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 both proximately caused the additional disability.

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

§ 3.360 Service-connected health-care eligibility of certain persons administratively discharged under other than honorable condition.

(a) General. The health-care and related benefits authorized by chapter 17 of title 38 U.S.C. shall be provided to certain former service persons with administrative discharges under other than honorable conditions for any disability incurred or aggravated during a period of service terminated by a discharge under other than honorable conditions. Specifically, 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.

(b) Discharge categorization. With certain 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.

(c) Eligibility criteria. In making determinations 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.

[43 FR 15154, Apr. 11, 1978]

§ 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.

(a) Claims subject to this section—(1) General. Except as provided in paragraph (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 readjudicate 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 therapy, 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 beginning of the hospital care, medical or surgical treatment, examination, training 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 separately.

(c) **Establishing the cause of additional disability or death.** Claims based on additional disability or death due to hospital care, medical or surgical treatment, or examination must meet the causation requirements of this paragraph and paragraph (d)(2) of this section. Claims based on additional disability or death due to training and rehabilitation services or compensated work therapy (CWT) program must meet the causation requirements of paragraph (d)(3) of this section.

(1) **Actual causation required.** To establish causation, the evidence must show that the hospital care, medical or surgical treatment, or examination resulted in the veteran’s additional disability or death. Merely showing that a veteran received care, treatment, or examination and that the veteran has an additional disability or died does not establish cause.

(2) **Continuance or natural progress of a disease or injury.** Hospital care, medical or surgical treatment, or examination cannot cause the continuance or natural progress of a disease or injury for which the care, treatment, or examination was furnished unless VA’s failure to timely diagnose and properly treat the disease or injury proximately caused the continuance or natural progress. The provision of training and rehabilitation services or CWT program cannot cause the continuance or natural progress of a disease or injury for which the services were provided.

(3) **Veteran’s failure to follow medical instructions.** Additional disability or death caused by a veteran’s failure to follow properly given medical instructions is not caused by hospital care, medical or surgical treatment, or examination.

(d) **Establishing the proximate cause of additional disability or death.** The proximate cause of disability or death is the action or event that directly caused the disability or death, as distinguished from a remote contributing cause.

(1) **Care, treatment, or examination.** To establish that carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA’s part in furnishing hospital care, medical or surgical treatment, or examination proximately caused a veteran’s additional disability or death, it must be shown that the hospital care, medical or surgical treatment, or examination caused the veteran’s additional disability or death (as explained in paragraph (c) of this section); and

(i) VA failed to exercise the degree of care that would be expected of a reasonable health care provider; or

(ii) VA furnished the hospital care, medical or surgical treatment, or examination without the veteran’s or, in appropriate cases, the veteran’s representative’s informed consent. To determine whether there was informed consent, VA will consider whether the health care providers substantially complied with the requirements of §17.32 of this chapter. Minor deviations from the requirements of §17.32 of this chapter that are immaterial under the circumstances of a case will not defeat a finding of informed consent. Consent may be express (i.e., given orally or in...
writing) or implied under the circumstances specified in §17.32(b) of this chapter, as in emergency situations.

(2) Events not reasonably foreseeable. Whether the proximate cause of a veteran’s additional disability or death was an event not reasonably foreseeable is in each claim to be determined based on what a reasonable health care provider would have foreseen. The event need not be completely unforeseeable or unimaginable but must be one that a reasonable health care provider would not have considered to be an ordinary risk of the treatment provided. In determining whether an event was reasonably foreseeable, VA will consider whether the risk of that event was the type of risk that a reasonable health care provider would have disclosed in connection with the informed consent procedures of §17.32 of this chapter.

(3) Training and rehabilitation services or compensated work therapy program. To establish that the provision of training and rehabilitation services or a CWT program proximately caused a veteran’s additional disability or death, it must be shown that the veteran’s participation in an essential activity or function of the training, services, or CWT program provided or authorized by VA proximately caused the disability or death. The veteran must have been participating in such training, services, or CWT program provided or authorized by VA as part of an approved rehabilitation program under 38 U.S.C. chapter 31 or as part of a CWT program under 38 U.S.C. 1718. It need not be shown that VA approved that specific activity or function, 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.

(e) Department employees and facilities.

(1) A Department employee is an individual—

(i) 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;

(ii) Who is engaged in furnishing hospital care, medical or surgical treatment, or examinations under authority of law; and

(iii) Whose day-to-day activities are subject to supervision by the Secretary of Veterans Affairs.

(2) A Department facility is a facility over which the Secretary of Veterans Affairs has direct jurisdiction.

(f) Activities that are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility. The following 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(a):

(1) Hospital care or medical services furnished under a contract made under 38 U.S.C. 1703.

(2) Nursing home care furnished under 38 U.S.C. 1720.

(3) Hospital care or medical services, including examination, provided under 38 U.S.C. 8153 in a facility over which the Secretary does not have direct jurisdiction.

(g) Benefits payable under 38 U.S.C. 1151 for a veteran’s death. (1) Death before January 1, 1957. The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran’s death occurring before January 1, 1957, is death compensation. See §§3.5(b)(2) and 3.702 for the right to elect dependency and indemnity compensation.

(2) Death after December 31, 1956. The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran’s death occurring after December 31, 1956, is dependency and indemnity compensation.