



# NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

## **Section 1151 Claims: How to Obtain VA Benefits for Disabilities Caused by VA Medical Care**

# AGENDA

- Section 1151 Basics
- **1<sup>ST</sup> Requirement: Additional Disability or Death**
- **2<sup>nd</sup> Requirement: Caused by Hospital Care, Medical or Surgical Treatment, or Exam**
- **3<sup>rd</sup> Requirement: Care was furnished either by VA employee or in a VA facility**
- **4<sup>th</sup> Requirement: Proximate Cause of Disability or Death**
- **Advice for Pursuing Section 1151 Claims**
- **Federal Tort Claims Act**



# Section 1151 Basics

# SECTION 1151 BASICS

- ▶ Disability caused by VA medical care, VR&E, or CWT may be treated “as if” it is SC
- ▶ No requirement that disability or death actually be related to service
- ▶ Same adjudication process as claims for compensation under 38 U.S.C. § 1110
- ▶ Implementing Reg: 38 C.F.R. § 3.361

# 4 REQUIREMENTS OF § 1151 CLAIM

1. Additional disability or death;
2. Caused by hospital care, medical or surgical treatment, or exam; or by VR&E or CWT Program;
3. Care was furnished either by VA employee or in a VA facility; AND

# 4 REQUIREMENTS OF § 1151 CLAIM

## 4. Proximate cause of disability or death was:

- ▶ For disability caused by VA medical care:
  - ▶ carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the VA in furnishing the hospital care, treatment, or exam; or
  - ▶ an event not reasonably foreseeable
- ▶ The provision of training and rehab services as part of a VR&E program, or
- ▶ Participation in a CWT program



# 1<sup>st</sup> REQUIREMENT: ADDITIONAL DISABILITY OR DEATH



# 1<sup>st</sup> REQUIREMENT: ADDITIONAL DISABILITY OR DEATH

- ▶ **Additional disability:** VA compares Vet's condition immediately before care or treatment to condition after care or treatment
- ▶ An additional disability can include:
  - ▶ A new disability that results from treatment; or
  - ▶ A worsening of already existing condition

# DOES PAIN COUNT AS AN ADDITIONAL DISABILITY?

- ▶ In April 2018, Federal Circuit issued a decision that held that pain can constitute a disability under 38 U.S.C. § 1110 (SC disability comp)
  - ▶ *Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018)
- ▶ Can a Vet be compensated for “pain” under § 1151?



# ***STEVENSON V. MCDONOUGH***

## **35 VET. APP. 432 (2022)**

### ▶ **CAVC addressed:**

- ▶ **What is the meaning of the term “disability” for purposes of § 1151 benefits?**
- ▶ **Does a disability needs to persist for any particular time period to qualify for § 1151 benefits?**

# *STEVENSON V. MCDONOUGH*

- ▶ “Disability” has the same meaning in § 1151 as in 38 U.S.C. § 1110 (the general SC statute): “functional impairment of earning capacity”
- ▶ “Additional disability” in § 1151 means “more or added functional impairment in earning capacity”
- ▶ There is no requirement that an additional disability be permanent or of a particular duration to warrant compensation under § 1151

# STEVENSON V. MCDONOUGH

## ► CAVC continued:

- Whether a Vet has demonstrated additional disability under § 1151 involves a straightforward inquiry: if the Vet’s condition following VA treatment results in “more” or “added” “functional impairment of earning capacity,” the Vet has demonstrated additional disability for § 1151 purposes
- Because compensation under § 1151 is to be awarded for a disability in the same manner as if the disability were service connected, it follows that § 1151 compensation is available for additional disability in existence when a claim is filed, but that may resolve before VA has completed adjudication

# ***STEVENSON V. MCDONOUGH***

## **Takeaways**

- ▶ Pain or other symptoms that impair earning capacity are disabilities for which § 1151 benefits can be paid
  - ▶ Explain how pain/sx impair earning capacity
- ▶ Even if additional disability caused by negligent VA medical / surgical care resolves, it can qualify for compensation under § 1151 (at least for the period the additional disability is present)
- ▶ But, additional disability must be present during pendency of the claim, so don't delay in filing
- ▶ Vet will also have to establish other elements of § 1151 claim to qualify for benefits (causation and proximate cause)



