



U.S. Department
of Veterans Affairs

38 U.S.C. §1151 CLAIMS

Providing Medical Opinions for 1151 Claims

Medical Disability Examination Program
Veterans Benefits Administration
February 2019



Lesson Objectives

- Develop a working knowledge for 38 U.S.C. §1151 claim disability examination requirements
- Understand medical opinions and rationales for 38 U.S.C. §1151 disability claims
- Provide medical opinions with appropriate medicolegal rationales for 38 U.S.C. § 1151 claims



38 U.S.C. §1151

Under 38 U.S.C. §1151, a claimant is entitled to compensation as if the claimed disability or death were service-connected, provided the Veteran's disability or death resulted from:

- Hospital care, medical or surgical treatment, or examination furnished by the Department of Veterans Affairs
- (VA) Participation in vocational rehabilitation training under any VA-administered law
- Participation in Compensated Work Therapy (CWT)

An 1151 review may be requested when a Veteran is injured under circumstances that result in possible entitlement to benefits under 38 U.S.C. §1151



Qualifying Disability or Death

To meet 38 U.S.C. §1151 qualifications, the proximate cause of additional disability or death must be due to:

- Carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of VA in furnishing the hospital care, medical or surgical treatment, or examination
- An event not reasonably foreseeable
- The provision of training and rehabilitation by VA or one of its service providers as part of an approved rehabilitation program under 38 U.S.C. Chapter 31
- The provision of a Compensated Work Therapy (CWT) program



Occurrences in 38 U.S.C. § 1151 Claims

Compensation is authorized under 38 U.S.C. §1151 for disabilities resulting from:

- Examination
- Acts of omission
- Premature discharge
- Medication
- Vocational rehabilitation or CWT

Note: Veteran's failure to follow instructions may constitute an intercurrent cause; thereby *precluding* payment of benefits under 38 U.S.C. §1151



What does NOT constitute hospital care, medical or surgical treatment, or examination furnished by a VA employee or in a VA facility?

- Hospital care or medical services furnished under a contract made under 38 U.S.C.A. § 1703 (contracts for hospital care and medical services in non-Department facilities or in other words negligent fee-basis care).
- Nursing home care furnished under 38 U.S.C.A. § 1720; (Non-Department nursing home care); or,
- Hospital care or medical services, including examination, provided under 38 U.S.C.A. § 8153 in a facility over which the Secretary does not have direct jurisdiction.
- A VA-run domiciliary facility does not constitute VA hospital care, or medical or surgical treatment as contemplated by 38 U.S.C.A. § 1151. See *Mangham v. Shinseki*, 23 Vet. App. 284, 288(2009).



Compensation

Compensation is awarded for qualifying additional disability or death under 38 U.S.C. 1151 in the same manner as if the disability or death is service-connected (SC).



Elements Required to Establish Benefits for 38 U.S.C. §1151 Claims

There are three elements required to establish benefits pursuant to 38 U.S.C. § 1151

1. First determine if an additional disability exists;
2. Next determine if there is a causal nexus between the VA treatment, examination or vocational rehabilitation and the additional disability; and
3. Finally, is there evidence of fault or a finding of an unforeseen circumstance?



Element #1 Additional Disability

- To determine whether a Veteran has incurred additional disability under 38 U.S.C. 1151, 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.
- There must be evidence of a new condition or worsening of a condition after the event/treatment/examination compared to the condition immediately prior to the treatment.



Element #2 Causation

To meet 38 U.S.C. §1151 qualifications, the proximate cause of additional disability or death must be due to:

- Carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of VA in furnishing the hospital care, medical or surgical treatment, or examination
- The injury or death resulted from an event not reasonably foreseeable
- The provision of training and rehabilitation by VA or one of its service providers as part of an approved rehabilitation program under 38 U.S.C. Chapter 31
- The provision of a Compensated Work Therapy (CWT) program



Element #3 Fault or Unforeseen Circumstances

It must be shown that the additional disability or death was due to:

- **Fault: carelessness, negligence, lack of proper skill, error in judgment or similar instance of fault;**
 - a) It must be shown that VA failed to furnish the degree of care expected of a reasonable health care provider; or,
 - b) VA furnished care without informed consent; or,
- **An event not reasonably foreseeable**
 - a) Reasonable health care provider standard applies.
 - b) Must not be an ordinary risk – it must be the type of risk that would not have been disclosed in informed consent procedures.



