

that, when a class member dies, VA will pay the full amount of any retroactive benefits owed the class member under the proposed regulation to the living person or persons who, at the time of death, would have been eligible to receive accrued benefits under 38 U.S.C. 5121(a)(2)-(a)(4). The cited statutory provisions authorize payment to a surviving spouse, child(ren), or dependent parent(s), in that order of priority. The second sentence of proposed paragraph (f)(1)(i) would further have stated that a person's status as a surviving spouse, child, or dependent parent would be determined as of the date of the class member's death, irrespective of the person's age or marital status at the time payment is made.

As explained above, the district court's April 2003 order specifies the individuals and entities entitled to payment. Further, the court's order states that the provisions of 38 U.S.C. 5121 do not govern such payments. Accordingly, we will delete the first sentence of paragraph (f)(1)(i), as proposed, and will amend paragraph (f)(1) to list the eligible payees as identified by the court's order. Revised paragraph (f)(1) will specify that VA will release payment to the first of the listed individual or entities that is in existence at the time payment is made.

We will delete the second sentence of paragraph (f)(1)(i), as proposed, because it reflects requirements applicable to 38 U.S.C. 5121(a). For purposes of 38 U.S.C. 5121(a), eligibility for payment as a surviving spouse, child, or parent is limited by a number of statutory provisions. For example, a "surviving spouse" is generally defined, with certain exceptions, as one who has not remarried. Eligibility for payment as a "child" is limited to unmarried children under the age of 18, or who became permanently incapable of self-support before attaining age 18, or who are under 23 years of age and pursuing a course of education at an approved institution. Eligibility for payment as a parent is subject to dependency. In view of the district court's conclusions that the provisions of the parties' August 2001 stipulation, rather than the provisions of 38 U.S.C. 5121(a), govern payments, we conclude that those restrictions are inapplicable. The August 2001 stipulation does not expressly incorporate the statutory limitations on recognition as a spouse, child, or dependent parent. Further, the provisions of the August 2001 stipulation reflect the view that payments to spouses, children, and parents were authorized because those persons are the usual heirs to a

decedent's estate, and that rationale would apply irrespective of age, marital status, or dependency. We will add language to § 3.816(f)(1) to clarify that those limitations do not apply. Specifically, we will provide that payments to a spouse will be made irrespective of current marital status, that payments to a child will be made irrespective of age or marital status, and that payments to a parent will be made irrespective of dependency. We will further explain that a spouse is a person who was married to the class member at the time of the class member's death. We will explain that the term "child" includes natural and adopted children, and also includes any stepchildren who were members of the class member's household at the time of the class member's death. We note that stepchildren ordinarily are not entitled to inherit from a stepparent's estate under the laws of intestate succession, and some stepchildren may have no direct relationship with the deceased class member. However, the laws governing veterans' benefits provide that a stepchild who was a member of a veteran's household at the time of the veteran's death is entitled to certain death benefits, including payment of amounts due and unpaid to the deceased veteran. We believe that persons who would be considered children under the laws governing VA benefits should not be excluded from receiving payment pursuant to the court orders in this case. Accordingly, we are defining "child" to include such stepchildren. We will also explain that the term "parent" includes natural and adoptive parents but that, in the case of successive parents, the persons who last stood in the relationship of parents to the class member will be considered the parents.

The last two sentences of paragraph (f)(1)(i), as proposed, will be deleted because they pertain to matters specific to determinations under 38 U.S.C. 5121.

Paragraph (f)(1)(ii) of 38 CFR 3.816, as proposed, would have stated that, if there is no living person eligible to receive benefits under 5121(a)(2)-(a)(4), VA would pay to the person who bore the expense of the class member's last sickness and burial only such portion of the class member's unpaid benefits as would be necessary to reimburse that person for such expense. We are removing this provision because it is contrary to the district court's order.

The other provisions of proposed 38 CFR 3.816(f) are not affected by the court's order, and we received no comments concerning them. Accordingly, we are adopting them without change.

### Presumptions Established Under the Benefits Expansion Act of 2001

We proposed to provide that the nonstatutory adjudication rules flowing from the *Nehmer* court orders would apply only with respect to regulatory presumptions of service connection established pursuant to the Agent Orange Act of 1991, Public Law 102-4, prior to October 1, 2002. We explained that the scope of the *Nehmer* rules is defined by a May 1991 Final Stipulation and Order entered in the *Nehmer* case, which specified that the rules would apply to presumptions of service connection established by VA under the Agent Orange Act of 1991, Public Law 102-4. We noted that, under the terms of the Agent Orange Act of 1991, Public Law 102-4, VA's authority to issue regulatory presumptions of service connection expired on September 30, 2002. Accordingly, we concluded that the *Nehmer* rules applied to awards based on presumptions of service connection established prior to October 1, 2002.

We noted that Congress in 2001 enacted legislation authorizing VA to establish new presumptions of service connection during the additional period from October 1, 2002 to September 30, 2015. Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, § 201(d) (Benefits Expansion Act). We concluded that the *Nehmer* rules would not apply to awards based on presumptions established pursuant to the new authority granted by this Act.

Two commenters expressed disagreement with our conclusion and asserted that the *Nehmer* rules should be applied to awards based on presumptions established under the Benefits Expansion Act. We make no change based on these comments, for the reasons explained in our January 2003 notice of proposed rule making and the additional reasons stated below in response to the comments we received.

One commenter asserts that it would be unfair to apply different effective date rules to Vietnam veterans' claims based on presumptions established under the Agent Orange Act of 1991 and those based on presumptions established under the Benefits Expansion Act. Although we agree that a uniform set of effective-date rules would ordinarily be preferable, the prospect of disparate treatment does not provide a basis for changing these rules. VA's obligation to comply with both 38 U.S.C. 5110(g) and the *Nehmer* court orders necessarily requires disparate treatment of claims that are similar in many respects. Section 5110(g)