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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

BEVERLY NEHMER, et al.,

Plaintiffs,

vs.

U.S. DEPARTMENT OF VETERAN AFFAIRS,

Defendant.

Case No.: 3:86-cv-06160-WHA

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ENFORCEMENT OF FINAL JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES

Date: TBD
Time: TBD
Dept.: Courtroom 12 – 19th Floor
Judge: William Alsup
Complaint Filed: October 31, 1986

TO DEFENDANT AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that pursuant to General Order 78, Class Counsel has not noticed this motion, as "[e]ach judge will determine whether to hold a hearing or decide a civil matter on the papers."

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CONCISE STATEMENT OF RELIEF REQUESTED

Pursuant to Civil L.R. 7-1 and 7-2, Class Counsel, on behalf of Beverly Nehmer and the plaintiff class, respectfully moves the Court to enforce the Final Stipulation and Order in this case. *See* Declaration of Alessandra M. Venuti ("Venuti Decl.") ¶ 1, Ex. 1, Dkt. No. 141 (Final Stipulation and Order, filed May 21, 1991) ("Consent Decree"); Venuti Decl. ¶ 1, Ex. 2, Dkt. No. 163 (Order, filed October 9, 1991). This Court should require the Department of Veterans Affairs ("VA")[1] to immediately rescind the final sentence of 38 C.F.R. 3.816(f)(3) and advise all federal employees involved in the veterans' claims adjudication process of this change and its meaning.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION

I. FACTUAL BACKGROUND

A. The Consent Decree

In 1987, this Court (Hon. Thelton Henderson presiding) certified a class of all Vietnam veterans and their survivors who had applied, or were eligible to apply, to the VA for service-connected disability or death compensation "arising from exposure during active-duty service to herbicides containing dioxin." *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113, 116 (N.D. Cal. Dec. 22, 1987). Dioxin is the toxic contaminant in the defoliant known as Agent Orange.

In 1991, Judge Henderson approved a Consent Decree governing the provision of relief to the class. *See generally* Consent Decree. The Consent Decree created a unique, ongoing, non-statutory remedy to ensure complete relief to the class. The Consent Decree requires the VA automatically—regardless of any action, or non-action by an eligible class member—to readjudicate any previously denied claim for disability or death compensation that was based on a disease that the VA thereafter, by regulation, accorded presumptive service connected status due to its association with dioxin exposure. *Id.* at ¶¶ 3, 5.

"The benefit of the consent decree for veterans was and remains the requirement for automatic readjudications." *Nehmer v. U.S. Dept. of Veteran Affairs*, 2020 WL 6508529, at *4

[1] This motion will also use the term VA to refer to the Department's predecessor, the Veterans Administration.

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(N.D. Cal. 2020). This is because "the VA's list of presumptively service-connected diseases related to dioxin exposure has since risen to thirty-seven [and] many diseases previously denied by the VA as connected to 'service in the Republic of Vietnam' have now been recognized by the agency as presumptively connected to such service." *Id.*

B. Previous Motions To Enforce The Decree

On three separate occasions, plaintiff veterans had to seek enforcement of the Consent Decree on a class-wide basis from Judge Henderson. Each time, he interpreted the Consent Decree in their favor and granted the requested relief. Each time, the Ninth Circuit affirmed. *See id.* at *2.

Last year, plaintiff veterans returned to the Court for a fourth time, asking it to require VA to re-adjudicate the thousands of decisions made pursuant to the Consent Decree that denied retroactive disability or death compensation to "Blue Water Navy veterans," that is, those who served aboard a ship in the territorial waters of the Republic of Vietnam but did not set foot on the landmass of Vietnam or serve in its inland waterways. On November 5, 2020, this Court granted the requested relief and ordered the readjudication of these cases to be completed within 240 days, i.e., by July 3, 2021. *Id.* at *6.

Thereafter, VA identified 60,492 Blue Water Navy veterans who were denied compensation under the Consent Decree and advised the Court that it needed additional time within which to complete the readjudications of so many cases. This Court entered an Order on June 11, 2021 (Dkt. 494), requiring the VA to issue replacement decisions for all of these veterans by November 30, 2022.

C. The Current Issue

Meanwhile, a separate issue was brewing about a "hold harmless" provision in the final sentence of 38 C.F.R. § 3.816 (f)(3), a VA regulation that purports to implement the Consent Decree. When VA promulgated subsection (f) of 38 C.F.R. § 3.816 in 2003, it attempted to codify the ruling issued by Judge Henderson earlier that year governing the entitlement of survivors and estates of class members to the retroactive disability or death compensation owed by virtue of the Consent Decree to class members who died before receiving payment. Judge Henderson ruled that

in this situation, the VA must transmit the unpaid retroactive compensation to the first individual or entity listed below that is in existence at the time of payment:

(1) the class member's spouse at the time of his or her death;

(2) the class member's children, in equal shares;

(3) the class member's parents, in equal shares;

(4) the class member's estate.

