



38 U.S.C. 1151 Claims (VSR)

**Compensation
Service**

September 2016



Objectives

Through lecture and practical exercises, you will:

- Identify the criteria and associated laws for 38 U.S.C. §1151
- Distinguish which benefits are applicable for 38 U.S.C §1151 claims
- Identify proper development procedures when adjudicating U.S.C §1151 claims
- Recognize correct effective dates for U.S.C §1151 claims
- Distinguish which promulgation actions are applicable for 38 U.S.C §1151 claims
- Prepare the correct notification letter for claims involving entitlement to U.S.C §1151 benefits



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
- 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 §3.400(i) Disability or death due to hospitalization, etc.
- 38 CFR §17.32 Informed consent and advance care planning
- M21-1, Part IV, Subpart iii, Subpart V, 4, B - M21-1, Part III, Subpart v, Chapter 4, Section B - Recoupment of Separation Benefits





References

- M21-1, Part IV, Subpart ii, 1, A - Developing Claims Filed Under 38 U.S.C. 1151
- 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
- M21-1, Part IV, Subpart iii, 1, A - DIC Under 38 U.S.C. 1151
- M21-1, Part IV, Subpart iii, 3, E - Determining Entitlement to Ancillary Benefits
- M21-1, Part IX, Subpart i Ancillary Benefits
- VBMS-Awards User Guide
- VETSNET Awards User Guide





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

What is a 38 U.S.C. 1151 Claim?

Compensation “as if” service-connected, provided that disability or death is a result of:

- hospital care, medical or surgical treatment, or exam furnished by the VA
- participation in vocational rehabilitation training under the VA law, or
- participation in compensated work therapy (CWT)
- *Compensation is not payable if disability is due to Veteran’s willful misconduct!*



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***“As If”* Defined**

If compensation is granted for a disability under 38 U.S.C. 1151, the disability is



not service connected



Note: Compensation is payable *“as if”* it were service connected, which means there is limited entitlement to ancillary benefits.



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38 CFR §3.358 vs. §3.361

- 38 CFR §3.358 Prior to **October 1, 1997** *No fault*
- 38 CFR §3.361 After **October 1, 1997** *Fault*
- 38 CFR §3.361a (2) **November 1, 2000** *Compensated Work Therapy (CWT)*



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Proximal Cause

Disability or death must be proximately caused by:

- carelessness, negligence, lack of proper skill, error in judgment or similar instance of fault on the part of the VA
- an event not reasonably foreseeable, or
- training or rehabilitation under Ch. 31 or CWT





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Fault on VA

To establish fault, the evidence must show that the medical care, treatment, or examination caused the additional disability or death, and the VA either:

- failed to exercise the degree of care expected of a reasonable health-care provider, or
- furnished care without the Veteran's or Veteran's representative's informed consent



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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 the informed consent procedures shown in 38 CFR §17.32.



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Express vs. Implied

- ***Express 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.





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Types of Occurrences

Some occurrences when 1151 might be warranted, are when disabilities result from:

- an examination
- an act of omission
- premature discharge
- medication





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Disability Resulting From an Examination

- 38 U.S.C. 1151 authorizes compensation for disability resulting from a Veteran's "*having submitted to an examination*" under any law administered by VA.
- Note: The U.S. Court of Appeals for Veterans Claims (CAVC) has interpreted this portion of the statute to mean that compensation is payable only for injuries that result from the examination itself, and not from the process of reporting for the examination.
 - Example: A Veteran injured by another patient while awaiting the start of his/her scheduled VA examination would not qualify for compensation for residuals of that injury under 38 U.S.C. 1151



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Disability Resulting From an Act of Omission

- Entitlement to compensation under 38 U.S.C. 1151 may be based on acts of omission as well as acts of commission.
- A Veteran may be entitled to benefits under 38 U.S.C. 1151 if VA failed to perform one of the following actions:
 - timely diagnose or properly treat a disability, thereby causing an increased disability or death, and/or
 - obtain informed consent from the Veteran or the Veteran's representative prior to treatment.
- Note: The natural progression (i.e. worsening) of a disease or injury may be the basis of eligibility under 38 U.S.C. 1151 only if it is attributable to VA's failure to timely diagnose or properly treat the disease or injury.



