

Date: June 2, 1995

VAOPGCPREC 15-95

From: General Counsel (022)

Subj: Applicability of the Final Stipulation and Order  
Entered in the *Nehmer* Litigation

To: Under Secretary for Benefits (211B)

QUESTIONS PRESENTED:

a. Under the provisions of the Final Stipulation and Order entered in the case of *Nehmer v. United States Veterans' Administration*:

- (1) should the effective date of an award of dependency and indemnity compensation to a veteran's surviving spouse be based on the date of an original claim filed in 1987 and finally denied in 1988, where, although the veteran served in the Republic of Vietnam during the Vietnam era, the surviving spouse did not allege in the original claim that the veteran's death was caused by exposure to Agent Orange or other herbicides; or
- (2) should the effective date of the award be based on the date of a reopened claim, filed in 1993, in which the claimant alleged that the veteran's death may have resulted from exposure to Agent Orange?

b. Do the provisions of the *Nehmer* Final Stipulation and Order governing readjudication of claims apply to claims for burial allowance for service-connected death?

c. If so, may burial allowance based on service-connected death be awarded in the case of a veteran buried prior to the effective date of the regulation establishing a presumption of service connection for the cause of the veteran's death?

d. If service-connected burial allowance may be paid for a veteran buried prior to the effective date of the regulation, would the amount payable be determined under the burial-allowance statute as in effect at the time of burial

or that in effect at the time of the change in law under which service connection was established?

COMMENTS:

1. The questions presented require interpretation of the provisions of the Final Stipulation and Order (Stipulation) entered in the case of *Nehmer v. United States Veterans' Administration, et al.*, C.A. No. CV-86-6160 (TEH) (N.D. Cal.) (May 17, 1991). That suit was filed as a class action on February 2, 1987, by Vietnam veterans and survivors of Vietnam veterans against the Veterans Administration, now the Department of Veterans Affairs (VA). The plaintiffs alleged, *inter alia*, that VA failed to comply with the provisions of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, § 5, 102 Stat. 2725, 2729 (1984) (Dioxin Act), when it promulgated former 38 C.F.R. § 3.311a (1986), a regulation governing claims based on exposure to herbicides containing dioxin. On December 22, 1987, the United States District Court for the Northern District of California certified a class (hereinafter referred to as the "Class") consisting of:

all current or former service members, or their next of kin (a) who are eligible to apply to, who will become eligible to apply to, or who have an existing claim pending before the Veteran's (sic) Administration for service-connected disabilities or deaths arising from exposure during active-duty service to herbicides containing dioxin or (b) who have had a claim denied by the VA for service-connected disabilities or deaths arising from exposure during active-duty service to herbicides containing dioxin.

*Nehmer v. United States Veterans' Administration*, 118 F.R.D. 113, 116, 125 (N.D. Cal. 1987).

2. On May 3, 1989, the district court invalidated a portion of former section 3.311a, holding that the regulation was based on an incorrect interpretation of the requirements of the Dioxin Act. *Nehmer v. United States Veterans' Administration*, 712 F.Supp. 1404, 1423 (N.D. Cal. 1989). The court also voided all benefit denials made

under the invalidated regulation <sup>1</sup> and remanded the matter to VA for further proceedings not inconsistent with the court's opinion. *Id.*

3. On February 6, 1991, the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, was enacted. Section 2 of that act added what is now 38 U.S.C. § 1116, establishing a process for the possible establishment of presumptions of service connection to assist veterans with service in the Republic of Vietnam during the Vietnam era who subsequently develop diseases determined to be associated with exposure to herbicide agents.

4. On May 17, 1991, the district court in *Nehmer* approved the Stipulation agreed to by the parties to the litigation. The Stipulation sets forth the parameters for rulemaking action relating to possible presumptions of service connection for diseases associated with exposure to dioxin (a substance found in Agent Orange). In addition, the Stipulation contains various provisions governing the adjudication of affected claims and the establishment of effective dates for benefit awards resulting from such claims.