# **2<sup>nd</sup> REQUIREMENT: CAUSED BY VA MEDICAL TREATMENT, VR&E, OR CWT**



# 2<sup>nd</sup> REQUIREMENT: CAUSED BY VA MEDICAL TREATMENT, VR&E, OR CWT

## ▶ Types of qualifying care:

- ▶ Hospital care
- ▶ Medical or surgical treatment
- ▶ Examination
- ▶ Vocational training and rehab services
- ▶ Compensated Work Therapy (CWT)

# HYP0

- ▶ Vet received treatment at VA facility in preparation for surgery
- ▶ While Vet ate lunch at facility's cafeteria, a gunman opened fire and killed one person
- ▶ As a result of witnessing this tragedy, Vet developed mental condition and filed a Section 1151 claim

# SURVEY #1

► Does this incident fulfill the 2nd requirement of a § 1151 claim?

- A. Yes, because it took place at a VA facility
- B. Yes, because it occurred while Vet was seeking medical treatment
- C. No, because the mental condition was not caused by the treatment Vet received



# ANSWER



- ▶ “the mere fact that a claimant is harmed by an event that occurs coincidentally with VA hospital care, medical or surgical treatment, or an examination is not sufficient to establish causation”
- ▶ In this case, the shooting had nothing to do with Vet’s medical treatment; thus, no causation
  - ▶ *Mangham v. Shinseki*, 23 Vet. App. 284 (2009)

# HYPOTHESIS

- ▶ Vet housed at lock-down VA psych ward
- ▶ While in line at hospital cafeteria, Vet was shoved by another patient
  - ▶ Aggressive patient was required to have 2 escorts as he was considered dangerous
- ▶ Hospital staff attempted to intervene, but aggressive patient shoved Vet a second time
- ▶ As a result, Vet suffered neck and back injuries

# SURVEY #2



- ▶ Does this incident fulfill the 2nd requirement of a Section 1151 claim?
  - A. Yes, because Vet suffered physical injuries (as opposed to mental)
  - B. Yes, because “hospital care” is not limited to the provision of medical services
  - C. No, because “hospital care” only includes the provision of medical services
  - D. No, because just like in Mangham, this incident was coincidental with Vet’s treatment

# ANSWER



- ▶ Court held that “hospital care” is not just limited to medical services
- ▶ Hospital care includes provision of basic services that are unique to being hospitalized

# ANSWER

- ▶ Important facts that influenced Court's decision:
  - ▶ Vet in lock-down facility where staff had total control over his movement
  - ▶ Required to be in cafeteria for meals
  - ▶ Facility contained mentally unstable patients who were foreseeably dangerous (attacking patient required 2 escorts)
    - ▶ *Bartlett v. Shinseki*, 24 Vet. App. 328 (2011)

# ADVOCACY ADVICE

- ▶ If it is unclear whether Vet's condition was caused by hospital care or other medical treatment, show why Vet's case is more similar to *Bartlett* than *Mangham*

- ▶ **Factors**

- ▶ Nature of services provided
- ▶ Degree of control over patient
- ▶ Mental & physical conditions of patients
- ▶ Foreseeability of potential harms





# **3<sup>RD</sup> REQUIREMENT: CARE FURNISHED BY VA EMPLOYEE OR AT VA FACILITY**



# 3<sup>RD</sup> REQUIREMENT: CARE FURNISHED BY VA EMPLOYEE OR AT VA FACILITY

- ▶ VA employee: must be engaged in providing hospital care, medical or surgical treatment, or examination
  - ▶ Must relate to furnishing of medical services
  - ▶ Actions of non-health care workers do not count
    - ▶ Ex: janitors, security officers, engineers, administrators

# 3<sup>RD</sup> REQUIREMENT: CARE FURNISHED BY VA EMPLOYEE OR AT VA FACILITY

- ▶ **VA facility:** A facility over which the Secretary has direct jurisdiction
  - ▶ If care is furnished in VA facility, it does not have to be provided by VA employee
    - ▶ Ex: non-VA contract personnel working in VA facility