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Disability Resulting From Premature Discharge

- Compensation may be payable under 38 U.S.C. 1151 when a physician determines that a Veteran should be discharged from a hospital after a period of treatment, but the Veteran 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 (i.e. worsening).
- Note: Development should include a request for a medical certificate indicating that the Veteran's condition at discharge was not stable, and that the discharge was premature.
- An independent medical opinion may be necessary in such a case.



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Disability Resulting From Medication

- Compensation is payable under 38 U.S.C. 1151 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 if:
 - VA prescribed a medication at ten times the proper dosage, and
 - additional permanent disability or death resulted from the erroneous prescription



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Disability Resulting From Medication (cont'd)

- Consider whether the timing of the discharge aggravated the disability beyond the level of natural progression (i.e. worsening).
- Note: Development should include a request for a medical certificate indicating that the Veteran's condition at discharge was not stable, and that the discharge was premature.
- An independent medical opinion may be necessary in such a case.
- Compensation may be payable under 38 U.S.C. 1151 when a physician determines that a Veteran should be discharged from a hospital after a period of treatment, but the Veteran claims that the discharge:
 - was too early, and
 - led to a relapse and worsening of the disability.



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Ch. 31 and CWT Program

The evidence must show that:

- The Veteran participated in one of the VA approved programs, and
- The participation in an essential activity of the training or services caused the disability or death.

- It need not be shown that VA approved of the activity or function, as long as it is generally accepted as being a necessary component of one of the programs.



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Entitlement to Ancillary Benefits

A Veteran with a qualifying disability under 38 U.S.C. 1151 may also be eligible for:

- a clothing allowance
- specially adapted housing benefits, including special housing adaptation grant
- an automobile or adaptive equipment benefit

Department of Veterans Affairs

APPLICATION IN ACQUIRING SPECIALLY ADAPTED HOUSING OR SPECIAL HOME ADAPTATION GRANT (Title 38 U.S.C. Section 2101(a) or 2101(b))

PRIVACY ACT NOTICE: VA will not disclose information collected on this form to any person other than what has been authorized under the Privacy Act of 1974 or Title 38, CFR 1.576 for routine use (for example, authorizing release of information to Congress when requested for statistical purposes) identified in the VA system of records, 25VAC6, Loan Guaranty, Home, Condominium and Manufactured Home Loan Applicant Records, Specially Adapted Housing Applicant Records, and Veteran Loan Applicant Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. Giving us your SSN account information is mandatory. Applicants are required to provide their SSN under Title 38, CFR 1.809. The VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by a Federal Statute of Law in effect prior to January 1, 1975, and will in effect.

RESPONDENT INSTRUCTIONS: We need this information to determine or verify your eligibility for a specially adapted housing or special home adaptation grant. Title 38, U.S.C. 2101(a) or 2101(b) allows us to ask for this information. We estimate that you will need an average of 10 minutes to review the instructions, fill out the information, and complete this form. VA cannot collect or process a collection of information unless a valid OMB control number is displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.omb.gov. If desired, you can call 1-800-821-1000 to get information on when to send comments or suggestions about this form.

INSTRUCTIONS: This application should be submitted to the VA regional office where your claim file is located or this form can be completed online by visiting www.dvbcva.va.gov.

