

Counsel's conclusion that service-connected burial benefits may be paid for deaths preceding the effective date of a regulatory presumption was based on the interpretation of statutes and regulations; it was not based on the *Nehmer* court orders and did not establish any exception to governing statutory requirements for *Nehmer* class members. Accordingly, we will not incorporate that conclusion in this final rule.

Identifying Prior Claims or Decisions

One commenter suggested a revision to proposed § 3.816(c)(2), which explains when a disability compensation award may be made retroactive to the date of a prior claim for compensation for a covered herbicide disease that was pending on May 3, 1989 or was received by VA between that date and the effective date of the regulation establishing a presumption of service connection for the disease. As proposed, § 3.816(c)(2) would explain that a prior claim will be considered a claim for compensation for a particular covered herbicide disease if the claimant's application and other submissions may reasonably be viewed, under the standards ordinarily governing such claims, as indicating an intent to apply for compensation for the covered herbicide disease. The commenter asserts that the *Nehmer* court orders also require payment of retroactive benefits in cases where the prior claim did not request compensation for a covered herbicide disease, but VA nevertheless denied compensation for such disease in its decision on the veteran's claim.

Longstanding VA policy reflected in VA procedural manuals provides that when disability compensation is claimed, VA must make a formal rating decision as to each disability that was either claimed by the veteran or noted in the veteran's records, subject to certain exceptions for non-claimed conditions that are acute and transitory or recorded by history only. That policy is currently stated in VA Manual M21-1, Part VI, para. 3.09(b), and was previously stated in VA Manual M21-1, para. 46.02 at the time of the 1991 final stipulation and order. Accordingly, VA may have denied disability compensation for conditions not expressly claimed by the veteran.

The 1991 final stipulation and order in *Nehmer* stated effective-date rules governing two kinds of claims: those where VA denied benefits in a decision rendered between September 25, 1985 and May 3, 1989 (which decisions were voided by a 1989 *Nehmer* court order), and those where a claim was filed after

May 3, 1989 and may or may not have been denied by VA before VA awarded benefits under an applicable regulatory presumption. With respect to the voided decisions, the stipulation and order provided that an award of benefits for a covered herbicide disease would be retroactive to the date of the previously-denied claim if the basis of the award was the same as the basis of the prior claim. The stipulation and order specified that the "basis" of the claim would be determined by reference to the diseases that were coded in the prior decision as required by former paragraph 46.02 of VA Manual M21-1. This requirement is reflected in § 3.816(c)(1) of the proposed regulation, which addresses claims denied by VA between September 25, 1985 and May 3, 1989.

With respect to claims filed after May 3, 1989, the 1991 final stipulation and order merely provides that the effective date of an award will be the later of the date the claim was received or the date disability arose or death occurred. It provided no criteria for determining whether an award related to a previously-filed claim or a prior decision by VA denying benefits. In proposed § 3.816(c)(2), we explained that VA would apply the ordinary standards of claim interpretation to determine whether a claim received after May 3, 1989 was a claim for compensation for the covered herbicide disease for which benefits were ultimately awarded. We believe it is necessary to state guidelines based on the nature of the claim, rather than only the nature of a prior VA decision, because paragraph (c)(2) applies in cases where VA may not have issued any prior decision on the veteran's claim. However, we did not intend to preclude retroactive payments in cases where VA did issue a decision denying compensation for a covered herbicide disease in a decision rendered after May 3, 1989.

As explained above, the 1991 final stipulation and order is ambiguous as to whether retroactive payments may be made where a veteran did not request service connection for a covered herbicide disease but VA expressly denied compensation for such disease in a decision rendered after May 3, 1989. We believe the stipulation may reasonably be construed to allow retroactive payment in those circumstances. Accordingly, we will revise proposed § 3.816(c)(2) to clarify that retroactive payment may be made where a VA decision rendered between May 3, 1989 and the effective date of the relevant statutory or regulatory presumption denied compensation for a

disease that reasonably may be construed as the same covered herbicide disease for which compensation was later awarded. As explained in our January 2003 notice of proposed rulemaking, we do not intend to require exact agreement in the terminology or diagnostic codes used to describe the disease at different times, if circumstances reasonably indicate that the same disease is involved.

Payments to Survivors or Estates of Deceased Beneficiaries

We proposed to state, in paragraph (f) of 38 CFR 3.816, that, when a *Nehmer* class member dies before receiving amounts due and unpaid under the *Nehmer* court orders, VA will pay the entire amount of unpaid benefits to the class member's surviving spouse, child(ren), or dependent parents, in that order of preference. In the event no such survivors are in existence, we proposed that VA would pay to the person who bore the expense of the class member's last sickness and burial as much of the unpaid benefits as necessary to reimburse such person for those expenses. Two commenters disagreed with this provision and asserted that the *Nehmer* court orders require VA to release payments to the estates of deceased class members.

In our January 2003 notice of proposed rule making, we stated that we considered it necessary to seek clarification from the district court regarding VA's ability to release payments in the manner proposed. On April 21, 2003, the district court issued an order stating that, in the event a *Nehmer* class member dies, VA must release payments as provided in an August 3, 2001 stipulation between the parties to the *Nehmer* case. Specifically, the Court stated that VA must release the payments to the first of the following individuals or entities who is in existence when payment is made: (a) The class member's spouse; (b) the class member's children (in equal shares); (c) the class member's parents (in equal shares); (d) the class member's estate.

In accordance with the district court's order and the comments, we are revising the proposed rule to provide that VA will release payment to the estate of the deceased class member when there is no surviving spouse, child, or parent. We proposed to caption paragraph (f) of 38 CFR 3.816(f) "Payment of Benefits to Survivors of Deceased Beneficiaries." Based on the court order and the comments, we will change this to "Payment of Benefits to Survivors or Estates of Deceased Beneficiaries."

As proposed, the first sentence of paragraph (f)(1)(i) would have stated