# 4<sup>TH</sup> REQUIREMENT: PROXIMATE CAUSE



# 4<sup>TH</sup> REQUIREMENT: PROXIMATE CAUSE

- ▶ Proximate cause: “the action or event that directly caused the disability or death, as distinguished from a remote contributing cause” (38 C.F.R. § 3.361(d))
- ▶ Under 38 U.S.C. § 1151(a)(1)(A), proximate cause of disability or death caused by VA hospital care, medical or surgical treatment, or exam, must be
  - ▶ Carelessness
  - ▶ Negligence
  - ▶ Lack of proper skill
  - ▶ Error in judgment
  - ▶ Similar instance of fault

# 4<sup>TH</sup> REQUIREMENT: PROXIMATE CAUSE

- ▶ The terms in § 1151(a)(1)(A) denote some form of fault, carelessness, error, etc. on the part of VA
- ▶ Negligence: “The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against reasonable risk of harm”
  - ▶ Black’s Law Dictionary

# ESTABLISHING PROXIMATE CAUSE

- ▶ 2 ways to establish VA fault was proximate cause of additional disability or death:
  1. VA failed to exercise degree of care that would be expected of reasonable health care provider
  2. VA provided care without Vet or surrogate's informed consent

# FAILURE TO EXERCISE REASONABLE DEGREE OF CARE

- ▶ Standard of Proof: as likely as not VA failed to exercise degree of care expected of reasonable health care provider
- ▶ Determination involves what constitutes standard medical practices
  - ▶ What is careless or negligent care?
- ▶ Opinion on this issue must come from medical professional

# HYPOTHESIS

- ▶ Vet with incomplete quadriplegia took aquatic therapy classes at VAMC
- ▶ While in VAMC restroom, the grab bar he used to lift himself up came loose from wall and Vet fell
- ▶ As a result of accident, Vet suffered neck and shoulder injuries and lost use of lower extremities



# SURVEY #3

- ▶ Would Vet's resulting disability qualify for Section 1151 benefits?
  - A. Yes
  - B. No
  - C. Not sure



# HYPOTHESIS - OUTCOME

## YES!

- ▶ Vet's injury was due to VA's failure to properly maintain and install necessary equipment
- ▶ Fed Circuit found Vet was entitled to Section 1151 benefits
  - ▶ *Viegas v. Shinseki*, 705 F.3d 1374 (Fed. Cir. 2013)

# **HYPO - ANALYSIS**

- ▶ **VA cannot reasonably provide care or treatment to disabled Vets if it doesn't provide handicapped-accessible restrooms**
- ▶ **Equipment designed to assist the disabled (including grab bars) are necessary component of VA's health care services**
- ▶ **Without such services, Vets could not use VA health care**

# INFORMED CONSENT

- ▶ Practitioner must explain treatment in understandable language and discuss expected benefits; reasonably foreseeable risks, complications, or side effects; alternative treatment options; and results if no action is taken
- ▶ Consent can be implied
  - ▶ Ex: individual unconscious and immediate medical care needed to save life



# EVENT NOT REASONABLY FORESEEABLE

- ▶ VA fault not always required for successful Section 1151 claim
- ▶ §1151(a)(1)(B) also provides for compensation if additional disability or death is proximately caused by “an event not reasonably foreseeable”
- ▶ This theory for establishing § 1151 benefits often gets overlooked by both VA and advocates



# EVENT NOT REASONABLY FORESEEABLE

- ▶ Event does not have to be completely unforeseeable, but one that a reasonable health care provider would not consider an ordinary treatment risk
- ▶ Consider whether health care provider would have disclosed possibility of an event occurring when providing informed consent
- ▶ Ex: Earthquake occurs during surgery causing surgeon to accidentally sever a nerve

# HYPPO

- ▶ VA referred Vet to private hospital for a total left knee arthroplasty
- ▶ 10/29/2020: Vet underwent total left knee replacement surgery at private facility
- ▶ Surgery went well and Vet received proper rehab treatment until his discharge from hospital on 11/2/2020

