Line of Duty – Willful Misconduct

Trainee Handouts

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Objectives

* Identify requirements for line of duty disability or death claim
* Identify the key components of “willful misconduct”
* Determine when to make a willful misconduct determination
* Restate considerations when making willful misconduct determinations based on alcohol consumption
* Restate considerations when making willful misconduct determinations based on substance abuse
* Restate considerations when making willful misconduct determinations based on vehicular accidents

References

* [38 CFR 3.1(m) Definition of In Line of Duty](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_1.htm)
* [38 CFR 3.1(n)](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_1.htm) Definition of Willful Misconduct
* 38 CFR [3.301 Line of Duty and Misconduct](http://www.ecfr.gov/cgi-bin/text-idx?SID=b685e50e2bacec1008bcd01cc2db7a1a&mc=true&node=se38.1.3_1301&rgn=div8)
* [38 CFR 3.302](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_302.htm) Service Connection for Mental Unsoundness in Suicide
* [M21-1, Part III, Subpart v, 1.D, Willful Misconduct and Line of Duty](http://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#!agent/portal/554400000001034/article/554400000014222/M21-1-Part-III-Subpart-v-Chapter-1-Section-D-Willful-Misconduct-and-Line-of-Duty)

Topic 1: Line of Duty Determination

In Line of Duty Definition

According to 38 CFR 3.1(m), "in line of duty" means an injury or disease incurred or aggravated during a period of active military, naval, or air service, with the following exceptions:

* The injury or disease was the result of the Veteran's own willful misconduct
* The claim was filed after October 31, 1990 and was a result of Veteran's abuse of alcohol or drugs.
* A service department finding that injury, disease, or death occurred in line of duty will be binding on the Department of Veterans Affairs (VA) unless it is patently inconsistent with the requirementsof laws administered by the VA.

Line of Duty Requirements "Not Met"

According to 38 CFR 3.1(m), requirements for in line of duty are not met if at the time the injury was suffered or disease contracted the Veteran was:

* Avoiding duty by desertion, or was absent without leave (AWOL) which materially interfered with the performance of military duty.
* Confined under a sentence of court-martial involving an unremitted dishonorable discharge.
* Confined under sentence of a civil court for a felony as determined under the laws of the jurisdiction where the person was convicted by such court.

Responsibility for Line of Duty Determination

Normally, the authorization activity is responsible for line of duty administrative determinations. However, the rating activity has jurisdiction over determinations involving:

* Disease
* Suicide attempts
* Death by suicide

The rating activity determines the issue, and includes the determination in the formal rating decision.

**Line of Duty Determination "Not Required"**

A line of duty determination is ***not*** required in the following cases:

* A service department makes a formal or informal determination that a disability or death was incurred in the line of duty
* Service records show that death occurred while flying in a military aircraft while on duty
* Service records show the injury was incurred accidentally or under circumstances which obviously indicate accidental incurrence, especially if incurred in a combat zone, except when specific information citing circumstances of unauthorized leave or willful misconduct exists
* Cases involving vehicular accidents are involved, except when there is positive evidence of record showing potential willful misconduct, such as:
  + - Medical records
    - Police reports showing intoxication of the Veteran at the time of the accident

Formal VA Line of Duty Determination

The VA will prepare a formal VA determination, whether favorable or unfavorable, as to line of duty if the service department:

* Did not make such finding, AND the injury or death was incurred under circumstances which raise a legitimate issue of willful misconduct
* Holds the disability or death not in line of duty
* Holds the disability or death to be in the line of duty, but its finding may be properly questioned

**Death Occurred On or After January 1, 1957**

If death occurred on or after January 1, 1957, the service departments are *not* required by law to make a formal line of duty finding. However, the service departments have agreed to continue making investigations and furnishing reports to VA when requested.

