



NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

GUIDANCE FOR “BLUE WATER” NAVY VIETNAM VETERANS AND THEIR SURVIVORS ON VA BENEFITS DUE TO AGENT ORANGE EXPOSURE

The purpose of this document is to provide information and guidance to Blue Water (BW) Vietnam Veterans and their survivors about how the November 5, 2020 Court Order in the *Nehmer* class action and the Blue Water Navy Vietnam Veterans Act of 2019 (BWNVVA) affect their rights to VA disability and death benefits due to exposure to Agent Orange. This document also provides advice about any actions that these individuals need to take in order to receive the earliest possible effective date for their Agent Orange-related VA benefits.

Background

The National Veterans Legal Services Program (NVLSP) is an independent, nonprofit veterans service organization that has served active duty military personnel and veterans since 1981. NVLSP attorneys are the certified class counsel in the landmark case, *Nehmer v. U.S. Veterans Administration*. In 1991, NVLSP’s attorneys negotiated a favorable consent decree with the VA in *Nehmer*. The *Nehmer* Consent Decree requires the VA, whenever it recognizes that the emerging scientific evidence shows that a positive relationship exists between Agent Orange exposure and a new disease, to (a) identify all claims based on the newly recognized disease that were previously denied and then (b) pay disability and death benefits to these claimants, retroactive to the initial date of claim.

In July 2020, NVLSP filed its fourth motion for enforcement to obtain compliance with the 1991 Consent Decree in *Nehmer* on behalf of Blue Water Navy Vietnam Veterans and their survivors who were wrongfully denied retroactive disability and death benefits since 2002 due to a change in VA policy. In November 2020, the U.S. District Court for the Northern District of California ruled in favor of the veterans and their families and ordered the VA to automatically readjudicate thousands of benefits claims that the Court found had been wrongly denied under the *Nehmer* Consent Decree. The Court also ordered the VA to pay retroactive compensation if it finds the veteran served in the territorial seas of Vietnam. The VA recently announced that it

had identified more than 60,000 “Blue Water” Vietnam Veterans and Survivors whose cases the VA must automatically review.

Definitions:

- Blue Water (BW) Vietnam Veteran: A BW Vietnam Veteran is a Veteran who served in the 12 nautical mile territorial seas of the Republic of Vietnam during the Vietnam Era **and** who was diagnosed during the Veteran’s lifetime with an Agent Orange-related disease (See TABLE below for a list of these diseases)
- Survivor: For purposes of the *Nehmer* class action, a survivor is (in order of precedence) (1) the veteran’s spouse, (2) the veteran’s child or children (if the spouse is no longer living), (3) the veteran’s parent (if the spouse and children are no longer living), or (4) the estate of a deceased BW Vietnam Veteran or DIC claimant (if no living spouse, child, or parent).
 - Spouse: the person who was legally married to the Veteran or DIC claimant at the time of the Veteran’s or DIC claimant’s death.
 - Child(ren): the Veteran or DIC claimant’s natural and adopted children, and stepchildren who were members of the Veteran’s or DIC claimant’s household at the time of that person’s death, regardless of current age.
 - Parent(s): the natural or adoptive parents of the Veteran or DIC claimant, but in the event of successive parents, the persons who last stood as parents of the Veteran or DIC claimant, regardless of whether they were a dependent of the Veteran or DIC claimant.
 - Estate: the legally established estate of the Veteran or DIC claimant, which is represented by the executor of the estate. Depending on state law, if an estate was never established, it may now be possible for a surviving family member of the deceased Veteran or DIC claimant to create an estate.
- Agent Orange-related disease: An Agent Orange-related disease is a disease that is currently recognized by VA as connected to Agent Orange exposure (See TABLE below).

