Paragraph 32(a)(1)(ii)

* * * * *

2. Annual adjustment of $400 amount. * * *

ix. For 2004, $499, reflecting a 2.22 percent increase in the CPI–U from June 2002 to June 2003, rounded to the nearest whole dollar.

* * * * *

By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Consumer and Community Affairs under delegated authority, August 18, 2003.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 03–21569 Filed 8–22–03; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AL37

Effective Dates of Benefits for Disability or Death Caused By Herbicide Exposure; Disposition of Unpaid Benefits After Death of Beneficiary

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is adding a new provision to its adjudication regulations concerning certain awards of disability compensation and dependency and indemnity compensation (DIC). The new rule explains that certain awards of disability compensation or DIC made pursuant to liberalizing regulations concerning diseases presumptively associated with herbicide exposure may be made effective retroactive to the date of the claim or the date of a previously denied claim, even if such date is earlier than the effective date of the regulation establishing the presumption. The new rule also provides that VA may pay to certain survivors of a deceased beneficiary, or to the beneficiary's estate, any amounts the beneficiary was entitled to receive under the effective-date provisions of this rule, but which were not paid prior to the beneficiary's death. The purpose of this rule is to reflect the requirements of court orders in a class-action case.

DATES: Effective Date: September 24, 2003.

FOR FURTHER INFORMATION CONTACT: David Barrans, Staff Attorney (022), Office of General Counsel, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–6332.

SUPPLEMENTARY INFORMATION: On January 28, 2003, VA published in the **Federal Register** (68 FR 4132), a proposed rule to establish provisions at 38 CFR 3.816 explaining certain rules arising from court orders in the class action litigation in *Nehmer* v. *United States Department of Veterans Affairs*, No. CV–86–6160 TEH (N.D. Cal.). As explained in that notice, the rule is intended to explain two exceptions to generally-applicable adjudication rules that have resulted from the *Nehmer* court orders.

First, this rule will clarify the standards governing the effective dates of disability compensation or dependency and indemnity compensation (DIC) awarded to *Nehmer* class members under liberalizing regulations establishing presumptions that certain diseases are associated with herbicide exposure in service. That change is necessary to address an apparent conflict between 38 U.S.C. 5110(g), which generally prohibits VA from awarding retroactive effective dates that precede the date a liberalizing regulation took effect, and the *Nehmer* court orders, which require VA to assign such retroactive effective dates for certain awards to *Nehmer* class members. The new rule explains that, when VA awards disability compensation or DIC to a *Nehmer* class member based on a VA regulation issued under the Agent Orange Act of 1991, Pub. L. 102–4, establishing a presumption that a disease is associated with herbicide exposure, VA will assign an effective date for the award that corresponds to the date the claim was received or to the date of a previously-denied claim based on the same disease, without regard to the provisions of 38 U.S.C. 5110(g).

Second, this rule will clarify that, when a *Nehmer* class member dies before receiving payment to which he or she is entitled under the *Nehmer* court orders, VA will pay the entire amount of such unpaid benefits to certain survivors or to the class member's estate if there are no such survivors. This change is necessary to address an apparent conflict between 38 U.S.C. 5121(a), which, in some circumstances, prohibits VA from paying amounts that had accrued for periods more than two years prior to the beneficiary's death, and the *Nehmer* court orders, which require VA to pay the entire amount of any unpaid benefits to the survivors or estate of a deceased *Nehmer* class member. Further, although section 5121(a) requires payment to the person who bore the expense of the beneficiary's last sickness and burial if there are no surviving members of the decedent's immediate family, the *Nehmer* court orders require payment to the decedent's estate in that circumstance. This rule will provide that, in cases governed by the *Nehmer* court orders, VA will pay the entire amount of such benefits to the specified survivors or to the decedent's estate, without regard to the two-year limit in 38 U.S.C. 5121(a).

We received comments on the proposed rule from three commenters. One commenter expressed unqualified support for the rule. The other commenters expressed general support for the rule, but disagreed with certain aspects of it, as discussed below.

