

§ 165.T05-153 Safety and Security Zone; Cove Point Liquefied Natural Gas Terminal, Chesapeake Bay, Maryland.

(a) *Location.* The following area is a safety and security zone: All waters of the Chesapeake Bay, from surface to bottom, encompassed by lines connecting the following points, beginning at 38°24'27" N, 076°23'42" W, thence to 38°24'44" N, 076°23'11" W, thence to 38°22'55" N, 076°22'27" W, thence to 38°23'37" N, 076°22'58" W, thence to beginning at 38°24'27" N, 076°23'42" W. These coordinates are based upon North American Datum (NAD) 1983. This area is 500 yards in all directions from the Cove Point LNG terminal structure.

(b) *Regulations.* (1) In accordance with the general regulations in §§ 165.23 and 165.33 of this part, entry into or movement within this zone is prohibited unless authorized by the Coast Guard Captain of the Port, Baltimore, Maryland or his designated representative. Designated representatives include any Coast Guard commissioned, warrant, or petty officer.

(2) Persons desiring to transit the area of the zone may contact the Captain of the Port at telephone number (410) 576-2693 or via VHF Marine Band Radio channel 16 (156.8 MHz) to seek permission to transit the area. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port or his designated representative.

(c) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the zone by Federal, State, local, and private agencies.

Dated: September 26, 2003.

Curtis A. Springer,

Captain, U.S. Coast Guard, Captain of the Port, Baltimore, Maryland.

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DEPARTMENT OF VETERAN AFFAIRS

38 CFR Part 3

RIN 2900-AL55

Disease Associated With Exposure to Certain Herbicide Agents: Chronic Lymphocytic Leukemia

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations concerning presumptive service connection for certain diseases for which there is no record during service. This amendment

is necessary to implement the decision of the Secretary of Veterans Affairs 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 chronic lymphocytic leukemia (CLL). The effect of this amendment is to establish presumptive service connection for that condition based on herbicide exposure.

DATES: *Effective Date:* October 16, 2003.

FOR FURTHER INFORMATION CONTACT: Cheryl Konieczny, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273-6779.

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on March 26, 2003 (68 FR 14567-14570), VA proposed to amend its adjudication regulations to provide for a presumption of service connection for CLL based on herbicide exposure. VA provided a 60-day comment period which ended on May 27, 2003. We received a written comment from Vietnam Veterans of America (VVA) and a joint written comment from two individuals.

Comments Supporting the Proposed Rule

The joint comment from two individuals expressed support for the proposed rule.

Outreach Mechanisms

One commenter urged that the final rule specifically state that VA will develop and implement outreach mechanisms by which attempts will be made to contact all in-country Vietnam veterans who are eligible for this benefit.

VA has already initiated a number of outreach activities. In January 2003, VA issued a news release concerning the Secretary's decision regarding CLL. This news release has also been distributed at health fairs, health care conferences, and on the National Mall in conjunction with Public Service Recognition Week. An article conveying this information can currently be found on VA's Web site. The lead article of the July issue of the Agent Orange Review, which will be sent to hundreds of thousands of Vietnam veterans, is about the Secretary's decision regarding CLL. Further, outreach efforts are procedural in nature, and are outside the scope of this rulemaking; therefore, no change is made based on this comment.

Establish a Retroactive Effective Date

The same commenter urged that the final rule state that compensation for

CLL will be retroactive for those eligible in-country Vietnam veterans who had previously applied for benefits based on CLL and were denied. We will make no change based on this comment because VA does not have authority to award such retroactive benefits. As explained below, existing statutes make clear that VA may not award retroactive benefits based on this final rule for any period before the date this final rule is published in the **Federal Register**.

Those statutes prohibit VA from granting benefits retroactive to the date of a previously denied claim. No statute or judicial decision authorizes VA to ignore those statutory requirements for purposes of this final rule.

Title 38 U.S.C. 1116(c)(2) clearly and unambiguously requires that regulations promulgated as a result of a decision of the Secretary of Veterans Affairs that a positive association exists between exposure to herbicides and a specified condition or disease "shall be effective on the date of issuance." The effective date established by this rule is in accordance with 38 U.S.C. 1116(c)(2). Under 38 U.S.C. 5110(g), when benefits are awarded based on a new regulation, the effective date of the award may not be earlier than the effective date of the regulation. In view of 38 U.S.C. 1116(c)(2) and 5110(g), VA does not have authority to provide in this rule for assignment of an effective date earlier than the date on which this rule is issued.