TABLE

Diseases Recognized by VA as Connected to Agent Orange Exposure	
Disease	Publication Date
Chloracne	05-19-1993
Soft-tissue sarcoma (STS)	05-19-1993
Non-Hodgkin’s lymphoma	05-19-1993

Diseases Recognized by VA as Connected to Agent Orange Exposure	
Disease	Publication Date
Porphyria cutanea tarda	02-03-1994
Hodgkin's disease	02-03-1994
Cancer of the lung	06-09-1994
Cancer of the larynx	06-09-1994
Cancer of the bronchus	06-09-1994
Cancer of the trachea	06-09-1994
Multiple myeloma	06-09-1994
Prostate cancer	11-07-1996
Acute and subacute peripheral neuropathy Note: These diseases were removed from this list on September 6, 2013, and replaced with early-onset peripheral neuropathy.	11-07-1996
Spina bifida in children of veterans exposed to Agent Orange	09-30-1997
Type 2 diabetes	05-08-2001
Certain birth defects in children of female Vietnam veterans	07-31-2002
Chronic lymphocytic leukemia ("CLL")	10-16-2003
AL amyloidosis	05-07-2009
Chronic B-cell leukemias other than CLL, such as hairy cell leukemia	08-31-2010
Ischemic heart disease	08-31-2010
Parkinson's disease	08-31-2010
Early-onset peripheral neuropathy	09-06-2013
Bladder Cancer	01-01-2021
Parkinsonism	01-01-2021
Hypothyroidism	01-01-2021

The full list diseases recognized by VA as associated with Agent Orange can also be found here: <https://www.va.gov/disability/eligibility/hazardous-materials-exposure/agent-orange/related-diseases/>

The information and advice we provide below varies depending on which of the following four types of claimants you are (survivors may fit into more than one category):

1. Living BW Vietnam Veterans
2. Survivors of a deceased BW Vietnam Veteran
3. Living Dependency and Indemnity Compensation (DIC) claimants
4. Survivors of a deceased DIC claimant

Living Blue Water Navy Vietnam Veterans

If you're a living BW Vietnam Veteran, you need the following information before you determine which category you fit in and how the November 2020 Court Order in *Nehmer* or the BWNVVA affects you:

1. The Agent Orange-related disease(s) with which you have been diagnosed
2. The approximate date(s) on which you first filed a claim with VA for service-connected disability compensation for the Agent Orange-related disease(s)
3. If your claim was denied, the reason why the VA denied your claim

Living BW Vietnam Veteran Category 1: A living BW Vietnam Veteran who (a) filed a VA claim for service-connected disability compensation for a disease before the date VA added the disease to the Agent Orange presumptive list (see TABLE); and (b) later received a VA denial of service connection for the disease because the Veteran did not step foot on land or serve on the inland waterways of Vietnam.

Our Advice: Between June 2021 and November 2022, the VA should automatically readjudicate the Veteran's claim, and grant service-connected disability benefits for the disease retroactive to the date of the original claim for benefits for the disease. VA will first send a letter notifying the Veteran that it will be conducting a *Nehmer* review of the claim. The Veteran does not need to submit evidence in response to this letter, unless he or she has medical evidence regarding the symptoms and severity of the Agent Orange-related disease that has not previously been submitted to the VA. We ask that the Veteran provide NVLSP with the information requested in the Blue Water Navy Vietnam Veteran Questionnaire at <https://forms.gle/KYSYUeuqH31mq54H8> so that we can ensure that the VA has identified the claim for readjudication and ensure that the Veteran receives the correct effective date for benefits.

Living BW Vietnam Veteran Category 2: A living BW Vietnam Veteran who (a) filed his/her first VA claim for service-connected disability compensation for a disease after the date VA added the disease to the Agent Orange presumptive list (see TABLE); and (b) VA denied service connection for the disease because the Veteran did not step foot on land or serve on the inland waterways of Vietnam.

Our Advice: A Category 2 Veteran's claims will not be automatically readjudicated by VA. However, if the Veteran reapplies for benefits for the disease, VA should grant service-connected disability benefits for the disease retroactive to the date of the original claim for benefits for the disease. Therefore, a Category 2 Veteran should file a supplemental claim for disability compensation for the Agent Orange-related disease using VA Form 20-0995 (<https://www.vba.va.gov/pubs/forms/VBA-20-0995-ARE.pdf>).

