as a result of a medical procedure conducted by a non-VA employee in a non-VA facility even if a VA physician had provided advice or recommendation concerning such procedure to the Veteran. See[*Ollis v.* *McDonald*,](https://a.next.westlaw.com/Document/I7332408d7dba11e5a795ac035416da91/View/FullText.html?listSource=Foldering&originationContext=clientid&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0) 2015 WL 6507830 (Oct. 15, 2015). ***Reference***: For more information on determining whether disability or death results from independent causes occurring coincident with the treatment or examination, see [VAOPGCPREC 01-99](http://www.va.gov/ogc/docs/1999/prc1-99.doc).  |

|  |  |
| --- | --- |
| **f. Vocational Rehabilitation Services Covered Under 38 U.S.C. 1151** | Compensation will be paid for disability or death that is proximately caused by training and rehabilitation services provided as part of an approved rehabilitation program under [38 U.S.C. Chapter 31](http://www.law.cornell.edu/uscode/html/uscode38/usc_sup_01_38_10_III_20_31.html).***Note***: This includes training and rehabilitation services provided by VA under [38 U.S.C. 3115](https://www.law.cornell.edu/uscode/text/38/3115).***Reference***: For more information on establishing causation for disability or death incurred due to training and rehabilitation services, see* [38 CFR 3.361(d)(3)](http://www.ecfr.gov/cgi-bin/text-idx?SID=9934debb35b9391d5d6729d0f33b85b2&node=se38.1.3_1361&rgn=div8), and
* M21-1, Part IV, Subpart ii, 2.G.1.o.
 |

|  |  |
| --- | --- |
| **g. CWT Services Covered Under 38 U.S.C. 1151** | Compensation will be paid for disability or death that is proximately caused by participation in a CWT program under [38 U.S.C. 1718](https://www.law.cornell.edu/uscode/text/38/1718).***Note***: *PL 106-419* authorized the grant of compensation for disability or death proximately caused by participation in CWT effective November 1, 2000. ***Reference***: For more information on establishing causation for disability or death incurred due to participation in a CWT program, see* [38 CFR 3.361(d)(3)](http://www.ecfr.gov/cgi-bin/text-idx?SID=9934debb35b9391d5d6729d0f33b85b2&node=se38.1.3_1361&rgn=div8), and
* M21-1, Part IV, Subpart ii, 2.G.1.o.
 |

|  |  |
| --- | --- |
| **h. Definition: Proximate Cause** | ***Proximate*** ***cause***  * is the action or event that directly caused the disability or death, as distinguished from a remote contributing cause, and
* means a direct and sufficient relationship exists between an event or act and a result.

***Important***: When considering whether proximate cause between an event and a subsequent disability or death exists, consider the following.* Evidence showing that a Veteran received VA medical care, treatment, or examination and that the Veteran has an additional disability or died does not establish proximate cause.
* Although the word “proximate” may connote immediacy, and although proximate causation may be more clear when the result follows immediately from an act or event, immediacy is not a precondition to finding proximate cause.
* A disability must result from medical treatment or examination itself and not from independent causes occurring coincident with the treatment or examination or from the process of reporting for the examination.
* Causation may also be established when a disability arises as a result of VA’s installation and maintenance of the equipment necessary for such treatment to occur.
* Benefits under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) cannot be paid for continuance or natural progress of a disease or injury.

***References***: For more information on * proximate cause, see [38 CFR 3.361(d)](http://www.ecfr.gov/cgi-bin/text-idx?SID=9934debb35b9391d5d6729d0f33b85b2&node=se38.1.3_1361&rgn=div8)
* considering disabilities resulting from VA facilities or arising due to other events occurring at the time of VA care, see
* [*Mangham v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm)*,* 23 Vet.App. 284, 289 (2009)
* [*Bartlett v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmb)*,* 24 Vet. App. 328 (2011)
* [*Viegas v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmv), 705 F.3d 1374 (Fed.Cir. 2013)
* [*Loving v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/DADS/2005dads/Loving.doc), 19 Vet.App. 96, 102-03 (2005)
* [*Sweitzer v. Brown*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bms), 5 Vet.App. 503 (1993), and
* [VAOPGCPREC 01-99](http://www.va.gov/ogc/docs/1999/prc1-99.doc)
* proximate cause associated with claims based on additional disability or death caused by provision of training and rehabilitation services or a CWT program, see M21-1, Part IV, Subpart ii, 2.G.1.o
* the fault requirement for proximate cause due to care provided by VA, see M21-1, Part IV, Subpart ii, 2.G.1.i-j, and
* determinations pertaining to continuance or natural progression of a disease, see M21-1, Part IV, Subpart ii, 2.G.1.p.
 |