We note that a series of orders from the United States District Court for the Northern District of California in the class-action litigation in *Nehmer v. U.S. Veterans' Administration* requires VA to pay retroactive benefits for certain diseases associated with herbicide exposure, in certain circumstances, in a manner that would otherwise be prohibited by 38 U.S.C. 1116(c)(2) and 5110(g). We conclude, however, that those orders do not apply to benefits based on a disease for which the Secretary of Veterans Affairs establishes a presumption of service connection after September 30, 2002.

The *Nehmer* court orders rely upon a May 1991 Final Stipulation and Order between the parties to that litigation. The 1991 stipulation and order required VA to accord retroactive effect to presumptions of service connection established by VA pursuant to the Agent Orange Act of 1991, Public Law 102-4. The Agent Orange Act of 1991, Public Law 102-4, established a sunset date of September 30, 2002, for the Secretary to establish such presumptions. Accordingly, the *Nehmer* stipulation and order applies only to awards based on presumptions established within the

time frame specified in the Agent Orange Act of 1991, Public Law 102-4.

The Agent Orange Act of 1991, Public Law 102-4, added section 1116 to title 38, United States Code. Section 1116(b) authorized the Secretary of Veterans Affairs to issue regulatory presumptions of service connection for diseases associated with herbicide exposure. Section 1116(e), as added by the Act, stated that section 1116(b) would cease to be effective 10 years after the first day of the fiscal year in which the NAS transmitted its first report to VA. The first NAS report was transmitted in June 1993, during the fiscal year that began on October 1, 1992. Accordingly, under the Act, VA's authority to issue regulatory presumptions as specified in section 1116(b) would have expired on September 30, 2002.

In December 2001, Congress enacted the Veterans Education and Benefits Expansion Act of 2001 (Benefits Expansion Act), Public Law 107-103, section 201(d) of which extended VA's authority under section 1116(b) through September 30, 2015. Pursuant to this statute, VA may issue new regulations between October 1, 2002, and September 30, 2015, establishing additional presumptions of service connection for diseases that are found to be associated with herbicide exposure based on evidence contained in future NAS reports. Because presumptions established pursuant to the authority of the Benefits Expansion Act, Public Law 107-103 are beyond the scope of the *Nehmer* stipulation and order, the effective-date provisions of the stipulation and order would not apply to benefit awards based on those presumptions.

The United States District Court for the Northern District of California and the United States Court of Appeals for the Ninth Circuit stated that the *Nehmer* stipulation and order applies only to awards based on presumptions issued within the time period established by the Agent Orange Act of 1991, Public Law 102-4. The district court noted that the retroactive payment provisions of the stipulation and order are "expressly tied" to the Agent Orange Act of 1991, Public Law 102-4, and that "the Stip. & Order is not therefore boundless." *Nehmer v. United States Department of Veterans Affairs*, No. CV-86-6160 TEH (N.D. Cal. Dec. 12, 2000). The Ninth Circuit stated that "the district court was careful to prescribe temporal limits on the effect of the consent decree, with which we agree." *Nehmer v. Veterans' Administration*, 284 F.3d 1158, 1162 n.3 (9th Cir. 2002).

In its December 12, 2000, order, the district court held that the 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 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). Accordingly, the enactment of the Benefits Expansion Act of 2001 cannot expand the Government's authority under the May 1991 stipulation and order.

VA is required to give effect to the clear statutory requirements in 38 U.S.C. 1116(c)(2) and 5110(g), in the absence of authority to the contrary. To the extent the *Nehmer* court orders require action seemingly at odds with those statutes, we believe they are most reasonably viewed as creating a non-statutory exception to the requirements of 38 U.S.C. 1116(c)(2) and 5110(g). We believe it would be inappropriate, however, to disregard the clear requirements of section 1116(c)(2) and 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). Accordingly, the district court orders in the *Nehmer* case do not permit VA to ignore the clear requirements of 38 U.S.C. 1116(c)(2) and 5110(g) as they apply to this final rule or to grant retroactive benefits in a manner prohibited by those statutes. We therefore make no change based on this comment.

Eligibility of Widows

The commenter urged that the final rule state that widows of in-country Vietnam veterans who died as a result of CLL are eligible for dependency and indemnity compensation (DIC). This

rule is not intended to define the criteria governing eligibility for DIC or any other benefit. Several existing statutes and regulations already provide that veterans and their survivors are entitled to benefits for disability or death due to a service-connected disease or injury. This rule would establish a presumption that CLL is service connected in veterans who were exposed to certain herbicide agents used in Vietnam and who subsequently developed that disease. That presumption will assist claimants in establishing entitlement to specific benefits under the statutes and regulations authorizing such benefits, and will apply whether the claimant is a veteran seeking compensation or a survivor seeking service-connected death benefits. We therefore make no change based on this comment, because the suggested change is beyond the scope of this rule and is unnecessary.

