§ 3.358 Compensation for disability or death from hospitalization, medical or surgical treatment, examinations or vocational rehabilitation training (§ 3.800).

(a) General. This section applies to claims received by VA before October 1, 1997. If it is determined that there is additional disability resulting from a disease or injury or aggravation of an existing disease or injury suffered as a result of hospitalization, medical or surgical treatment, examination, or vocational rehabilitation training, compensation will be payable for such additional disability. For claims received by VA on or after October 1, 1997, see §3.361.

(b) Additional disability. In determining that additional disability exists, the following considerations will govern:

(1) The veteran’s physical condition immediately prior to the disease or injury on which the claim for compensation is based will be compared with the subsequent physical condition resulting from the disease or injury, each body part involved being considered separately.

(i) As applied to examinations, the physical condition prior to the disease or injury will be the condition at time of beginning the physical examination as a result of which the disease or injury was sustained.

(ii) As applied to medical or surgical treatment, the physical condition prior to the disease or injury will be the condition which the specific medical or surgical treatment was designed to relieve.

Cross Reference: Basic pension and eligibility determinations. See §3.314.

[38 FR 52018, Oct. 6, 1993]
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(2) Compensation will not be payable under this section for the continuance or natural progress of a disease or injury for which the hospitalization, medical or surgical treatment, or examination was furnished, unless VA’s failure to exercise reasonable skill and care in the diagnosis or treatment of the disease or injury caused additional disability or death that probably would have been prevented by proper diagnosis or treatment. Compensation will not be payable under this section for the continuance or natural progress of a disease or injury for which vocational rehabilitation training was provided.

(c) Cause. In determining whether such additional disability resulted from a disease or an injury or an aggravation of an existing disease or injury suffered as a result of training, hospitalization, medical or surgical treatment, or examination, the following considerations will govern:

(1) It will be necessary to show that the additional disability is actually the result of such disease or injury or an aggravation of an existing disease or injury and not merely coincidental therewith.

(2) The mere fact that aggravation occurred will not suffice to make the additional disability compensable in the absence of proof that it resulted from disease or injury or an aggravation of an existing disease or injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination.

(3) Compensation is not payable for the necessary consequences of medical or surgical treatment or examination properly administered with the express or implied consent of the veteran, or, in appropriate cases, the veteran’s representative. “Necessary consequences” are those which are certain to result from, or were intended to result from, the examination or medical or surgical treatment administered. Consequences otherwise certain or intended to result from a treatment will not be considered uncertain or unintended solely because it had not been determined at the time consent was given whether that treatment would in fact be administered.

(4) When the proximate cause of the injury suffered was the veteran’s willful misconduct or failure to follow instructions, it will bar him (or her) from receipt of compensation hereunder except in the case of incompetent veterans.

(5) Compensation for disability resulting from the pursuit of vocational rehabilitation is not payable unless there is established a direct (proximate) causal connection between the injury or aggravation of an existing injury and some essential activity or function which is within the scope of the vocational rehabilitation course, not necessarily limited to activities or functions specifically designated by the Department of Veterans Affairs in the individual case, since ordinarily it is not to be expected that each and every different function and act of a veteran pursuant to his or her course of training will be particularly specified in the outline of the course or 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 the Department of Veterans Affairs independently giving rise to such entitlement and such acts on the part of both proximately caused the additional disability.

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

§ 3.359 Determination of service connection for former members of the Armed Forces of Czechoslovakia or Poland.

Rating boards will determine whether or not the condition for which treatment is claimed by former members of the Armed Forces of Czechoslovakia or Poland under 38 U.S.C. 109(c) is service connected. This determination will be made using the same criteria that applies to determinations of service incurrence and in line of duty when there is no character of discharge bar.

[43 FR 4424, Feb. 2, 1978]

§ 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 active military, naval, or air service in line of duty.

(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. 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 §3.32(c) applies.

(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 §§3.114(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.