38 USC §1151 Claims

Trainee Handout

**Table of Contents**

[Objectives 2](#_Toc428513584)

[References 3](#_Toc428513585)

[Topic 1: 38 USC §1151 Criteria and Laws 4](#_Toc428513586)

[Topic 2: Reasons for Decision 8](#_Toc428513587)

[Attachment A: Decision Assessment Document 11](#_Toc428513588)

[Attachment B: Federal Tort Claims Act 13](#_Toc428513589)

[Attachment C: Occurrences for Consideration in §1151 Claims 14](#_Toc428513590)

[Attachment D: Reference Notes 17](#_Toc428513591)

[Attachment E: Topic 2 Exercise 18](#_Toc428513592)

[Practical Exercise 20](#_Toc428513593)

Objectives

* Given the trainee handout packet and references, identify the criteria and associated laws for 38 USC §1151, with 80% accuracy.
* Given the trainee handout packet and references, distinguish which benefits are applicable for 38 U.S.C **§**1151 claims, with 80% accuracy.
* Given the trainee handout packet and references, differentiate between a tort claim and 38 U.S.C **§**1151 claim, with 80% accuracy.
* Given the trainee handout packet and references, differentiate between reason for decision and rating criteria requirements, with 80% accuracy.

References

* [38 USC §1151 Benefits for Persons Disabled by Treatment or Vocational Rehabilitation](http://www.law.cornell.edu/uscode/text/38/1151)
* [38 CFR §3.154 Injury due to hospital treatment, etc](http://www.ecfr.gov/cgi-bin/text-idx?SID=41ba91920fcf7d183ebc3507eafd0f14&mc=true&node=se38.1.3_1154&rgn=div8)
* [38 CFR §3.358 Compensation for disability or death from hospitalization, medical or surgical treatment, examinations or vocational rehabilitation training](http://www.ecfr.gov/cgi-bin/text-idx?SID=41ba91920fcf7d183ebc3507eafd0f14&mc=true&node=se38.1.3_1358&rgn=div8)
* [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.](http://www.ecfr.gov/cgi-bin/text-idx?SID=41ba91920fcf7d183ebc3507eafd0f14&mc=true&node=se38.1.3_1361&rgn=div8)
* [38 CFR §3.800 Disability or death due to hospitalization, etc.](http://www.ecfr.gov/cgi-bin/text-idx?SID=41ba91920fcf7d183ebc3507eafd0f14&mc=true&node=se38.1.3_1800&rgn=div8)
* [38 CFR §14.600 Federal Tort Claims Act – general.](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=32343a909d02efa45194f300c7351ef3&ty=HTML&h=L&mc=true&r=SECTION&n=se38.1.14_1600)
* [M21-1, Part IV, Subpart ii, Chapter 1, Section A - Developing Claims Filed Under 38 U.S.C. 1151](http://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#!agent/portal/554400000001034/article/554400000014321/M21-1-Part-IV-Subpart-ii-Chapter-1-Section-A-Developing-Compensation-Claims)
* [M21-1, Part IV, Subpart ii, Chapter 2, Section G - Benefits under 38 U.S.C 1151](http://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#!agent/portal/554400000001034/article/554400000014567/M21-1-Part-IV-Subpart-ii-Chapter-2-Section-G-Benefits-Under-38-USC-1151?fromQuery=1151)
* [M21-1, Part IV, Subpart ii, Chapter 3, Section D - Disability Compensation Under 38 U.S.C 1151](http://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#!agent/portal/554400000001034/article/554400000014596/M21-1-Part-IV-Subpart-ii-Chapter-3-Section-D-Disability-Compensation-Under-38-USC-1151?fromQuery=1151)
* [M21-1, Part IV, Subpart iii, Chapter 3, Section E - DIC Benefits Under 38 U.S.C 1151](http://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#!agent/portal/554400000001034/article/554400000014638/M21-1-Part-IV-Subpart-iii-Chapter-3-Section-E-old-G-Dependency-and-Indemnity-Compensation-DIC-Benefits-Under-38-USC-1151?fromQuery=1151)
* [M21-1, Part IX, Subpart i - Ancillary Benefits](http://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#!agent/portal/554400000001034/article/554400000014997/M21-1-Part-IX-Subpart-i-Chapter-2-A)
* [Bartlett v Shinseki March 10, 2011](http://vbaw.vba.va.gov/bl/21/advisory/DADS/2011dads/Bartlett.doc)