|  |  |
| --- | --- |
| i. Fault Requirement for Proximate Cause Due VA Care for 1151 Claims | For a grant of compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), the evidence must show that the proximate cause of the disability or death resulting from VA hospital care, medical or surgical treatment, or examination was the result of* an instance of fault on the part of VA, such as
* careless
* negligence
* lack of proper skill, or
* error in judgment, or
* an event not reasonably foreseeable.

***Note***: The requirement for a showing of fault or that an event was not reasonably foreseeable applies only to claims received on or after October 1, 1997. ***References***: For more information on * the criteria for establishing fault, see
* M21-1, Part IV, Subpart ii, 2.G.1.j, and
* [*Mangham v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm)*,* 23 Vet.App. 284, 289 (2009)
* determining whether an event was not reasonably foreseeable, see M21-1, Part IV, Subpart ii, 2.G.1.k, and
* the change in the threshold requirement for proximate cause effective October 1, 1997, see M21-1, Part IV, Subpart ii, 2.G.1.q.
 |

|  |  |
| --- | --- |
| **j. Establishing Fault Associated with Proximate Cause in 1151 Claims** | To establish that fault (including carelessness, negligence, lack of proper skill or error in judgment) on the part of VA in furnishing hospital care, medical or surgical treatment, or examination was the proximate cause of a Veteran’s disability or death, the evidence must show that VA* failed to exercise the degree of care that would have been expected of a reasonable health-care provider, or
* furnished the care without the Veteran’s or Veteran’s representative’s informed consent.

***Reference***: For more information on informed consent, see M21-1, Part IV, Subpart ii, 2.G.1.l. |

|  |  |
| --- | --- |
| **k. Determining When an Event Is Not Reasonably Foreseeable in 1151 Claims** | An event is not reasonably foreseeable if it is not one of the risks that is or would be disclosed as a part of informed consent procedures. * The incident need not be completely unimaginable, but it must be one that a reasonable health care provider would not consider an ordinary risk of the treatment provided.
* The correct standard for determining whether an event is reasonably foreseeable is what a *reasonable health care provide*r would have considered to be an *ordinary risk of treatment* that would be disclosed in connection with the informed consent procedures.
* These consent procedures require the primary health care provider to explain the reasonably foreseeable risks associated with the surgery or treatment being provided.
* A treating physician’s subjective individual determination on foreseeability is not dispositive.

***References***: For more information on * informed consent, see
* [38 CFR 17.32](http://www.ecfr.gov/cgi-bin/text-idx?SID=d9f73a4061ddae1dafebd25dc25b08a5&node=se38.1.17_132&rgn=div8)
* M21-1, Part IV, Subpart ii, 2.G.1.l, and
* determining the foreseeability of an event, see [*Schertz v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/DADS/2013dads/Schertz.docx), 25 Vet. App. 362 (2014).
 |

|  |  |
| --- | --- |
| l. Definition: Informed Consent | ***Informed consent*** generally means agreement by a patient, or in some cases a surrogate, to treatment or care after having been provided with information. The informed consent process typically has the following main elements:* a conversation between the provider and the patient and/or surrogate, covering matters such as
* the health condition that is the impetus for the treatment
* a description of the treatment
* the expected benefit
* the reasonably foreseeable associated risks
* complications or side effects, and
* alternatives including the anticipated results of not pursuing treatment
* an opportunity for questions from the patient/surrogate
* verbal expression by the patient/surrogate of understanding and permission or assent to proceed, and
* documentation of the process and outcome.