On that form, the Category 2 Veteran should check the box for “compensation” in block 12, and write the following language in box 13A: “I am entitled to service-connected disability benefits for [insert the Agent Orange-related disease(s)] under the Blue Water Navy Vietnam Veterans Act of 2019.” In block 13B of that form, the Veteran should write the date of the VA decision that denied benefits for the disease(s). If you don’t know the date, we suggest that you write the following: “See my claims file for date of denial of my claim for service connection for [insert the Agent Orange-related disease].”

*****Special *Nehmer* Rule – Medical Evidence of a Disease Might Constitute a Claim for Service Connection for the Disease***** If before VA added a Veteran’s disease to the Agent Orange presumptive list, the Veteran filed an unrelated VA compensation claim or a pension claim, and while that claim was pending VA had medical evidence showing that the Veteran had the Agent Orange-related disease, VA must treat the pending claim as a claim for service connection for the Agent Orange-related disease. We call this special rule a “footnote 1 claim,” because it comes from footnote 1 of the *Nehmer* Final Stipulation and Order. A living BW Vietnam Veteran might benefit from this special rule if he or she (a) was first diagnosed with an Agent Orange-related disease before the date VA added the disease to the Agent Orange presumptive list (see TABLE); (b) filed a VA claim for service connection or an increased rating for a *different* disease, or for non-service-connected disability pension, before the date VA added the Agent Orange-related disease to the Agent Orange presumptive list (see TABLE), and (c) VA decided that claim after the date the Veteran was diagnosed with the Agent Orange-related disease.

These special footnote 1 claims require readjudication under *Nehmer* and the award of service-connected disability benefits for the Agent Orange-related disease retroactive to the date of the claim that was pending when VA received medical evidence of the disease (or the date the disease was diagnosed, if the disease was first diagnosed after the date of that claim). However, these footnote 1 claims will not be automatically identified by VA for readjudication, unless the Veteran satisfies the Category 1 criteria discussed above. If a Veteran thinks he or she is entitled to additional VA benefits for an Agent Orange-related disease under this special rule, we recommend that that the Veteran provide NVLSP with the information requested in the Blue Water Navy Vietnam Veteran Questionnaire at <https://forms.gle/KYSYUeuqH31mq54H8> so that we can ensure the VA identifies the claim for readjudication and ensure the Veteran receives the correct effective date for benefits.

Survivors of a Deceased Blue Water Navy Vietnam Veteran

If you're a survivor of a deceased BW Vietnam Veteran, you need the following information before you determine which category you fit in and how the November 2020 Court Order in *Nehmer* or the BWNVVA affects you:

1. The Agent Orange-related disease(s) with which the BW Vietnam Veteran was diagnosed
2. The approximate date(s) on which the Veteran first filed a claim with VA for service-connected disability compensation for the Agent Orange-related disease(s)

Survivor Category 1: A survivor of a deceased BW Vietnam Veteran who (a) filed a VA claim for service-connected disability compensation for a disease before the date VA added the disease to the Agent Orange presumptive list (see TABLE); and (b) VA later denied the Veteran service connection for the disease because the Veteran did not step foot on land or serve on the inland waterways of Vietnam.

Our Advice: Between June 2021 and November 2022, VA should automatically readjudicate the claim made by the deceased Veteran. VA should grant service-connected disability benefits for the disease retroactive to the date of the original claim for benefits for the disease until the date of the Veteran's death. However, VA may not know the identity of or contact information for the survivor or survivors entitled to payment of the retroactive benefits (see Definitions above). Therefore, we ask that the survivor provide NVLSP with the information requested in the Blue Water Navy Vietnam Veteran Questionnaire at <https://forms.gle/KYSYUeugH31mq54H8>, so that we can ensure that VA has identified the claim for readjudication, has the contact information for the survivor(s), and assigns the correct effective date for benefits.

Survivor Category 2: A survivor of a deceased BW Vietnam Veteran who (a) filed his or her first VA claim for service-connected disability compensation for a disease after the date VA added the disease to the Agent Orange presumptive list (see TABLE); and (b) VA denied service connection for the disease because the Veteran did not step foot on land or serve on the inland waterways of Vietnam.