Topic 1: 38 USC §1151 Criteria and Laws

38 USC §1151 Claims

38 USC §1151 covers claims regarding compensation based on:

* A disability or aggravation of a pre-existing disability due to hospitalization furnished by VA
* Injuries that occur as a result of Vocational Rehabilitation Training

**38 CFR Provisions**

The following regulations govern the claims under 38 USC §1151:

* 38 CFR §3.358 applies to claims received before *October 1, 1997* in which the condition for compensation is not based on the “fault requirement”.
* 38 CFR §3.361 discusses how compensation is based on the requirement that fault on part of the VA be found for claims received on or after October 1, 1997.
* 38 CFR §3.361a (2) applies to claims alleging disability or death due to compensated work therapy. This section applies to claims that were pending with the VA on *November 1, 2000*, or that were received by the VA after that date.

38 USC §1151 Benefits

If compensation is granted for a disability under 38 USC §1151, the disability is **not service- connected**. However, compensation is payable ***as if*** it were service-connected.

The distinction is that a Veteran receiving compensation solely under 38 USC §1151 is not entitled to all ancillary benefits that are payable to Veterans with service-connected disabilities.

Under 38 USC §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)

Compensation is **not** payable under 38 USC §1151 if injury or death was due to the Veteran’s own willful misconduct.

According to VAOPGCPREC 8-97, compensation may be paid for disabilities secondary to disabilities for which compensation is payable under 38 USC §1151.

**Identifying Claims for 38 USC §1151 Benefits**

There is no official form for claiming 38 U.S.C §1151 benefits.

Any form or other written communication used to claim compensation benefits may be accepted as a claim for benefits under 38 USC §1151.

It is important to remember the following:

* When a formal claim for compensation or pension is received and entitlement under 38 USC §1151 is ultimately established, the formal claim must be accepted as a claim for 38 USC §1151 benefits.
* 38 USC §1151 does not apply to service-connected disabilities made worse by treatment or Vocational Rehabilitation.

**Qualifying Disability or Death under 38 USC §1151**

In order to meet the qualifications of 38 USC §1151, 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 USC Chapter 31
* The provision of a COMPENSATED WORK THERAPY (CWT) program

**Non-VA Facility Disability or Death**

Under 38 USC §1151, the following are not considered hospital care, medical treatment, surgical treatment, or examination within the meaning of:

* Hospital care or medical services provided in a non-VA facility under a VA contract prepared under 38 USC §1703
* Nursing home care furnished under 38 USC §1720
* Hospital care, medical services, or examination provided under 38 USC §8153 in a facility over which the VA does not have direct jurisdiction

VA treatment or examination resulting in additional disability or death concurrent with a Veteran’s residence, in a contracted non-VA facility, might result in eligibility under 38 USC §1151.

**Ancillary Benefits**

A Veteran with a qualifying disability under 38 USC §1151 may also be eligible for the following ancillary benefits:

* Clothing allowance
* Specially adapted housing benefits, including a special housing adaptation grant
* Automobile or adaptive equipment benefits.

**Unavailable Ancillary Benefits**

The following ancillary benefits are not available by reason of a qualifying disability under 38 USC §1151:

* Service Disabled Veteran (RH) Insurance
* Civilian Health and Medical Program of VA (CHAMPVA)
* Waiver of the loan guaranty funding fee
* 38 USC Chapter 31 education benefits
* 38 USC Chapter 35 education benefits
* 10-point Civil Service Preference
* Special allowances under 38 USC §1312(a) and *Public Law (PL) 87-377*, Section 156, Restored Entitlement Program for Survivors (REPS)
* SC burial allowance
* Loan guaranty benefits for a surviving spouse

Fault on the Part of VA

M21-1, Part IV.ii.2.G states that 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 that:

* 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

**Expressed Consent vs. Implied Consent**

When determining if the fault is on the part of VA it is crucial to consider the type of consent the Veteran elicited to the treatment.