Burial Benefits

Two commenters suggested that we add provisions to the rule specifying that when service connection for the cause of a *Nehmer* class member's death is established under a presumption issued pursuant to the Agent Orange Act, VA may pay a service-connected burial allowance under 38 U.S.C. 2307, even if the death occurred prior to the effective date of the regulation establishing the presumption. Those suggestions are based on a 1995 opinion of VA's General Counsel, designated as VAOPGCPREC 15–95, which stated such a conclusion in the context of a *Nehmer* class member's claim.

We make no change based on these comments. The additional provisions suggested by the commenters do not relate to the effective date of awards of disability compensation or DIC, nor to the manner of paying amounts due and unpaid to a beneficiary at death. Rather, they pertain to a distinct issue concerning entitlement to service-connected burial benefits under 38 U.S.C. 2307. Because these comments relate solely to matters outside the scope of the rule we proposed, we will make no change based on them.

Moreover, unlike the subjects of our proposed rule, the General Counsel's conclusion regarding entitlement to service-connected burial benefits does not rest upon the requirements of the *Nehmer* court orders, nor does it establish an exception to the generally applicable adjudication rules. In our January 2003 notice of proposed rule making, we explained that the purpose of the proposed rule was to explain the requirements of the *Nehmer* court orders, which created exceptions to the general statutory prohibitions in 38 U.S.C. 5110(g) and 5121(a) applicable to *Nehmer* class members. The General

Counsel's conclusion that service-connected burial benefits may be paid for deaths preceding the effective date of a regulatory presumption was based on the interpretation of statutes and regulations; it was not based on the *Nehmer* court orders and did not establish any exception to governing statutory requirements for *Nehmer* class members. Accordingly, we will not incorporate that conclusion in this final rule.

Identifying Prior Claims or Decisions

One commenter suggested a revision to proposed § 3.816(c)(2), which explains when a disability compensation award may be made retroactive to the date of a prior claim for compensation for a covered herbicide disease that was pending on May 3, 1989 or was received by VA between that date and the effective date of the regulation establishing a presumption of service connection for the disease. As proposed, § 3.816(c)(2) would explain that a prior claim will be considered a claim for compensation for a particular covered herbicide disease if the claimant's application and other submissions may reasonably be viewed, under the standards ordinarily governing such claims, as indicating an intent to apply for compensation for the covered herbicide disease. The commenter asserts that the *Nehmer* court orders also require payment of retroactive benefits in cases where the prior claim did not request compensation for a covered herbicide disease, but VA nevertheless denied compensation for such disease in its decision on the veteran's claim.

Longstanding VA policy reflected in VA procedural manuals provides that when disability compensation is claimed, VA must make a formal rating decision as to each disability that was either claimed by the veteran or noted in the veteran's records, subject to certain exceptions for non-claimed conditions that are acute and transitory or recorded by history only. That policy is currently stated in VA Manual M21–1, Part VI, para. 3.09(b), and was previously stated in VA Manual M21–1, para. 46.02 at the time of the 1991 final stipulation and order. Accordingly, VA may have denied disability compensation for conditions not expressly claimed by the veteran.

The 1991 final stipulation and order in *Nehmer* stated effective-date rules governing two kinds of claims: those where VA denied benefits in a decision rendered between September 25, 1985 and May 3, 1989 (which decisions were voided by a 1989 *Nehmer* court order), and those where a claim was filed after May 3, 1989 and may or may not have been denied by VA before VA awarded benefits under an applicable regulatory presumption. With respect to the voided decisions, the stipulation and order provided that an award of benefits for a covered herbicide disease would be retroactive to the date of the previously-denied claim if the basis of the award was the same as the basis of the prior claim. The stipulation and order specified that the ''basis'' of the claim would be determined by reference to the diseases that were coded in the prior decision as required by former paragraph 46.02 of VA Manual M21–1. This requirement is reflected in § 3.816(c)(1) of the proposed regulation, which addresses claims denied by VA between September 25, 1985 and May 3, 1989.

