act or omission on the part of the Depart-  
mment 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)

§ 3.361 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, train-  
ing and rehabilitation services, or  
compensated work therapy (CWT) pro-  
gram 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-  
ately.

(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-  
compensated work therapy 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 any 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 proximately 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.
§ 3.362 Offsets under 38 U.S.C. 1151(b) of benefits awarded under 38 U.S.C. 1151(a).

(a) Claims subject to this section. 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.

(b) Offset of veterans’ awards of compensation. If a veteran’s disability is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, on or after December 1, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any compensation awarded under 38 U.S.C. 1151(a) is the entire amount of the veteran’s share of the judgment, settlement, or compromise, including the veteran’s proportional share of attorney fees.

(c) Offset of survivors’ awards of dependency and indemnity compensation. If a veteran’s death is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, on or after December 1, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any dependency and indemnity compensation awarded under 38 U.S.C. 1151(a) to a survivor is only the amount of the judgment, settlement, or compromise representing damages for the veteran’s death the survivor receives in an individual capacity or as distribution from the decedent veteran’s estate of sums included in the judgment, settlement, or compromise to compensate for harm suffered by the survivor, plus the survivor’s proportional share of attorney fees.

(d) Offset of structured settlements. This paragraph applies if a veteran’s disability or death is the basis of a structured settlement or structured compromise under 28 U.S.C. 2672 or 2677 entered on or after December 1, 1962.

(1) The amount to be offset. The amount to be offset under 38 U.S.C. 1151(b) from benefits awarded under 38 U.S.C. 1151(a) is the veteran’s or survivor’s proportional share of the cost to the United States of the settlement or compromise, including the veteran’s or survivor’s proportional share of attorney fees.