

**Department of  
Veterans Affairs**

# Memorandum

Date: February 16, 1999

VAOPGCPREC 1-99

From: General Counsel (022)

Subj: Interpretation of 38 U.S.C. § 1151 and 38 C.F.R. § 3.358;  
Psychiatric Disability Resulting from Assault During Examination or Treatment

To: Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

- a. May compensation be paid under 38 U.S.C. § 1151 for disability incurred or aggravated as the result of a sexual assault by a Department of Veterans Affairs (VA) physician which occurred while a veteran was receiving an examination or medical treatment at a VA facility?
- b. May compensation be paid under 38 U.S.C. § 1151 for a psychiatric disability incurred or aggravated as the result of a VA examination or medical treatment, or is compensation under those provisions limited to incurrence or aggravation of physical disability?

DISCUSSION:

1. The opinion request concerns a veteran's claim for benefits under 38 U.S.C. § 1151 for a psychiatric disability allegedly resulting from a sexual assault by a VA physician. The opinion request states the following facts. The veteran received treatment for a service-connected back disability at a VA outpatient clinic in 1992. The veteran asserts that she was sexually assaulted at the outpatient clinic by the VA physician providing her medical treatment. It is not clear from the currently available evidence whether the assault occurred in the context of a VA examination or the delivery of medical treatment. A VA therapist who has treated the veteran for psychiatric problems has concluded that the veteran suffers from post-traumatic stress disorder arising from the sexual assault at the outpatient clinic. The veteran has filed a claim for benefits under 38 U.S.C. § 1151.
2. The current provisions of 38 U.S.C. § 1151, as amended by Pub. L. No. 104-204, apply only with respect to claims filed on or after October 1, 1997. Pub. L. No. 104-204, § 422(a) and (c), 110 Stat. 2874, 2926-27; VAOPGCPREC 40-97. Because the veteran's claim was filed in August 1996, it is governed by the provisions of 38 U.S.C. § 1151 in effect prior to

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October 1, 1997. All references to 38 U.S.C. § 1151 in this opinion are to the version of that statute in effect prior to October 1, 1997, unless otherwise indicated. Section 1151 provides, in pertinent part:

Where any veteran shall have suffered an injury, or an aggravation of an injury, *as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Secretary, or as a result of having submitted to an examination under any such law . . .*, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under [38 U.S.C. ch. 11] and dependency and indemnity compensation under [38 U.S.C. ch. 13] shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

(Emphasis added.)

3. We begin with the question of whether compensation may be paid under section 1151 for disability due to sexual assault occurring during the provision of medical treatment. Section 1151 authorizes compensation for disability due to injury, or aggravation of an injury, suffered "as the result of . . . medical or surgical treatment." In *Brown v. Gardner*, 513 U.S. 115, 119 (1994), the Supreme Court stated that "[t]his language is naturally read simply to impose the requirement of a causal connection between the 'injury' or 'aggravation of an injury' and ' . . . medical or surgical treatment . . .'" The plain language of section 1151 does not cover injuries which were merely incurred during or coincident with treatment but not "as a result of" treatment. See VAOPGCPREC 7-97 (stating similar conclusion with respect to injuries incurred or aggravated "as the result of . . . hospitalization").

4. The term "treatment" is defined as "the institution of measures or the giving of remedies designed to cure a disease," *Stedman's Medical Dictionary* 1320 (3rd ed. 1972), or "the management and care of a patient for the purpose of combating disease or disorder." *Dorland's Illustrated Medical Dictionary* 1736 (28th ed. 1994). Accordingly, section 1151 is most naturally read as authorizing compensation for disability caused by procedures or remedies administered by VA for the purposes of combating a disease or injury. A sexual assault generally would not be within the ordinary meaning of the term "medical or surgical treatment." The fact that a sexual

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assault occurs coincident with the administration of medical or surgical treatment or is committed by a treating physician does not provide a basis for compensation under the plain language of 38 U.S.C. § 1151. Notwithstanding the proximity in time and place to medical or surgical treatment, a sexual assault would ordinarily be an independent and intervening event which does not itself constitute medical or surgical treatment. We note, however, that, if the particular actions or procedures which are alleged to have constituted an assault are otherwise within the ordinary meaning of the term "medical or surgical treatment," then compensation may be paid under section 1151 for disability caused by such actions or procedures, even though the claimant has characterized those actions as an assault. Accordingly, it may be necessary to make a factual determination in a particular case as to whether the actions claimed to have caused disability may reasonably be considered part of the "treatment" designed to combat a disease or disorder, or whether they were independent actions which were merely coincidental with such treatment.