M21-1, Part IV.ii.G differentiates the two forms of consent as:

* **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.

Example: If a Veteran requires emergency care to preserve life or prevent serious impairment to health, and the Veteran or his/her representative is unable to consent orally or in writing, then consent is implied.

**Reasonably Foreseeable Event**

According to M21-1, Part IV.ii.2.G if 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.

The incident is not required to be completely unfathomable, however it must be one that a reasonable health-care provider would not consider an ordinary risk of the treatment provided.

**Tort Claims vs. 38 USC§1151 Claims**

38 USC §14.600 states that tort claims are claims filed in Federal Court against the United States, whereas 38 USC §1151 claims are filed with the Department of Veterans Affairs.

Tort claims are another way for a person to be compensated for injuries caused by Government employees. The Veteran may sue and recover damages after a trial or agreeing to a settlement.

According to M21-1, Part IV.ii.3.D, when a Veteran is injured under circumstances that result in possible entitlement to benefits under 38 USC §1151, the Veteran may also seek a judgment against the U.S. in a civil action, called a Tort Claim.

**Note:** When a Veteran agrees to a settlement or compromise, he/she signs away the right to sue in court in return for payment of an agreed-upon amount for damages.

**Duplication of Benefits**

The prohibition against duplication of benefits applies when the following two events occur:

* A claimant receives a sum of money or property to settle a legal claim arising from the injury or death of a Veteran
* Then the claimant files a claim for compensation with the Department of Veterans Affairs (VA) for that same injury or death

Topic 2: Reasons for Decision

Reason for Decision

According to M21-1, Part IV.ii.2.G, when preparing the Reasons and Bases section for USC §1151 claims, the RVSR should:

* Provide an adequate discussion of the factual bases for the claim
* Specify any treatment, surgery, or therapy that was provided

If VA treatment is found to have been erroneous, resulting in an additional disability, the RVSR should discuss ‘fault’ as the basis of an award of benefits under 38 USC §1151.

\***Important Note**: 38 U.S.C. 1151 Ratings are exempt from the Simplified Notification Letter procedures. 1151 ratings must be completed in the legacy-rating format.

**Decision Considerations**

Take the following steps when preparing a decision:

1. Prepare a decision whenever possible.
2. Seek VHA Opinion to avoid remand of a case.
3. Seek and interpret relevant materials:

* Follow-up treatment reports
* Medical records
* Surgical records
* Hospital clinical records
* Nurses' notes
* Consent Forms
* Accident or incident reports
* Records in connection with Federal Tort Claims Act based upon the same alleged disability

**Occurrences in §1151 Claims**

The following list the occurrences for which compensation is authorized under 38 USC §1151 for disabilities resulting from:

* Examination
* An act of omission
* Premature discharge
* Medication
* Vocational rehabilitation or CWT
* Veteran’s failure to follow instructions

**Independent Medical Evidence and Medical Opinions**

According to M21-1, Part IV.ii.2.G, 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

**Advisory Position**

M21-1, Part IV.ii.2.G suggests submission of unusually difficult cases involving claims for compensation under 38 USC §1151 to VA Central Office (CO) (211B) for an advisory opinion.

Rating Decisions

Claims under 38 USC §1151 are uncommon and difficult to process; therefore it is crucial for RVSRs to possess knowledge of this process in the event a claim is filed.

Often making a decision and a rating for this type of claim will require seeking advisory opinions from the Veterans Health Administration (VHA) in addition to the VA Central Office.

**3 Elements for a Successful 38 USC §1151 claim**

The following elements iterate the basic elements indicative of a successful 38 USC §1151 claim:

1. Determine if there were VA Therapeutic and Rehabilitative activities, Vocational Rehabilitation, Hospitalization, Medical /Surgical Treatment, or Examination.
2. Determine if additional disability exists by comparing the physical condition prior to claimed disease or injury with subsequent physical condition that resulted from claimed disease or injury (Reference 38 CFR §3.361(b).
3. Establish a ***nexus*** between VA therapeutic or vocational rehabilitation activities, hospitalization, medical or surgical treatment, or examination, and the additional disability or death.