# **HYPOTHESIS**

- ▶ **VA did not give Vet instructions on how to proceed with therapy after hospital discharge**
- ▶ **Vet contacted VAMC to ask about treatment**
- ▶ **11/15/2020: VA note stated Vet needed physical therapy (PT) 3 times a week for 6 weeks**
- ▶ **11/28/2020: Vet's PT began (over 4 weeks after surgery)**

# HYPOTHESIS

- ▶ **Private treatment records:**
  - ▶ Vet did not do well with PT due to late start
  - ▶ ROM more limited than prior to surgery
- ▶ **12/12/2020: Vet underwent additional surgery; diagnosed with arthrofibrosis of knee**

# HYPOTHESIS

- ▶ 1/2021: Vet filed Section 1151 claim contending that VA's delay in start of PT caused additional knee disability
- ▶ 4/2021 VA Exam:
  - ▶ “I see no evidence of medical carelessness, negligence, lack of skill or similar incidence of fault of the VA medical personnel. For whatever reason, it does appear that he was late getting started on his PT after his discharge from the hospital. This as likely as not was a significant contributing factor to the development of his arthrofibrosis.”

# HYPOTHESIS

## VETERAN'S ARGUMENTS

- ▶ The delay in the start of PT was evidence of VA negligence or carelessness
- ▶ The delay in the start of PT was not a reasonably foreseeable event

# SURVEY #4

- ▶ Was the delay in start of PT a reasonably foreseeable event?
  - A. Yes
  - B. No
  - C. Not sure



# **HYPOTHESIS - OUTCOME**

- ▶ **CAVC held that the delay in the start of PT was not reasonably foreseeable**
- ▶ **Court cited to VA examiner and Board's failure to explain the cause of the delay in the start of PT**
  - ▶ **It's difficult to understand how an event that no one, especially VA and its own examiners, can even begin to explain could ever be "reasonably foreseeable"**

# HYPOTHESIS - OUTCOME

- ▶ **Presumption of Regularity:** in certain situations, it is presumed public officers have properly performed their duties, unless there is evidence to the contrary
- ▶ Court used this presumption to conclude Vet was entitled to presume VA employees would properly discharge duties, such as setting Vet up for PT in timely manner

# HYPOTHESIS - OUTCOME

- ▶ Court found VA's failure to properly perform its duties was an unforeseeable event
- ▶ Court ordered VA to grant Vet compensation under Section 1151
  - ▶ *Billiot v. O'Rourke*, U.S. Vet. App. No. 18-400 (June 4, 2018) (non-precedential, but persuasive)

# ADVOCACY ADVICE

- ▶ If possible, make both a “VA negligence/carelessness” argument and a “not reasonably foreseeable event” argument (no VA fault required)
- ▶ Argue VA’s action or inaction was evidence of VA employee’s failure to perform duties that Vet could have presumed would be properly performed
- ▶ You do not always need a medical opinion to show that an event was not reasonably foreseeable



# EXAMPLE

- ▶ Vet receiving physical therapy for his NSC left knee
- ▶ After completing a PT session, Vet was being transported back to his room by a VA employee
- ▶ VA employee accidentally jammed Vet's left knee into door frame
- ▶ After incident, Vet started to experience back pain and was diagnosed with recurrent disc herniation

# EXAMPLE

- ▶ In addition to arguing that VA employee was negligent/careless, argue that VA employee jamming Vet's leg into door was **unforeseeable event**
- ▶ Argue that under **presumption of regularity**, Vets can presume VA employees will properly transport them from PT to their hospital room without jamming their legs into doors
  - ▶ VA employee's failure to properly perform this duty was not reasonably foreseeable

# HYPOTHESIS

- ▶ VA cardiologist (Dr. Rottman) recommended that Vet undergo minimally invasive surgical procedure, called mini-MAZE, to treat Vet's atrial fibrillation
- ▶ VA facility did not have specialized equipment to perform mini-MAZE procedure, but doctor said it could be performed at other local institutions

