

other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing compensation claims, as indicating an intent to apply for compensation for the covered herbicide disability. This will merely ensure that the generally applicable provisions of statute and regulation governing claims will apply in determining whether and at what date a particular claim was filed for purposes of this rule.

3. Qualifying Claims by Nehmer Class Members Filed Within 1 Year After Separation From Service

We propose to state in § 3.816(c)(3) that, if a claim referenced in paragraph (c)(1) or (c)(2) was received by VA within one year after the date of the veteran's separation from service, the effective date of compensation will be the day following such separation. This would ensure that the principle stated in 38 U.S.C. 5110(b)(1) is applied, as required by the *Nehmer* stipulation and order. We note that the stipulation and order requires VA to apply section 5110(b)(1) to awards made upon readjudication of claims where a prior decision was voided by the court's 1989 order, but not to awards made in claims pending on or filed after May 3, 1989. Nevertheless, we propose to apply section 5110(b)(1) to claims pending on or filed after May 3, 1989, in order to ensure that the generally applicable provisions of that statute are applied in a consistent manner.

4. Other Claims

We propose to state in § 3.816(c)(4) that, if the requirements of paragraph (c)(1) or (c)(2) are not met, the effective date of the award shall be determined in accordance with 38 CFR 3.114 and 3.400, the provisions generally governing the effective dates of disability compensation. The United States Court of Appeals for Veterans Claims has held that the provisions of the *Nehmer* stipulation and order do not apply where a prior claim was denied before September 25, 1985. See *Williams v. Principi*, 15 Vet. App. 189 (2001) (en banc).

Similarly, the stipulation and order does not apply in cases where the veteran's initial claim for a covered herbicide disease was filed after the effective date of the regulations establishing a presumption of service connection for that disease. Further, application of the *Nehmer* stipulation to such cases would ordinarily be detrimental to veterans. Under 38 CFR 3.114, when disability compensation is awarded pursuant to a liberalizing regulation, the award may be made

effective up to one year prior to the date of the claim, but no earlier than the effective date of the liberalizing regulation. In contrast, the *Nehmer* stipulation and order generally does not permit payment for any period prior to the date of the veteran's claim, except in the limited circumstances described in 38 U.S.C. 5110(b)(1) and (d)(1) involving claims filed within one year of the date of separation from service or the date of death.

Dependency and Indemnity Compensation

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

Section 3.816(d)(1) states that, if a *Nehmer* class member is entitled to DIC for death caused by a covered herbicide disease, and VA previously denied DIC for the death in a decision issued between September 25, 1985 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 death occurred. This rule governs cases where a prior denial was voided by the district court's May 3, 1989 order. Because DIC claims do not require assignment of disability ratings, decisions on DIC claims do not assign a diagnostic code corresponding to VA's rating schedule and may not identify the disease causing death with the same specificity necessary to decisions concerning disability compensation. Moreover, because the cause of death is usually established by the death certificate and medical records existing at death, DIC claims filed at different times ordinarily will not involve different conditions, as often occurs with respect to disability compensation claims. Accordingly, rather than requiring a specific finding that the prior denial of DIC expressly referenced the same covered herbicide disease that provided the basis for the current DIC award, we propose to require only that the prior decision issued between September 25, 1985 and May 3, 1989, have denied DIC for the same death.

2. Claims By Nehmer Class Members Pending on May 3, 1985 or Filed Between May 3, 1989 and the Effective Date of the Authorizing Statute or Regulation

Proposed § 3.816(d)(2) states that, if the class member's claim for DIC for the death 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 causing the death, the

effective date of DIC will be the later of the date VA received such claim or the date the death occurred. For the reasons stated above with respect to disability compensation, we propose to include claims filed before May 3, 1989, but still pending on that date, even though the *Nehmer* stipulation and order does not expressly provide for such claims.

The provisions of 38 U.S.C. 5101(b)(1) and 38 CFR 3.152(b)(1) state that a claim by a surviving spouse or child for death pension shall be considered a claim for DIC as well. We propose to reference this requirement in the proposed rule. Further, for the same reasons stated above with respect to disability compensation claims, we propose to state that a claim will be considered a claim for DIC if the claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing DIC claims, as indicating an intent to apply for DIC.

3. Qualifying Claims by Nehmer Class Members Filed Within 1 Year After Date of Death

We propose to state in § 3.816(d)(3) that, if a claim referenced in paragraph (d)(1) or (d)(2) was received by VA within one year after the date of the veteran's death, the effective date of DIC will be the first day of the month of death. This would ensure that the principle stated in 38 U.S.C. 5110(d)(1) is applied, as required by the *Nehmer* stipulation and order. We note that the stipulation and order requires VA to apply section 5110(d)(1) to awards made upon readjudication of claims where a prior decision was voided by the court's 1989 order, but not to awards made in claims pending on or filed after May 3, 1989. Nevertheless, we propose to apply section 5110(d)(1) to claims pending on or filed after May 3, 1989, in order to ensure that the generally applicable provisions of that statute are applied in a consistent manner.

4. Other Claims

For the reasons stated above with respect to disability compensation, we propose to state in § 3.816(d)(4) that, if the requirements of paragraph (d)(1) or (d)(2) are not met, the effective date of DIC will be governed by 38 CFR 3.114 and 3.400.

Effect of Other Provisions

We propose to state in § 3.816(e)(1) that, if the requirements of paragraphs (c)(1) or (c)(2) or (d)(1) or (d)(2) are met, the effective date of benefits will be determined as provided by this rule, without regard to any contrary provision