

generally provides that, when benefits are awarded under a liberalizing regulation establishing a presumption of service connection, VA may not pay benefits for any period prior to the effective date of that regulation. Accordingly, any veteran who becomes entitled to service connection pursuant to a presumption, including presumptions relating to radiation exposure, mustard gas exposure, or prisoner of war experience, is subject to this restriction on retroactive payment. The *Nehmer* court orders establish a limited non-statutory exception to this general rule for certain claims based on herbicide exposure, and inevitably require that some veterans will be accorded retroactive benefits that most other veterans cannot receive. In determining where the line must be drawn, we necessarily look to the governing legal authorities.

VA is required to give effect to the clear statutory requirements in 38 U.S.C. 5110(g), in the absence of authority to the contrary. To the extent the *Nehmer* court orders require action seemingly at odds with section 5110(g), we believe they are most reasonably viewed as creating a non-statutory exception to section 5110(g)'s requirements. We believe it would be inappropriate, however, to disregard the clear requirements of section 5110(g) in cases that are not within the scope of the *Nehmer* court orders. The United States Court of Appeals for the Federal Circuit and the United States Court of Appeals for Veterans Claims have held that 38 U.S.C. 5110(g) governs the effective date of awards made pursuant to regulatory presumptions of service connection for diseases associated with herbicide exposure, at least in cases that are not clearly within the scope of the *Nehmer* court orders. See *Williams v. Principi*, 15 Vet. App. 189 (2001) (en banc); *aff'd*, 310 F.3d 1374 (Fed. Cir. 2002). As explained in our January 2003 notice of proposed rule making and reiterated below, the 1991 stipulation and order in *Nehmer* provides an exception to 38 U.S.C. 5110(g) that applies by its terms only to certain claims based on presumptions established under the authority granted in Agent Orange Act of 1991, Public Law 102-4.

One commenter asserts that these rules should apply to presumptions established under the Benefits Expansion Act because, when VA and the representatives for the *Nehmer* class entered into the May 1991 Final Stipulation and Order, they intended to incorporate any changes Congress might make in the future to the sunset provisions of the Agent Orange Act of

1991, Public Law 102-4. VA does not agree.

The United States District Court for the Northern District of California has held that the May 1991 stipulation and order must be interpreted in accordance with general principles of contract law. It is well established that, unless the parties provide otherwise, a contract is presumed to incorporate the law that existed at the time the contract was made. See *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 129-30 (1991). The May 1991 stipulation and order specified that it would apply to presumptions established under the Agent Orange Act of 1991, Public Law 102-4. Both the district court and the United States Court of Appeals for the Ninth Circuit have noted that, at the time the parties entered into the May 1991 stipulation and order, the Agent Orange Act of 1991, Public Law 102-4, vested VA with authority to establish presumptions only for a specified 10-year period. *Nehmer v. United States Department of Veterans Affairs*, No. CV-86-6160 TEH (N.D. Cal. Dec. 12, 2000); *Nehmer v. Veterans' Administration*, 284 F.3d 1158, 1162 n.3. (9th Cir. 2002). The scope of the *Nehmer* rules must be determined with respect to the law existing in 1991, rather than the subsequent changes in law enacted ten years after the final stipulation and order was entered.

The terms of a contract "do not change with the enactment of subsequent legislation, absent a specific contractual provision providing for such a change." *Winstar Corp. v. United States*, 64 F.3d 1531, 1547 (Fed. Cir. 1995), *aff'd*, 518 U.S. 839 (1996). A subsequent change in the law cannot retrospectively alter the terms of the agreement. See *Florida East Coast Ry. Co. v. CSX Transportation, Inc.*, 42 F.3d 1125, 1129-30 (7th Cir. 1994). The 1991 stipulation and order in *Nehmer* contains no provision providing for subsequent changes in law. Accordingly, the enactment of the Benefits Expansion Act of 2001 cannot expand the Government's authority under the May 1991 stipulation and order.

The commenter asserts that, if Congress had enacted legislation after May 1991 to shorten the 10-year life span of the Agent Orange Act of 1991, the parties would have agreed that VA was relieved from the original agreement made in contemplation of a 10-year life span. The commenter argues that it necessarily follows that the parties intended to incorporate any subsequent legislative changes either limiting or extending VA's authority to establish presumptions. We do not

agree, and we believe the hypothetical scenario described by the commenter is inapt. The 1991 stipulation and order in *Nehmer* did not require VA to issue regulations under the Agent Orange Act of 1991, Public Law 102-4. Rather, it established rules for determining the effective dates of benefit awards made pursuant to such regulations as VA would issue under that statute. Accordingly, the hypothetical legislation shortening the life span of the Agent Orange Act of 1991, Public Law 102-4, would not have altered any provision in the 1991 stipulation and order, but would have, at most, resulted in fewer presumptions to which the terms of the stipulation and order would apply. Moreover, even if there were any conflict between the 1991 stipulation and order and the hypothetical legislation described by the commenter, we would still disagree with the commenter's conclusion. Where intervening and unforeseen events interfere with fulfillment of a contract, the performance by one or more parties may be excused under principles of contract law relating to impossibility or impracticability of performance. The hypothetical described by the commenter would likely be governed by that principle rather than any inference that the parties silently intended to incorporate subsequent changes in law.

Two commenters assert that extending the *Nehmer* rules to presumptions established under the Benefits Expansion Act would be consistent with Congress' purpose in that Act. Specifically, the commenters state that Congress extended VA's authority to establish presumptions because the scientific evidence regarding the effects of herbicide exposure continues to develop. As explained above, the 2001 enactment of the Benefits Expansion Act does not bear upon the parties' intent when they entered into the 1991 final stipulation and order. Moreover, nothing in the Benefits Expansion Act suggests a legislative intent to authorize retroactive benefits.

The Benefits Expansion Act, Public Law 107-103, reflects a purpose to require ongoing periodic reviews of the scientific evidence to determine whether additional presumptions of service connection should be established. It does not, however, reflect any purpose to authorize retroactive benefits based on presumptions established under that Act. To the contrary, Congress has expressly limited the retroactive effect of new presumptions established by VA under the Benefits Expansion Act or any other statute. Section 5110(g) of title 38,