Informed consent can be express or implied.***Notes***: * In deciding if there was informed consent for 38 U.S.C. 1151 purposes, [38 CFR 3.361(d)](http://www.ecfr.gov/cgi-bin/text-idx?SID=3eda2294154393c1c0bab3e2b4821a52&node=se38.1.3_1361&rgn=div8) only requires VA to determine whether health care providers *substantially complied* with [38 CFR 17.32](http://www.ecfr.gov/cgi-bin/text-idx?SID=d9f73a4061ddae1dafebd25dc25b08a5&node=se38.1.17_132&rgn=div8). Minor deviations that are immaterial under the facts of the case will not prevent a finding of informed consent.
* In most cases, the informed consent process in [38 CFR 17.32](http://www.ecfr.gov/cgi-bin/text-idx?SID=d9f73a4061ddae1dafebd25dc25b08a5&node=se38.1.17_132&rgn=div8) merely needs to be appropriately documented in the health record, although certain procedures require “signature consent” where consent and a signature are provided on a VA-authorized consent form.
* *PL 104-204 Section 422* amended the consent requirement, previously included in [38 CFR 3.358(c)(3)](http://www.ecfr.gov/cgi-bin/text-idx?SID=2dd04442148a3884b9456db919f0c245&mc=true&node=se38.1.3_1358&rgn=div8), to include a requirement for informed consent as specified in [38 CFR 3.361(d)(1)(ii)](http://www.ecfr.gov/cgi-bin/text-idx?SID=3eda2294154393c1c0bab3e2b4821a52&node=se38.1.3_1361&rgn=div8).

***References***: For more information on * VA’s informed consent procedures, see
* [38 CFR 17.32](http://www.ecfr.gov/cgi-bin/text-idx?SID=d9f73a4061ddae1dafebd25dc25b08a5&node=se38.1.17_132&rgn=div8)
* [*Halcomb v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmh), 23 Vet.App. 234 (2009), and
* [*McNair v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), 25 Vet.App. 98 (2011)
* express consent, see M21-1, Part IV, Subpart ii, 2.G.1.m, and
* implied consent, see M21-1, Part IV, Subpart ii, 2.G.1.n.
 |

|  |  |
| --- | --- |
| **m. Definition: Express Consent** | ***Express consent*** is a type of informed consent that has been clearly stated either orally or in writing.  |

|  |  |
| --- | --- |
| **n. Definition: Implied Consent** | ***Implied consent*** is a type of informed consent that may be inferred from the circumstances in the case. [38 CFR 17.32](http://www.ecfr.gov/cgi-bin/text-idx?SID=d9f73a4061ddae1dafebd25dc25b08a5&node=se38.1.17_132&rgn=div8) permits practitioners to provide necessary medical care in emergency situations without the patient’s/surrogate’s express consent when * immediate medical care is necessary to preserve life or prevent serious impairment of the health of the patient or others
* the patient is unable to consent, and
* the practitioner determines that
* the patient has no surrogate, or
* waiting to obtain consent from the patient’s surrogate would increase the hazard to the life or health of the patient or others.
 |

|  |  |
| --- | --- |
| **o. Establishing Proximate Cause Associated With CWT or Vocational Rehabilitation Services in 1151 Claims** | To establish proximate cause of additional disability or death associated with the provision of training and rehabilitation services or a CWT program, the evidence must show* the Veteran was participating in an essential activity or function of the training, services, or CWT program
* the training, services, or CWT was provided or authorized by VA, and
* the Veteran’s participation in the essential activity or function proximately caused the disability or death.

***Important***: * It is not necessary that the evidence shows that VA approved the specific activity or function resulting in disability or death as long as the activity or function is generally accepted as being a necessary component of the training, services, or CWT program that VA provided or authorized.
* Injuries sustained only as a result of pursuing vocational rehabilitation training to achieve employability are subject to compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html). Per [VAOPGCPREC 14-97](http://www.va.gov/ogc/docs/1997/Prc14-97.doc), injuries sustained as a result of engaging in post-training employment are not subject to compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html).

***References***: For more information on * the definition of proximate cause, see M21-1, Part IV, Subpart ii, 2.G.1.h
* vocational rehabilitation activities covered under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see M21-1, Part IV, Subpart ii, 2.G.1.f, and
* CWT activities covered under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see M21-1, Part IV, Subpart ii, 2.G.1.g.
 |

|  |  |
| --- | --- |
| **p. Failure to Diagnose or Treat in 1151 Claims** | Compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) is not payable when a disability or death is the result of continuation or natural progression of a disease or injury. Benefits under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) are authorized where VA improperly fails to diagnose or provide treatment for a preexisting disease if it is determined that the Veteran’s disability is greater than it would have been with proper diagnosis and treatment. A grant of benefits under this standard requires the following findings of fact.* VA failed to diagnose and/or treat a preexisting disease or injury.
* A physician exercising the degree of skill and care ordinarily required of the medical profession reasonably should have diagnosed the condition and rendered treatment.
* Medical evidence is ordinarily required in order to establish that a physician exercising the degree of skill and care ordinarily required of the medical profession reasonably should have diagnosed the condition and rendered treatment.
* As an exception, no additional specific medical evidence is required if the alleged failure to exercise ordinary skill and care is one which would be readily apparent to a layperson.
* VA may assist claimants by obtaining a medical opinion on this issue when deemed necessary to adjudication of a claim, and
* The Veteran suffered disability or death which probably would have been avoided if proper diagnosis and treatment had been rendered.