# HYPOTHESIS

- ▶ Vet then saw private cardiologist (Dr. Teague) who referred him to another private cardiologist (Dr. Hall) who performed mini-MAZE
- ▶ During procedure, Vet's phrenic nerve was damaged, resulting in paralysis of diaphragm which led to shortness of breath and decreased lung function
- ▶ To support § 1151 claim, Vet argued that phrenic nerve damage was (1) an unforeseeable event and (2) that it was proximately caused by a negligent VA referral

# HYPOTHESIS - ISSUE

- ▶ Can Vet be compensated under § 1151 when the additional disability was incurred during a procedure performed at a non-VA facility by a non-VA employee, if a VA employee recommended the procedure?
- ▶ In other words, can the “VA care” in a Section 1151 claim be a referral?



# HYPOTHESIS - OUTCOME

## Yes!

- ▶ But, when § 1151 claim is based on a referral theory involving an unforeseeable event, Vet must prove “chain of causation”
  - ▶ Proximate cause between VA medical care (referral) and the treatment
  - ▶ Proximate cause between unforeseeable event and the disability

# HYPOTHESIS - OUTCOME

- ▶ Fed Circuit also remanded claim for VA to determine if VA doctor was negligent in recommending mini-MAZE procedure
- ▶ In summary, the VA medical care or treatment in a Section 1151 claim can be a referral
  - ▶ *Ollis v. Shulkin*, 857 F.3d 1338 (Fed. Cir. 2017)

# CLAIMS BASED ON VR&E AND CWT

- ▶ Section 1151 benefits are warranted for disability or death “proximately” caused by (1) the provision of training and rehabilitation through a VR&E program, or (2) participation in a CWT program
- ▶ In such cases, there is **NO REQUIREMENT** that the disability or death be caused by carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault; or an event not reasonably foreseeable
  - ▶ 38 U.S.C. § 1151(a)(2)

# Advice for Pursuing Section 1151 Claims



# FILING A CLAIM

- ▶ No time limit for filing a Section 1151 claim
- ▶ No unique VA form for filing Section 1151 claims
- ▶ Use VA Form 21-526EZ
  - ▶ You can also submit an ITF
- ▶ Vet or advocate should explicitly state on Form 21-526EZ that Vet is pursuing a claim under Section 1151

# HYPOTHESIS

- ▶ **12/2024:** Vet filed Section 1151 claim for a back disability that she claimed resulted from surgery performed at VA hospital
  - ▶ Claimed doctor was negligent
- ▶ **2/2025:** VA examiner concluded doctor followed proper standard of care throughout surgery and there was no evidence of negligence

# HYPOTHESIS

- ▶ VA examiner referenced an in-service back injury documented in Vet's STRs and stated the current back condition is likely due to the in-service injury
- ▶ 3/2025 VA treatment records: Doctor stated Vet's back condition is likely due to her SC bilateral knee disability
- ▶ 7/2025: RO denied claim and Vet appealed to BVA

# SURVEY #5

- ▶ **What theories of SC must the Board address?**
  - A. Section 1151
  - B. Section 1151 and Direct SC
  - C. Section 1151, Direct SC, and Secondary SC

# ANSWER



- ▶ Claim for SC under 38 U.S.C. § 1151 is separate and distinct from a claim for compensation under 38 U.S.C. § 1110
- ▶ If Vet filed claim under only § 1151, VA cannot address theories of service connection (direct SC, secondary SC, etc.), b/c they are not part of the claim
  - ▶ SC claim will not be “reasonably raised”

# ANSWER


- ▶ Also, a claim for a condition secondary to a disability for which Vet receives comp under § 1151 is separate and distinct from a claim that the same condition is related to service
  
- ▶ The following are 2 distinct claims:
  - ▶ Vet Tom claims his depression is related to in-service MST
  
  - ▶ Tom receives compensation under § 1151 for impotence, and claims his depression is secondary to his impotence
    - ▶ *Anderson v. Principi*, 18 Vet. App. 371 (2004)

# ADVOCACY ADVICE

- ▶ If Vet/advocate knows Vet wants to pursue both a claim for SC and a Section 1151 claim, distinguish the claims on the VA claims form
  - ▶ Ex: “I request service-connected disability compensation for my back condition under 38 U.S.C. § 1110 based on an in-service back injury. Alternatively, I request benefits under 38 U.S.C. § 1151 for my back condition based on negligent treatment I received at a VA facility.”