Our Advice: Unfortunately, Category 2 Survivors are not covered by the *Nehmer* Court Order, and adult children of the Veteran, parents of the Veteran, and the Veteran's estate are not covered by the BWNVVA and therefore are not entitled to benefits. This is true even if the BW Veteran became service connected for the Agent Orange-related disease after his/her first claim. If the Category 2 Survivor is the Veteran's spouse or minor/school-age child, it is unclear whether he or she is entitled to benefits under the BWNVVA. We recommend that Category 2 surviving spouses and minor/school-age children (if there is no surviving spouse) file a claim with VA for retroactive service-connected disability compensation for the Agent Orange-related disease based on the Veteran's claim that was previously denied; however, there is no guarantee the claim

will be granted. We recommend filing such a claim on VA Form 21P-534EZ, *Application for DIC, Survivors Pension, and /or Accrued Benefits*, and attaching a page explaining that you are seeking retroactive service-connected disability compensation under the Blue Water Navy Vietnam Veterans Act of 2019 for the Agent Orange-related disease(s) that were the subject of the previously denied claim(s).

*****Special *Nehmer* Rule – Medical Evidence of a Disease Might Constitute a Claim for Service Connection for the Disease***** If before VA added a Veteran’s disease to the Agent Orange presumptive list, the Veteran filed an unrelated VA compensation claim or a pension claim, and while that claim was pending VA had medical evidence showing that the Veteran had the Agent Orange-related disease, VA must treat the pending claim as a claim for service connection for the Agent Orange-related disease. We call this special rule a “footnote 1 claim,” because it comes from footnote 1 of the *Nehmer* Final Stipulation and Order. A survivor of a deceased BW Vietnam Veteran might benefit from this special footnote 1 rule if the Veteran (a) was first diagnosed with an Agent Orange-related disease before the date VA added the disease to the Agent Orange presumptive list (see TABLE); (b) filed a VA claim for service connection or an increased rating for a *different* disease, or for non-service-connected disability pension, before the date VA added the Agent Orange-related disease to the Agent Orange presumptive list (see TABLE), and (c) VA decided that claim after the date the Veteran was diagnosed with the Agent Orange-related disease.

These special footnote 1 claims require readjudication under *Nehmer* and the award of service-connected disability benefits for the Agent Orange-related disease retroactive to the date of the claim that was pending when VA received medical evidence of the disease (or the date the disease was diagnosed, if the disease was first diagnosed after the date of that claim). However, these footnote 1 claims will not be automatically identified by VA for readjudication, unless the survivor of the deceased Veteran satisfies the Category 1 criteria discussed above. If a survivor of a deceased BW Veteran thinks he or she is entitled to additional VA benefits for an Agent Orange-related disease under this special rule, we recommend that the survivor provide NVLSP with the information requested in the Blue Water Navy Vietnam Veteran Questionnaire <https://forms.gle/KYSYUeuqH31mq54H8>, so that we can ensure the VA identifies the claim for readjudication, has the contact information for the survivor(s), and assigns the correct effective date for benefits.

Living DIC Claimants

If you filed a claim for Dependency and Indemnity Compensation (DIC) based on the death of a BW Vietnam Veteran (a claim for VA survivors pension, sometimes called death pension, qualifies as a claim for DIC), you need the following information before you determine which

category you fit in and how the November 2020 Court Order in Nehmer or the BWNVVA affects you:

1. The Agent Orange-related disease(s) that were the cause or contributing cause of the BW Vietnam Veteran's death
2. The BW Vietnam Veteran's date of death
3. The approximate date on which you first filed a claim for DIC
4. The reason why VA denied the DIC claim

DIC Claimant Category 1: A survivor of a deceased BW Vietnam Veteran who died due to an Agent Orange-related disease (see TABLE) and (a) who filed a claim for DIC before the date VA added the disease to the Agent Orange presumptive list; and (b) was later denied entitlement to DIC because the deceased Veteran did not step foot on land or serve on the inland waterways of Vietnam.