1. FIRST NAME - MIDDLE INITIAL - LAST NAME		2. SOCIAL SECURITY NO.	3. VA FILE CLAIM NUMBER
4. DATE OF BIRTH		5. E-MAIL ADDRESS	
6. ADDRESS (Number and street or rural route, city or P.O., State and ZIP Code)			
7. TELEPHONE NUMBER OF APPLICANT (Include Area Code)			
A. DAYTIME	B. EVENING	C. CELL	
8. HAVE YOU MADE PREVIOUS APPLICATION FOR SPECIALLY ADAPTED HOUSING? <input type="checkbox"/> YES <input type="checkbox"/> NO (If "Yes," give date and place)			
9. HAVE YOU MADE PREVIOUS APPLICATION FOR HOME IMPROVEMENT AND STRUCTURAL ALTERATION GRANT? <input type="checkbox"/> YES <input type="checkbox"/> NO (If "Yes," give date and place)			
10. ARE YOU CONFINED TO A NURSING HOME OR MEDICAL CARE FACILITY? <input type="checkbox"/> YES <input type="checkbox"/> NO (If "Yes," give name and address of facility)			
11. REMARKS			
CERTIFICATION			
I am applying for assistance in acquiring specially adapted housing or special home adaptation grant because of the nature of my service-connected disability. I understand that there are medical and economic factors yet to be considered before I am eligible for this benefit, and that I will be notified of the action taken on this application as soon as possible.			
12A. SIGNATURE OF APPLICANT (Type/print name)			12B. DATE SIGNED
<small>PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.</small>			
<small>VA FORM 28-4555</small>		<small>SUPPLEMENTARY VA FORM 28-4555, JAN 2006, WHICH WILL NOT BE USED.</small>	



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

Non-Entitlement to Ancillary Benefits

The following ancillary benefits are not available by reason of a qualifying disability under 38 U.S.C. 1151:

RH Insurance	Chapter 31	Champ VA
REPS	SC Burial or 38 U.S.C 1312(a)	Chapter 35
Civil Service Preference	Surviving Spouse LG Benefits	Waiver of LG Funding Fee



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

Tort Claims and Entitlement to Benefits Under 38 U.S.C. 1151

The Veteran may also seek a judgment against the U.S. in a civil action, called a *Tort* claim. The Veteran may sue and recover damages after:

- a trial, or
- agreeing to a settlement or compromise

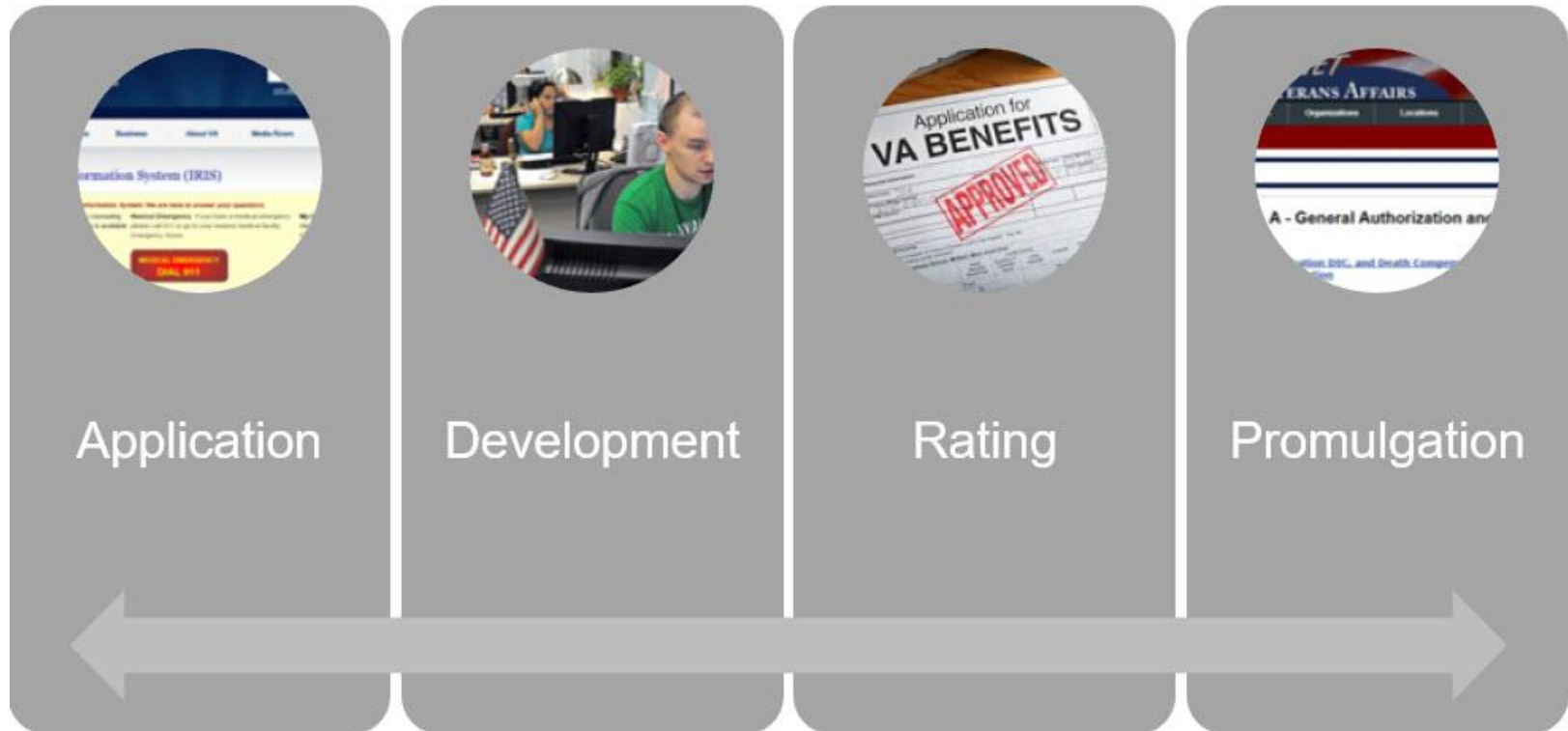


Filed in federal court vs. 1151 claims filed with VA.



Topic 2: Identifying and Developing Claims for Entitlement to 38 U.S.C. 1151

1151 Workflow Process

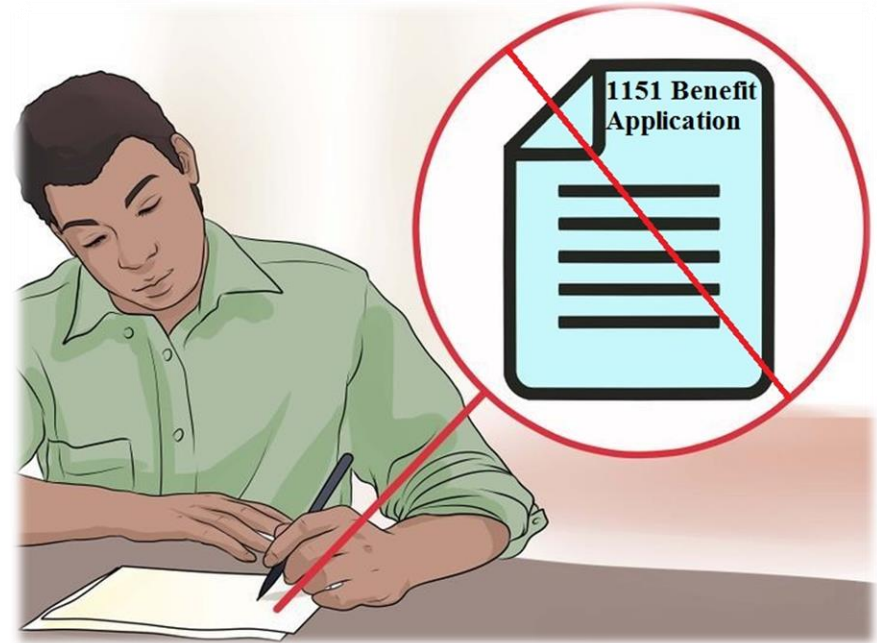




Topic 2: Identifying and Developing Claims for Entitlement to 38 U.S.C. 1151

Identifying 1151 Claims

There is no specific application form for these benefits. Any form or other written communication used to claim compensation benefits may be accepted as a claim for benefits.