Order of April 22, 2003 (Dkt. 324).

In recent years, Class Counsel communicated with a number of children of *Nehmer* class members who had not received any of the retroactive compensation owed to them under the August 22, 2003 Order. Class Counsel asked the VA on their behalf to pay the child his or her full share, but in some cases, VA refused on the ground that it had already paid the full amount of retroactive compensation owed under the Consent Decree to the class member's other children. In support of this position, VA cited the "hold harmless" provision in 38 C.F.R. § 3.816 (f)(3), which provides that, if "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."

In other words, in some cases, VA failed to identify all of a veteran's survivors and so paid all of the benefits, or a disproportionate share, to the survivors it did locate. When additional surviving children later were identified, the VA invoked this regulation to limit payments to them to the remaining amount of unpaid benefits, if any. This resulted in a reduced share or no benefits at all for the overlooked survivors. The VA claimed that it had no obligation to pay a full share to them unless it was first able to recover the benefits it mistakenly paid out.

Class Counsel raised this issue in a June 8, 2020, letter to counsel for the VA. Venuti Decl. ¶ 2, Ex. 3. The letter asserted that the VA's position was neither equitable nor lawful, and noted that it shifted the consequences of the agency's mistakes to the blameless beneficiaries. The letter detailed a number of specific cases in which survivors had been shortchanged or deprived of

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benefits and requested that these individuals be paid in full. The letter further requested that the regulatory provision be rescinded.

This letter initiated productive discussions between Class Counsel and counsel for the VA. The VA ultimately paid full shares of benefits to the survivors identified in the letter after confirming their eligibility. Further, counsel for VA notified Class Counsel first on October 14, 2020, and again confirmed on February 1, 2021, that it agreed to change its policy regarding payment to late-claiming child beneficiaries. Venuti Decl. ¶ 3.

But no modification of the regulation was forthcoming. Meanwhile, the VA is starting to readjudicate the cases of 60,492 Blue Water Navy veterans who were denied compensation under the Consent Decree. Given the age of, and seriously disabling diseases suffered by, *Nehmer* veterans, compensation for a significant number of those readjudications will be payable to surviving children, implicating the "hold harmless" provision in the final sentence of 38 C.F.R. § 3.816(f)(3). Accordingly, on August 11, 2021, Class Counsel wrote another letter to counsel for the VA, noting the pressing need to resolve the issue because of the Blue Water Navy veteran readjudications. Venuti Decl. ¶ 4, Ex. 4. The letter requested that VA act within 30 days to rescind this provision.

This letter began further productive, but ultimately unsuccessful, discussions between Class Counsel and counsel for the VA about when VA would rescind the regulatory provision and about possible interim solutions until the regulatory change is effected. Venuti Decl. ¶ 5. Class Counsel, however, determined that none of the interim options VA identified is an adequate substitute for a prompt change to the regulation. Class Counsel advised the VA that it would seek relief from this Court unless the VA committed to promptly rescind the provision. The VA did not do so. Venuti Decl. ¶ 6.

II. ARGUMENT

A. This Court Has Jurisdiction Over A Challenge To The Regulation

The regulation at issue here was promulgated by the VA in 2003 ostensibly to explain certain exceptions to the agency's generally-applicable adjudication rules that result from the

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Court's orders in this case. *See* 69 FR 50966 (2003). However, as the Ninth Circuit has ruled, these regulations "do[] not constitute rulemaking … because the regulations do not contain substantive rules, statements or interpretations of general applicability." *Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846, 859 (9th Cir. 2007) (*Nehmer IV*). Instead, they "express[] the VA's view of the meaning of the Consent Decree … the VA's expression of its position in a contested judicial matter [which] is more like the function of advocacy, undertaken when the agency is a party to litigation, rather than of adjudication." *Id.*

"[T]he VA cannot usurp the power of a district court to construe the provisions of an order it has issued or divest that court of its authority … simply by issuing a regulation interpreting that order or declining to follow it." *Id.* at 860. The agency "cannot dictate the meaning of the decree to the court or relieve itself of its obligations under the decree without the district court's approval." *Id.* Accordingly, this Court has full authority to interpret and enforce the Consent Decree, and to require the VA to modify or rescind portions of its regulations that conflict with the Consent Decree.

B. The Regulation Is Unlawful And Conflicts With The Consent Decree

The final sentence of 38 C.F.R. § 3.816 (f)(3) is unlawful and conflicts with the Consent Decree. There is no authority—either in the Consent Decree or in any applicable statute—for this provision.

To the contrary, section 3.816 (f)(3)'s hold-harmless provision conflicts with the well-established law that the federal government must pay its obligations. "[I]f an agency has a legal obligation to pay money to a party, that duty does not disappear simply because the money was paid in error to the wrong person." *Aetna Cas. & Sur. Co. v. U.S.*, 71 F.3d 475, 479 (2d Cir. 1995). As the "authoritative"[2] GAO Red Book explains, "[p]ayment to the wrong person obviously does not discharge the government's obligation. If, through administrative mistake of fact or law or clerical error, a payment is made to a person not entitled to it, the government is still obligated to make payment to the proper claimant." 3 United States General Accounting Office, *Principles of Federal*

[2] *California v. Trump*, 963 F.3d 926, 968 (9th Cir.) (Collins, J., dissenting), *cert. granted*, 141 S.Ct. 618 (2020).

