

manner most consistent with the language and purpose of existing law.

Consistent with this practice, we propose to state in paragraph 3.816(f)(1) that, if a *Nehmer* class member dies prior to receiving payment of retroactive benefits due pursuant to the *Nehmer* stipulation and order, VA will pay the full amount of such unpaid benefits directly to the person or persons who would have been eligible to receive accrued benefits under 38 U.S.C. 5121(a)(2)–(a)(4) at the time of the class member's death (*i.e.*, the class member's spouse, children (in equal shares), or dependent parents (in equal shares), in that order of preference). If no such survivors are in existence, VA would pay as much of the unpaid retroactive benefits as necessary to reimburse the person who bore the expense of the class member's last sickness and burial, in the same manner as provided in 38 U.S.C. 5121(a)(5) for accrued benefits.

Paragraph (f)(1) would further provide that a person's status as the spouse, child, or dependent parent of the class member would be determined as of the date of the class member's death, rather than the date that payment is made under this rule. As noted above, some class members may have died several months or years before payment can be made under these rules. Due to the lapse of time, a person who qualified as the class member's spouse or child on the date of the class member's death may no longer meet the statutory or regulatory definition of spouse or child, due to changes in their age or marital status. For example, a "child" is generally defined in 38 U.S.C. 101(4)(A) to refer to an unmarried child who is (with certain exceptions) under the age of eighteen years. A person who met this definition on the date of a class member's death may have married or attained the age of eighteen years before VA releases payment of unpaid retroactive benefits due to the class member. Because the *Nehmer* court orders were generally intended to correct past errors, we propose to authorize payment to persons who would have been eligible for payment as a spouse, child, or dependent parent on the date of the class member's death, irrespective of subsequent changes in age or marital status that would otherwise affect their entitlement to payment.

In view of language in the *Nehmer* court's order requiring payments to estates, however, we believe it is necessary to seek an order from that court clarifying or modifying its prior order to make clear that VA may release payments in the manner proposed. Accordingly, we intend to request such

an order from the district court concurrently with the publication of these proposed rules.

3. Inapplicability of Certain Accrued Benefit Requirements

As stated above, the district court indicated that the statutory two-year limit on payment of accrued benefits and the statutory requirement that a qualified payee or payees file a claim for accrued benefits do not apply to payments of retroactive benefits due and unpaid to a *Nehmer* class member at the time of death. Accordingly, we propose to state, in paragraph (f)(2), that those requirements do not apply. We further propose to state that, if a class member dies before receiving payment of retroactive benefits due to him or her, VA will pay the amount to the known payee(s) without requiring a claim. A veteran's VA claim file will often contain information identifying the surviving spouse, children, or parents of a class member. By clarifying that VA will release payment based on such information without awaiting communication from such survivors, this provision would permit expeditious release of payments.

4. Identifying Payees

We propose to state, in paragraph (f)(3), that VA shall make reasonable efforts to identify appropriate payees based on information contained in the veteran's claims file. We propose to state that, if further information is needed to determine whether an appropriate payee exists, or whether there is any person having precedence equal to or greater than a known survivor, VA will request such information from a known survivor or the class member's authorized representative if the claims file contains sufficient contact information. We also propose to state that, before releasing payment to a known survivor, VA will request information from the survivor concerning the possible existence of other survivors with equal or greater priority for payment, unless the circumstances clearly indicate that such a request is unnecessary. For example, if the claims file contained the name and address of a child of the deceased class member, VA would contact the child to inquire whether there is a surviving spouse or any other children of the class member in existence. In seeking to identify appropriate payees, VA necessarily must rely on information in the claims file. VA does not have the resources to conduct independent investigations of estate issues.

We propose to state that, after making reasonable efforts to identify the

appropriate payee(s), if VA releases the full amount of retroactive payments to a payee, VA generally may not thereafter pay any portion of such benefits to any other individual, unless VA is able to recover any payment previously released.

5. Prohibition On Duplicate Payments

We propose to state, in paragraph (f)(4), that, payment of benefits pursuant to this rule shall bar a later claim by any individual for payment of all or any part of such benefits as accrued benefits under 38 U.S.C. 5121 and 38 CFR 3.1000. The district court ordered VA to release all retroactive amounts due a class member at the time of death under the *Nehmer* stipulation and order. This would necessarily include amounts that otherwise would be payable as accrued benefits under 38 U.S.C. 5121. Accordingly, once payment has been made pursuant to the court's order, no retroactive benefits would remain for payment to any person as accrued benefits. Inasmuch as this rule applies only to retroactive benefits payable for a covered herbicide disease pursuant to the 1991 stipulation and order, it would not preclude a survivor's right to seek accrued benefits under section 5121 in the event a deceased class member was entitled at death to benefits for conditions other than a covered herbicide disease.

Awards Not Covered by the *Nehmer* Rules

We propose to state, in § 3.816(g), that the provisions of this rule do not apply to awards of disability compensation or DIC for disability or death due to a disease for which the Secretary of Veterans Affairs establishes a presumption of service connection after September 30, 2002. The *Nehmer* stipulation and order applies to awards based on diseases for which the Secretary establishes a presumption of service connection pursuant to the Agent Orange Act of 1991, Public Law 102–4. The Act established a sunset date of September 30, 2002, for the Secretary to establish such presumptions. Accordingly, the *Nehmer* stipulation and order applies only to awards based on presumptions established within the time frame specified in the Agent Orange Act of 1991, Public Law 102–4.

The Agent Orange Act of 1991, Public Law 102–4, added section 1116 to title 38, United States Code. Section 1116(b) authorized the Secretary of Veterans Affairs to issue regulatory presumptions of service connection for diseases associated with herbicide exposure. Section 1116(e), as added by the Act, stated that section 1116(b) would cease