

voided decision or the date the disability arose or the death occurred, whichever was later. In claims filed after May 3, 1989, the stipulation stated that the effective date of any benefits awarded would be the date VA received the claim or the date the disability arose or the death occurred, whichever was later. The district court incorporated the stipulation in a final order.

On October 15, 1991, VA issued a regulation establishing a presumption of service connection for soft-tissue sarcomas based on herbicide exposure. On February 6, 1991, the Agent Orange Act of 1991, Pub. L. 102-4, established statutory presumptions of service connection for non-Hodgkin's lymphoma, soft-tissue sarcomas, and chloracne. In June 1993, VA received the first NAS report under the Agent Orange Act of 1991. Thereafter, VA issued regulations establishing presumptions of service connection for four additional diseases (Hodgkin's disease, February 3, 1994; porphyria cutanea tarda, February 3, 1994; respiratory cancers, June 9, 1994; multiple myeloma, June 9, 1994). In 1994, VA began to readjudicate the claims where a prior denial had been voided by the 1989 court order and to adjudicate claims filed subsequent to that order. In cases where VA granted benefits upon such readjudication or adjudication, it assigned effective dates as required by the *Nehmer* stipulation and order, even though the effective dates in many cases were earlier than the effective dates of the statute or liberalizing regulations that authorized the awards.

In 1996, VA received the second NAS report under the Agent Orange Act of 1991. Based on new information contained in that report, VA issued regulations on November 7, 1996 establishing presumptions of service connection for prostate cancer and acute and subacute peripheral neuropathy. In 2001, based on new information in a later NAS report, VA established a presumption of service connection for type 2 diabetes effective July 9, 2001.

In 2000, the parties to the *Nehmer* case disagreed as to whether the retroactive-payment provisions of the *Nehmer* stipulation and order applied to all eight diseases that were associated with herbicide exposure at that time (type 2 diabetes had not yet been recognized) or only to the seven diseases that were presumptively service connected based on the Agent Orange Act of 1991, Pub. L. 102-4, and the first NAS report under that statute. The plaintiffs argued that the stipulation required VA to pay retroactive benefits for all diseases that are service

connected at any time under the Agent Orange Act of 1991, Pub. L. 102-4. VA argued that the stipulation required retroactive payment only for disease service connected based on the first NAS report, and that the broader interpretation urged by the plaintiffs was contrary to the Agent Orange Act of 1991, Pub. L. 102-4 and 38 U.S.C. 5110(g).

In a December 12, 2000 order, the district court held that the stipulation and order required VA to give retroactive effect to all regulations issued under the Agent Orange Act of 1991, Pub. L. 102-4. VA appealed that order to the United States Court of Appeals for the Ninth Circuit. On April 1, 2002, the Court of Appeals affirmed the district court's order.

Purpose of This Rule

We propose to issue a new regulation, to be codified at 38 CFR 3.816, to explain the rules VA is required to apply as a result of the court orders in the *Nehmer* case. Those rules are complex and are not reflected in any current statute or regulation. Moreover, the public may have difficulty accessing and understanding the court orders establishing those rules. Accordingly, we believe a regulation explaining the *Nehmer* rules is necessary to provide guidance to VA personnel as well as to VA claimants and their representatives.

To the extent the rules required by the *Nehmer* court orders depart from the generally-applicable rules in 38 U.S.C. 5110(g) and 5121(a), they are judicially-created exceptions to those general rules. VA is required to comply with the *Nehmer* court orders. In order to clarify the basis for this regulation, we propose to state, in § 3.816(a), that these rules are required by the *Nehmer* court orders.

Definitions

The effective-date rules required by the *Nehmer* court orders apply only to members of the plaintiff class certified by the district court in that case. In a 1987 order, the district court ruled that the *Nehmer* class would consist of all veterans and their survivors who have applied for VA benefits for disability or death due to exposure in service to an herbicide containing dioxin or who would become eligible in the future to apply for such benefits. Accordingly, any Vietnam veteran would potentially be a *Nehmer* class member, as would any survivors of such veteran who would be eligible to apply for DIC. The effective-date provisions of this rule would apply only to class members entitled to disability compensation or DIC for disability or death due to a disease associated with herbicide

exposure. Accordingly, for purposes of this rule, we propose to define a "*Nehmer* class member" as a Vietnam veteran who has a covered herbicide disease, or a surviving spouse, child, or parent of a deceased Vietnam veteran who died from a covered herbicide disease.

The effective-date rules required by the *Nehmer* court orders apply only to benefits for disability or death caused by a disease for which VA has established a presumption of service connection under the Agent Orange Act of 1991, Public Law 102-4. For purposes of this rule, we propose to use the term "covered herbicide disease" and to define that term to mean a disease for which the Secretary of Veterans Affairs has established a presumption of service connection before October 1, 2002 pursuant to the Agent Orange Act of 1991, Public Law 102-4, excluding chloracne. As explained below in this notice, the effective-date rules of the *Nehmer* stipulation and court orders apply only to diseases for which a presumption of service connection is established under the authority granted by the Agent Orange Act of 1991, Public Law 102-4. Because the authority granted by that Act at the time the stipulation was entered extended only until September 30, 2002, any presumptions established after that date based on other legislative grants of rule-making authority are not within the scope of the *Nehmer* stipulation and court orders.

Although chloracne is a presumptive herbicide disease, we propose to exclude it from the definition of covered herbicide disease for purposes of this rule because claims and awards based on chloracne were not affected by any of the *Nehmer* court orders. VA established a presumption of service connection for chloracne effective September 25, 1985, and that presumption has remained in effect throughout the period relevant to the *Nehmer* litigation. In its May 3, 1989, order, the district court invalidated the portion of VA's regulation providing that conditions other than chloracne were not shown to be associated with herbicide exposure and it voided decisions made under that portion of the regulation. The court left intact the provision establishing a presumption of service connection for chloracne and did not void any decisions involving chloracne. Moreover, the *Nehmer* stipulation and order states that it applies to diseases service connected by VA "in the future" under the Agent Orange Act of 1991, Public Law 102-4. Because chloracne had been presumptively service connected since