

section. A prior decision will be construed as having denied compensation for the same disease if the prior decision denied compensation for a disease that reasonably may be construed as the same covered herbicide disease for which compensation has been awarded. Minor differences in the terminology used in the prior decision will not preclude a finding, based on the record at the time of the prior decision, that the prior decision denied compensation for the same covered herbicide disease.

(2) If the class member's claim for disability compensation for the covered herbicide disease was either pending before VA on May 3, 1989, or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for the covered disease, the effective date of the award will be the later of the date such claim was received by VA or the date the disability arose, except as otherwise provided in paragraph (c)(3) of this section. A claim will be considered a claim for compensation for a particular covered herbicide disease if:

(i) The claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing compensation claims, as indicating an intent to apply for compensation for the covered herbicide disability; or

(ii) VA issued a decision on the claim, between May 3, 1989 and the effective date of the statute or regulation establishing a presumption of service connection for the covered disease, in which VA denied compensation for a disease that reasonably may be construed as the same covered herbicide disease for which compensation has been awarded.

(3) If the class member's claim referred to in paragraph (c)(1) or (c)(2) of this section was received within one year from the date of the class member's separation from service, the effective date of the award shall be the day following the date of the class member's separation from active service.

(4) If the requirements of paragraph (c)(1) or (c)(2) of this section are not met, the effective date of the award shall be determined in accordance with §§ 3.114 and 3.400.

(d) *Effective date of dependency and indemnity compensation (DIC)*. If a Nehmer class member is entitled to DIC for a death due to a covered herbicide disease, the effective date of the award will be as follows:

(1) If VA denied DIC for the death 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 such prior denial was based or the date the death occurred, except as otherwise provided in paragraph (d)(3) of this section.

(2) If the class member's claim for DIC for the death was either pending before VA on May 3, 1989, or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for the covered herbicide disease that caused the death, the effective date of the award will be the later of the date such claim was received by VA or the date the death occurred, except as otherwise provided in paragraph (d)(3) of this section. In accordance with § 3.152(b)(1), a claim by a surviving spouse or child for death pension will be considered a claim for DIC. In all other cases, a claim will be considered a claim for DIC if the claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing DIC claims, as indicating an intent to apply for DIC.

(3) If the class member's claim referred to in paragraph (d)(1) or (d)(2) of this section was received within one year from the date of the veteran's death, the effective date of the award shall be the first day of the month in which the death occurred.

(4) If the requirements of paragraph (d)(1) or (d)(2) of this section are not met, the effective date of the award shall be determined in accordance with §§ 3.114 and 3.400.

(e) *Effect of other provisions affecting retroactive entitlement*. (1) *General*. If the requirements specified in paragraphs (c)(1) or (c)(2) or (d)(1) or (d)(2) of this section are satisfied, the effective date shall be assigned as specified in those paragraphs, without regard to the provisions in 38 U.S.C. 5110(g) or § 3.114 prohibiting payment for periods prior to the effective date of the statute or regulation establishing a presumption of service connection for a covered herbicide disease. However, the provisions of this section will not apply if payment to a Nehmer class member based on a claim described in paragraph (c) or (d) of this section is otherwise prohibited by statute or regulation, as, for example, where a class member did not qualify as a surviving spouse at the time of the prior claim or denial.

(2) *Claims Based on Service in the Republic of Vietnam Prior To August 5, 1964*. If a claim referred to in paragraph (c) or (d) of this section was denied by VA prior to January 1, 1997, and the

veteran's service in the Republic of Vietnam ended before August 5, 1964, the effective-date rules of this regulation do not apply. The effective date of benefits in such cases shall be determined in accordance with 38 U.S.C. 5110. If a claim referred to in paragraph (c) or (d) of this section was pending before VA on January 1, 1997, or was received by VA after that date, and the veteran's service in the Republic of Vietnam ended before August 5, 1964, the effective date shall be the later of the date provided by paragraph (c) or (d) of this section or January 1, 1997.

(Authority: Public Law 104-275, sec. 505)

(f) *Payment of Benefits to Survivors or Estates of Deceased Beneficiaries*. (1) *General*. If a Nehmer class member entitled to retroactive benefits pursuant to paragraphs (c)(1) through (c)(3) or (d)(1) through (d)(3) of this section dies prior to receiving payment of any such benefits, VA shall pay such unpaid retroactive benefits to the first individual or entity listed below that is in existence at the time of payment:

(i) The class member's spouse, regardless of current marital status.

*Note to Paragraph (f)(1)(i)*: For purposes of this paragraph, a spouse is the person who was legally married to the class member at the time of the class member's death.

(ii) The class member's child(ren), regardless of age or marital status (if more than one child exists, payment will be made in equal shares, accompanied by an explanation of the division).

*Note to Paragraph (f)(1)(ii)*: For purposes of this paragraph, 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.

(iii) The class member's parent(s), regardless of dependency (if both parents are alive, payment will be made in equal shares, accompanied by an explanation of the division).

*Note to Paragraph (f)(1)(iii)*: For purposes of this paragraph, the term "parent" includes natural and adoptive parents, but in the event of successive parents, the persons who last stood as parents in relation to the class member will be considered the parents.

(iv) The class member's estate.

(2) *Inapplicability of certain accrued benefit requirements*. The provisions of 38 U.S.C. 5121(a) and § 3.1000(a) limiting payment of accrued benefits to amounts due and unpaid for a period not to exceed 2 years do not apply to payments under this section. The provisions of 38 U.S.C. 5121(c) and