***Note***: Compensation for the continuation or natural progress of preexisting disease or injury due to VA’s failure to diagnose or treat a condition does not apply in the context of vocational rehabilitation training or CWT because vocational rehabilitation does not involve medical services. ***Reference***: For more information on determining whether an injury is due to continuation or natural progression of a disease or injury for [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) purposes, see * [*Roberson (C.) v. Shinseki*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVC/2001dec/FedCirc/Roberson00-7009.doc)*,* 607 F.3d 809-817 (2010), and
* [VAOPGCPREC 05-01](http://www.va.gov/ogc/docs/2001/prc05-2001.doc).
 |

|  |  |
| --- | --- |
| **q. The Fault Requirement and 38 CFR 3.358 Vs. 38 CFR 3.361** | In the case of [*Gardner v****.*** *Derwinski*](http://vbaw.vba.va.gov/bl/21/advisory/DADS/1991dads/Gardner.doc), 1 Vet. App. 584 (1991), 513 U.S. 115(1994), the US Supreme Court held that [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html)imposed only a causation requirement and did not authorize VA to establish an additional requirement for a showing of fault. *PL 104-204 Section 422* amended the causation standard for claims under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) to include a fault element.  * Prior to October 1, 1997, a showing of VA fault or failure to exercise reasonable skill and care is not an element of establishing causation for entitlement to [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) benefits. Statutory language imposed the requirement of a causal connection only between the injury or aggravation of an injury and hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation. This standard of causation is discussed in [38 CFR 3.358](http://www.ecfr.gov/cgi-bin/text-idx?SID=f67e3d5922c0241ec00b8dade00a4a2e&mc=true&node=se38.1.3_1358&rgn=div8).
* On or after October 1, 1997, an additional fault element was added under [38 CFR 3.361](http://www.ecfr.gov/cgi-bin/text-idx?SID=f67e3d5922c0241ec00b8dade00a4a2e&mc=true&node=se38.1.3_1361&rgn=div8), requiring that the evidence show that additional disability or death was caused by either
* an event not reasonably foreseeable, or
* carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault.

***Reference***: For more information on the revision of causation to include the addition of the fault requirement, see* [*Gardner v****.*** *Derwinski*](http://vbaw.vba.va.gov/bl/21/advisory/DADS/1991dads/Gardner.doc), 1 Vet. App. 584 (1991), 513 U.S. 115(1994)
* ***PL 104-204 Section 422*, and**
* [VAOPGCPREC 05-01](http://www.va.gov/ogc/docs/2001/prc05-2001.doc).
 |

|  |  |
| --- | --- |
| **r. Definition of Hospitalization under 38 CFR 3.358 Vs. Hospital Care Under 38 CFR 3.361** | *PL 104-204 Section 422* changed the term *hospitalization* to *hospital care* effective October 1, 1997.* ***Hospitalization***, as included in [38 CFR 3.358(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=f67e3d5922c0241ec00b8dade00a4a2e&mc=true&node=se38.1.3_1358&rgn=div8), is not restricted to activities specifically related to care and treatment but encompasses the entire process of maintaining or lodging a patient during the period of hospitalization.
* ***Hospital care***, as included in [38 CFR 3.361(a)(2)(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=f67e3d5922c0241ec00b8dade00a4a2e&mc=true&node=se38.1.3_1361&rgn=div8), encompasses, at a minimum, services unique to the hospitalization of patients. Whether there was hospital care for the purpose of [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) depends on a variety of factors, including the
* nature of services
* degree of VA control over patient freedom
* mental and physical condition of patients, and
* foreseeability of potential harm.