Extend Eligibility to Those Who Served on Naval Vessels

The commenter urged that we extend eligibility to service connection for CLL to all Vietnam veterans who served within the geographical boundaries of the Republic of Vietnam and those who served on naval vessels within the territorial waters of the Republic of Vietnam. As revised by this final rule, 38 CFR 3.309(e) will expressly provide that CLL will be presumed service connected in any veteran who was exposed to certain herbicide agents during service. Veterans who served in the Republic of Vietnam between January 9, 1962, and May 7, 1975, are presumed to have been exposed to such herbicide agents. Veterans who served only in other locations or at other times, including those who served on naval vessels in the territorial waters of Vietnam but never set foot within the Republic of Vietnam, would need to establish that they were exposed to herbicide agents during service.

Title 38 U.S.C. 1116 requires that a veteran have served "in the Republic of Vietnam" to be eligible for the presumption of exposure to herbicides. 38 CFR 3.307(a)(6)(iii) provides that "Service in the Republic of Vietnam" includes service in offshore waters or other locations only if the conditions of service involved duty or visitation within the Republic of Vietnam. In interpreting similar language in 38 U.S.C. 101(29)(A), VA's General Counsel has concluded that service in a deep-water vessel in waters offshore the Republic of Vietnam does not constitute service "in the Republic of Vietnam." (See VAOPGCPREC 27-97.) VA's regulatory definition of "Service in the Republic of Vietnam" predates the

enactment of section 1116(a)(3) (see former 38 CFR 3.311a(a)(1)(1990)), and we find no basis to conclude that Congress intended to broaden that definition. The commenter cited no authority for concluding that individuals who served in the waters offshore of the Republic of Vietnam were subject to the same risk of herbicide exposure as those who served within the geographic boundaries of the Republic of Vietnam, or for concluding that offshore service is within the meaning of the statutory phrase "Service in the Republic of Vietnam." We therefore make no change based on this comment.

CLL and Non-Hodgkin's Lymphoma

The commenter stated that because of the common etiology and shared symptoms between CLL and non-Hodgkin's lymphoma (NHL), all in-country Vietnam veterans who are eligible for compensation because of NHL should also be eligible for CLL diagnoses, treatment plans, and compensation.

We disagree. While CLL and NHL may share certain traits and symptomatology, they are, nonetheless, distinct diagnostic entities, both of which VA presumes to result from herbicide exposure. We believe the responsibilities of diagnosing disease and establishing treatment plans must rest with health care professionals. Further, it would be improper and contrary to current statutes to provide for automatic compensation for a disease that the claimant may not even have. Whether a veteran has one of these conditions, or which one, must be established by competent medical evidence. Therefore, no changes have been made based on this comment.

Based on the rationale set forth in the proposed rule document and this document, we are adopting the provisions of the proposed rule as a final rule without change.

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.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information

under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

Executive Order 12866

This final rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

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

Catalog of Federal Domestic Assistance Numbers

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, Health care, Pensions, Veterans, Vietnam.

Approved: August 27, 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. In § 3.309, paragraph (e), the listing of diseases is amended by adding "Chronic lymphocytic leukemia" between "Hodgkin's disease" and "Multiple myeloma" to read as follows:

§ 3.309 Disease subject to presumptive service connection.

* * * * *

(e) * * *

Chronic lymphocytic leukemia

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL-7575-1]

West Virginia: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: West Virginia has applied to EPA for final authorization of changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has determined that these changes satisfy all requirements needed to qualify for final authorization and is authorizing West Virginia's changes through this immediate final action. EPA is publishing this rule to authorize the changes without a prior proposal because we believe this action is not controversial and do not expect comments that oppose it. Unless we receive written comments which oppose this authorization during the comment period, the decision to authorize West Virginia's changes to its hazardous waste program will take effect. If we receive comments that oppose this action, or portions thereof, we will publish a document in the **Federal Register** withdrawing the relevant portions of this rule, before they take effect, and a separate document in the proposed rules section of this **Federal Register** will serve as a proposal to authorize changes to West Virginia's program that were the subject of adverse comment.

DATES: This final authorization will become effective on December 15, 2003, unless EPA receives adverse written comments by November 17, 2003. If EPA receives any such comment, it will publish a timely withdrawal of this immediate final rule in the **Federal Register** and inform the public that this authorization, or portions thereof, will not take effect as scheduled.

ADDRESSES: Send written comments to Lillie Ellerbe, Mailcode 3WC21, RCRA State Programs Branch, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103, Phone number: (215) 814-5454. Comments may also be submitted electronically to ellerbe.lillie@epa.gov or by facsimile at (215) 814-3163. Comments in electronic format should identify this specific notice. You may inspect and copy West Virginia's application from 8 a.m. to 4:30 p.m., at the following addresses: West Virginia Department of Environmental Protection