5. Specifically, the Stipulation requires that VA not deny the Agent Orange claims of Class members until such time as the Secretary makes a determination under the Agent Orange Act of 1991 concerning whether a positive association exists between their diseases and herbicide exposure. Stipulation, para. 6. The Stipulation further requires that, when the Secretary issues regulations in accordance with the Agent Orange Act of 1991 establishing a presumption of service connection for a disease determined to be associated with herbicide exposure, VA will readjudicate all claims based on such disease in which benefit denials were voided by the court's May 3, 1989, order and adjudicate all similar claims which were filed subsequent to that order. Stipulation, para. 3. The Stipulation also contains provisions governing the effective dates of awards where benefits are awarded in

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<sup>1</sup> The regulation had taken effect on September 25, 1985.

such claims. Stipulation, para. 5. In general, the Stipulation provides that the effective date of awards for claims in which denials of benefits were voided by the court in *Nehmer* and for claims filed subsequent to the court order and held open under the Stipulation will be based on the later of the date of receipt of the claim or the date on which disability or death occurred, assuming that the disease for which the benefit is ultimately granted is the same as that upon which the original claim was based. See Stipulation, para. 5.

6. On June 9, 1994, VA amended 38 C.F.R. §§ 3.307(a)(6) and 3.309(e) to establish presumptive service connection for multiple myeloma and respiratory cancers based on exposure to herbicide agents. 59 Fed. Reg. 29,723 (1994). The amendment implemented a decision by the Secretary of Veterans Affairs (Secretary) under the authority granted by the Agent Orange Act of 1991 that there is a positive association between exposure to herbicides used in the Republic of Vietnam during the Vietnam era and the subsequent development of multiple myeloma and respiratory cancers.

7. In the claim giving rise to the first question presented, a Vietnam-era veteran with service in the Republic of Vietnam died of lung cancer on November 27, 1987. The veteran had not filed a claim for veterans' disability compensation. On December 23, 1987, the veteran's surviving spouse filed a claim for dependency and indemnity compensation (DIC). The claim alleged that the veteran's death was service connected, but did not specifically allege that the death was associated with exposure to herbicides. In the block on the claim form requesting information on cause of death, the surviving spouse stated "SEE ATTACHED DEATH CERTIFICATE." The attached death certificate listed "LARGE CELL CARCINOMA OF LUNG WITH METASTASES" as the immediate cause of death. In support of the claim, the surviving spouse submitted, among other documents, an undated "Agent Orange Claim Form" (AO Form), completed by the veteran, of the type used to claim benefits from the settlement fund established in *In re "Agent Orange" Product Liability Litigation*, 689 F. Supp. 1250 (E.D.N.Y. 1988). The veteran did not list any medical problems as allegedly related to Agent Orange in the portion of the form for that purpose. On the AO Form, the veteran reported serving in Vietnam from August 1967 to August 1968 and having been in areas that had previously been sprayed with Agent Orange. In a May 3, 1988, rating decision, VA denied the surviving spouse's claim on the basis that a chronic lung disease was

not shown to have become manifest in service or within one year following service discharge. The decision did not address former 38 C.F.R. § 3.311a, governing claims based on exposure to herbicides containing dioxin during service in the Republic of Vietnam. The surviving spouse did not file a notice of disagreement, and the decision became final.

8. On May 28, 1993, VA received the surviving spouse's request to reopen the claim for service connection for the cause of the veteran's death. The request did not allege that the veteran's death was caused by exposure to herbicides. However, on August 5, 1993, the surviving spouse's representative specifically asserted that the veteran's death may have been associated with exposure to Agent Orange. In a September 28, 1993, rating decision, VA confirmed and continued the prior denial of the surviving spouse's claim for service connection for the cause of the veteran's death. The rating decision did not make reference to the allegations of exposure to Agent Orange.

9. On July 15, 1994, VA established service connection for the cause of the veteran's death based on the June 9, 1994, regulatory amendments, codified at 38 C.F.R. §§ 3.307(a)(6) and 3.309(e), authorizing presumptive service connection for respiratory cancer based on exposure to herbicides. The effective date was established as May 28, 1993, the date of receipt of the surviving spouse's reopened claim.

10. We believe that under the terms of the order certifying the *Nehmer* Class, the surviving spouse is a member of the Class. The surviving spouse filed a claim for DIC on December 23, 1987, the date after the order certifying the Class was issued. As of the date of issuance of the order, the surviving spouse was the next of kin of a former service member and was eligible to apply to VA for service-connected benefits based on a death allegedly arising from exposure during active-duty service to herbicides containing dioxin.

Thus, she appears to fall within the terms of the class-certification order. See *Nehmer*, 118 F.R.D. at 116.