# ADVOCACY ADVICE

- ▶ If during the pendency of a § 1151 claim, you discover Vet may have valid SC claim for same condition (or vice versa):
  - ▶ File another claim under § 1110 (or § 1151) immediately
  - ▶ At the very least, submit an ITF

|  |   |   |
|--|---|---|
|  <b>Department of Veterans Affairs</b>  |   | <b>VA DATE STAMP</b><br><small>(DO NOT WRITE IN THIS SPACE)</small> |
| <b>INTENT TO FILE A CLAIM FOR COMPENSATION AND/OR PENSION,<br/>                 OR SURVIVORS PENSION AND/OR DIC</b>  |   |   |
| <small><b>INSTRUCTIONS:</b> Before completing this form, read the Privacy Act and Respondent Burden on page 2. This form is used to notify VA of your intent to file for the general benefit(s). For more information, contact us online through ASK VA: <a href="https://ask.va.gov/">https://ask.va.gov/</a>. Ask us a question online or call us toll-free at 1-800-827-1000 (TTY:711). VA forms are available at <a href="http://www.va.gov/vaforms">www.va.gov/vaforms</a>.</small> |   |   |
| <b>SECTION I: VETERAN'S IDENTIFICATION INFORMATION</b>   |   |   |
| <small><b>NOTE:</b> You may complete the form online or by hand. If completed by hand, print the information requested in ink, neatly and legibly, insert one letter per box, and completely fill in each applicable check box to expedite processing of the form.</small>   |   |   |
| <small>1. VETERAN'S NAME (First, Middle Initial, Last)</small>   |   |   |
| <input type="text"/>   |   |   |
| <small>2. SOCIAL SECURITY NUMBER</small>   | <small>3. HAVE YOU EVER FILED A VA CLAIM?</small> | <small>4. VA FILE NUMBER (if applicable)</small>                    |

# ADVOCACY ADVICE

- ▶ If negligent VA care or treatment occurred while Vet was receiving treatment for an already service-connected condition, in addition to § 1151 claim, Vet should pursue claim based on secondary service connection
- ▶ Even non-negligent VA care can support a claim for secondary SC



# DUTY TO ASSIST

- ▶ Vets often need a medical opinion to support a § 1151 claim (especially if the issue is whether VA was negligent)
- ▶ Under 38 U.S.C. § 5103A, VA must provide a medical opinion for § 1151 claims when evidence indicates Vet's disability or symptoms may be associated with VA care, treatment, or exam (or VR&E / CWT)

# FEDERAL TORT CLAIMS ACT



# FEDERAL TORT CLAIMS ACT (FTCA)

- ▶ Additional remedy available to some Vets
- ▶ Allows claimant to sue federal gov't for injury or death caused by negligence of gov't employee
- ▶ Claimant must first file administrative claim with VA
  - ▶ If admin claim is denied by VA, claimant can then file lawsuit in federal court

# FTCA

- ▶ FTCA claims are not claims for VA compensation
- ▶ Unlike § 1151 claims, FTCA claims have a statute of limitations (time limit for filing)
  - ▶ Generally, 2 years from the date the cause and existence of the injury was known or should have been known
- ▶ Vets should seek representation by attorneys who are experienced with the FTCA

# ADVOCACY ADVICE

- ▶ **Advising Vets with respect to FTCA:**
  - ▶ Inform Vet of FTCA's existence and that Vet may have remedy under FTCA
  - ▶ Suggest Vet contact an experienced FTCA attorney to see if Vet has valid FTCA case
    - ▶ Refer Vet to local or state bar association
  - ▶ Advise Vet to make this inquiry ASAP, due to statute of limitations
  - ▶ Do not provide substantive advice or representation, unless you are an attorney who is knowledgeable about FTCA

