

in 38 U.S.C. 5110(g) or 38 CFR 3.114. As noted above, the effective-date rules required by the *Nehmer* court create a limited exception to that statute and regulation. In order to avoid confusion among VA personnel, claimants, and claimants' representatives regarding the effect of this exception, we believe it is necessary to state clearly that the *Nehmer* rules shall be applied, when they are applicable, without regard to 38 U.S.C. 5110(g) or 38 CFR 3.114.

We also propose to state that the effective-date provisions in this rule will not apply if a statute or regulation other than 38 U.S.C. 5110(g) or 38 CFR 3.114 would bar a retroactive payment that would otherwise be available under the *Nehmer* rules. For example, if a DIC claimant did not qualify as a surviving spouse at the time of the prior DIC claim, VA would lack authority to pay DIC to the claimant for periods relevant to such claim, even if the claimant later attains the status of a surviving spouse, based, for example, upon termination of remarriage. The *Nehmer* court orders require VA to give retroactive effect to its herbicide regulations, but do not purport to eradicate statutory bars to benefits that would preclude payment even if the herbicide regulations apply retroactively.

Proposed paragraph (e)(2) would explain the effect of section 505 of Public Law 104-275, which prohibits VA from making retroactive payments in certain circumstances where a benefit award is based on service in the Republic of Vietnam prior to August 5, 1964. Prior to January 1, 1997, the presumptions of service connection for diseases associated with herbicide exposure applied only to veterans who served in the Republic of Vietnam during the Vietnam era, which was then defined by statute and regulation to encompass the period beginning on August 5, 1964 and ending on May 7, 1975. In 1996, Congress enacted Public Law 104-275, section 505(b) of which extended those presumptions to veterans who served in the Republic of Vietnam during the period between January 9, 1962, and August 4, 1964. Congress specified, in section 505(d) of Public Law 104-275, that the amendment would take effect on January 1, 1997, and that "[n]o benefit may be paid or provided by reason of such amendments for any period before such date." Accordingly, some claims may have been denied prior to January 1, 1997, because the claimants' service did not meet the then-existing statutory requirement of service during the Vietnam era. Although some such claimants may now be entitled to presumptive service connection under

the liberalizing 1996 statute, Congress has prohibited VA from paying retroactive benefits based on the amendment made by Public Law 104-275.

We propose to state that the retroactive payment provisions of these proposed rules do not apply if the veteran's Vietnam service ended before August 5, 1964 and the class member's prior claim for benefits was denied by VA before January 1, 1997. In such cases, the denial was required by statute and VA is prohibited from paying retroactive benefits based on the prior claim. We propose to state that the effective date of any subsequent award in such cases will be governed by 38 U.S.C. 5110(g). We further propose to state that, if a veteran's Vietnam service ended before August 5, 1964 and the class member's claim for benefits was pending on or was received by VA after January 1, 1997, the effective date shall be the later of the effective date provided for in the proposed rules or January 1, 1997. This would conform to the requirement in Public Law 104-275 that VA may not pay benefits in such cases for any period before January 1, 1997.

Payment of Benefits to Survivors of Deceased Beneficiaries

1. Requirements of the Nehmer Court Orders

In its December 12, 2000 order, the district court held that, when a *Nehmer* class member entitled to retroactive benefits under the *Nehmer* stipulation and order dies prior to receiving payment of such benefits, VA must pay the full amount of such benefits to the class member's estate. Under 38 U.S.C. 5121 and 38 CFR 3.1000, when any monetary benefits remain due and unpaid at the time of a beneficiary's death, VA may pay to certain individuals only the portion of such benefits that accrued during the two-year period preceding death. Further, VA cannot pay any such accrued benefits unless the appropriate payee files a claim for accrued benefits within one year after the date of death. However, the *Nehmer* court held that these restrictions do not apply to payments of amounts payable pursuant to the *Nehmer* stipulation and order. Rather, the court held that VA must pay the entire amount of such retroactive payment to the class member's estate and must do so without requiring a claim for accrued benefits.

2. Persons Eligible for Payments

In implementing the court's order, VA found that it was impractical in most

cases to pay retroactive benefits to a class member's estate. Although VA claims files ordinarily contain information identifying persons who would be eligible for accrued benefits under section 5121 of title 38, United States Code, they generally do not contain information concerning the estates of veterans and other class members. Further, in a substantial number of cases, entitlement to retroactive payments under the *Nehmer* stipulation and order is established several months or even years after the class member's death, at a time when the decedent's estate would have been finally settled. In such cases, there may be no existing estate to receive payment. Even if an estate exists, paying benefits to the estate would arguably contravene the fundamental purpose of the veterans' benefits laws to provide payments for the use of the veteran and his or her family. Section 5121 provides that accrued benefits shall be paid to the decedent's surviving spouse, children, or dependent parents (in that line of succession), but does not permit payment to a decedent's estate. Although this statute limits the amount of accrued benefits payable, it clearly indicates that the accrued benefits are intended for the use of the decedent's family rather than the decedent's estate and creditors. If benefits were paid to a decedent's estate, they would potentially be subject to claims of creditors of the estate, with the possibility that the decedent's family would obtain no benefit from such payments. This would improperly deprive the decedent's family of the benefits expressly authorized by section 5121(a) (to the extent the payment to the estate encompassed benefits due and unpaid for the two-year period preceding death), and would contravene the general purpose of veterans benefits laws to provide benefits for the personal use of the veteran and his or her family.

After consulting with representatives of the *Nehmer* class, VA decided to issue payment directly to the persons who would have been eligible to receive accrued benefits under 38 U.S.C. 5121(a) at the time of the class member's death, rather than withholding all payment. We believe this procedure is consistent with the purpose of the *Nehmer* court orders and is more beneficial to class members, in view of the impracticability of locating and paying estates and the possibility that payments to estates may not inure to the benefit of the class member's survivors. We also believe that this procedure ensures that payments are made in the