Our Advice: Between June 2021 and November 2022, VA should automatically readjudicate a Category 1 DIC Claimant's DIC claim. VA should grant DIC retroactive to the date of the original DIC claim or, if the claim was filed within one year of the Veteran's death, retroactive to the first day of the month of the Veteran's death. However, VA may not know the contact information for the Veteran's survivor(s) who may be entitled to DIC. Therefore, we ask that the survivor provide NVLSP with the information requested in the Blue Water Navy Vietnam Veteran Questionnaire <https://forms.gle/KYSYUeugH31mq54H8>, so that we can ensure that VA has identified the claim for readjudication, has the contact information for the survivor(s), and assigns the correct effective date for DIC.

DIC Claimant Category 2: A survivor of a deceased BW Vietnam Veteran who died due to an Agent Orange-related disease (see TABLE) (a) who filed his/her first claim for DIC after the date VA added the disease to the Agent Orange presumptive list; and (b) VA later denied entitlement to DIC because the deceased Veteran did not step foot on land or serve on the inland waterways of Vietnam.

Our Advice: A Category 2 DIC Claimant's DIC claim will not be automatically readjudicated by VA. The claimant should file a supplemental claim for DIC using a VA Form 20-0995 (<https://www.vba.va.gov/pubs/forms/VBA-20-0995-ARE.pdf>). On that form, the claimant should check the box for "pension/survivors benefits" in block 12, and write the following language in box 13A: "Because of the Blue Water Navy Vietnam Veterans Act of 2019, I am entitled to DIC given that [insert Agent Orange related disease that led to the Veteran's death] caused or contributed to the Veteran's death." In block 13B of that form, you should write the date of the VA decision that previously denied DIC. If you don't know the date, we suggest that you write the following: "See Veteran's claims file for date VA denied DIC."

Survivor of a Deceased DIC Claimant

If you're a survivor of someone who filed a DIC claim based on the death of a BW Vietnam Veteran (a claim for VA survivors pension, sometimes called death pension, qualifies as a claim for DIC), you need the following information before proceeding to determine which category you fit in and how the November 2020 Court Order or BWNVVA affects you:

1. The Agent Orange-related disease(s) that were the cause or contributing cause of the BW Vietnam Veteran's death
2. The BW Vietnam Veteran's date of death
3. The approximate date on which the deceased DIC claimant first filed a claim for DIC
4. The reason why VA denied the DIC claim

Survivor of a Deceased DIC Claimant Category 1: A survivor of someone who (a) filed a DIC claim based on the death of a BW Vietnam Veteran who died due to an Agent Orange-related disease before the date VA added the disease to the Agent Orange presumptive list (see TABLE); and (b) VA later denied entitlement to DIC because the deceased Veteran did not step foot on land or serve on the inland waterways of Vietnam.

Our Advice: Between June 2021 and November 2022, VA should automatically readjudicate the DIC claim. VA should grant DIC retroactive to the date of the original DIC claim or, if the claim was filed within one year of the Veteran's death, retroactive to the first day of the month of the Veteran's death, until the date of the DIC claimant's death. However, VA may not know the identity of or contact information for the DIC claimant's survivor(s) who may be entitled to payment of the benefits. Therefore, we ask that the survivor provide NVLSP with the information requested in the Blue Water Navy Vietnam Veteran Questionnaire at <https://forms.gle/KYSYUeugH31mq54H8> so that we can ensure that VA has identified the claim for readjudication, has the contact information for the survivor(s), and assigns the correct effective date for DIC.

Survivor of a Deceased DIC Claimant Category 2: A survivor of someone who (a) filed a DIC claim based on the death of a BW Vietnam Veteran who died due to an Agent Orange-related disease after the date VA added the disease to the Agent Orange presumptive list (see TABLE); and (b) VA later denied entitlement to DIC because the deceased Veteran did not step foot on land or serve on the inland waterways of Vietnam.

Our Advice: Unfortunately, Category 2 Survivors of a Deceased DIC claimant are not covered by the Court Order and do not appear to be entitled to retroactive benefits under the BWNVVA.