Do not assume that an investigation was made in every case. In the request for a report, state briefly what is required, either in the form of a:

* Question
* Request for a record that is known to exist
* Request for a record that may reasonably be expected to exist

**Development**

Accept service department findings as conclusive for VA purposes, unless a preponderance of evidence indicates willful misconduct.

According 38 CFR 3.301, direct service connection may be granted only when a disability or cause of death was incurred or aggravated in line of duty and not the result of the Veteran's:

* Own willful misconduct
* Abuse of alcohol or drugs

VSR must look to the facts to determine level of impairment and causation for line of duty claims involving alcohol or substance abuse.

***It is important that VSR not apply his or her own personal standard or bias.***

Topic 2: Willful Misconduct

Willful Misconduct Definition

According to 38 CFR 3.1(n), willful misconduct is defined as:

* An act involving conscious wrongdoing or known prohibited action.
* A service department finding that injury, disease, or death was not due to misconduct will be binding on the Department of Veterans Affairs (VA) unless it is patently inconsistent with the facts and the requirements of laws administered by VA.

**Key Components**

The definition of willful misconduct includes the following key components:

* Willful misconduct involves deliberate or intentional wrongdoing with knowledge of, or wanton and reckless disregard of, its probable consequences.
* A wrongful act is either inherently wrong in itself, or forbidden by law.
* Mere technical violation of police regulations or ordinances does not necessarily constitute willful misconduct.
* Willful misconduct will not be determinative unless it is the proximate cause of injury, disease, or death.

Willful Misconduct Determinations

When considering determination of willful misconduct, note the subtle differences in the wording of the two laws:

* Line of duty - “The service department’s finding of in line of duty is binding on VA unless patently inconsistent with the requirements of VA law.”
* Willful misconduct - “The service department’s finding of not willful misconduct is binding on VA unless patently inconsistent with the facts and the requirements of VA law.” The addition of "the facts":
  + - Grants VA more leeway in determining the presence or absence of willful misconduct.

**When to Make a Willful Misconduct Determination**

Make a willful misconduct determination if a death or disability that affects entitlement occurred under questionable circumstances.

Willful misconduct is not determinative unless it is the proximate, or direct, cause of injury, disease, or death.

**Proximate Cause**

Injury cannot be held due to willful misconduct on the basis of an act "*malum in se*" (inherently wrong in itself; immoral) or "*malum prohibitum*" (forbidden by positive law), unless the wrongful act was, in and of itself, the proximate or direct cause of the resulting injury.

**When Not to Make a Willful Misconduct Determination**

In general, accept service department findings of no misconduct as conclusive unless there is a preponderance of evidence to the contrary.

The principles stated in [M21-1, Part III, subpart v, 1.D.6.c](http://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/portal.html?portalid=554400000001034) regarding circumstances in which line of duty should not routinely be questioned apply to willful misconduct.

**Death Pension Entitlement in Willful Misconduct Cases**

Death pension benefits may be payable if death:

* Was not in the line of duty OR
* Was due to willful misconduct, AND
* Occurs in service

Development

When developing a claim involving willful misconduct:

* The VSR should not “witch-hunt” or over-develop cases of accidental injury or death.
* If there is no unfavorable evidence of record and no specific indication of its existence, then the service department’s finding should be accepted without question and no development is needed.
* If the fact pattern in the particular case is inconsistent or would lead a reasonable person to question the circumstances surrounding the event, injury, or death, then development is in order.

**Willful Misconduct Exceptions**

There are exceptions to the application of willful misconduct in determining entitlement for benefits involving venereal disease and suicide.

According to 38 CFR 3.301(c)(1), residuals of venereal disease:

* Are not to be considered the result of willful misconduct.
* Service connection for residuals of venereal disease requires that the initial infection must have occurred during active service.

Under 38 CFR 3.302, for suicide to constitute willful misconduct the act of self-destruction must be intentional. The VA will not consider the suicide willful misconduct if the:

* Person is mentally unsound, because he/she cannot form the required "intent" that's required for willful misconduct.
* Mental unsoundness is related to military service. If it is, the Veteran's family is eligible for VA benefits.