11. The Stipulation entered in the *Nehmer* case provides for readjudication of claims in which decisions were voided by the May 3, 1989, order upon issuance by the Secretary, pursuant to the Agent Orange Act of 1991, of a final rule establishing presumptive service connection for a disease based on dioxin exposure. See Stipulation, para. 3. The district court's May 3, 1989, order in *Nehmer* voided "all benefit denials made under [former] section [3.311a(d)]." *Nehmer*, 712 F. Supp. at 1423. Thus, the question whether the surviving spouse's December 1987 claim is covered by the Stipulation turns on whether VA's denial of the claim was voided by the May 3, 1989, order.

12. Although the surviving spouse's claim was filed prior to the court's May 3, 1989, order, the claim did not allege that the veteran's death was caused by a disease which may have resulted from exposure to Agent Orange, nor did the surviving spouse make such an allegation in the course of VA's adjudication of the claim. Although documents submitted by the surviving spouse included the AO Form, the form did not allege that the veteran had suffered any medical problems as a result of exposure to Agent Orange. (Indeed, under the Agent Orange Veteran Payment Program it is unnecessary that any relationship exist between the disease at issue and herbicide exposure, *In re "Agent Orange" Product Liability Litigation, Michael F. Ryan, et al. v. Dow Chemical Co., et al.*, 611 F. Supp. 1396, 1412 (E.D.N.Y. 1985), *aff'd in part, rev'd in part*, 818 F.2d 179 (2d Cir. 1987), hence we do not believe the claim of any such connection need be inferred on these facts.) The claim was decided and finally denied under the regulations governing direct service connection and the generally applicable chronic-disease presumptions. Neither the rating decision denying the claim, nor VA's letter notifying the surviving spouse of denial of the claim, made any mention of former section 3.311a(d). Accordingly, we believe you would be justified in concluding that the claim was not denied under former section 3.311a(d) <sup>2</sup> and that, therefore, the claim was not among the benefit denials voided by the district

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<sup>2</sup> The Court of Veterans Appeals has held that, under certain circumstances, VA is obligated to consider whether a claimant is entitled to benefits under a particular law, regardless of whether the claimant specifically raised the issue of entitlement under that law. *Douglas v. Derwinski*,

court's May 3, 1989, order in *Nehmer* and was not subject to the Stipulation. If the claim was not subject to the Stipulation, the Stipulation does not authorize retroactive payment of DIC to the surviving spouse from the date of the original claim.

13. The Stipulation, para. 3, provides that, upon issuance of a final rule establishing service connection for any disease under the Agent Orange Act of 1991, VA will adjudicate all claims for that disease which are similar to those in which decisions were voided by the court's May 3, 1989, order and were filed subsequent to that order. The surviving spouse's May 28, 1993, reopened claim, which involved allegations that the veteran's death may have resulted from exposure to Agent Orange, was based on lung cancer, a disease for which the Secretary subsequently established a presumption of service connection pursuant to the Agent Orange Act of 1991. Thus, the May 28, 1993,

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2 Vet. App. 435, 439 (1992) (*en banc*) (Where evidence of record supports entitlement under a statute or regulation, VA must consider such entitlement, notwithstanding that the issue was not raised by the claimant.); *Schafrath v. Derwinski*, 1 Vet. App. 589, 592-93 (1991) (Where the potential application of a regulation is apparent from the record of a well-grounded claim, VA must consider the regulation, regardless of whether the claimant called it to VA's attention.); *Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991) (VA should have inferred a claim for a particular benefit from the evidence submitted, although the claimant did not request consideration of entitlement to that benefit.). However, under regulations in effect at the time the surviving spouse's December 1987 claim was decided, the claim cannot be considered to have reasonably raised the possibility that the veteran's lung cancer could be service connected on the basis of herbicide exposure, as those regulations provided that sound scientific and medical evidence did not establish a cause and effect relationship between dioxin exposure and any disease other than chloracne. See former 38 C.F.R. § 3.311a(c) and (d) (1988). Further, to the extent that any duty on the part of VA to identify a possible basis for entitlement is triggered by submission of a well-grounded claim, the surviving spouse in this case did not submit any cognizable medical evidence to support a claim that the veteran's death was associated with exposure to herbicides and thus did not submit a well-grounded claim on that basis. See *Grottveit v. Brown*, 5 Vet. App. 91, 93 (1993).