With respect to claims filed after May 3, 1989, the 1991 final stipulation and order merely provides that the effective date of an award will be the later of the date the claim was received or the date disability arose or death occurred. It provided no criteria for determining whether an award related to a previously-filed claim or a prior decision by VA denying benefits. In proposed § 3.816(c)(2), we explained that VA would apply the ordinary standards of claim interpretation to determine whether a claim received after May 3, 1989 was a claim for compensation for the covered herbicide disease for which benefits were ultimately awarded. We believe it is necessary to state guidelines based on the nature of the claim, rather than only the nature of a prior VA decision, because paragraph (c)(2) applies in cases where VA may not have issued any prior decision on the veteran's claim. However, we did not intend to preclude retroactive payments in cases where VA did issue a decision denying compensation for a covered herbicide disease in a decision rendered after May 3, 1989.

As explained above, the 1991 final stipulation and order is ambiguous as to whether retroactive payments may be made where a veteran did not request service connection for a covered herbicide disease but VA expressly denied compensation for such disease in a decision rendered after May 3, 1989. We believe the stipulation may reasonably be construed to allow retroactive payment in those circumstances. Accordingly, we will revise proposed § 3.816(c)(2) to clarify that retroactive payment may be made where a VA decision rendered between May 3, 1989 and the effective date of the relevant statutory or regulatory presumption denied compensation for a disease that reasonably may be construed as the same covered herbicide disease for which compensation was later awarded. As explained in our January 2003 notice of proposed rulemaking, we do not intend to require exact agreement in the terminology or diagnostic codes used to describe the disease at different times, if circumstances reasonably indicate that the same disease is involved.

Payments to Survivors or Estates of Deceased Beneficiaries

We proposed to state, in paragraph (f) of 38 CFR 3.816, that, when a *Nehmer* class member dies before receiving amounts due and unpaid under the *Nehmer* court orders, VA will pay the entire amount of unpaid benefits to the class member's surviving spouse, child(ren), or dependent parents, in that order of preference. In the event no such survivors are in existence, we proposed that VA would pay to the person who bore the expense of the class member's last sickness and burial as much of the unpaid benefits as necessary to reimburse such person for those expenses. Two commenters disagreed with this provision and asserted that the *Nehmer* court orders require VA to release payments to the estates of deceased class members.

In our January 2003 notice of proposed rule making, we stated that we considered it necessary to seek clarification from the district court regarding VA's ability to release payments in the manner proposed. On April 21, 2003, the district court issued an order stating that, in the event a *Nehmer* class member dies, VA must release payments as provided in an August 3, 2001 stipulation between the parties to the *Nehmer* case. Specifically, the Court stated that VA must release the payments to the first of the following individuals or entities who is in existence when payment is made: (a) The class member's spouse; (b) the class member's children (in equal shares); (b) the class member's parents (in equal shares); (d) the class member's estate.

In accordance with the district court's order and the comments, we are revising the proposed rule to provide that VA will release payment to the estate of the deceased class member when there is no surviving spouse, child, or parent. We proposed to caption paragraph (f) of 38 CFR 3.816(f) ''Payment of Benefits to Survivors of Deceased Beneficiaries.'' Based on the court order and the comments, we will change this to ''Payment of Benefits to Survivors or Estates of Deceased Beneficiaries.''

As proposed, the first sentence of paragraph (f)(1)(i) would have stated

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)

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,

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

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

§ 3.1000(c) requiring survivors to file claims for accrued benefits also do not apply to payments under this section. When a *Nehmer* class member dies prior to receiving retroactive payments under this section, VA will pay the amount to an identified payee in accordance with paragraph (f)(1) of this section without requiring an application from the payee. Prior to releasing such payment, however, VA may ask the payee to provide further information as specified in paragraph (f)(3) of this section.