**Uncorroborated Conclusions**

The RVSR should not make any uncorroborated conclusions in the rating decision regarding a relationship between treatment, surgery, or medication provided and the claimed disability.

The following are examples of what a RVSR may not simply state without corroborating medical evidence:

* The evidence does not show a myelogram caused the claimant’s tinnitus.
* It is unlikely that the Veteran’s medication caused a claimed side effect.

**Rating Criteria**

The rating criteria for 38 USC §1151 includes:

* Combining Qualifying Disabilities under §1151 and Service-Connected Disability
* Additional Degree of Disability
* Entitlement of Benefits for Additional Disability

**Combining Qualifying Disabilities under §1151 and Service-Connected Disability**

Disability ratings for which compensation is payable under 38 USC §1151 are to be combined with disability ratings assigned to service-connected disabilities as if the former were service-connected.

If two or more disabilities (at least one being a qualifying disability under §1151) are rated at 0 percent but interfere with the Veteran’s employability, the RVSR will assign a 10% rating under 38 CFR §3.324.

**Additional Degree of Disability**

According to M21-1, Part IV.ii.2.G, the following steps will assist the RVSR in determining the additional degree of disability for benefits payable under 38 USC §1151:

1. Determine the current level of disability (expressed as a percentage) based on all symptoms and findings.
2. Determine the level of disability prior to the treatment or examination, vocational rehabilitation, or participation in Compensated Work Therapy (CWT) that resulted in additional disability.
3. Subtract the percentage of disability reached in Step 2 from the percentage of disability reached in Step 1. (If the percentage of disability in Step 1 is 100, do not subtract the percentage of disability in Step 2, even if it is also 100.)

Note: If a percentage of disability cannot be determined in Step 2, no subtraction may be made.

**Entitlement of Benefits for Additional Disability**

Establish entitlement to benefits for an additional disability under 38 USC §1151 if the evidence shows aggravation of a non service-connected (NSC), pre-existing condition as a result of the following:

* VA medical treatment or examination
* Course of vocational rehabilitation
* Compensated Work Therapy (CWT) program

Attachment A: Decision Assessment Document

*Bartlett v. Shinseki*, March 10, 2011, No. 08-4092

United States Court of Appeals for Veterans Claims (Court)

What the case is about:

The Court held that the phrase “hospital care” under 38 U.S.C. § 1151 includes the provision of services unique to the hospitalization of patients.

The Court held that the determination of whether a situation involves “hospital care” depends on a variety of factors, to include the nature of services, degree of VA control over patient freedom, mental and physical condition of the patients, and foreseeability of potential harms.

Impact on VBA:

We will revise MR IV.ii.2.G.33 to comply with the Court’s decision.

Summary of the facts and Court’s reasons:

The Veteran was a patient in a lock-down psychiatric ward at a VAMC. While the Veteran was waiting in line at a cafeteria authorized for lock-down psychiatric patients, another patient shoved him. Nursing staff intervened and returned the aggressor to the line; however, the aggressor eluded the nursing staff and shoved the Veteran a second time.

The Veteran alleged that he suffered back and neck injuries due to this altercation and claimed compensation under 38 U.S.C. § 1151, which authorizes compensation for a disability that was “caused by hospital care, medical or surgical treatment, or examination.” In support of his claim, the Veteran stated that he was required to go to the cafeteria if he wanted to be fed and that two hospital staff members were required to escort the aggressor-patient, as VAMC personnel considered him to be dangerous.

The Board of Veterans’ Appeals (Board), in September 2008, denied section 1151 compensation on the basis that the fact pattern alleged by the Veteran fell outside the current scope of section 1151. The Board found that the Veteran was not injured as a result of hospital care, but rather as a result of an altercation with another patient that was “merely a coincidental event.”

The Veteran argued before the Court that “hospital care” includes the supervision of dangerous patients in a lock-down ward for purposes of section 1151 compensation, and that the negligent performance of that supervision caused his injury.