reopened claim is governed by the provisions of the Stipulation pertaining to claims filed after the district court's May 3, 1989, order and before issuance of new regulations under the Agent Orange Act of 1991. Under the Stipulation, para. 5, the effective date of the award in such a claim must be based on the later of the date of filing of the reopened claim (May 28, 1993) or the date of the veteran's death (November 27, 1987).<sup>3</sup>

14. Turning to the second question presented in the request for opinion, we next address whether the provisions of the Stipulation govern a claim for service-connected burial allowance under 38 U.S.C. § 2307. In the matter giving rise to the questions concerning burial benefits, the veteran died on August 26, 1987, of lung cancer, and VA received an application for burial benefits on October 21, 1987, from the funeral director who handled the veteran's burial. The form indicated that the veteran was buried on September 1, 1987, and that the services provided by the funeral director were authorized by the veteran's surviving spouse. The form contained no item requesting information on whether the death was service connected. The surviving spouse, in a claim for death benefits filed on December 14, 1987, indicated that benefits were not being claimed on the basis that the veteran's death was service connected. The surviving spouse did not indicate on the form the cause of the veteran's death. On February 4, 1988, the VA regional office notified the surviving spouse that it was authorizing payment of burial benefits based on nonservice-connected death and, on April 15, 1988, notified the surviving spouse that the death-benefit claim was denied. On April 18, 1990, the surviving spouse filed a reopened claim for death benefits. In connection with that claim, the surviving spouse alleged that the veteran's death was service connected. On August 2, 1994, the VA regional office issued a rating decision establishing service connection for the cause of the veteran's death based on findings that the veteran had died of lung cancer and that the

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<sup>3</sup> Although the VA regional office issued a decision in September 1993 confirming and continuing denial of service connection for the cause of the veteran's death, that decision must be interpreted as not having reached the issue of presumptive service connection based on herbicide exposure, since, under paragraph 6 of the Stipulation, VA was required to hold such claims open pending issuance of regulations.

veteran was presumed to have been exposed to Agent Orange during service in Vietnam.

15. As discussed above, the Stipulation provides that, when VA establishes a presumption of service connection for a disease under the Agent Orange Act of 1991, VA will read-judicate "all claims" for that disease, denials of which were voided by the May 3, 1989, order in *Nehmer*. Stipulation, para. 3. Although paragraph 5 of the Stipulation, which governs effective dates for certain claims, does refer specifically to claims for disability compensation and DIC, paragraph 3 of the Stipulation is not so limited, and examination of the other provisions of the Stipulation do not reveal a focus solely on compensation and DIC claims. Further, the May 3, 1989, order in *Nehmer* refers generally to claims denied under section 3.311a(d) and does not limit its application to compensation and DIC claims. Thus, we believe that paragraph 3 of the Stipulation applies to claims for burial allowance for service-connected death, if such claims were denied under former section 3.311a(d).

16. In the case giving rise to your inquiry, when VA notified the surviving spouse that it was making payment of nonservice-connected burial benefits to the funeral home, it stated that "the veteran's death was not caused by a service-connected condition." Similarly, when VA notified the surviving spouse that the claim for death benefits was denied, it stated that the evidence did not establish that the veteran's death was due to a service-connected disability. Neither decision mentioned former section 3.311a(d) or referred to the possibility that the veteran's death might have been attributable to exposure to herbicides. Further, neither the funeral director nor the surviving spouse had alleged that the veteran's death was in any way related to Agent Orange exposure. In fact, the surviving spouse had asserted that no claim of service connection was being made. Under the circumstances, we believe you would be justified in concluding that the funeral director's October 1987 burial-benefit claim was not denied under former section 3.311a(d) and therefore was not among the benefit denials which were voided by the court's May 3, 1989, order in *Nehmer*, as referred to in paragraph 3 of the Stipulation.

