that could be considered as major factors. Employment which was only casual, intermittent, tryout, unsuccessful, or terminated after a short period by reason of disability, should not be considered as rebutting permanent incapability of self-support otherwise established.

(3) It should be borne in mind that employment of a child prior or subsequent to the delimiting age may or may not be a normal situation, depending on the educational progress of the child, the economic situation of the family, indulgent attitude of parents, and the like. In those cases where the extent and nature of disability raises some doubt as to whether they would render the average person incapable of self-support, factors other than employment are for consideration. In such cases there should be considered whether the daily activities of the child in the home and community are equivalent to the activities of employment of any nature within the physical or mental capacity of the child which would provide sufficient income for reasonable support. Lack of employment of the child either prior to the delimiting age or thereafter should not be considered as a major factor in the determination to be made, unless it is shown that it was due to physical or mental defect and not to mere disinclination to work or indulgence of relatives or friends.

(4) The capacity of a child for self-support is not determinable upon employment afforded solely upon sympathetic or charitable considerations and which involved no actual or substantial rendition of services.

CROSS REFERENCE: Basic pension and eligibility determinations. See §3.314.

For disabilities incurred in combat, however, no actual impairment is required.

[58 FR 52018, Oct. 6, 1993]

§ 3.358 Compensation for disability or death from hospitalization, medical or surgical treatment, examinations or vocational rehabilitation training (§3.800).

(a) General. This section applies to claims received by VA before October 1, 1997. If it is determined that there is additional disability resulting from a disease or injury or aggravation of an existing disease or injury suffered as a result of hospitalization, medical or surgical treatment, examination, or vocational rehabilitation training, compensation will be payable for such additional disability. For claims received by VA on or after October 1, 1997, see §3.361.

(b) Additional disability. In determining that additional disability exists, the following considerations will govern:

(1) The veteran’s physical condition immediately prior to the disease or injury on which the claim for compensation is based will be compared with the subsequent physical condition resulting from the disease or injury, each body part involved being considered separately.

(ii) As applied to examinations, the physical condition prior to the disease or injury will be the condition at time of beginning the physical examination as a result of which the disease or injury was sustained.

(ii) As applied to medical or surgical treatment, the physical condition prior to the disease or injury will be the condition which the specific medical or surgical treatment was designed to relieve.

(2) Compensation will not be payable under this section for the continuance or natural progress of a disease or injury for which the hospitalization, medical or surgical treatment, or examination was furnished, unless VA’s failure to exercise reasonable skill and care in the diagnosis or treatment of the disease or injury caused additional disability or death that probably would have been prevented by proper diagnosis or treatment. Compensation will
not be payable under this section for the continuance or natural progress of a disease or injury for which vocational rehabilitation training was provided.

(c) Cause. In determining whether such additional disability resulted from a disease or an injury or an aggravation of an existing disease or injury suffered as a result of training, hospitalization, medical or surgical treatment, or examination, the following considerations will govern:

(1) It will be necessary to show that the additional disability is actually the result of such disease or injury or an aggravation of an existing disease or injury and not merely coincidental therewith.

(2) The mere fact that aggravation occurred will not suffice to make the additional disability compensable in the absence of proof that it resulted from disease or injury or an aggravation of an existing disease or injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination.

(3) Compensation is not payable for the necessary consequences of medical or surgical treatment or examination properly administered with the express or implied consent of the veteran, or, in appropriate cases, the veteran’s representative. “Necessary consequences” are those which are certain to result from, or were intended to result from, the examination or medical or surgical treatment administered. Consequences otherwise certain or intended to result from a treatment will not be considered uncertain or unintended solely because it had not been determined at the time consent was given whether that treatment would in fact be administered.

(4) When the proximate cause of the injury suffered was the veteran’s willful misconduct or failure to follow instructions, it will bar him (or her) from receipt of compensation hereunder except in the case of incompetent veterans.