The Court held that “hospital care” encompasses, at a minimum, the provision of services unique to the hospitalization of patients. The Court reasoned that alternative meanings of “hospital care” do not accord with the ordinary meaning of the term “care” and do not give meaning to all the terms in section 1151. The Court declined to further clarify the definition of “hospital care” and provided a series of factors to guide future decision-making. Factors governing whether a situation involves “hospital care” include: the nature of the services, the degree of VA control over patient freedom, mental and physical condition of patients, and the foreseeability of potential harms.

In applying this definition of “hospital care” to the facts, the Court held that the Board erred in finding that the facts alleged by the Veteran were clearly outside the scope of section 1151. The Court noted that, according to the Veteran’s allegations, the Veteran was in a lock-down psychiatric ward where VA staff had total control over his movement, mandated his presence at the cafeteria for meals, and the facility contained patients who were mentally unstable and dangerous in such a foreseeable way that VA staff provided escorts to those individuals. Considering these factors, the Court concluded that the Veteran’s alleged situation involved “hospital care.”

The Court rejected the Board’s reasoning that an injury resulting from an altercation with a third party cannot be caused by “hospital care” for the purposes of section 1151 as misguided. The Court opined that there could be circumstances where a third-party attack is not a coincidental event, but is rather caused by negligent provision of VA hospital services to a patient. The Court also rejected the Secretary’s argument that availability of a tort award as a remedy does precludes the award of benefits under section 1151.

The Court, having concluded that the Veteran’s alleged situation involved “hospital care,” set aside the Board decision and remanded the case for the Board to determine whether the “hospital care” was (1) provided with “carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault” and (2) was the “proximate cause of the disability or death.”

Attachment B: Federal Tort Claims Act

**§14.600 Federal Tort Claims Act.**

(a) The Federal Tort Claims Act (28 U.S.C. §1291, §1346, §1402, §1504, §2110, §2401, §2402, §2411, §2412, and §2671 through §2680) prescribes a uniform procedure for handling claims against the United States, for money only, on account of damage to or loss of property, or on account of personal injury or death, caused by the negligent or wrongful act or omission of a Government employee while acting within the scope of his or her office or employment, under circumstances where the United States, if a private person, would be liable in accordance with the law of the place where the act or omission occurred.

(b) The Act provides that:

(1) No court action (except those involving a third party complaint, cross-claim, or counterclaim) shall be instituted unless the claimant shall have first presented his or her claim to, and it has been finally denied by, the appropriate Federal agency. The failure, however, of the agency to make final disposition of the claim within 6 months after it is filed may, at the option of the claimant, be deemed a final denial of the claim (28 U.S.C. **§**2675(a));

(2) Where a suit is filed after the denial of the administrative claim, the amount sought is limited to the amount of the claim presented to the Federal agency, except on proof of newly discovered evidence or intervening facts relating to the amount of the claim (28 U.S.C. §2675(b));

(3) Suits are tried without a jury, and a district court judgment may be appealed to the appropriate U.S. Circuit Court of Appeals, or upon consent, to the Court of Claims of the United States;

(4) Administrative claims must be filed in writing with the appropriate Federal agency within 2 years from the date the claim accrues, and a suit must be filed within 6 months from the date of mailing of the final denial by the agency of the administrative claim (28 U.S.C. §2401(b));

(5) 28 U.S.C. §2680 enumerates certain types of claims for which the United States is not liable under the Federal Tort Claims Act.

[38 FR. 5470, Mar. 1, 1973, as amended at 42 FR 41414, Aug. 17, 1977; 54 FR 34982, Aug. 23, 1989]

Attachment C: Occurrences for Consideration in §1151 Claims

Considering Compensation for 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, 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.

***Reference***: For more information on compensation for a disability resulting from VA examination, see Sweitzer v. Brown, 5 Vet. App. 503 (1993).

Considering Compensation for Disability Resulting from an Act of Omission (Ref: M21-1, IV.ii.2.G)

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 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.

***References***: For more information on informed consent, see 38 CFR **§**17.34, and the natural progression of a disease or injury, see 38 CFR **§**3.361(c)(2).