5. In other contexts, primarily involving matters of insurance coverage, courts have held that sexual assault by a physician does not constitute "medical treatment" or "medical services." In *D.D. v. Insurance Co. of North America*, 905 P.2d 1365 (Alaska 1995), the court concluded that a physician's sexual assault of a patient did not arise out of medical treatment or service for purposes of a business owner's insurance policy which excluded coverage for injuries arising out of medical treatment or service. The court reasoned that "for the sexual assault to 'arise out of' medical treatment or service, the medical treatment or service must be more than just the site of the assault." 905 P.2d at 1368. The court noted that its conclusion represented the consensus view of the courts which had addressed that issue:

[T]here is . . . consensus that when a physician causes an injury that is wholly unrelated to the treatment, he has not rendered "medical services or treatment" to the patient. In particular, courts which have considered cases involving sexual assaults by health care providers held that such assaults do not "arise out of" medical treatment.

*Id.* at 1369 (citing cases from several jurisdictions). Although not controlling for purposes of interpreting 38 U.S.C. § 1151, these cases are consistent with our conclusion that sexual assault by a physician would not be within the ordinary meaning of the term "medical or surgical treatment," as used in section 1151.

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6. The history of section 1151 indicates that its purpose was to provide compensation for disability resulting from procedures employed by VA for purposes of treating a disease or injury. The history of section 1151 is discussed in detail in *Gardner v. Brown*, 5 F.3d 1456, 1460-62 (Fed. Cir. 1993), *aff'd*, 513 U.S. 115 (1994), and is repeated here to the extent pertinent. The provisions currently codified in section 1151 originated in section 213 of the World War Veterans' Act of 1924, ch. 320, 43 Stat. 607, 623 (1924) (WWVA). Section 213 derived from a proposal by General Frank T. Hines, the Director of the United States Veterans' Bureau, to provide compensation for disability resulting from medical or surgical treatment of veterans. In commenting on a proposal to pay compensation for disability due to vocational training, General Hines stated: "I would extend the principle beyond this particular proposal to include also ratable disabilities incurred without fault and *due to the hazards of medical and surgical treatment.*" *World War Veterans' Legislation: Hearings Before the House Comm. on World War Veterans' Legislation*, 68th Cong., 1st Sess. 122 (1924) (*House Hearings*) (emphasis added). At hearings concerning that proposal, General Hines and members of Congress discussed the need to provide compensation for disability due to medical procedures such as operations and "spinal punctures." *House Hearings* at 114.

7. The above-referenced history suggests that, in authorizing compensation for disability due to "medical or surgical treatment," Congress had in mind the unintended effects of medical and surgical procedures administered as treatment for a service-connected disability. There is no indication in the language or history of the WWVA or section 1151 that Congress intended those provisions to provide a remedy for an occurrence such as an intentional tort committed by a VA employee, where such action would not ordinarily be considered part of the treatment of the veteran's injury or disease.

8. In VAOPGCPREC 7-97, we concluded that, insofar as section 1151 authorizes compensation for disability due to "hospitalization," it is not restricted to disability caused by medical care administered during hospitalization, but may encompass disability caused by circumstances of hospitalization which are not directly related to medical care. That conclusion was based on the plain meaning of the term "hospitalization," which is ordinarily understood to encompass, in addition to medical services, other custodial aspects of maintaining an individual in a hospital. In contrast, the term "medical or surgical treatment" unambiguously refers only to

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medical or surgical procedures and remedies administered to combat disease or injury and cannot be construed to encompass other circumstances which occur coincident with the provision of treatment but which do not themselves constitute medical or surgical treatment.