(3) *Identifying payees.* VA shall make reasonable efforts to identify the appropriate payee(s) under paragraph (f)(1) of this section based on information in the veteran's claims file. If further information is needed to determine whether any appropriate payee exists or whether there are any persons having equal or higher precedence than a known prospective payee, VA will request such information from a survivor or authorized representative if the claims file provides sufficient contact information. Before releasing payment to an identified payee, VA will ask the payee to state whether there are any other survivors of the class member who may have equal or greater entitlement to payment under this section, unless the circumstances clearly indicate that such a request is unnecessary. If, following such efforts, VA releases the full amount of unpaid benefits to a payee, VA may not thereafter pay any portion of such benefits to any other individual, unless VA is able to recover the payment previously released.

(4) *Bar to accrued benefit claims.* Payment of benefits pursuant to paragraph (f)(1) of this section shall bar a later claim by any individual for payment of all or any part of such benefits as accrued benefits under 38 U.S.C. 5121 and § 3.1000.

(g) *Awards covered by this section.* This section applies only to awards of disability compensation or DIC for disability or death caused by a disease listed in paragraph (b)(2) of this section.

(Authority: 38 U.S.C. 501)

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 15

[ET Docket No. 98–156; FCC 03–175]

Certification of Equipment in the 24.05–24.25 GHz Band at Field Strengths up to 2500 mV/m

AGENCY: Federal Communications Commission.

ACTION: Final rule; termination.

SUMMARY: In this document, the Commission affirms the decision to allow the unlicensed operation of fixed point-to-point transmitters in the 24.05–24.25 GHz band at field strengths up to 2500 mV/m under amended provisions of the Commission's rules. In the course of taking this action, the Commission also denies the petition for reconsideration filed by the National Association for Amateur Radio (ARRL) that challenged the decision to allow the described operation on an unlicensed basis. Because the MO&O resolves all pending matters in this proceeding, the Commission terminates this proceeding.

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SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Memorandum Opinion and Order, ET Docket No. 98–156, FCC 03–175, adopted July 15, 2003, and released July 21, 2003. The full text of this Commission decision is available on the Commission's Internet site at *www.fcc.gov.* It is available for inspection and copying during normal business hours in the FCC Reference Information Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365.

Summary of the Memorandum Opinion and Order

1. In the Report and Order (R&O) in this proceeding, ET Docket No. 98–156, 67 FR 1,623, January 14, 2002, the Commission amended § 15.249 of the Commission's rules to allow unlicensed operation of fixed point-to-point transmitters in the 24.05–24.25 GHz band with field strengths up to 2500 mV/m. The Commission further decided that such devices must use directional antennas with gains of at least 33 dBi or a main lobe beamwidth not exceeding 3.5 degrees. The Commission also adopted strict frequency stability requirements to limit out-of-band emissions to minimal levels. The Commission concluded that it is in the public interest to allow such operation on an unlicensed basis to supplement the growing demand for licensed point-to-point facilities that satisfy important communications needs. For example, the Commission concluded that increasing the field strength limit would promote greater use of part 15 unlicensed devices for emergency restoration of communications in disaster situations, low-cost telecommunications delivery in rural areas, and other beneficial applications.

2. By this Memorandum Opinion and Order, the Commission affirms the decision made in the R&O to allow the unlicensed operation of fixed point-to-point transmitters in the 24.05–24.25 GHz band at field strengths up to 2500 mV/m under amended provisions of § 15.249 in part 15 of the Rules. The Commission affirms the central technical finding made in the R&O namely, that devices having field strengths up to 2500 mV/m and conforming to the specified directional antenna requirements are suitable for unlicensed operation under part 15 in the 24.05–24.25 GHz band. In particular, the Commission affirms the conclusion that devices operating within these requirements will not increase the interference potential to licensed amateur services in the band.

3. In the course of affirming its decision in the R&O, the Commission also denies the petition for reconsideration filed by the National Association for Amateur Radio (ARRL) that challenged the propriety of the described operation in the 24.05–24.25 GHz band on an unlicensed basis. Because the unlicensed operation provided for by the R&O will not increase the interference potential to licensed amateur services in the band, the Commission finds no merit in ARRL's argument that the Commission violated 47 U.S.C. 301 of the Communications Act in authorizing the unlicensed operation under part 15 of the Commission's rules. Furthermore, the Commission affirms that the rules adopted in the R&O are reasonable for