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Appropriation Law, p. 14-50 (3d ed. 2008). Further, although the agency should seek to recover the incorrect payment or overpayment to the first payee, "payment to the proper claimant should not be held up pending recovery of the erroneous payment, even though this may result in a duplicate payment" *Id.* (emphasis added) (citing 66 Comp. Gen. 617 (1987), *aff'd on reconsideration*, B-226540.2, Aug. 24, 1988; 19 Comp. Gen. 104 (1939); and B-249869, Jan. 25, 1993)).

This long-standing payment rule applies equally to the VA. "[W]here VA makes an erroneous payment to a particular beneficiary, that payment in no way impairs its authority and obligation to pay ... the amount that is owed to the correct beneficiary.... Whether or not the Secretary decides to seek to recoup the erroneous payment is an entirely different matter." *Luckett v. Wilkie*, 2019 WL 6794789, at *2 (Vet. App. 2019) (quoting *Snyder v. Principi*, 15 Vet. App. 285, 292 (2001)). "The bottom line is that the erroneous payment's existence is immaterial to the Secretary's responsibility to make the payment to which there is lawful entitlement." *Snyder v. Principi*, 15 Vet. App. at 292.

Furthermore, this payment rule applied to the VA long before the Consent Decree. Almost a century ago, the Comptroller General explained that it is the "duty" of Director of Veterans' Bureau to "make payment to the rightful claimant ... irrespective of recovery by the government of the amount erroneously paid ... even though it involves the government in a double payment, provided, of course, there has been no contributing negligence or other fault chargeable to the person claiming the payment." 2 Comp. Gen. 102, 106 (1922); *see also* 37 Comp. Gen. 131, 133 (1957) (same, as to payment of death gratuity under Servicemen's and Veterans' Survivor Benefits Act). There is no reason to conclude that the Consent Decree adopted a different rule. Implicit in the Consent Decree is the principle that the VA must pay the full amount of benefits to each of the correct beneficiaries and that this obligation is not affected by any erroneous payments the agency may make.

Accordingly, the "hold harmless" provision in the final sentence of 38 C.F.R. § 3.816 (f)(3) must be removed because it is unlawful and conflicts with the Consent Decree. Moreover, this provision should be removed as soon as possible so that it does not adversely affect any of the ongoing readjudications of the 60,492 cases involving Blue Water Navy veterans.

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C. Immediate Rescission Of The Provision Is The Appropriate Remedy

The rescission of this unlawful provision is a simple, straightforward matter. Because *Nehmer IV* establishes that the regulation is not a "rule" within the meaning of the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 551(4), it is not subject to the APA's procedural requirements for promulgating or altering rules. Even if the APA applied, advance notice of a regulatory change is not required when the agency for good cause finds it is impracticable, unnecessary, or contrary to the public interest. *See* 5 U.S.C. § 553(b)(B). An order by this Court would certainly constitute good cause for the VA to issue an interim final rule that takes effect immediately.

VA agreed seven months ago to remove this provision from the regulation but has not done so. Further delay is unjustified. As the Ninth Circuit made clear in *Nehmer IV*, the VA is a litigant bound by the Consent Decree; it "cannot dictate the meaning of the decree to the court or relieve itself of its obligations under the decree without the district court's approval." 494 F.3d at 860. Here the VA has promulgated a regulatory provision that conflicts with the requirements of the Consent Decree. Like any litigant, VA has an obligation to correct its conduct as soon as possible and come into compliance with the decree. The agency must rectify the situation at once.

III. CONCLUSION

To enforce the Consent Decree, the Court should order the VA to immediately rescind the final sentence of 38 C.F.R. 3.816(f)(3) and to advise all federal employees involved in the veterans' claims adjudication process of this change and its meaning.

DATED: September 17, 2021

HOLLAND & KNIGHT LLP

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Jessica M. Brown
Steven D. Gordon, *pro hac vice application forthcoming*

NATIONAL VETERANS LEGAL SERVICES PROGRAM

/s/ Barton F. Stichman
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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that I am over the age of 18 years and not a party to the above-captioned action; that my business address is 50 California Street, Suite 2800, San Francisco, CA 94111.

On September 17, 2021, the following document(s) were served:

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ENFORCEMENT OF FINAL JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES

on the parties to this action at the following address(es):

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ATTORNEY TO BE NOTICED

☑ (BY EMAIL) I caused a true copy of each document(s) to be electronically served.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed September 17, 2021, at Alameda, California.

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HOLLAND & KNIGHT LLP

/s/ Jessica M. Brown
Jessica M. Brown
Steven D. Gordon, *pro hac vice application forthcoming*

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