

1985, it was not affected by the stipulation and order.

Effective Date Rules

The effective-date rules stated in the proposed regulation reflect paragraph 5 of the *Nehmer* stipulation and order. That paragraph states separate rules governing the effective dates of awards granted upon readjudication of a claim where a prior denial was voided by the May 3, 1989 *Nehmer* order and the effective dates of awards granted upon adjudication of a claim filed after May 3, 1989.

With respect to the voided decisions, the stipulation and order provides that the effective date of an award made upon readjudication of the claim will be the later of the date the claim giving rise to the voided decision was filed (provided that the basis of the award is the same basis upon which the original claim was filed) or the date the disability arose or the death occurred. The stipulation and order states that the "basis" of the original claim refers to the disease or condition required, under provisions of a VA procedural manual, to be coded in the VA rating decision on the claim. The stipulation and order further states that the provisions of 38 U.S.C. 5110(b)(1) and (d)(1) will govern when applicable. Section 5110(b)(1) provides for a disability compensation effective date corresponding to the day following the veteran's release from service if the veteran's application is received within one year of that date. Section 5110(d)(1) provides for a DIC effective date corresponding to the first day of the month in which death occurred if the claimant's application is received within one year from the date of death.

With respect to claims filed after May 3, 1989, the stipulation and order provides that the effective date of benefits shall be the later of the date VA received the claim asserting the basis upon which the claim was granted or the date the disability arose or the death occurred.

We propose to provide paragraphs separately explaining the application of these rules to disability compensation awards and DIC awards. In view of the complexity of the *Nehmer* rules, we believe this level of detail will provide greater clarity.

Effective-Date Rules for Disability Compensation

1. Claims by Nehmer Class Members Denied Between September 25, 1985 and May 3, 1989

Section 3.816(c)(1) states that, if a *Nehmer* class member is entitled to

disability compensation for a covered herbicide disease, and VA previously denied service connection for the same disease in a decision issued between September 25, 1985, the effective date of the invalidated regulation, and May 3, 1989, the effective date will be the later of the date VA received the claim on which the prior decision was based or the date the disability arose. This rule governs cases where a prior denial was voided by the district court's May 3, 1989 order. In an order dated February 11, 1999, the district court in *Nehmer* held that its 1989 order had voided claims rendered while former 38 CFR 3.311a(d) was in effect, provided that such claims denied compensation for a disease that VA later recognized as being associated with herbicide exposure. The court held that it is irrelevant whether the prior claim alleged that the disease was caused by herbicide exposure or whether the prior decision had referenced former § 3.311a(d). Accordingly, the only requirements for retroactive payment to a class member under proposed § 3.816(c)(1) would be that the decision have been rendered between September 25, 1985 and May 3, 1989—the period when former § 3.311a(d) was in effect—and that the decision have denied service connection for the same covered herbicide disease for which compensation has now been awarded.

Paragraph 5 of the *Nehmer* stipulation and order provides that the basis of the prior claim will be determined by reference to the diseases or conditions coded in the prior rating decision as required by provisions of a VA procedural manual. In accordance with the manual, VA rating decisions on claims for disability compensation ordinarily identify each claimed disease or injury by name and by a diagnostic code found in VA's Schedule for Rating Disabilities, which is located in 38 CFR part 4. There may be variations in both the terminology and diagnostic codes assigned to a particular disease depending on various aspects of the disease or associated conditions. For example, disability due to cancer of the larynx may have been rated as either a malignant neoplasm of the respiratory system (diagnostic code 6844) or residuals of a laryngectomy (diagnostic code 6819). Similarly, soft-tissue sarcomas may be described using different terminology or different diagnostic codes depending upon the body part or system primarily involved. Additionally, some diagnostic codes refer to broad classes of disease that encompass both covered and non-covered diseases. For example,

diagnostic code 6819 (Neoplasms, malignant, any specified part of respiratory system exclusive of skin growths) may refer to either a covered disease (e.g., lung cancer) or a non-covered disease (e.g., nasal cancer).

We do not intend that minor, immaterial variations in terminology or diagnostic code would preclude application of the *Nehmer* rules. However, it must be established that the prior decision involved the same disease for which compensation has now been awarded, rather than a distinct condition arguably bearing some relation to the compensable disease because, for example, it involves the same body part or system. Accordingly, we propose to state that a prior decision will be construed as having denied compensation for the same disease if the prior decision denied compensation for a disease that reasonably may be construed as the same covered herbicide disease for which compensation has been awarded. We further propose to state that minor variations in the terminology used in the prior decision will not preclude a finding, based on the record at the time of the prior decision, that the decision denied service connection for the same covered herbicide disease.

2. Claims by Nehmer Class Members Pending on May 3, 1989, or Filed Between May 3, 1989 and the Effective Date of the Authorizing Statute or Regulation

Proposed § 3.816(c)(2) states that, if a class member is entitled to compensation for a covered herbicide disease and the class member's claim for compensation for that same disease was either pending on May 3, 1989 or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for the disease, the effective date of compensation will be the later of the date VA received such claim or the date the disability arose. The *Nehmer* stipulation and order refers only to claims denied prior to May 3, 1989 and claims filed after that date. It does not expressly provide effective dates for claims that were filed prior to May 3, 1989 but not yet adjudicated by that date. Notwithstanding this apparent oversight, we propose to treat such claims in the same manner as claims filed after May 3, 1989, as no decision on a claim pending on May 3, 1989, could have been voided by the court order.

We propose to state that a claim will be considered a claim for compensation for a particular covered herbicide disease if the claimant's application and