Topic 2: Identifying and Developing Claims for Entitlement to 38 U.S.C. 1151

Development of 38 U.S.C. 1151 Claims

You may request information from the VA medical facility by generating a local letter by using the verbiage provided in the M21-1 reference into an electronic 7131 request in Compensation and Pension Record Interchange (CAPRI).

- Provide as much information as possible about the incident in the request.
- Request all evidence and documents pertinent to the incident upon which the claim is based.
- *See the QUICK REFERENCE DEVELOPMENT GUIDE and SAMPLE DEVELOPMENT NOTIFICATION included in student handout



Topic 2: Identifying and Developing Claims for Entitlement to 38 U.S.C. 1151

Development of 38 U.S.C. 1151 Claims

- Possible sources of information about the incident may include:
 - Medical record
 - surgical records
 - hospital clinical records, or
 - nurses' notes



Topic 2: Identifying and Developing Claims for Entitlement to 38 U.S.C. 1151

Development of 38 U.S.C. 1151 Claims

- Quality Assurance Investigative Reports:
 - Do not request quality assurance investigative reports. They are investigative reports that are confidential under 38 U.S.C. 5705, and cannot be used as evidence in the adjudication of a claim.
 - If quality assurance investigative reports are received from a VA medical facility, return the reports immediately. Do not file copies of these reports in the Veteran's claims folder.



Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

Identifying the Correct Effective Dates

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

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





Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

Determining if there is an Offset Required

- If a Tort claim appears to have been finalized, defer compensation award for possible offset,

but
- do not defer compensation just because a Tort claim exists.



Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

Determining the Final Date of a Judgment

Use the information in the table below to determine when various judgments are considered final.

If the judgment is ...	Then the ...
a VA administrative award	judgment is considered final on the date of approval.
an Attorney General agreement	settlement or compromise entered into by the Attorney General after a suit has been filed is considered final when the agreement is approved by the court, even though a final order of dismissal may not be entered until a later date.

Note: If, after reviewing the evidence of record, there is any question as to the date the judgment became final, request clarification from the local Regional Counsel.



Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

- **Tort Settlement and Offset Requirement**

An offset is required when a Tort settlement is finalized, and:

- An 1151 grant increases the total compensation payable; or,
- Compensation is payable solely due to 1151

The amount of offset must never deprive a Veteran of compensation payable if an 1151 claim had not been filed.



Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

- **Action to take if an Offset is Required**
- The amount of offset must not deprive a Veteran of any part of the compensation payable if a claim under 38 U.S.C. 1151 had not been filed.
- If there are existing service connected disabilities and the total compensation is increased by the grant of an 1151 disability, a partial offset is required.
- If the only disability for which compensation is paid is granted under the provisions of 1151, than a total offset is required.
- In any case, the offset will be the effective the first of the month following the date the settlement is finalized.



Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

- **Action to take if an Offset is Required (cont'd)**
- If an increase in the evaluation of a service-connected (SC) disability is awarded, such that the existence of the disability compensable under 38 U.S.C. 1151 no longer increases the total amount of compensation payable, then
 - determine the total compensation payable for all disabilities (SC and those compensable under 38 U.S.C. 1151)
 - determine the total compensation payable for SC disabilities only
 - withhold the difference between the two totals, and
 - discontinue the previously established offset.



Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

Offset Amount

Increase

Total Compensation
(S/C & 1151 Disabilities)

minus

S/C Disabilities Only

Total Offset

1151

Offset the full amount of compensation if the only disability is a grant under the provisions of 1151.



Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

When an Offset is Not Required

- Do not offset the award if any of the following circumstances exists:
 - A Tort settlement has not been finalized.
 - A claimant elects to continue pension payments even though entitlement to 1151 exists for a qualifying disability.
 - The Veteran has service connected disabilities (aside from the 1151 disabilities), and the combined evaluation does not warrant an increase with the grant of an 1151 disability.
 - Compensation is otherwise payable (i.e. an established service connected disability being aggravated under the provisions of 1151).
 - Rating decision grants service connection for a disability as secondary to an established service connected disability, as opposed to granting under the provision of 1151.



Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

Duplication of Benefits

The prohibition against duplication of benefits applies whenever a claimant receives a sum of *money* or *property* to settle a legal claim arising from the injury or death of a Veteran, and then files a claim for compensation with the VA for that same injury or death.





Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

Award Input

Step	Action
1	On the RECORD DECISIONS page in the AWARD ADJUSTMENTS screen, click the DISABILITY PAY tab.
2	Click the ADD button
2	Select TORT in the PAYMENT TYPE field.
3	Enter the amount that will be recouped in the ORIGINAL BALANCE field.
4	In the AWARD EFFECTIVE DATE field, enter date the adjustments begin
5	When finished, click ACCEPT to save the entry to the decision grid.
6	<ul style="list-style-type: none">➤ For awards processed in VETSNET Awards, select OK to save the decision and close the screen.➤ For awards processed in Veterans Benefits Management System-Awards (VBMS-A), click the DONE button when finished.



Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

Entitlement to Ancillary Benefits if Compensation Is Awarded for a Disability Under 38 U.S.C. 1151

- If compensation is awarded for a disability under 38 U.S.C. 1151, the Veteran, if otherwise eligible, may receive
 - the annual clothing allowance administered by the Veterans Health Administration
 - automobile or adaptive equipment, per M21-1, Part IX, Subpart i, 2, and
 - specially adapted housing benefits, including a special housing adaptation grant, per M21-1, Part IX, Subpart i. 3.



Topic 3: Promulgation of Entitlement to Benefits Under 38 U.S.C. 1151

Entitlement to Ancillary Benefits if Compensation Is Awarded for a Disability Under 38 U.S.C. 1151 (cont'd)

- There is no entitlement to the following ancillary benefits unless the Veteran is entitled based on disabilities for which compensation is payable without regard to the provisions of 38 U.S.C. 1151:
 - Dependents' Educational Assistance (DEA), per M21-1, Part III, Subpart iii, 6.C.1.
 - vocational rehabilitation, per M21-1, Part IX, Subpart i, 1.A, and
 - the Civilian Health and Medical Program



Topic 4: Preparing a Locally-Generated Letter for Entitlement to Benefits Under 38 U.S.C. 1151

Providing Notice for Claims for Entitlement to 38 U.S.C. 1151

- Prepare a locally-generated letter, referring to the benefit as “compensation under 38 U.S.C. 1151” and not “service connection.”
- When using a locally-generated letter to inform a claimant of the formal denial of a claim filed under 38 U.S.C. 1151, include
 - a list of the evidence considered
 - reasons for the determination
 - procedural and appellate rights, and
 - a copy of VA Form 21-0958, Notice of Disagreement
- Important: Do not refer to entitlement under 38 U.S.C. 1151 as “service connection.”





Topic 4: Preparing a Locally-Generated Letter for Entitlement to Benefits Under 38 U.S.C. 1151

Providing Notice of an Offset Requirement

Use the information below to provide the notice of an offset and the related requirements.

If the award ...	Then ...
includes an offset	include the offset information in the locally-generated letter to the Veteran.
does not include an offset	inform the Veteran that the VA must be notified of any court judgment or Tort award resulting from this disability or injury. Note: Include this information whether or not there is any indication that a Tort claim has or will be filed.
is a zero-rate award, meaning that a total offset is in effect until an amount equal to the judgment has been recouped	advise the Veteran to keep the VA informed of any changes of address.



Summary

- Identified the criteria and associated laws for 38 U.S.C. §1151 with 80% accuracy
- Distinguished which benefits are applicable for 38 U.S.C §1151 claims
- Identified proper development procedures when adjudicating U.S.C §1151 claims
- Discussed correct effective dates considerations for U.S.C §1151 claims
- Distinguished which promulgation actions are applicable for 38 U.S.C §1151 claims
- Discussed the correct notification letter requirements for claims involving entitlement to U.S.C §1151 benefits



Practical Exercise



Questions