

Paragraph 32(a)(1)(ii)

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2. Annual adjustment of \$400 amount. * * *

ix. For 2004, \$499, reflecting a 2.22 percent increase in the CPI-U from June 2002 to June 2003, rounded to the nearest whole dollar.

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By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Consumer and Community Affairs under delegated authority, August 18, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AL37

Effective Dates of Benefits for Disability or Death Caused By Herbicide Exposure; Disposition of Unpaid Benefits After Death of Beneficiary

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is adding a new provision to its adjudication regulations concerning certain awards of disability compensation and dependency and indemnity compensation (DIC). The new rule explains that certain awards of disability compensation or DIC made pursuant to liberalizing regulations concerning diseases presumptively associated with herbicide exposure may be made effective retroactive to the date of the claim or the date of a previously denied claim, even if such date is earlier than the effective date of the regulation establishing the presumption. The new rule also provides that VA may pay to certain survivors of a deceased beneficiary, or to the beneficiary's estate, any amounts the beneficiary was entitled to receive under the effective-date provisions of this rule, but which were not paid prior to the beneficiary's death. The purpose of this rule is to reflect the requirements of court orders in a class-action case.

DATES: Effective Date: September 24, 2003.

FOR FURTHER INFORMATION CONTACT: David Barrans, Staff Attorney (022), Office of General Counsel, Department

of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-6332.

SUPPLEMENTARY INFORMATION: On January 28, 2003, VA published in the **Federal Register** (68 FR 4132), a proposed rule to establish provisions at 38 CFR 3.816 explaining certain rules arising from court orders in the class action litigation in *Nehmer v. United States Department of Veterans Affairs*, No. CV-86-6160 TEH (N.D. Cal.). As explained in that notice, the rule is intended to explain two exceptions to generally-applicable adjudication rules that have resulted from the *Nehmer* court orders.

First, this rule will clarify the standards governing the effective dates of disability compensation or dependency and indemnity compensation (DIC) awarded to *Nehmer* class members under liberalizing regulations establishing presumptions that certain diseases are associated with herbicide exposure in service. That change is necessary to address an apparent conflict between 38 U.S.C. 5110(g), which generally prohibits VA from awarding retroactive effective dates that precede the date a liberalizing regulation took effect, and the *Nehmer* court orders, which require VA to assign such retroactive effective dates for certain awards to *Nehmer* class members. The new rule explains that, when VA awards disability compensation or DIC to a *Nehmer* class member based on a VA regulation issued under the Agent Orange Act of 1991, Pub. L. 102-4, establishing a presumption that a disease is associated with herbicide exposure, VA will assign an effective date for the award that corresponds to the date the claim was received or to the date of a previously-denied claim based on the same disease, without regard to the provisions of 38 U.S.C. 5110(g).

Second, this rule will clarify that, when a *Nehmer* class member dies before receiving payment to which he or she is entitled under the *Nehmer* court orders, VA will pay the entire amount of such unpaid benefits to certain survivors or to the class member's estate if there are no such survivors. This change is necessary to address an apparent conflict between 38 U.S.C. 5121(a), which, in some circumstances, prohibits VA from paying amounts that had accrued for periods more than two years prior to the beneficiary's death, and the *Nehmer* court orders, which require VA to pay the entire amount of any unpaid benefits to the survivors or estate of a deceased *Nehmer* class member. Further, although section

5121(a) requires payment to the person who bore the expense of the beneficiary's last sickness and burial if there are no surviving members of the decedent's immediate family, the *Nehmer* court orders require payment to the decedent's estate in that circumstance. This rule will provide that, in cases governed by the *Nehmer* court orders, VA will pay the entire amount of such benefits to the specified survivors or to the decedent's estate, without regard to the two-year limit in 38 U.S.C. 5121(a).

We received comments on the proposed rule from three commenters. One commenter expressed unqualified support for the rule. The other commenters expressed general support for the rule, but disagreed with certain aspects of it, as discussed below.

Burial Benefits

Two commenters suggested that we add provisions to the rule specifying that when service connection for the cause of a *Nehmer* class member's death is established under a presumption issued pursuant to the Agent Orange Act, VA may pay a service-connected burial allowance under 38 U.S.C. 2307, even if the death occurred prior to the effective date of the regulation establishing the presumption. Those suggestions are based on a 1995 opinion of VA's General Counsel, designated as VAOPGCPREC 15-95, which stated such a conclusion in the context of a *Nehmer* class member's claim.

We make no change based on these comments. The additional provisions suggested by the commenters do not relate to the effective date of awards of disability compensation or DIC, nor to the manner of paying amounts due and unpaid to a beneficiary at death. Rather, they pertain to a distinct issue concerning entitlement to service-connected burial benefits under 38 U.S.C. 2307. Because these comments relate solely to matters outside the scope of the rule we proposed, we will make no change based on them.

Moreover, unlike the subjects of our proposed rule, the General Counsel's conclusion regarding entitlement to service-connected burial benefits does not rest upon the requirements of the *Nehmer* court orders, nor does it establish an exception to the generally applicable adjudication rules. In our January 2003 notice of proposed rule making, we explained that the purpose of the proposed rule was to explain the requirements of the *Nehmer* court orders, which created exceptions to the general statutory prohibitions in 38 U.S.C. 5110(g) and 5121(a) applicable to *Nehmer* class members. The General