Topic 3: Willful Misconduct Determinations and Alcohol Consumption

Willful Misconduct and Alcohol Consumption

According to 38 CFR 3.301(c)(2):

* Simple drinking of alcoholic beverage is not of itself willful misconduct.
* Deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct.
* If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person’s willful misconduct.
* Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

**Intoxication Standards Set by National Safety Council (NSC)**

The National Safety Council (NSC) defines Blood Alcohol Concentration (BAC) as:

* Grams of alcohol per 100 milliliters of blood, or
* Grams of alcohol per 210 liters of breath.

Under [23 U.S.C. 163](http://www.law.cornell.edu/uscode/html/uscode23/usc_sec_23_00000163----000-.html), BAC of .08 is the legal level of intoxication

|  |  |
| --- | --- |
| Blood Alcohol Concentration | Level of Intoxication |
| .00 - .05 | Presumed not intoxicated/impaired. |
| .05 - .08 | No presumption that the person was or was not intoxicated/impaired.  Such BAC may be considered with other competent evidence in determining if the person was under the intoxicating influence of alcohol. |
| .08 or more | Presumption established that the person was intoxicated / impaired. |

**Proximate and Immediate Effects**

A person is held responsible for disabling injuries or death that resulted directly and immediately from indulgence in alcohol on an individual occasion.

Willful misconduct in cases involving alcohol consumption for proximate and immediate effects, involves the willingness to achieve a drunken state and, while in this condition, to undertake tasks for which the person is unqualified, physically and mentally, because of the resulting intoxication.

### **Development for Secondary Diseases**

The following guidelines apply to claims for compensation based on organic diseases that are secondary to chronic use of alcohol.

|  |  |
| --- | --- |
| For claims filed… | VA considers… |
| Prior to November 5, 1990 | Such disabling diseases were incurred in the line of duty and therefore could qualify for compensation. |
| On or after November 5, 1990 | Such disabling diseases were not incurred in the line of duty and cannot qualify for compensation, because 38 U.S.C. 1110 prohibits payment of compensation for a disability that is a result of a Veteran’s abuse of alcohol. |

Willful Misconduct Involving Alcohol Determinations

When making determinations involving alcohol, consider the following:

* Determinations in such instances depend on the facts found.
* Exercise care to guard against findings of willful misconduct on the basis of inconclusive evidence.
* An adverse determination requires that there must be excessive indulgence as the proximate cause of the disability or death in question.
* In determining willful misconduct, consider laboratory tests bearing on the issue of alcoholic intoxication together with all other facts and circumstances.

Discussion: Determination is not resolved in the claimants favor if blood alcohol is less than the legal level of intoxication.

**Rationale:** Because, the question is whether the individual was *impaired* by ingestion of alcohol and that impairment proximately caused the injury or death. Impairment can be shown by errors in judgment by the claimant; errors which he/she would not normally make.

Topic 4: Willful Misconduct Determinations and Substance Abuse

**Alcohol and Drug Abuse Definitions**

For the purpose of VA benefits, substance abuse includes both alcohol and drugs.

Alcohol abuse is the drinking of alcoholic beverages in an amount, over any period of time, sufficient to cause a disability.

Drug abuse includes the use of:

* Illegal drugs, including prescription drugs that are illegally or illicitly obtained
* Prescribed or non-prescribed drugs for a purpose other than the medically intended purpose
* Other agents, such as glue or paint, to enjoy their intoxicating effects

Willful Misconduct and Substance Abuse

According to 38 CFR 3.301(c)(2), substance abuse is not considered willful misconduct when use involves:

* Isolated and infrequent use of drugs by itself
* Organic diseases and disabilities which are a secondary result of the chronic use of drugs and infections coinciding with the injection of drugs
* Drugs used for therapeutic purposes or where use of drugs or addiction thereto, results from a service-connected disability