(5) Compensation for disability resulting from the pursuit of vocational rehabilitation is not payable unless there is established a direct (proximate) causal connection between the injury or aggravation of an existing injury and some essential activity or function which is within the scope of the vocational rehabilitation course, not necessarily limited to activities or functions specifically designated by the Department of Veterans Affairs in the individual case, since ordinarily it is not to be expected that each and every different function and act of a veteran pursuant to his or her course of training will be particularly specified in the outline of the course or training program. For example, a disability resulting from the use of an item of mechanical or other equipment is within the purview of the statute if training in its use is implicit within the prescribed program or course outlined or if its use is implicit in the performance of some task or operation the trainee must learn to perform, although such use may not be especially mentioned in the training program. In determining whether the element of direct or proximate causation is present, it remains necessary for a distinction to be made between an injury arising out of an act performed in pursuance of the course of training, that is, a required “learning activity”, and one arising out of an activity which is incidental to, related to, or coexistent with the pursuit of the program of training. For a case to fall within the statute there must have been sustained an injury which, but for the performance of a “learning activity” in the prescribed course of training, would not have been sustained. A meticulous examination into all the circumstances is required, including a consideration of the time and place of the incident producing the injury.

(6) Nursing home care furnished under section 1720 of title 38, United States Code is not hospitalization within the meaning of this section. Such a nursing home is an independent contractor and, accordingly, its agents and employees are not to be deemed agents and employees of the Department of Veterans Affairs. If additional disability results from medical or surgical treatment or examination through negligence or other wrongful acts or omissions on the part of such a nursing home, its employees, or its agents, entitlement does not exist under this section unless there was an
act or omission on the part of the De-

partment of Veterans Affairs independ-

ently giving rise to such entitlement

and such acts on the part of both prox-

imately caused the additional dis-

ability.

(Authority: 38 U.S.C. 1151, 1720)

§ 3.359 Determination of service con-

nection for former members of the

Armed Forces of Czechoslovakia or

Poland.

Rating boards will determine wheth-

er or not the condition for which treat-

ment is claimed by former members of

the Armed Forces of Czechoslovakia or

Poland under 38 U.S.C. 109(c) is service

connected. This determination will be

made using the same criteria that ap-

plies to determinations of service con-

nection based on service in the Armed

Forces of the United States.

§ 3.360 Service-connected health-care

eligibility of certain persons admin-

istratively discharged under other

than honorable condition.

(a) General. The health-care and re-

lated benefits authorized by chapter 17

title 38 U.S.C. shall be provided to

certain former service persons with ad-

ministrative discharges under other

than honorable conditions for any dis-

ability incurred or aggravated during

active military, naval, or air service in

line of duty.

(b) Discharge categorization. With cer-

tain exceptions such benefits shall be

furnished for any disability incurred or

aggravated during a period of service

terminated by a discharge under other

than honorable conditions. Specific-

ally, they may not be furnished for

any disability incurred or aggravated

during a period of service terminated

by a bad conduct discharge or when one

of the bars listed in §3.12(c) applies.

(c) Eligibility criteria. In making de-

terminations of health-care eligibility

the same criteria will be used as is now

applicable to determinations of service

incurrence and in line of duty when

there is no character of discharge bar.

§ 3.361 Benefits under 38 U.S.C. 1151(a)

for additional disability or death

due to hospital care, medical or sur-

gical treatment, examination, train-

ing and rehabilitation services, or

compensated work therapy pro-

gram.

(a) Claims subject to this section—(1)

General. Except as provided in para-

graph (2), this section applies to claims

received by VA on or after October 1,

1997. This includes original claims and

claims to reopen or otherwise readjudi-
cate a previous claim for benefits

under 38 U.S.C. 1151 or its predecessors.
The effective date of benefits is subject

to the provisions of §3.400(i). For

claims received by VA before October 1,

1997, see §3.358.

(2) Compensated Work Therapy. With
respect to claims alleging disability or

death due to compensated work ther-

apy, this section applies to claims that

were pending before VA on November 1,

2000, or that were received by VA after

that date. The effective date of benefits

is subject to the provisions of §§3.114(a)

and 3.400(i), and shall not be earlier

than November 1, 2000.

(b) Determining whether a veteran has
an additional disability. To determine

whether a veteran has an additional
disability, VA compares the veteran’s
condition immediately before the be-

ginning of the hospital care, medical or

surgical treatment, examination, treat-

ment, and rehabilitation services, or

compensated work therapy (CWT)

program upon which the claim is based

to the veteran’s condition after such care,
treatment, examination, services, or

program has stopped. VA considers

each involved body part or system sep-

arately.

(c) Establishing the cause of additional
disability or death. Claims based on ad-
ditional disability or death due to hos-
pital care, medical or surgical treat-

ment, or examination must meet the
causation requirements of this para-

graph and paragraph (d)(1) or (d)(2) of

this section. Claims based on addi-
tional disability or death due to train-
ing and rehabilitation services or com-

pensated work therapy program must