

Date: May 4, 1998

VAOPGCPREC 7-98

From: Acting General Counsel (022)

Subj: REPS Effective Dates

To: Director, Compensation and Pension Service (213B)

QUESTIONS PRESENTED:

a. Where eligibility under the Restored Entitlement Program for Survivors (REPS) is based on service connection established under a Department of Veterans Affairs (VA) regulation establishing a presumption of service connection for a disease, is the effective date of the award of REPS benefits limited by the effective date of the regulation establishing the presumption?

b. If, pursuant to the *Nehmer* stipulation, an award of dependency and indemnity compensation (DIC) is made effective prior to the effective date of the VA regulation establishing presumptive service connection for the cause of death, is the effective date of an award of REPS benefits also governed by the *Nehmer* stipulation?

DISCUSSION:

1. Pursuant to Pub. L. No. 97-377, § 156, 96 Stat. 1830, 1920 (1982) (set out, as amended, at 42 U.S.C. § 402 note), REPS benefits may be paid to certain surviving spouses and children of members or former members of the Armed Forces who died on active duty before August 13, 1981, or who died from a service-connected disability which was incurred or aggravated before such date. A surviving spouse is entitled to REPS benefits for any month in which: (1) he or she is caring for a child of the member or former member who is at least sixteen years old but less than eighteen years old and who is eligible for a child's insurance benefit under 42 U.S.C. § 402(d) or its equivalent under 38 U.S.C. § 1312(a); and, (2) the surviving spouse is not entitled to a mother's insurance benefit under 42 U.S.C. § 402(g) or its equivalent under 38 U.S.C. § 1312(a). A child is entitled to REPS benefits for any month in which such child: (1) is at least eighteen years old but less than twenty-two years old; (2) is a full-time student at a postsecondary school, college, or university; and, (3) is

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not eligible for a child's insurance benefit under 42 U.S.C. § 402(d) or is entitled to such benefit only by reason of

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section 2210(c) of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 841 (authorizing a limited child's benefit for certain full-time students over age 18).

2. There is no time limit on filing claims for REPS benefits, and those benefits generally may be paid retroactively for all months in which the claimant met the statutory eligibility criteria. See *Skinner v. Brown*, 27 F.3d 1571, 1574-75 (Fed. Cir. 1994); 38 C.F.R. § 3.812(f). Section 3.812(f) states that, "[u]pon the filing of a claim, benefits shall be payable for all periods of eligibility beginning on or after the first day of the month in which the claimant first became eligible for this special allowance, except that no payment may be made for any period prior to January 1, 1983." 38 C.F.R. § 3.812(f).

3. In the two cases discussed in the opinion request, service connection for the cause of the veteran's death was established based on VA regulations issued subsequent to the initial period of REPS eligibility. The regulations established liberalized evidentiary standards for establishing service connection for certain diseases associated with service in the Republic of Vietnam during the Vietnam era or associated with exposure to an herbicide agent during service. Our opinion is requested as to whether REPS benefits may be paid in these cases for all periods of eligibility, as prescribed in 38 C.F.R. § 3.812(f), or whether such benefits may be paid only from the effective date of the liberalizing regulations upon which the finding of service connection was based. In the event that we conclude that REPS benefits generally cannot be paid for periods prior to the effective date of the liberalizing regulations, our opinion is requested concerning the possible effect of the *Nehmer* stipulation on the effective date of REPS benefits.

4. The opinion request refers to 38 C.F.R. § 3.114(a), which provides, in pertinent part, that, "[w]here pension, compensation, or [DIC] is awarded . . . pursuant to a liberalizing law, or a liberalizing VA issue . . . , the effective date of such award or increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date

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of the act or administrative issue." (Emphasis added). Section 3.114(a) implements 38 U.S.C. § 5110(g), which provides that compensation, pension, or DIC awarded pursuant to a liberalizing law or VA issue may be paid retroactively for up to one year prior to the date of the claim, but in no event earlier than the effective date of the statute or administrative issue. These provisions establish an exception to the general

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rule, stated in 38 U.S.C. § 5110(a), that compensation, pension, and DIC may not be paid for periods prior to the date of the claim. By their express terms, 38 U.S.C. § 5110(a) and (g) and 38 C.F.R. § 3.114(a) apply only to awards of compensation, pension, and DIC. Accordingly, those provisions do not impose a limit on the effective date of a REPS award under 38 C.F.R. § 3.812(f). See VAOPGCPREC 22-94 (O.G.C. Prec. 22-94), para. 9. There is no similar statutory or regulatory provision expressly governing the effective date of REPS benefits in cases where service connection is established pursuant to a liberalizing statute or VA issue.