**Considering Compensation for Disability Resulting from Premature Discharge (Ref: M21-1, IV.ii.2.G)**

Compensation may be payable under 38 U.S.C. **§**1151 when a physician determines that a patient should be discharged from a hospital after a period of treatment, but the patient claims that the discharge:

* Was too early
* 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
* Discharge was premature.

An independent medical opinion may be necessary in such a case.

Considering Compensation for Disability Resulting from Medication (Ref: M21-1, IV.ii.2.G)

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.

Establishing Proximate Cause Associated With Compensated Work Therapy (CWT) Or Vocational Rehabilitation Services (Ref: M21-1, IV.ii.2.G)

Compensation may be payable under 38 U.S.C. **§**1151 for disability resulting from the Veteran's participation in an essential activity or function of vocational rehabilitation training or a CWT program.

It need not be shown that VA approved the specific activity that resulted in disability, as long as the activity is considered a necessary component of the training or work therapy VA authorized.

***Reference***: For more information, see 38 CFR **§**3.361(d) (3).

**Disability Resulting From Veteran’s Failure to Follow Medical Instructions (Ref: M21-1, IV.ii.2.G)**

In some cases, the evidence will show that, following VA treatment or surgery, the Veteran failed to follow post-treatment medical instructions, and incurred or aggravated a disability that would not have developed had he/she followed instructions.

In such cases, this failure may constitute an intercurrent cause, thereby precluding payment of benefits under 38 U.S.C. **§**1151.

Attachment D: Reference Notes

* More information on the adjudication of death claims involving 38 USC §1151, see M21-1, Part IV, Subpart iii, Chapter 1.B (Developing DIC claims under 38 USC §1151).
* More information on proximate cause can be located under 38 CFR §3.361(d).
* Additional information for care in non VA facilities can be located under 38 CFR §3.361(f).
* Additional information can be found in 38 CFR §3.361(1) regarding fault on the part of VA.
* Additional information can be found in 38 CFR §17.32 regarding unforeseeable events.
* Additional information on evaluating medical evidence is located under M21-1, Part III.iv.5.

Attachment E: Topic 2 Exercise

Instructions: Answer the following questions.

1. The provisions of which 38 CFR apply to claims under 38 USC §1151 received on or after October 1, 1997?
2. When compensation is granted for a disability under 38 USC §1151, what is the difference between compensation payable as if it were service-connected and compensation that is service-connected?
3. \_\_\_\_\_\_\_\_\_\_\_\_ is consent that has been clearly stated either orally or in writing.
4. When a Veteran is injured under circumstances that result in possible entitlement to benefits under 38 USC §1151, he/she may file what type of claim that is seeking a judgment against the U.S. in a civil action?
5. List the three elements of a successful 38 USC §1151 claim.
6. \_\_\_\_\_\_\_\_\_\_\_\_\_ is consent that may be inferred from the circumstances in the case.
7. How do 38 USC §1151 claims apply to service-connected disabilities made worse by treatment or Vocational Rehabilitation?
8. To what ancillary benefits may a claimant granted compensation under 38 USC §1151 be entitled?
9. What must the evidence show to establish that fault on the part of the VA in furnishing medical care, treatment or examination was the proximate cause of a Veteran’s disability or death?
10. Disability or death alleged due to Compensated Work Therapy is only applicable on or after what date?

Practical Exercise

Scenario:

Rex, a Veteran who is an orthopedic doctor, was hospitalized at a VA medical facility following a myocardial infarction. He was treated at the VA facility for six days and released, with a prescription for Coumadin from his treating VA physician, Dr. Hartman. Afterwards, he dropped the prescription off with George, the local (VA) pharmacist. However, George, who was distracted with distressing news concerning his wife Bree, replaced Rex’s Coumadin tablets with Prozac.

Within two weeks, Rex began experiencing additional chest pains and was again hospitalized at the VAMC. The hospital admission report, signed by Dr. Angina, contains a notation that “the Veteran’s Coumadin dose appears to have been inadequate.” Three days later, Rex sustained another cardiovascular infarction and passed away.

Following Rex’s death, in 2005, his spouse filed a 38 USC §1151 cause of death claim with the VA.

What action would the RVSR have to take in this scenario?