



FALL CONFERENCE 2011

VA's REVIEW OF 140,000 PAST CLAIMS UNDER *NEHMER* AND THE SPECIAL EFFECTIVE DATES RULES THAT APPLY

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Barton F. Stichman

Barton F. Stichman is Co-Director of the National Veterans Legal Services Program (NVLSP), a non-profit public interest law firm that he helped found in 1980. After earning law degrees from New York University School of Law (J.D. 1974) and Georgetown University Law Center (LLM 1975), he has devoted his entire professional legal career to assisting veterans, active duty military personnel and their families receive the federal veterans benefits to which they are entitled.

Over the last 35 years, Mr. Stichman has represented current and former military personnel before U.S. district courts, U.S. courts of appeals, the U.S. Court of Federal Claims, the U.S. Court of Appeals for Veterans Claims, the Department of Veterans Affairs, military department discharge review boards and boards for correction of military records. His litigation efforts have resulted in payment of hundreds of millions of dollars in disability and death benefits to tens of thousands of disabled veterans and their families.

During his career, Mr. Stichman has trained thousands of attorneys and lay advocates in veterans law. He helped organize two major national pro bono programs: the Veterans Consortium Pro Bono Program (which has recruited and trained volunteer attorneys for the last 19 years to represent those who have appealed to the Court of Appeals for Veterans Claims without a representative) and Lawyers Serving Warriors® (which provides free legal representation to thousands of veterans of the current wars in Iraq and Afghanistan through NVLSP's national network of dozens of private law firms).

Mr. Stichman is a co-author of *The Veterans Benefits Manual*, NVLSP's 1900-page treatise on veterans benefits law, published annually by Lexis Law Publishing; and of past editions of *The Rights of Military Personnel*, and NVLSP's *Military Discharge Upgrade Manual*. He has written articles on veterans benefits law appearing in the *Administrative Law Review*, *The American University Law Review*, *The Federal Bar News and Journal*, *Clearinghouse Review*, and *Legal Times*.

Mr. Stichman served as co-chair of the Veterans Affairs Committee of the Section on Administrative Law and Regulatory Practice of the American Bar Association from 1994 to 2009, and he served as president of the U.S. Court of Appeals for Veterans Claims Bar Association from 2004-2005.

VA's Review of 140,000 Past Claims Using *Nehmer* Special Effective Date Rules

Bart Stichman, Co-Director
National Veterans
Legal Services Program

The *Nehmer* Lawsuit

- Filed in 1986 to challenge VA's 1985 Agent Orange compensation reg (nothing but chloracne)
- Certified as a national class action in 1987
- In 1989, Court invalidates 1985 VA reg; voids all VA decisions denying benefits under 1985 reg

1991 Final Stipulation and Order

Whenever VA adds disease to those presumptively service connected due to AO exposure, VA must:

- Identify all Vietnam vets & survivors who applied, or who had applications pending for service connection based on the new disease between 9/25/85 and pub. date of reg adding disease

1991 Final Stipulation and Order

- Redecide whether benefits warranted for the disease under the new reg, after allowing claimant to add new evidence
- If SC granted, VA must apply the special effective date rules contained in the 1991 Stip. & Order

Who Qualifies as a *Nehmer* Class Member?

1. Veteran who served on active duty between 1/9/62 - 5/7/75 and
 - (a) stepped foot on Vietnamese soil; or
 - (b) served on the inland waterways of Vietnam.
2. Qualified surviving spouse, child, or parent of a veteran described in 1.

Who Does NOT Qualify as a *Nehmer* Class Member?

- Those who served on ships off the coast of Vietnam (so-called “Blue Water Navy”)
- Those exposed to AO during service in Korea, Thailand, or elsewhere

(Note: above vets would qualify if service meets definition on last slide)

VA Mass Reviews of Past Claims Required by *Nehmer*

- 1991: Non-Hodgkin's lymphoma and Soft-tissue sarcoma
- 1994: Hodgkin's disease; cancer of the lung, trachea, bronchus, and larynx; and multiple myeloma
- 1996: Prostate cancer
- 2001: Type 2 diabetes
- 2003: Chronic lymphocytic leukemia

VA Mass Reviews of Past Claims under *Nehmer*

- 2009: Primary AL Amyloidosis

- Currently (2010-11):
 - Ischemic heart disease (aka coronary artery disease);
 - Parkinson's disease; and
 - B-cell leukemias (including Hairy Cell Leukemia)

VA's Normal Effective Date Rules

- When VA amends regs to change criteria for SC to make it easier for claimant to win = “liberalizing reg”

→ ED for benefit award under liberalizing reg cannot be earlier than effective date of liberalizing reg (usually reg pub'n date)

VA's Normal Effective Date Rules

Example

- Vet: discharged in 1992; diagnosed with amyotrophic lateral sclerosis (ALS) in 1994; dies of ALS in 1997. Widow files for DIC in 1997; VA denies in 1998.
- On 9/23/08, VA issues reg service connecting ALS based on military service at any time. Widow files 2d DIC claim on 5/1/08.
- ED →→ cannot be earlier than 9/23/08

Nehmer Effective Date Rules

ED for award of SC disability benefits=
the later of:

(a) date VA receives “initial claim” for AO
disease; or

(b) date AO disease is first diagnosed

“Initial claim” = first claim filed after or
pending on 9/25/1985

Nehmer Effective Date Rules

■ ED for award of DIC =

(a) date of death if initial DIC claim is received within 1 year of death; or

(b) date VA receives initial DIC claim if received > 1 year after death

“Initial DIC claim” = first DIC claim filed after or pending on 9/25/1985

Nehmer Effective Date Rules

In other words,

CLASS MEMBER ENTITLED TO ED
BEFORE DATE VA AMENDED
REG TO ADD THE DISEASE !!!