9. We next consider whether compensation may be paid under section 1151 for disability due to sexual assault occurring during a VA examination. Section 1151 authorizes compensation for disability suffered "as a result of having submitted to an examination" under any law administered by VA. In *Sweitzer v. Brown*, 5 Vet. App. 503, 505 (1993), the United States Court of Veterans Appeals (CVA) interpreted the phrase "having submitted to an examination" to mean that "an injury, in order to be compensable under § 1151, must have resulted from the examination itself, not the process of reporting for the examination." The CVA further indicated that section 1151 does not apply to disabilities which are merely coincidental with the receipt of examination or treatment from VA. *Id.* at 505. The term "examination" is defined as "[a]ny investigation made for the purpose of diagnosis," *Stedman's Medical Dictionary* 440 (3d ed. 1972), or "inspection, palpitation, auscultation, percussion, or other means of investigation, especially for diagnosing disease." *Dorland's Illustrated Medical Dictionary* 589 (28th ed. 1994). A sexual assault generally would not be within the ordinary meaning of the term "examination," as used in section 1151. Accordingly, disability due to a sexual assault occurring coincident with a VA examination generally may not be said to have resulted from the examination itself. Rather, the assault would be an independent and intervening cause of the disability and would be beyond the scope of section 1151. We note, however, that, if the actions or procedures alleged to have constituted an assault are otherwise within the ordinary meaning of the term "examination," as used in section 1151 with reference to medical examinations, then compensation may be paid under section 1151 for disability caused by such actions or procedures, even though the claimant has characterized those actions as an assault. Accordingly, it may be necessary to make a factual determination in a particular case as to whether the actions alleged to have caused disability were part of an examination made for purposes of diagnosis or evaluation of a disability, or whether they were independent actions which were merely coincidental with the examination.

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10. Viewed in isolation, the statutory phrase "as a result of having submitted to an examination" may appear broader than the phrase "as the result of . . . medical or surgical treatment." Specifically, the inclusion of the phrase "having submitted to" could be viewed as covering disabilities which do not result from the examination itself, but which would not have been incurred but for the claimant's having submitted to the examination. However, the CVA's decision in *Sweitzer* strongly suggests that the phrase "having submitted to" does not create a broader causation standard with respect to examinations than was provided with respect to hospitalization, treatment, or vocational rehabilitation. A similar interpretation is suggested by 38 C.F.R. § 3.358(a), the VA regulation implementing section 1151, which does not include the phrase "having submitted to," but refers only to disease or injury suffered "as a result of . . . medical or surgical treatment, or examination." As a general rule, statutes must be construed so as to give effect to every clause and word. See *Moskal v. United States*, 498 U.S. 103, 109 (1990). Although *Sweitzer* and 38 C.F.R. § 3.358(a) both suggest that the phrase "having submitted to" does not establish a broad causation standard encompassing all injuries or diseases flowing, in a but-for sense, from the act of submitting to an examination, neither purports to explain the purpose and effect of that statutory language. As explained below, we believe that the context and history of section 1151 reasonably indicate the purpose and effect of that phrase.

11. The meaning of any statutory word or phrase must be discerned by reference to context of the entire statute. See *Smith v. Brown*, 35 F.3d 1516, 1522-23 (Fed. Cir. 1994). Section 1151 authorizes compensation for disability due to injury incurred or aggravated "as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation . . . awarded under any of the laws administered by the Secretary, or as a result of having submitted to an examination under any such law." (Emphasis added). The significance of the phrase "having submitted to" is suggested by its juxtaposition to the preceding phrase "awarded under any of the laws administered by the Secretary." The statute unambiguously provides that disability due to VA hospitalization, treatment, or vocational rehabilitation may be compensated under section 1151 only if such hospitalization, treatment, or vocational rehabilitation was "awarded" by VA under the laws governing entitlement to such benefits. See, e.g., 38 U.S.C. §§ 1710 (eligibility for hospital care), 1712 (eligibility for outpatient services), 3102 (eligibility for vocational rehabilitation). In contrast, disability due

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to VA examination is not subject to the "awarded under" limitation. Rather, section 1151 requires only that the veteran "hav[e] submitted to" the examination under any law administered by VA. Many examinations conducted by VA are not "awarded" as benefits to claimants, but, rather, are conducted for the convenience of VA in evaluating the existence or severity of a disability. See 38 C.F.R. §§ 3.326, 3.327. Claimants may be required to submit to VA examinations as a condition of obtaining or continuing to receive VA benefits. See 38 C.F.R. § 3.655. Viewed in this context, it appears that the phrase "having submitted to" was intended to make clear that compensation under that statute is not limited to disability due to examinations "awarded" by VA, but extends to disability due to any examination to which a claimant submits under a law administered by VA. Viewing section 1151 as a whole, the phrase "having submitted to" is most reasonably read as clarifying the types of VA examinations which may provide the basis for a valid claim under that statute, rather than as authorizing compensation for disability incurred coincidental with, but not as a result of, the examination.