***Reference***: For more information on the definition of and distinction between hospitalization and hospital care, see * [VAOPGCPREC 07-97](http://www.va.gov/ogc/docs/1997/PRC07-97.DOC), and
* M21-1, Part IV, Subpart ii, 2.G.1.d.
 |

#### 2. Considering Specific Instances of Causation and Fault Under 38 U.S.C. 1151

|  |  |
| --- | --- |
| Introduction | This topic contains information on considering specific instances of causation and fault, including1151 disability resulting from * an act of omission
* premature discharge
* medication
* Veteran’s failure to follow medical instructions, and
* error in judgment.
 |

|  |  |
| --- | --- |
| Change Date | May 14, 2015 |

|  |  |
| --- | --- |
| **a. 1151 Disability Resulting From an Act of Omission** | Entitlement to compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) may be based on acts of omission as well as acts of commission in providing hospital care, medical or surgical treatment, or examination. * An act of commission occurs when an action results in disability or death.
* An act of omission under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) occurs when VA fails to perform one of the following actions and additional disability or death results:
* timely diagnose or properly treat a disability, thereby causing increased disability or death, and/or
* obtain informed consent from the Veteran or the Veteran’s representative prior to treatment.

***References***: For more information on* failure-to-diagnose claims under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see[*Roberson (C.) v. Shinseki*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVC/2001dec/FedCirc/Roberson00-7009.doc)*,* 607 F.3d 809-817 (2010)
* acts of omission, see [VAOPGCPREC 05-01](http://www.va.gov/ogc/docs/2001/prc05-2001.doc)
* informed consent, see
* M21-1, Part IV, Subpart ii, 2.G.1.k, and
* [38 CFR 17.32](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKI/PART17/S17_32.DOC), and
* the natural progression of a disease or injury, see
* [38 CFR 3.361(c)(2)](http://www.ecfr.gov/cgi-bin/text-idx?SID=a8af408e8e6c5e3af4047f2a36ed05ac&node=se38.1.3_1361&rgn=div8), and
* M21-1, Part IV, Subpart ii, 2.G.1.o.
 |

|  |  |
| --- | --- |
| b. 1151 Disability Resulting From Premature Discharge | Compensation may be payable under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) when a physician determines that a patient should be discharged from a hospital after a period of treatment, but the patient claims that the discharge* was too early, and
* led to a relapse and worsening of the disability.

Consider whether the timing of the discharge aggravated the disability beyond the level of natural progression. ***Notes***: * Development for medical records should include a request for a medical certificate indicating that the
* Veteran’s condition at discharge was not stable, and
* discharge was premature.
* A medical opinion may be necessary in such a case.
 |

|  |  |
| --- | --- |
| c. 1151 Disability Resulting From Medication | Compensation is payable under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) for any disability caused by medication that was prescribed by VA and taken or administered as prescribed, if the disability was directly due to* fault on the part of the VA, or
* an incident that could not have been reasonably foreseen.

***Example***: Compensation is payable under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) if* VA prescribed a medication at ten times the proper dosage, *and*
* additional permanent disability or death resulted from the erroneous prescription.
 |

|  |  |
| --- | --- |
| d. 1151 Disability Resulting From Veteran’s Failure to Follow Medical Instructions  | In some cases, the evidence will show that, following VA treatment or surgery, the Veteran * failed to follow post-treatment medical instructions, and
* incurred or aggravated a disability that would not have developed had he/she followed instructions.

In such cases, this failure may constitute an intercurrent cause, thereby *precluding* payment of benefits under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html). |

|  |  |
| --- | --- |
| **e. 1151 Disability Resulting From Error in Judgment** | Error in judgment, as used in [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), refers to errors involving negligence and does not encompass reasonable decisions regarding diagnosis and treatment merely because they later prove to have been incorrect. |

#### 3. Procedures For Considering a Claim for Benefits Under 38 U.S.C. 1151

|  |  |
| --- | --- |
| Introduction | This topic contains information on procedural elements for processing a claim for benefits under 38 U.S.C.1151, including* claims for benefits under 38 U.S.C. 1151
* entitlement to 1151 compensation vs. service connection
* disability secondary to an 1151 disorder
* 1151 disability based on aggravation
* paired organs or extremities and 38 U.S.C. 1151
* obtaining records in 1151 claims
* requesting medical opinions in 1151 claims, and
* obtaining an advisory opinion for 1151 claims.
 |