5. Apart from the provisions of 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a), it is well established that statutes and regulations are presumed not to operate retroactively, absent explicit language requiring that result. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); VAOPGCPREC 10-97, paras. 6 and 7. This principle of statutory and regulatory interpretation is generally applicable and must be considered in determining the effect of liberalizing VA regulations as applied to claims for REPS benefits. The Supreme Court has stated the analytical framework for determining the temporal reach of legislation:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional

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presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994). The presumption against retroactivity applies to statutes imposing new monetary obligations on the Government, as well as to statutes imposing burdens on private parties. *Id.* at 271 n.25. We believe that these principles are equally applicable in determining the temporal reach of administrative regulations. See *Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994) (applying canons of statutory construction to VA regulations).

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6. If the language of a statute or regulation is silent as to its temporal scope, it is necessary to determine whether application of the statute or regulation to events occurring prior to its enactment or issuance would have a genuine "retroactive" effect. A statute or regulation does not have retroactive effect merely because it is applied in a case arising out of conduct antedating its enactment or issuance, or because it upsets expectations based on prior law. *Landgraf*, 511 U.S. at 269. Rather, the question is whether the statute or regulation impairs vested rights or imposes new liabilities based on conduct occurring prior to its enactment or issuance. *Id.* at 268-69. The temporal reach of the liberalizing regulations at issue in these cases must be determined under these standards.

7. In the first case discussed in the opinion request, the veteran's child became eligible for REPS benefits on June 1, 1990, when the child's Social Security benefits terminated. Service connection for the cause of the veteran's death has been established pursuant to 38 C.F.R. § 3.313, which was issued on October 26, 1990, and which provides that the development of non-Hodgkin's lymphoma subsequent to service in Vietnam during the Vietnam Era is sufficient to establish service connection for that disease. On February 6, 1991, Congress enacted the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, section 2 of which established a presumption of service connection for non-Hodgkin's lymphoma becoming manifest to a ten-percent degree of disability in a veteran who served in the Republic of Vietnam during the Vietnam era. See 38 U.S.C. § 1116. The opinion request raises the issue of whether REPS benefits may be paid from June 1, 1990, when the veteran's child first became eligible, or whether the effective date of REPS benefits is limited by the effective dates

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of 38 C.F.R. § 3.313 or the Agent Orange Act of 1991, which provide the basis for establishing service connection for the veteran's death.

8. We note that the opinion request misstates the effective date of 38 C.F.R. § 3.313. Although that regulation was issued on October 26, 1990, it was made effective retroactive to August 5, 1964. See 55 Fed. Reg. 43,123 (1990); see also VAOPGCADV 28-90 (O.G.C. Adv. 28-90) (discussing VA's authority to issue regulation with retroactive effective date). Where, as here, VA has expressly defined the retroactive reach of its regulation, there is no need to resort to the presumption against retroactivity. See *Landgraf*, 511 U.S. at 280. Because VA has expressly provided that 38 C.F.R. § 3.313 shall be effective from August 5, 1964, the effective date of that

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regulation imposes no restriction on VA's authority to pay REPS benefits in this case from June 1, 1990, in accordance with 38 C.F.R. § 3.812(f).

9. The effective date of the statutory presumption established by the Agent Orange Act of 1991 also does not impose a restriction on VA's authority to pay REPS benefits effective from June 1, 1990, in this case. According to the opinion request, service-connection for the veteran's cause of death was established pursuant to 38 C.F.R. § 3.313, which was issued under the Secretary's general rulemaking authority under 38 U.S.C. § 501. Because the award of REPS benefits was properly authorized without reference to the presumption established by the Agent Orange Act, awarding REPS benefits effective from June 1, 1990, would not violate the presumption against retroactivity, even if that presumption is applicable to the pertinent provisions of the Agent Orange Act.