12. Our interpretation of section 1151 is supported by the history of that provision. As originally enacted, section 213 of the WWVA authorized compensation for disability suffered as the result of "training, hospitalization, or medical or surgical treatment, awarded to [the veteran] by the director [of the Veterans' Bureau]." WWVA, § 213, 43 Stat. at 623. In a 1925 letter to the House Committee on World War Veterans' Legislation, General Hines, the Director of the Veterans' Bureau, recommended that section 213 be amended to provide compensation for disability caused by an examination ordered by the Veterans' Bureau under then-existing statutory authority. *World War Veterans' Legislation: Hearings Before the House Comm. on World War Veterans' Legislation*, 68th Cong., 2d Sess. 92 (1925). Pursuant to that recommendation, Congress amended section 213 to authorize compensation for disability suffered "as a result of having submitted to examination under authority of section 303 of the War Risk Insurance Act or section 203 of this Act." Act of March 4, 1925, ch. 553, § 11, 43 Stat. 1302, 1308. At that time, section 303 of the War Risk Insurance Act and section 203 of the WWVA both provided that any person applying for or receiving disability compensation "shall submit himself to examination" as frequently and at such times and places as may reasonably be required. Act of October 6, 1917, ch. 105, § 303, 40 Stat. 398, 406-07; WWVA, § 203, 43 Stat. at 622.

13. The context of the 1925 amendment suggests that the phrase "having submitted to" was included to describe the

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types of examinations covered by the statute--i.e., those to which a veteran was required to submit under law--and to differentiate the cases covered by that amendment from the cases covered under prior law, which applied only to disability caused by provision of certain benefits "awarded . . . by" the Veterans' Bureau. Viewed in light of this history, it does not appear that the phrase "having submitted to" was intended to authorize compensation for disability due to causes other than the examination itself. There is no indication that Congress intended to create a substantially broader causation standard for disability due to examinations than it had established for disability due to medical or surgical treatment for service-connected disabilities. Rather the history of the 1925 amendment suggests that Congress intended merely to provide benefits to veterans injured by examinations required by the Veterans' Bureau on the same basis as it had provided benefits to veterans injured by treatment awarded by the Veterans' Bureau. See H.R. Rep. No. 1518, 68th Cong., 2d Sess. 7, 8 (1925) (stating that, "[w]hen section 213 was originally written into the law by the act of June 7, 1924, it was intended that these cases should be covered but through some inadvertence the language was not sufficiently broad to take in these cases.").

14. In hearings preceding the enactment of the WWVA, members of Congress had discussed with General Hines the matter of compensating veterans for injuries resulting from diagnostic examinations, as opposed to treatment for service-connected disability:

Mr. RANKIN. . . . [A] great many fellows go to these hospitals to get examined and stay there a while until their case can be thoroughly examined. Suppose it was determined that they had no disability due to the service when they went there, but that they were injured in this process in some way, would this apply to them?

General HINES. If they were injured, for instance, in determining whether a man has or has not syphilis, by a spinal puncture--when they make the spinal puncture and get the results, they all seem to be satisfied whatever the result is--if that results, as it might, that they would paralyze a man under that operation, under those circumstances that man would be entitled to compensation.

*House Hearings at 114; see also Veterans' Bureau Codification Act: Hearings on S. 2257 Before the Subcomm. of the Senate*

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*Comm. on Finance, 68th Cong., 1st Sess. 102-03 (1924)* (statement of General Hines, also referring to disability due to diagnostic spinal puncture administered in Veterans' Bureau disability examination). The discussion of disability resulting from a specific diagnostic procedure is consistent with our conclusion that Congress intended to provide compensation for disability caused by the examination itself. Nothing in the history of the WWVA or the 1925 amendment to section 213 of that act suggests an intent to compensate for disability incurred coincident with an examination but due to causes other than the examination itself.