|  |  |
| --- | --- |
| **Change Date** | May 14, 2015 |

|  |  |
| --- | --- |
| a. Claims for Benefits under 38 U.S.C. 1151  | There is no application form specific to claims for [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) compensation. Subject to the general policies and procedures applicable to claims, accept a claim for [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) compensation when the claim is submitted on the appropriate standardized claim form for compensation benefits. ***Important***: Do not solicit a claim for [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) compensation where review of the evidence of record suggests or raises the possibility that the provisions of the statute may apply. ***References***: For more information on * soliciting claims based on evidence of record, see M21-1, Part III, Subpart iv, 6.B.5.a
* claims for benefits under [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see [38 CFR 3.154](http://www.ecfr.gov/cgi-bin/text-idx?SID=3eda2294154393c1c0bab3e2b4821a52&node=se38.1.3_1154&rgn=div8), and
* form requirements for claims, see M21-1, Part III, Subpart ii, 2.B.1.a-b.
 |

|  |  |
| --- | --- |
| b. Entitlement to 1151 Compensation vs. Service Connection | Although compensation or DIC is payable under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) as if the additional disability or death were SC, the additional disability or death is *not* actually SC. |

|  |  |
| --- | --- |
| c. Disability Secondary to an1151 Disorder  | Compensation is payable for disability that is secondary to a disability that has been granted under [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html).***Reference***: For more information on payment of compensation for disabilities secondary to 1151 disabilities, see [VAOPGCPREC 8-97](http://www.va.gov/ogc/docs/1997/Prc08-97.doc). |

|  |  |
| --- | --- |
| d. 1151 Disability Based on Aggravation  | Compensable for additional disability under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) exists where there is a non-service-connected (NSC), pre-existing condition that has been aggravated by * VA hospital care, medical or surgical treatment, examination, or
* participation in a course of vocational rehabilitation or a CWT program.

Use the table below to determine the appropriate evaluation to assign based on aggravation of a disability under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html). |

|  |  |
| --- | --- |
| Step | Action |
| 1 | Determine the disability percentage for current symptoms and findings based on applicable [38 CFR Part 4](http://www.ecfr.gov/cgi-bin/text-idx?SID=d90f6cb08c2677809f7c98cea88edf71&node=pt38.1.4&rgn=div5) criteria. |
| 2 | Determine the disability percentage prior to the treatment or examination, vocational rehabilitation, or participation in CWT that resulted in additional disability. |
| 3 | Subtract the percentage of disability reached in Step 2 from the percentage of disability reached in Step 1.***Notes***: * If the percentage of disability in Step 1 is 100, do not subtract the percentage of disability in Step 2, even if it is also 100.
* If a percentage of disability cannot be determined in Step 2, no subtraction may be made.
 |

|  |
| --- |
| ***Reference***: For more information on aggravation of disabilities under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see [VAOPGCPREC 4-01](http://www.va.gov/ogc/docs/2001/prc04-2001.doc). |

|  |  |
| --- | --- |
| e. Paired Organs or Extremities and 38 U.S.C. 1151 | Entitlement to compensation under [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) confers entitlement to compensation for paired organs or extremities under [38 U.S.C. 1160](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001160----000-.html) if the criteria for entitlement are otherwise met.Under [38 U.S.C. 1160](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001160----000-.html), the evaluations of paired organs or extremities are combined as if both were SC, even if one of the paired organs or extremities is compensable “as if” SC under [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html).***Reference***: For more information on special considerations for paired organs and extremities, see * M21-1, Part IV, Subpart ii, 3.C.1, and
* [VAOPGCPREC 73-90](http://www.va.gov/ogc/opinions/1990precedentopinions.asp).
 |

|  |  |
| --- | --- |
| **f. Obtaining Records in 1151 Claims** | Ensure that the following evidence has been obtained prior to deciding a claim for benefits under [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html):* records from a VA facility that provided hospital or other care alleged to have resulted in additional disability or death
* records of vocational rehabilitation services documenting incurrence of disability or death
* records of participation in CWT resulting in incurrence of disability or death, and/or
* any non-VA records pertaining to treatment for the injury or death identified by the Veteran or claimant, as directed in M21-1, Part I,1.C and M21-1, Part III, Subpart iii, 1.C.3.