17. In light of the above discussion, and the facts of the claim giving rise to your inquiry concerning burial bene-

fits, the third and fourth questions presented appear largely hypothetical. However, with respect to the third question presented, we note that, if a claim for service-connected burial allowance had been denied under former section 3.311a(d) and therefore fell within the group of claim denials voided by the court's May 3, 1989, order in *Nehmer*, and if service connection for the cause of death were later established on the basis of regulations issued pursuant to the Agent Orange Act of 1991, we would not view the post-burial effective date of the regulations as an impediment to payment of the burial allowance under section 2307. In such a case, VA would have been statutorily authorized to pay a burial allowance for service-connected death at the time of the burial under what is now section 2307, but for the fact that the claimant was unable to establish service connection for the cause of death. Where issuance of regulations under the Agent Orange Act of 1991 results in a liberalization of evidentiary rules, i.e., creation of a presumption, which permits the claimant to establish service connection for cause of death, burial allowance may, in our view, be paid if otherwise in order. In such a case, the effective date of the statute authorizing payment of the benefit, rather than the effective date of the evidentiary rule which permitted the claim to be proven, would be controlling. <sup>4</sup>

18. As to the fourth question presented, the maximum amount of burial allowance which could be paid on a particular claim would be governed by the burial-allowance statute in effect on the date of burial. See VAOPGCPREC 18-89.

Pub. L. No. 95-479, § 303(c), 92 Stat. 1560, 1565 (1978), which amended what was then 38 U.S.C. § 907 to provide a maximum burial allowance of \$1,100 for service-connected deaths, was effective on October 1, 1978, Pub. L. No. 95-479, § 401(a), 92 Stat. at 1566, and would control the amount payable for burials occurring between that date and April 1, 1988, the effective date of title III of Pub. L. No. 100-322, 102 Stat. 487 (1988), which increased the service-connected burial allowance to the current maximum of \$1,500. Pub. L. No. 100-322, §§ 303, 304, 102 Stat.

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<sup>4</sup> To the extent that a contrary conclusion may be suggested by VAOPGCPREC 18-89, that aspect of that opinion, which was based on an analysis of the legislative history of a particular statute, may be considered applicable only to the particular situation described therein.

at 534. Finally, we note that the burial allowance under section 2307 is in lieu of nonservice-connected burial benefits payable under sections 2302 and 2303(a)(1) and (b).

Therefore, only the difference between any amount previously paid as nonservice-connected burial benefits and the amount payable under section 2307 could be paid.

HELD:

a. If you conclude that the original dependency and indemnity compensation claim of a veteran's surviving spouse did not allege that the veteran's death resulted from a disease which may have been caused by exposure to herbicides containing dioxin during the veteran's Vietnam-era service in the Republic of Vietnam, and was not denied under former 38 C.F.R. § 3.311a(d) (1986), which governed claims based on herbicide exposure, the claim does not fall within the scope of the Final Stipulation and Order entered in *Nehmer v. United States Veterans' Administration*. In that case, the effective date of a subsequent award of dependency and in demnity compensation to the surviving spouse following reopening of the claim may not be based on the date of the original claim. However, if such a surviving spouse's reopened claim involved allegations that the veteran's death from lung cancer may have resulted from exposure to Agent Orange, it would be governed by the provisions of the Stipulation pertaining to claims filed after the district court's May 3, 1989, order in *Nehmer* invalidating a portion of the referenced regulations. Under paragraph 5 of the Final Stipulation and Order, the effective date of the award in such a claim must be based on the later of the date of filing of the reopened claim or the date of the veteran's death.

b. The portion of the Final Stipulation and Order in the *Nehmer* case pertaining to readjudication of claim denials voided by the district court's May 3, 1989, order in that case applies to claims for burial allowance for service-connected death under 38 U.S.C. § 2307, if such claims were denied under former 38 C.F.R. § 3.311a(d). However, under the circumstances of a particular claim, you may be justified in concluding that a burial-allowance claim was not denied under former section 3.311a(d). In that case, the Final Stipulation and Order would not be applicable.

c. If a claim for service-connected burial allowance under what is now 38 U.S.C. § 2307 was denied under former 38 C.F.R. § 3.311a(d) and therefore fell within the group of claim denials voided by the district court's May 3, 1989, order in the *Nehmer* case, or if entitlement to the nonservice-connected burial benefit was previously established, if service connection for the cause of the veteran's death is later established on the basis of regulations issued pursuant to the Agent Orange Act of 1991, the post-burial effective date of those regulations would not be an impediment to payment of a burial allowance under section 2307.

d. The maximum amount of burial allowance payable under section 2307 is determined based on the maximum rate authorized at the time the burial took place. Where nonservice-connected burial benefits have already been paid, and it is later determined that entitlement to service-connected burial allowance exists, only the difference between the amount previously paid and the amount payable under section 2307 may be paid.

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