10. In the second case discussed in the opinion request, the veteran died in 1987 as the result of lung cancer. Service connection for the cause of death was denied in April 1989, in the context of a DIC claim. In 1997, service connection was established, apparently on the basis of regulations issued on June 9, 1994, establishing a presumption of service connection for respiratory cancers in veterans exposed to an herbicide agent during service. See 59 Fed. Reg. 29,723 (1994) (amending 38 C.F.R. §§ 3.307(a)(6) and 3.309(e)). DIC benefits have been awarded retroactive to December 1988, apparently in accordance with the stipulation entered in *Nehmer v. United States Veterans' Admin.*, No. CV-86-6160 (TEH) (final stipulation and order

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approved May 17, 1991). The veteran's child has applied for REPS benefits retroactive to September 1, 1989, the month in which the child's Social Security benefits terminated. The request for opinion raises the issue of whether the effective date of the 1994 regulations imposes a limit on retroactive payment of REPS benefits and, if so, whether the *Nehmer* stipulation would provide an exception to that limitation under the circumstances of this case.

11. We note, initially, that the *Nehmer* stipulation does not directly govern the effective date of REPS benefits in this case. The court in *Nehmer* invalidated a portion of a former VA regulation governing adjudication of claims for service connection based on exposure to dioxin. *Nehmer v. United States Veterans' Admin.*, 712 F. Supp. 1404, 1423 (N.D. Cal. 1989). The court further voided all benefit denials made under the invalidated regulation. *Id.* In a stipulation between VA and the plaintiff class in *Nehmer*, VA generally agreed to

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readjudicate the voided decisions under regulations subsequently issued pursuant to the Agent Orange Act of 1991. The stipulation provided that compensation or DIC awarded upon such readjudication would generally be made effective retroactive to the date of the original claim which was the subject of the voided decision. In the present case, it does not appear that a claim for REPS benefits was previously denied under the invalidated regulation. Accordingly, the effective date provisions of the *Nehmer* stipulation are not applicable to the REPS claim at issue. Further, the effective-date provisions of the stipulation apply only to awards of compensation and DIC and do not establish any standards governing the effective date of awards under the REPS program.

12. Having concluded that the *Nehmer* stipulation does not directly govern the effective date of REPS benefits in this case, we turn to the question of whether the effective date of the 1994 regulations imposes a limit on the effective date of REPS benefits. The liberalizing regulations at issue in this case established, in 38 C.F.R. §§ 3.307(a)(6) and 3.309(e), a presumption of service connection for respiratory cancers becoming manifest within 30 years after herbicide exposure in a veteran who was exposed to an herbicide agent during service. Those regulations are effective from June 9, 1994.

13. In VAOPGCPREC 15-95, we addressed the question of whether service-connected burial benefits could be paid in a case

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where the finding of service connection was based on the same regulations at issue in this case and the burial occurred prior to the effective date of the regulations. As with REPS benefits, service-connected burial benefits may be claimed at any time, see VAOPGCPREC 9-89 (O.G.C. Prec. 9-89), and are not subject to the limitations on retroactive payments in 38 U.S.C. § 5110 and 38 C.F.R. § 3.114(a). Although the issue was raised in VAOPGCPREC 15-95 in relation to claims subject to readjudication under the *Nehmer* stipulation, our analysis of that issue is pertinent to the present case. We concluded that, "[i]f a claim for service-connected burial allowance . . . fell within the group of claim denials voided by the [*Nehmer* order], . . . 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 [service-connected] burial allowance." VAOPGCPREC 15-95, para. c of "HELD" section. In explaining that conclusion, we stated:

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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 [38 U.S.C. §] 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.

VAOPGCPREC 15-95, para. 17.