# SECTION 1151 AND THE FTCA

- ▶ Claimants can pursue simultaneously a claim for VA compensation under 38 U.S.C. § 1151 and a lawsuit under FTCA
- ▶ If both are successful, Section 1151 benefits will be offset by the total amount of an FTCA judgment or settlement
- ▶ There are ways to avoid or delay offset
  - ▶ Ex: Terms of FTCA judgment or settlement can prevent VA from offsetting FTCA award

# HAMILTON V. MCDONOUGH

## 37 VET. APP. 228 (2024)

► **Issue:** Whether VA must associate Vet's FTCA file with the Vet's VA claims file when addressing a § 1151 claim

► **Facts**

- Mr. Hamilton filed an FTCA claim and reached a settlement with VA at the administrative stage (prior to filing a lawsuit)
- Vet later filed a § 1151 claim and asked VA to associate his FTCA claims file with his VA claims file
- BVA denied the § 1151 claim. BVA acknowledged the FTCA claim, but indicated that Vet had not submitted any evidence in conjunction with it.

# HAMILTON V. MCDONOUGH

## ▶ Vet's Argument

- The FTCA file was constructively part of the VA claims file and should have been discussed by BVA in its decision denying his claim
- Alternatively, the duty to assist required VA to obtain the FTCA file and associate it with the VA claims file

## ▶ Secretary's Argument

- The FTCA file was shielded from disclosure to Appellant, and therefore from BVA's consideration in connection with the § 1151 claim, because it was attorney work product and was compiled in reasonable anticipation of litigation (a Privacy Act exemption)

# HAMILTON V. MCDONOUGH

## ► CAVC Holding

- Vet's FTCA claim file is constructively part of the Vet's VA claims file, as it was in VA's control and relevant to Vet's § 1151 claim
- However, VA may invoke the work product doctrine and an exemption in the Privacy Act (5 U.S.C. § 552a(d)(5)) to argue that the contents of the FTCA claim file should not be disclosed to the Vet, made part of the VA claims file, or considered by VA adjudicators when deciding the merits of the § 1151 claim

# HAMILTON V. MCDONOUGH

## ▶ CAVC Holding (cont'd)

- Nondisclosability must be assessed on an individualized basis, based on the nature of each document or the info in question
- ▶ **Opinion work product is protected from disclosure and should not be considered by BVA in connection with the merits of a § 1151 claim**
  - Opinions, mental impressions, conclusions, and legal theories reflected in documents such as interviews, statements, memoranda, correspondence, and briefs prepared in anticipation of an adversarial proceeding

# HAMILTON V. MCDONOUGH

## ► CAVC Holding (cont'd)

- **Fact work product is not shielded from disclosure and should be considered by BVA in connection with the merits of a § 1151 claim**
  - BVA is deemed to have constructive knowledge of such info, so the duty to assist requires that it be made part of the VA claims file
- **Remand required for BVA to conduct fact-intensive inquiry of assessing the nature of documents in FTCA claim file to determine which ones are “fact work product” vs. “opinion work product”**

# HAMILTON V. MCDONOUGH

## ADVOCACY ADVICE

- ▶ If Vet has previously filed an FTCA claim with VA and is now filing a § 1151 claim, request that the entire FTCA claim file be associated with the VA claims file
  - VA will need to determine what info it can withhold as “opinion work product”
- ▶ Request a list and detailed description of any documents or other info withheld, so that you can determine whether to seek such info on appeal or if it is legitimately protected

# ADVOCACY ADVICE

- ▶ Sometimes a Vet may have legitimate SC claim and Section 1151 claim for the same condition
- ▶ While Vet should pursue both claims, it is usually preferable to establish SC compensation under § 1110 than compensation under § 1151
- ▶ More likely to get favorable medical opinion linking condition to an in-service event than finding that VA was negligent or careless

# ADVOCACY ADVICE

- ▶ No offset with an FTCA judgment if condition is service-connected under 38 U.S.C. § 1110
- ▶ Certain VA benefits are only available if a condition is service-connected, as opposed to awarded compensation under 38 U.S.C. § 1151
  - ▶ Ex: SC burial allowance