***Reference***: For additional information on development required, including requests for VA records, for claims under [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see M21-1, Part IV, Subpart ii, 1.A.3. |

|  |  |
| --- | --- |
| g. Requesting Medical Opinions in 1151 Claims | To clarify whether the care, treatment, or examination at issue resulted in additional disability or death, it may be necessary to obtain* a medical opinion from a VA medical facility as shown in M21-1, Part III, Subpart iv, 3.A.9
* independent medical evidence, such as
* a medical statement provided by a regional office (RO) rating specialist who is a qualified medical professional, such as a physician, physician’s assistant, or registered nurse, and not a signatory to the rating, or
* information from a medical treatise, such as *The Merck Manual of Diagnosis and Therapy, Cecil Textbook of Medicine,* or *Physician’s Desk Reference (PDR)*, and/or
* an independent medical opinion under [38 CFR 3.328](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_328.DOC), but only when warranted by the medical complexity or controversy involved in the case.

The threshold for requesting an examination and/or opinion in a claim under [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) for a disability resulting from VA care is the same threshold as applies to regular claims for SC compensation benefits as described in [38 CFR 3.159(c)(4)](http://www.ecfr.gov/cgi-bin/text-idx?SID=ddbd086305fa28d8fc9d12ec0aa5d34a&mc=true&node=se38.1.3_1159&rgn=div8). Request an examination or medical opinion if the evidence of record does not contain sufficient competent medical evidence to decide the claim but* contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability, and
* establishes that the claimed additional disability may be causally associated with VA hospital care, medical or surgical treatment, or examination.

***Important***: As discussed in [*McLendon v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/DADS/2006dads/Mclendon.doc), 20 Vet.App. 79 (2006), the threshold for providing a VA examination must be low. Do not require that the evidence of record prove a nexus between the asserted injury or event and the current disability or competent medical evidence of fault before providing the Veteran with a VA examination or opinion.***References***: For more information on * obtaining independent medical opinions under [38 CFR 3.328](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_328.DOC), see M21-1, Part III, Subpart iv, 3.A.9.f through i
* requesting medical opinions for claims under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see M21-1, Part III, Subpart iv, 3.A.9.h
* the legal standard for determining whether to schedule and examination or opinion in connection with a [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) claim, see [*Trafter v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmt), 26 Vet.App. 267 (2013), and
* the use of medical treatise information for the purpose of establishing nexus or causation, see [*Sacks v. West*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms), 11 Vet.App. 314 (1998).
 |

|  |  |
| --- | --- |
| h. Obtaining an Advisory Opinion for 1151 Claims | Submit unusually difficult cases involving claims for compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) to VA Central Office (CO) (211B) for an advisory opinion.***Reference***: For more information on CO guidance and advisory opinions, see M21-1, Part III, Subpart vi, 1. |

#### 4. Preparing a Rating Decision Under 38 U.S.C. 1151

|  |  |
| --- | --- |
| Introduction | This topic contains information on preparing a rating decision involving a claim for benefits under 38 U.S.C.1151, including* considering direct and presumptive SC in 1151 claims
* preparing the rating decision for 1151 grants
* preparing the rating decision for 1151 denials
* assigning an effective date for 1151 compensation
* combining the disability ratings of qualifying 1151 disabilities and SC disabilities
* possible eligibility for ancillary benefits based on qualifying 1151 disability, and
* ancillary benefits not available by reason of a qualifying 1151 disability.
 |

|  |  |
| --- | --- |
| Change Date | May 14, 2015 |

|  |  |
| --- | --- |
| a. Considering Direct and Presumptive SC in 1151 Claims | Do not put direct or presumptive service connection (SC) at issue if the only issue raised is compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) and the disability is clearly one that arose many years after service or coincident with treatment.***Note***: Undertake development and consider awarding SC on a presumptive basis if the disability in question arose within the applicable presumptive period following release from active duty. |

|  |  |
| --- | --- |
| **b. Preparing the Rating Decision for 1151 Grants** | System-generated text is legally adequate for most grants of benefits under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html). Grants of compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) can be completed in short form rating narrative format.* No additional text is necessary for the automated decision letter (ADL) document when ADL procedures can be used.
* Supplement the rating narrative language with a brief discussion of the event that resulted in additional injury or death.