15. For the foregoing reasons, we conclude that section 1151 authorizes compensation only for disability resulting from treatment or examination itself and not for disability incurred during or coincident with treatment or examination but due to an intervening cause. A sexual assault, or other intentional tort committed by a VA employee, generally may not be considered part of "treatment" or an "examination" within the meaning of 38 U.S.C. § 1151, but would constitute an independent and intervening occurrence. Remedies for such intentional torts are beyond the scope of VA's authority under section 1151, which, as relevant here, authorizes compensation only for disability resulting from the medical or surgical treatment administered or examination conducted by VA.

16. Our conclusion concerning this question is limited to the issue of VA's authority under 38 U.S.C. § 1151 and is not intended to address any other remedies potentially available to the veteran based on the circumstances giving rise to the opinion request. Further, our conclusion is limited to interpretation of the provisions of section 1151 applicable to claims filed prior to October 1, 1997. We note, however, that the provisions of section 1151 applicable to claims filed on or after October 1, 1997, (referring to disability or death "caused by hospital care, medical or surgical treatment, or examination") may suggest a similar result. Although section 1151 does not authorize VA to pay compensation for disability due to an intentional assault by a VA employee committed during treatment or examination, we believe that this limitation on the scope of section 1151 may present an appropriate matter for congressional consideration.

17. The second question raised by the opinion request concerns whether 38 U.S.C. § 1151 authorizes compensation for psychiatric disability incurred or aggravated by VA medical treatment or examination, or whether it authorizes such compensation only for physical disability. Section 1151 authorizes compensation for "additional disability . . . or . . .

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death" resulting from "an injury, or an aggravation of an injury" caused by VA hospitalization, treatment, examination, or vocational rehabilitation. In authorizing compensation for "additional disability", section 1151 does not distinguish between physical disability and psychiatric disability. Insofar as section 1151 refers to disability caused by "injury", but not disease, it might appear to be limited to physical disability, because psychiatric disability would ordinarily result from a psychiatric disease, rather than an injury. However, VA has historically interpreted section 1151 and its predecessors as authorizing compensation for disability due to either disease or injury. That interpretation is currently expressed in 38 C.F.R. § 3.358(a), which provides:

Where it is determined that there is additional disability resulting from a disease or injury or an aggravation of an existing disease or injury suffered as a result of training, hospitalization, medical or surgical treatment, or examination, compensation will be payable for such additional disability.

As explained below, we conclude that this regulation represents a reasonable interpretation of section 1151.

18. The interpretation stated in 38 C.F.R. § 3.358(a) is rooted in section 213 of the WWVA. Section 213 authorized compensation for disability due to "an injury or an aggravation of an existing injury" caused by training, treatment, or hospitalization awarded by the United States Veterans' Bureau. Section 3(11) of the WWVA defined the term "injury" to include disease. 43 Stat. at 608. After section 213 was repealed in 1933, Congress enacted a substantially similar provision in section 31 of the Act of March 28, 1934, ch. 102, 48 Stat. 509, 526. The 1934 Act did not include a provision expressly defining the term "injury" to include disease. However, the legislative history indicated that section 31 was intended as a reenactment of the law existing under section 213 of the WWVA. 78 Cong. Rec. 3298 (Feb. 27, 1934) (Statement of Sen. Steiwer, characterizing provision as "a mere reenactment of the law as it existed prior to the Economy Act"). Based on that history, the Administrator of Veterans' Affairs concluded, in a 1946 opinion, that the term "injury", as used in section 31 of the 1934 Act, included disease. Admin. Dec. No. 716 (7-8-46). Section 31 of the 1934 Act was subsequently replaced by substantially similar provisions in section 351 of Pub. L. No. 85-56, 71 Stat. 83, 102 (1957), and section 1 of

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Pub. L. 85-857, 72 Stat. 1105, 1124 (1958), which were codified at 38 U.S.C. § 351. Those statutes were designed for the primary purpose of collecting and codifying the various laws governing veterans' benefits, and there is no indication of an intent to make a substantive change in the provisions previously contained in section 31. See, e.g., H.R. Rep. No. 279, 85th Cong., 1st Sess. (1957), reprinted in 1957 U.S.C.C.A.N. 1214. Section 351 was subsequently renumbered as 38 U.S.C. § 1151 by Pub. L. No. 102-83, § 5, 105 Stat. 378, 406 (1991).

