

DATES: Comments must be received on or before March 31, 2003.

ADDRESSES: Mail or hand deliver written comments to: Director, Office of Regulatory Law (02D), Room 1154, 810 Vermont Ave., NW., Washington, DC 20420; or fax comments to (202) 273-9289; or e-mail comments to OGCRegulations@mail.va.gov. Comments should indicate that they are submitted in response to "RIN 2900-AL37." All comments received will be available for public inspection in the Office of Regulatory Law, Room 1158, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays).

FOR FURTHER INFORMATION CONTACT: David Barrans, Staff Attorney (022), Office of General Counsel, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-6332.

SUPPLEMENTARY INFORMATION: A series of court orders in the class-action litigation in *Nehmer v. United States Department of Veterans Affairs*, No. CV-86-6160 TEH (N.D. Cal.), requires VA to assign retroactive effective dates for certain awards of disability compensation and DIC in a manner not provided for in any existing statute or regulation. The court orders require that, when VA awards disability compensation or DIC pursuant to a regulatory presumption of service connection under the Agent Orange Act of 1991, Pub. L. 102-4, VA must in certain cases make the award effective retroactive to the date of the claimant's application or the date of a previously-denied application, even if such date is earlier than the effective date of the regulation establishing the presumption. Current regulations, however, prohibit VA from making a benefit award effective any earlier than the effective date of the regulation establishing the presumption. Because the conflict between current statutes and regulations and the *Nehmer* court orders may create confusion, we propose to amend our regulations to reflect the requirements of the *Nehmer* court orders.

In 1991, Congress enacted the Agent Orange Act of 1991, Pub. L. 102-4 (codified at 38 U.S.C. 1116 and in the notes to that section). That Act established presumptions for chloracne, non-Hodgkins lymphoma, and soft-tissue sarcoma. It further provided that VA would obtain reports from the National Academy of Sciences (NAS) every two years for a ten-year period, assessing the available scientific evidence regarding the association between exposure to herbicides and the development of diseases in humans. After receiving each report, VA must

determine whether there is a "positive association" between herbicide exposure and any of the diseases discussed in the report. If a positive association exists for any such disease, VA must issue regulations to establish a presumption of service connection for that disease in veterans exposed to herbicides during service. VA has established presumptions of service connection for seven additional diseases or categories of disease, which are listed in 38 CFR 3.309(e).

The Agent Orange Act of 1991 provides that regulations issued pursuant to that act shall take effect on the date they are issued. Under generally applicable effective-date rules in 38 U.S.C. 5110(g) and 38 CFR 3.114, when VA awards benefits pursuant to a liberalizing regulation, the award may not be made effective any earlier than the effective date of the liberalizing regulation. Under those provisions, awards based on presumptions of service connection established under the Agent Orange Act of 1991 can be made effective no earlier than the date VA issued the regulation authorizing the presumption.

However, the district court orders in the *Nehmer* litigation create an exception to the generally applicable rules in 38 U.S.C. 5110(g) and 38 CFR 3.114, and require VA to assign retroactive effective dates for certain awards of disability compensation and DIC that are based on VA's regulations under the Agent Orange Act of 1991, Pub. L. 102-4. This exception applies only to claims by members of the *Nehmer* class. VA is required to comply with the district court's orders, which have been affirmed by the United States Court of Appeals for the Ninth Circuit to the extent they were appealed. Accordingly, we propose to issue a regulation explaining the requirements established by those orders to ensure timely and consistent adjudication under those orders without further need for special instructions.

The *Nehmer* court orders also require that, if an individual was entitled to retroactive benefits as a result of the court orders but died prior to receiving such payment, VA must pay the entire amount of such retroactive payments to the veteran's estate, without regard to statutory limits on payment of benefits following a beneficiary's death. Section 5121(a) of title 38, United States Code, provides that, when VA benefits remain due and unpaid at the time of a beneficiary's death, VA may pay to certain survivors only the portion of such benefits that accrued during the two-year period preceding death. Current VA regulations reflect the

requirements of section 5121(a), and contain no exception for cases covered by the *Nehmer* court orders. Because the conflict between current regulations and the *Nehmer* court orders may create confusion, we propose to amend our regulations to reflect the requirements of the *Nehmer* court orders. Accordingly, we propose to issue rules reflecting the limited exception to section 5121(a) established by the *Nehmer* court orders. This exception applies only to certain benefits for members of the *Nehmer* class. As stated above, the intent of this rule is to ensure timely and consistent compliance with the court's orders without the need for further special instructions.

The *Nehmer* Litigation

The *Nehmer* litigation was initiated in 1986 to challenge a VA regulation, former 38 CFR 3.311a (which has since been rescinded) that stated, among other things, that chloracne was the only disease shown by sound medical and scientific evidence to be associated with herbicide exposure. In 1987, the district court certified the case as a class action on behalf of all Vietnam veterans and their survivors who had been denied VA benefits for a condition allegedly associated with herbicide exposure or who would be eligible to file a claim for such benefits in the future. In an order issued on May 3, 1989, the court invalidated the portion of the regulation providing that no condition other than chloracne was associated with herbicide exposure and voided all VA decisions denying benefit claims under that portion of the regulation. *Nehmer v. United States Veterans' Admin.*, 712 F. Supp. 1404 (N.D. Cal. 1989).

After Congress enacted the Agent Orange Act of 1991, Pub. L. 102-4, VA and the plaintiff class in *Nehmer* entered into a stipulation to address remedial issues resulting from the May 1989 order. The stipulation provided that VA would not deny any claims of the *Nehmer* class members until VA had acted on the first NAS report issued under the Agent Orange Act of 1991, Pub. L. 102-4. The stipulation further stated that, once VA issued regulations establishing a presumption of service connection for any disease pursuant to the Act, VA would readjudicate all claims for any such disease in which a prior denial had been voided by the district court's May 3, 1989 order and would adjudicate all similar claims filed after May 3, 1989. The stipulation stated that, if benefits were granted upon readjudication of a claim where a prior denial was voided, the effective date of the benefit award would be the date VA received the claim underlying the