***Important***: Although the regulatory standard for a finding of fault lists *carelessness, negligence, lack of proper skill [and] error in judgment* as falling under the umbrella of fault-related fact patterns, avoid using words like *negligence* or *malpractice,* particularly if those words do not appear verbatim in the evidence of record, as use of those terms may result in unintended impacts on associated tort claims. ***References***: For more information on * rating decisions completed in ADL format, see M21-1, Part III, Subpart iv, 6.F, and
* rating decisions completed in short form rating narrative format, see M21-1, Part III, Subpart iv, 6.C.6.
 |

|  |  |
| --- | --- |
| **c. Preparing the Rating Decision for 1151 Denials** | Supplement system-generated text with text that adequately explains the basis for denial of benefits under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html). Denials of compensation under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) must be completed in long form rating narrative format.* For the ADL document, briefly summarize the basis for the denial to include relevant medical opinions and/or findings of fact.
* For the rating narrative, include a more thorough discussion of the basis for the denial and facts of the case. Particularly
* discuss the event claimed to have resulted in additional disability or death
* discuss all relevant medical opinions to include a discussion of
* whether causation is shown
* whether, if the claim is based on VA care, fault is indicated, and
* discuss all relevant findings of fact such as
* whether the care was in a VA facility
* whether the care was provided by a VA employee, and/or
* whether the training was a type of covered vocational rehabilitation or CWT activity.

***Important***: Avoid statements that are uncorroborated or speculative. Cite the evidence and rationale upon which the conclusion is based.***References***: For more information on * rating decisions completed in ADL format, see M21-1, Part III, Subpart iv, 6.F
* long form rating narrative format, see M21-1, Part III, Subpart iv, 6.C.7, and
* evaluating medical evidence for a rating decision, see M21-1, Part III, Subpart iv, 5.5.
 |

|  |  |
| --- | --- |
| d. Assigning an Effective Date for 1151 Compensation | Under [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), the effective date of entitlement to * compensation is either the
* date of the injury or aggravation, if the claim is received within one year of the incident, or
* date of receipt of the claim, and
* DIC is either the
* first day of the month in which the Veteran’s death occurred, if a claim is received within one year following the date of death, or
* date of receipt of the claim.

***Reference***: For more information on determining effective dates under [38 U.S.C. 1151](http://law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), see [38 CFR 3.400(i)](http://www.ecfr.gov/cgi-bin/text-idx?SID=a8af408e8e6c5e3af4047f2a36ed05ac&node=se38.1.3_1400&rgn=div8). |

|  |  |
| --- | --- |
| e. Combining the Disability Ratings of Qualifying 1151 Disabilities and SC Disabilities | Combine the disability rating(s) assigned to disabilities for which compensation is payable under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) with the disability ratings assigned to SC disabilities, as if the former were SC.If two or more disabilities (at least one being a qualifying disability under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html)) are rated zero percent disabling but interfere with the Veteran’s employability, the assignment of a 10-percent disability rating under [38 CFR 3.324](http://www.ecfr.gov/cgi-bin/text-idx?SID=a8af408e8e6c5e3af4047f2a36ed05ac&node=se38.1.3_1324&rgn=div8) is acceptable.***Note***: [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) disabilities may serve as the basis of an individual unemployability (IU) award. |

|  |  |
| --- | --- |
| f. Possible Eligibility for Ancillary Benefits Based on Qualifying 1151 Disability  | A Veteran with a qualifying disability under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html) may also be eligible for * a clothing allowance
* specially adapted housing benefits, including a special housing adaptation award, and
* automobile or adaptive equipment benefits.

***Reference***:For more information on ancillary benefits, see* M21-1, Part IX, Subpart i
* M21-1, Part III, Subpart iv, 6.B.2, and
* M21-1, Part IV, Subpart iii, 3.E.5.
 |

|  |  |
| --- | --- |
| g. Ancillary Benefits Not Available by Reason of a Qualifying 1151 Disability  | The following ancillary benefits are not available by reason of a qualifying disability under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html): * Service Disabled Veteran (RH) Insurance
* waiver of the loan guaranty funding fee
* [38 U.S.C. Chapter 31](http://www.law.cornell.edu/uscode/html/uscode38/usc_sup_01_38_10_III_20_31.html) education benefits
* [38 U.S.C. Chapter 35](http://www.law.cornell.edu/uscode/html/uscode38/usc_sup_01_38_10_III_20_35.html) education benefits
* the 10-point Civil Service Preference
* the special allowances under [38 U.S.C. 1312(a)](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001312----000-.html) and *Public Law (PL) 87-377*, Section 156, Restored Entitlement Program for Survivors (REPS)
* the Civilian Health and Medical Program of VA (CHAMPVA)
* SC burial allowance, and
* loan guaranty benefits for a surviving spouse.
 |