19. Based on the foregoing, we conclude that the history of the 1934 act reasonably supports the conclusion that the term "injury" as used in section 31 of that statute, was intended to include disease. Further, because there is no indication that the codifications in 1957 and 1958 or any subsequent legislation was intended to alter the scope of section 1151 or its predecessors in this regard, we conclude that section 1151 may be construed to encompass disability due to disease as well as disability due to injury. We note that, in VAOPGCPREC 86-90 (O.G.C. Prec. 86-90), we concluded that the term "injury", as used in a different statute, 38 U.S.C. § 101(24), did not include disease. However, our conclusion was based on the specific language and history of section 101(24), which reflected a clear legislative intent to differentiate injuries from diseases for purposes of that provision. Further, we noted in that opinion that, in other statutory schemes, the term "injury" has been defined or interpreted to include disease. Accordingly, our conclusion in VAOPGCPREC 86-90 does not govern our interpretation of section 1151.

20. Having concluded that the term "injury" as used in 38 U.S.C. § 1151, includes disease, we find nothing in that statute or its predecessors to suggest that psychiatric conditions that would ordinarily be considered diseases by VA would be excluded from the scope of section 1151. Statutes and regulations dating at least to the WWVA have consistently recognized psychiatric conditions as diseases for purposes of VA compensation. See WWVA, § 200, 43 Stat. at 615-16 (establishing a presumption of service connection for "neuro-psychiatric disease"); 38 U.S.C. § 1101(3) and 1112(a) (establishing "chronic disease" presumption of service connection for "psychoses"); 38 C.F.R. § 4.130 (establishing disability ratings for mental disorders). Section 1151 and its predecessors have consistently authorized compensation for "disability", without distinguishing between physical and psychiatric disability. Similarly, section 3.358(a) authorizes compensation for disability resulting from disease incurred or aggravated as a result of any of the specified VA activities, without distinguishing between physical and psychiatric disease.

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Absent any statutory basis for distinguishing between physical diseases and psychiatric diseases for purposes of section 1151, we conclude that section 1151 authorizes payment of compensation for disability due to psychiatric conditions which would ordinarily be considered "diseases" by VA for compensation purposes.

21. Our conclusion also comports with the clear purpose of section 1151 to provide compensation for disability resulting from the unintended effects of hospitalization, treatment, examination, or vocational rehabilitation provided by VA. Congress and VA have recognized that psychiatric diseases may produce disability similar in degree, for VA purposes, to physical disability. Accordingly, absent any evidence of a contrary intent, section 1151 is most reasonably construed as authorizing compensation for disability resulting from one of the specified activities, regardless of whether such disability is physical or psychiatric in nature.

22. As stated above, 38 C.F.R. § 3.358(a) authorizes compensation for additional disability due to a disease or injury incurred or aggravated by one of the specified VA activities and does not state any distinction between physical disease or disability and psychiatric disease or disability. However, 38 C.F.R. § 3.358(b)(1) provides that, in determining whether "additional disability" exists, "[t]he 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." (Emphasis added.) The reference to the veteran's "physical" condition may appear to imply that compensation may be paid only for physical disability, to the exclusion of psychiatric disability. Viewing section 3.358(b)(1) in relation to the surrounding statutory and regulatory scheme, however, we cannot conclude that that provision precludes compensation for psychiatric disability which would otherwise be compensable under the general standard stated in 38 U.S.C. § 1151 and 38 C.F.R. § 3.358(a). As noted above, neither 38 U.S.C. § 1151 nor 38 C.F.R. § 3.358(a) purport to exclude psychiatric conditions from the plain meaning of the terms "disability", as used in those provisions, and "disease", as used in that regulation. Nor does it appear that section 3.358(b)(1) was intended to impose such a limitation on the plain language of those provisions. The context of section 3.358(b)(1) suggests that it was intended to specify the pertinent time periods at which the veteran's condition must be evaluated, rather than to preclude payment of compensation for disability which would otherwise be authorized under 38 U.S.C. § 1151 and 38 C.F.R. § 3.358(a).