14. As discussed above, a regulation will be construed to have a disfavored retroactive effect if it impairs vested rights or imposes new liabilities on the basis of events occurring prior to its issuance. Consistent with our analysis in VAOPGCPREC 15-95, we conclude that awarding REPS benefits retroactive to September 1, 1989, in this case would not give impermissible retroactive effect to the regulations issued

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pursuant to the Agent Orange Act. Prior to issuance of those regulations, VA had authority to establish service connection for the veteran's death and to award REPS benefits effective from September 1, 1989. The 1994 regulations substantially eased the claimant's burden in establishing service connection for the cause of the veteran's death. They did not, however, impose a new liability upon VA distinct from its duty under previously-existing law to pay REPS benefits in cases involving service-connected deaths. Because application of the 1994 regulations to the present case would be consistent with VA's authority under pre-existing law, it would not, in our view, have an impermissible retroactive effect.

15. In *Goodyear Tire & Rubber Co. v. Department of Energy*, 118 F.3d 1531 (Fed. Cir. 1997), the United States Court of Appeals for the Federal Circuit concluded that the Department of Energy's application of a regulatory presumption to events occurring prior to the regulation's issuance did not have an impermissible retroactive effect. The court concluded that the regulatory presumption reasonably implemented the requirements of pre-existing law by defining which persons would be presumed to have met the requirements of such pre-existing law. 118 F.3d at 1537-38. Accordingly, the court concluded that
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the regulation "did not transform qualified applicants into unqualified applicants," but, rather, "properly treated applicants who may not have suffered the injuries contemplated by the statute . . . as unqualified." 118 F.3d at 1538. By analogy, the 1994 regulatory presumptions at issue in this case did not transform unqualified applicants into qualified applicants. We cannot conclude that persons who establish entitlement to benefits based on the 1994 regulations were ineligible for benefits prior to issuance of those regulations. The fact that such applicants may have been unable to establish service connection under prior law may be attributed to the difficulties in establishing causation by direct evidence for diseases allegedly caused by exposure to an herbicide agent, rather than to a lack of eligibility.

16. This situation is distinct from situations in which Congress has established a new benefit or has extended a benefit to persons previously ineligible for such benefit under prior law. The 1994 regulations liberalized the evidentiary requirements for establishing entitlement to benefits under pre-existing law, but did not constitute an initial grant of authority to award benefits which must be presumed to apply pro-

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spectively only. Accordingly, as we reasoned in VAOPGCPREC 15-95, the effective date of the statute authorizing payment of the benefit (in this case, Pub. L. No. 97-377, § 156), rather than the effective date of the evidentiary rule which permitted the claim to be proven, is controlling in determining the scope of VA's authority. Payment of compensation, pension, and DIC on the basis of the 1994 regulations may be subject to the provisions of 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a). As noted above, however, there is no similar statute or regulation applicable to payment of REPS benefits. Under these circumstances, we conclude that the effective date of the 1994 regulations does not limit VA's authority to pay REPS benefits retroactive to September 1, 1989, in accordance with 38 C.F.R. § 3.812(f).

17. Because we have concluded that the effective date of the 1994 regulations does not limit VA's authority to pay REPS benefits for periods prior to such effective date, it is unnecessary to address the second question raised in the opinion request, regarding whether the terms of the *Nehmer* stipulation, which provided a basis for a retroactive award of DIC in this case, would provide a basis for paying REPS benefits retroactive to September 1, 1989.

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HELD:

In the case of a member or former member of the Armed Forces who died on active duty prior to August 13, 1981, or who died from a service-connected disability which was incurred or aggravated in service before such date, the Department of Veterans Affairs (VA) is authorized, under Pub. L. No. 97-377, § 156, 96 Stat. 1830, 1920 (1982), and 38 C.F.R. § 3.812, to award benefits under the Restored Entitlement Program for Survivors (REPS) to the member or former member's surviving spouse or child for all periods in which such spouse or child meet the eligibility requirements for such benefits. If a claimant meets the statutory requirements governing eligibility for REPS benefits, the fact that service connection for a former member's death has been established pursuant to regulatory presumptions of service connection which became effective subsequent to the initial period of eligibility does not limit VA's authority to award REPS benefits retroactive for all periods of eligibility.

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