Nehmer Effective Date Rules

Example

- Vet files for SC for larynx cancer (LC) in 1982; diagnosed with LC in 1981; VA denies in 1983. No appeal.
- Vet files reopened claim for LC in 1989. Vet silent on AO. RO denies in 1990.
- 1994 reg adds LC as presumptive disease
- Vet files claim for LC in 2005.
- ED →→ 1989

Judicial Rulings on *Nehmer*

- Claimant does not have to refer to AO in initial claim
- If claimant dies before VA readjudicates initial claim per *Nehmer*, VA still must readjudicate and pay, in priority order:
 - 1) spouse; 2) children of any age; 3) parent(s); or 4) estate

Deceased *Nehmer* Class Member

Example

- Vet files SC claim for lung cancer in 1988. VA denies. Vet never applies again.
- VA adds lung cancer as presumptive AO disease in 1994, but never identifies vet.
- Vet dies in auto accident in 2008, leaving 34-year old son.
- Son now entitled to vet's SC benefits for lung cancer from 1988-2008.

Correcting VA Errors on ED

- Guidance on *Nehmer* ED rules:

- ☺ Section 8.7 of NVLSP's Veterans Benefits Manual

- ☺ 38 C.F.R. § 3.816

Correcting VA Errors on ED

Timetable Court Order

- VA must adjudicate ED complaint by class counsel (NVLSP) within 90 days of receipt by DoJ
- If VA agrees that earlier ED warranted, VA must pay retroactive benefits owed within 120 days of receipt of NVLSP complaint

Current VA Mass Review Under *Nehmer*

On 8/31/10, VA issued final rule presumptively SC 3 new diseases due to AO exposure

- VA identified > 146,000 vets and survivors to review
(i.e., probable class members who likely filed, before 8/31/10, claim based on ischemic heart disease (IHD), Parkinson's disease (PD), or B-cell leukemia (BCL))

Current VA Mass Review Under *Nehmer*

- Most cases transferred to 14 ROs
- Using 513 RVSRs, 562 VSRs, & 68 DROs
- Gave ROs 168-page *Nehmer* Training Guide + all-day *Nehmer* training video
- Start date for decisions: 10/30/10
- As of 6/24/11, VA has awarded > \$1.5 billion to 56,181 VA claimants

Current VA Mass Review Under *Nehmer*

VA has provided NVLSP, as class counsel,
with:

- Name and VA claims file number of all 146,000 claimants identified by VA
- Copies of all *Nehmer* decisions (cover letter, rating decision, and coding sheet)



DEPARTMENT OF VETERANS AFFAIRS
VA Regional Office
PO Box 34720
Phoenix, AZ 85067-4720

December 1, 2010

- We have conducted a special review of your claims file mandated by the United States District Court's orders in *Nehmer v. U.S. Department of Veterans Affairs*.
- This letter tells you about your entitlement amount and payment start date and what we decided.

Your Estimated Retroactive Amount

- The estimated amount of retroactive benefits is approximately \$1.3 million dollars. These retroactive benefits are a result of the United States District Court's order in *Nehmer v. U.S. Department of Veterans Affairs*. Please see Your Award Amount and Payment Start Date.

Your Monthly Compensation

- Your monthly entitlement amount is shown below

Total VA Benefit	Amount Withheld	Amount Previously Paid	Effective Date	Reason For Change
\$3,422.00	\$3,245.00	\$177.00	Jul 1, 1986	Compensation Rating Adjustment, Withholding awaiting fiduciary appointment.

Most Common *Nehmer* Error

- Footnote 1 of 1991 *Nehmer* Final Stip. & Order:

FN #1 incorporates 1991 M21-1 rule that, in deciding claim for SC or pension for disability X, VA must code in rating decision as SC or NSC all diagnosed conditions other than X.

Most Common *Nehmer* Error

Footnote 1 Example

Facts: Diagnosis of IHD in 1997 becomes part of VA record in 1999; Vet applies for IHD on 11/1/09; VA IHD reg published 8/31/10.

■ Easy ED: 11/1/09

Key Question: Was 1997 IHD diagnosis in C-file during a prior VA claim for anything?

1997 IHD diagnosis rec'd in 1999

- Case #1: Vet filed claim for PTSD in 1996, finally decided by VA in 2000. ED under *Nehmer* fn #1 = 1997.
- Case #2: Vet filed claim for diabetes in 1998, finally decided by VA in 2000. ED under *Nehmer* fn #1 = 1998.

Services Available from NVLSP

- Disability rating disputes \neq *Nehmer* issue. Must file NOD within 1 year of *Nehmer* rating decision
- For ED errors, contact NVLSP at
855-333-0677
agentorange@nvlsp.org
P.O. Box 65762, Wash. D.C. 20035
- Will include class member in future NVLSP EED complaints to DoJ