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23. Although the purpose of the adjective "physical" in section 3.358(b)(1) is not clear, the history of that provision may shed some light upon its place in the regulation. A provision similar to section 3.358(b)(1) was first issued in 1927 in Veterans' Bureau Regulation No. 167, § 7701.A. (Feb. 21, 1927), which stated that "[t]he determination that additional disability exists will be based upon a comparison of the beneficiary's physical condition immediately prior to the injury on which the claim for compensation under section 213 [of the WWVA] is based with his subsequent physical condition resulting from such injury." A similar provision was subsequently included in VA regulation 1123(A) (1-25-36). Notably, Veterans' Bureau Regulation No. 167 and VA regulation 1123 referred only to compensation for disability due to "injury" caused by the specified activities and may have been based on the assumption that the governing statutes authorized compensation only for disability resulting from injury, and not disease. Following the Administrator's 1946 determination that compensation was payable for disability resulting from either disease or injury, VA amended VA regulation 1123 on September 26, 1947, to refer to disability resulting from either "disease or injury" due to VA hospitalization, treatment, examination, or training. However, VA did not delete the term "physical" from paragraph (A) of that regulation. The provisions of VA regulation 1123, first codified at 38 C.F.R. § 3.123, were incorporated into 38 C.F.R. § 3.358 in 1961, and the adjective "physical" was retained in the provisions now located in section 3.358(b)(1).

24. Based on the foregoing history, it appears that the term "physical" may have originally been included in Veterans' Bureau and VA regulations based on the assumption that the governing statutes authorized compensation only for disability caused by physical "injury" and not for disability caused by disease. The Administrator's 1946 decision and the 1947 amendment to VA regulation 1123 clearly reflect an intent to clarify that compensation could be paid for disability resulting from either disease or injury. Viewed in light of that intent, the retention of the term "physical" in VA regulation 1123(A) and 38 C.F.R. § 3.358(b)(1) may have been inadvertent, or may simply reflect VA's failure to consider that disability due to disease may include psychiatric, as well as physical, disability. It does not, however, appear that that section 3.358(b)(1) was intended to independently establish a rule limiting compensation under section 1151 to physical disability only. Moreover, because 38 U.S.C. § 1151 does not provide any basis for excluding psychiatric

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disability, we find no justification for concluding that such a limitation is imposed by section 3.358(b)(1).

HELD:

a. Section 1151 of title 38, United States Code, as applicable to claims filed before October 1, 1997, does not authorize payment of compensation for disability incurred or aggravated as the result of a sexual assault by a Department of Veterans Affairs (VA) physician which occurred while a veteran was receiving medical treatment or an examination at a VA facility. For purposes of compensation under those provisions, the disability must result from the medical treatment or examination itself and not from independent causes occurring coincident with the treatment or examination. A sexual assault generally would not constitute medical treatment or examination within the meaning of 38 U.S.C. § 1151 and would not provide a basis for compensation under those provisions. However, if the actions or procedures alleged to have constituted an assault would otherwise be within the ordinary meaning of the terms "medical treatment" or "examination," then compensation may be payable under section 1151. Accordingly, it may be necessary to make factual determinations in individual cases as to whether the actions or procedures alleged to have caused disability constituted part of "medical treatment" or "examination" or were independent actions merely coincidental with such treatment or examination.

b. VA may pay compensation under 38 U.S.C. § 1151 for psychiatric disability due to a disease or injury incurred or aggravated as a result of VA hospitalization, medical or surgical treatment, examination, or vocational rehabilitation.

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disability, we find no justification for concluding that such a limitation is imposed by section 3.358(b)(1).

HELD:

a. Section 1151 of title 38, United States Code, as applicable to claims filed before October 1, 1997, does not authorize payment of compensation for disability incurred or aggravated as the result of a sexual assault by a Department of Veterans Affairs (VA) physician which occurred while a veteran was receiving medical treatment or an examination at a VA facility. For purposes of compensation under those provisions, the disability must result from the medical treatment or examination itself and not from independent causes occurring coincident with the treatment or examination. A sexual assault generally would not constitute medical treatment or examination within the meaning of 38 U.S.C. § 1151 and would not provide a basis for compensation under those provisions. However, if the actions or procedures alleged to have constituted an assault would otherwise be within the ordinary meaning of the terms "medical treatment" or "examination," then compensation may be payable under section 1151. Accordingly, it may be necessary to make factual determinations in individual cases as to whether the actions or procedures alleged to have caused disability constituted part of "medical treatment" or "examination" or were independent actions merely coincidental with such treatment or examination.

b. VA may pay compensation under 38 U.S.C. § 1151 for psychiatric disability due to a disease or injury incurred or aggravated as a result of VA hospitalization, medical or surgical treatment, examination, or vocational rehabilitation.

  
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