Substance abuse is considered willful misconduct when:

* Progressive and frequent use of drugs reach the point of addiction
* Drugs are used to enjoy or experience their effects and the effects result proximately and immediately in disability or death

Accidental or Careless Use of Drugs

Do not consider the accidental or careless use of prescription or non-prescription drugs, or other agents, to be drug abuse unless the accident or carelessness is the result of:

* Intoxication from alcohol or illegal drugs
* Veteran’s willful misconduct

Service Connection for Secondary Conditions Considerations

|  |  |
| --- | --- |
| Service Connection for Secondary Conditions Involving Substance Abuse | |
| If … | Then … |
| The diseases and disabilities are a secondary result of alcohol or drug abuse | Effective November 1, 1990, SC cannot be granted for these diseases and disabilities. |
| A Veteran’s alcohol or drug abuse is determined to be part of, or secondary to, an SC condition | Any disease or disability resulting from the alcohol or drug abuse should still be SC under [38 CFR 3.310(a)](http://www.warms.vba.va.gov/regs/38CFR/BOOKB/PART3/S3_310.DOC).  ***Reference***: For more information on service connection under [38 CFR 3.310(a)](http://www.warms.vba.va.gov/regs/38CFR/BOOKB/PART3/S3_310.DOC) for disease or disability resulting from alcohol or drug abuse, see *Allen v. Principi* (Docket 99-7199, U. S. Court of Appeals for the Federal Circuit). |

Topic 5: Willful Misconduct Determinations and Vehicular Accidents

Importance of Physical Evidence

In vehicular accidents, there is frequently no direct testimony or such testimony in itself presents an incomplete picture. Therefore, the physical evidence assumes added importance and is entitled to greater weight. Such facts speak for themselves and are not subject to the variations of observation or self-interest often found in direct testimony.

Some examples of physical evidence that may be considered are:

* Skid marks
* Damage to vehicles
* Position of vehicles after the accident in relation to the point of impact
* Debris and scattered parts

Considerations

In vehicular accident cases, a decision maker should consider all factors including, but not limited to:

* Excessive speed
* Diversion of attention to companions
* Use of intoxicants or illegal substances

Although a single factor may not be sufficient evidence, it is possible that a combination of factors may be sufficient evidence that the Veteran’s manner of operation of a vehicle was so unreasonable and dangerous as to constitute a wanton and reckless disregard of the probable consequences.

It is reasonable for the decision maker to conclude that an accident proximately resulted from such combined factors in the absence of any intervening cause, including, but not limited to:

* Mechanical defect in the vehicle
* A defect in the road
* Actions by some other person

Willful Misconduct Vehicular Accidents Determination

Willful misconduct may be determined if the Veteran’s disability or death resulted from a vehicular accident, and it is established that the Veteran:

* Was the operator of the vehicle, or
* Contributed in some way to the cause of the accident, for example, interfering with the operator.

A preponderance of evidence establishing that there was a wanton and reckless disregard of the probable consequences in a vehicular accident is generally the decisive factor in a willful misconduct determination.

### **Development**

When developing claims involving vehicle accidents, consider the following:

* Do not routinely develop for a misconduct determination in automobile accident cases without positive evidence of potential misconduct.
* To make a determination, obtain and carefully consider all evidence available, including police reports.
* Give service department findings, including “no misconduct” determinations, due consideration.

Weight of Service Department Findings

The decision of Department of Veterans Affairs (VA) mustrest on principles developed under VA laws, with special reference to wanton and reckless disregard of the probable consequences, as evidence of willful misconduct.

Attachment A: Topic 1 Exercise

Scenario 1:

The Veteran’s records show that, on January 12, 1968, he fell and suffered significant injuries to his left leg. The service department found the injury to be in line of duty.

Question: Is any development required based on the need for determination? Why or why not?

