

United States Code, provides that, when disability compensation, DIC, or pension benefits are awarded pursuant to a new regulation, the effective date of the benefit award may not be earlier than the effective date of the regulation itself. Further, 38 U.S.C. 1116(c), which governs regulations issued under the Benefits Expansion Act, provides that regulations under that Act establishing new presumptions of service connection shall be effective on the date they are issued. Although these statutory provisions alone amply convey Congress' intent, we note that the legislative history of 38 U.S.C. 1116(c) further establishes that Congress was concerned with the possibility that according retroactive effect to new regulatory presumptions would be unfair insofar as it would accord preferential treatment to veterans with disabilities associated with herbicide exposure, as compared with all other veterans who become entitled to benefits under a liberalizing statute or regulation. See S. Rep. 379, 101st Cong., 2nd Sess. 105–06 (1990) (expressing disapproval of VA's past actions in issuing retroactive presumptions of service connection according "preferential treatment" to certain veterans).

We note further that section 10(e) of the Agent Orange Act of 1991, Public Law 102–4, expressly referenced the *Nehmer* court orders. That provision delayed the effective date of certain changes to preexisting law made by Public Law 102–4 for a period of six months or for a lesser period in the event that the Secretary of Veterans Affairs determined that VA had fulfilled its obligations under the *Nehmer* court orders based on the prior law. If Congress had intended to codify and extend the provisions of the *Nehmer* court orders when it enacted the Benefits Expansion Act, Public Law 107–103, it is reasonable to expect that it would have done so by a similar express reference to *Nehmer*. However, neither the text nor the legislative history of Public Law 107–103 discusses the *Nehmer* court orders. Applying the *Nehmer* court orders to presumptions established under the Benefits Expansion Act, Public Law 107–103, would be contrary to the governing statutory requirements in 38 U.S.C. 1116(c) and 5110(g), and we have found nothing in the language, purpose, or history of the Benefits Expansion Act to suggest that Congress intended VA to ignore those statutory requirements.

For these reasons, we find that Congress has clearly expressed its intent that regulations issued under the Benefits Expansion Act will not provide

a basis for awarding benefits for any period prior to the date such regulations are issued. Accordingly, we make no change based on this comment.

Executive Order 12866

This regulatory amendment has been reviewed by the Office of Management and Budget under the provisions of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any given year. This rule would have no such effect on State, local, or tribal governments, or the private sector.

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The reason for this certification is that these amendments would not directly affect any small entities. Only VA beneficiaries and their survivors could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers are 64.109, and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Herbicides, Veterans, Vietnam.

Approved: July 2, 2003.

Anthony J. Principi,

Secretary of Veterans Affairs.

■ For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

■ 1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

■ 2. Section 3.816 is added to read as follows:

§ 3.816 Awards under the *Nehmer* Court Orders for disability or death caused by a condition presumptively associated with herbicide exposure.

(a) *Purpose.* This section states effective-date rules required by orders of a United States district court in the class-action case of *Nehmer v. United States Department of Veterans Affairs*, No. CV–86–6160 TEH (N.D. Cal.).

(b) *Definitions.* For purposes of this section—

(1) *Nehmer class member* means:

(i) A Vietnam veteran who has a covered herbicide disease; or
(ii) A surviving spouse, child, or parent of a deceased Vietnam veteran who died from a covered herbicide disease.

(2) *Covered herbicide disease* means a disease for which the Secretary of Veterans Affairs has established a presumption of service connection before October 1, 2002 pursuant to the Agent Orange Act of 1991, Public Law 102–4, other than chloracne. Those diseases are:

(i) Type 2 Diabetes (Also known as type II diabetes mellitus or adult-onset diabetes).
(ii) Hodgkin's disease.
(iii) Multiple myeloma.
(iv) Non-Hodgkin's lymphoma.
(v) Acute and Subacute peripheral neuropathy.
(vi) Porphyria cutanea tarda.
(vii) Prostate cancer.
(viii) Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea).
(ix) Soft-tissue sarcoma (as defined in § 3.309(e)).

(c) *Effective date of disability compensation.* If a *Nehmer* class member is entitled to disability compensation for a covered herbicide disease, the effective date of the award will be as follows:

(1) If VA denied compensation for the same covered herbicide disease in a decision issued between September 25, 1985 and May 3, 1989, the effective date of the award will be the later of the date VA received the claim on which the prior denial was based or the date the disability arose, except as otherwise provided in paragraph (c)(3) of this