Event Not Reasonably Foreseeable

An event is considered "not reasonably foreseeable" if:

- It is not the type of risk that would be disclosed as part of informed consent procedures
- It must be an event that a reasonable health-care provider would not consider an ordinary risk of the treatment provided.

As an examiner, you determine if the consequences of the care were foreseeable and ordinary in risk.



When is an additional disability or death not caused by VA?

Causation is **not** shown if the injury is coincidental to VA examination/treatment or the additional disability results from the natural progress of the disease or the Veteran fails to follow medical instructions. (Exception: VA's failure to timely diagnose and properly treat a disease or injury).



Fault on the Part of VA

In order to establish fault on the part of VA in furnishing medical care, treatment, or examination as the proximate cause of a Veteran's disability or death, the evidence must show one of the following:

- The medical care, treatment, or examination caused the additional disability or death
- VA failed to exercise the degree of care that would have been expected of a reasonable healthcare provider
- VA furnished the care without the Veteran's or Veteran's representative's informed consent



Informed Consent

Informed consent includes the nature of the procedure, expected benefits, reasonably foreseeable risks, reasonable alternatives, and anticipated results if nothing is done.

- The absence of a specific list of risks on informed consent is not evidence that VA failed to obtain informed consent, and it may not be presumed that complications were not discussed because they were not recorded.
- A failure to provide information to a patient about a foreseeable risk does not defeat a finding of informed consent if a reasonable person faced with similar circumstances would have proceeded with the treatment.



5 Elements of Informed Consent

1. **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
2. **an opportunity for questions** from the patient/surrogate
3. **verbal expression** by the patient/surrogate of understanding and permission or
4. **assent to proceed**, and
5. **documentation of the process and outcome.**



Express or Implied

Expressed consent is consent that has been clearly stated either orally or in writing.

Implied consent is consent that may be inferred from the circumstances in the case. 38 CFR 17.32 permits practitioners to provide necessary medical care in emergency situations without 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.



Medical Opinions for §1151 Claims

A medical opinion is frequently needed to determine whether:

- There is actually additional disability
- The additional disability or death of the Veteran was a continuance or natural progression of the disease or injury for which treatment was provided
- The additional disability is merely coincident with treatment
- Any additional disability would be considered a necessary consequence of treatment



Medical Opinions for §1151 Claims cont'd

Answer all questions asked on the examination request and state whether it is **at least as likely as not** that:

- The claimed disability was caused by or became worse as a result of the VA treatment at issue
- The additional disability resulted from the attending VA personnel's failure to follow the appropriate standard of care
- The additional disability resulted from an event that could not have reasonably been foreseen by a reasonable healthcare provider, and/or
- Failure on the part of VA to timely diagnose and/or properly treat the claimed disease or disability allowed the disease or disability to continue to progress.



References

- 38 U.S.C. §1151 Benefits for persons disabled by treatment or vocational rehabilitation
- 38 CFR §3.154 Injury due to hospital treatment, etc.
- 38 CFR §3.358 Compensation for disability or death from hospitalization, medical or surgical treatment, examinations or vocational rehabilitation training (§3.800)
- 38 CFR §3.361 Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program
- 38 CFR §3.800 Disability or death due to hospitalization, etc.
- 38 CFR §14.600 Federal Tort Claims Act—general



References continued

- M21-1, Part IV, Subpart ii.1.A - Developing Compensation Claims
- M21-1, Part IV, Subpart ii.2.G - Benefits Under 38 U.S.C. 1151
- M21-1, Part IV, Subpart ii.3.D - Disability Compensation Under 38 U.S.C. 1151
- Viegas v Shinseki, No. 2012-7075, January 31, 2013
- Bartlett v Shinseki, No. 08-4092, March 10, 2011
- DMA C&P Disability Examinations Procedural Manual, December 27, 2018



Informed Consent References

For more information on VA's informed consent procedures, see

- 38 CFR 17.32
- Halcomb v. Shinseki, 23 Vet.App. 234 (2009), and
- McNair v. Shinseki, 25 Vet.App. 98 (2011)
- express consent, see M21-1, Part IV, Subpart ii, 2.G.1.e, and
- implied consent, see M21-1, Part IV, Subpart ii, 2.G.1.f.