Scenario 2:

The Veteran’s records show that, on January 12, 1968, he fell and suffered significant injuries to his left leg. The service department found the injury to be in line of duty. However, the Veteran’s DD-214 in file shows 31 days of lost time, 1 Jan – 31 Jan, 1968.

Question: Is any development required based on the need for determination? Why or why not?

Attachment B: Topic 5 Exercise

**Scenario 1:**

Facts show the Veteran was a passenger in a civilian automobile that was involved in an accident, resulting in significant injuries to the Veteran. Service department found them to be in line of duty, no misconduct.

Question: Is any development required based on the need for determination? Why or why not?

**Scenario 2:**

The Veteran was the driver of a civilian automobile that was involved in an accident, resulting in significant injuries to the Veteran. Service department found them to be in line of duty, no misconduct. However, the police report (of record) showed that, just prior to the accident, the Veteran’s car was traveling at estimated speeds in excess of 100 mph, causing him to lose control and crash.

Question: Is any development required based on the need for determination? Why or why not?

Attachment C: Practical Exercise

**Scenario 1:**

While in service, Veteran, highly intoxicated, was a passenger in a civilian vehicle. While being driven back to base, the Veteran initiated horse-play with the driver of the vehicle, jerking on the steering wheel and attempting to take the transmission out of gear. As a result, the driver lost control of the vehicle, striking a light pole and causing significant disability to the Veteran’s right arm. No line of duty determination was done by the service department.

Is this situation in line of duty, not in line of duty, willful misconduct or not due to willful misconduct?

**Scenario 2:**

While in service, Veteran was driving home on authorized leave. Although his home was 1,000 miles away from the base, and his leave was only for 4 days, he decided that he could drive all night and still be able to spend 2 days at home. He fell asleep at the wheel, which resulted in an accident leaving him a quadriplegic. Service department found the disabilities to be in line of duty.

Is this situation in line of duty, not in line of duty, willful misconduct or not due to willful misconduct?

**Scenario 3:**

Three Army telephone linemen are drinking at the NCO club. After remaining there for some hours, they leave. Once outside, one Service member grabs the cap of another, climbs a telephone pole, and places the cap on the top of the pole. The capless Service member then climbs the pole to retrieve his cap and, while reaching for it, falls to the ground, resulting in significant disabilities to the left leg. Service department findings are indeterminate.

Is this situation in line of duty, not in line of duty, willful misconduct or not due to willful misconduct?

**Scenario 4:**

While in service, the Veteran takes his spouse to restaurant for anniversary dinner. During the course of the meal, they share a split of champagne. Following dessert and coffee, they go to the car to drive home. On the way home, the car skids on the wet road and hits a parked car, resulting in a significant disability to the Veteran’s chest. The police report notes the wet roadway, absence of streetlights, and does not mention any finding or comment about alcohol or any indication of recklessness on the part of the driver.

Is this situation in line of duty, not in line of duty, willful misconduct or not due to willful misconduct?

**Scenario 5:**

A Service member went home after work and took a cooler of beer out to the back yard. He sat in the yard drinking the beer, hoping to spot an owl that had kept him awake the previous 4 nights. A long-distance trucker lived next door. The neighbor returned home at 10 p.m. from a long haul, and parked his semi into the space between the two houses. The Service member had fallen asleep after consuming several beers while waiting for the owl. He was fast asleep in the yard when the neighbor’s semi backed over him resulting in his death. Post-mortem blood-alcohol tests noted .12 blood-alcohol levels.

Is this situation in line of duty, not in line of duty, willful misconduct or not due to willful misconduct?

**Scenario 6:**

A Service member scores some really good methamphetamine from his friends. After ingesting some, decides that he possesses the strength of 10 men, and proceeds to show his friends that he can stop an oncoming train with his bare hands. The task far over-reaching his abilities, the train strikes him, knocking him 650’ down the tracks, killing him.

Is this situation in line of duty, not in line of duty, willful misconduct or not due to willful misconduct?