Nehmer Update:

Nehmer Phase II & VA’s Most Common Errors in Nehmer Cases
Nehmer Phase I

- Pursuant to the Nehmer Court Orders, from November 2010 through 2012, VA adjudicated approx. 150,000 claims for service connection for ischemic heart disease ("IHD"), Parkinson’s disease ("PD"), and chronic B-cell leukemias ("BCL") as due to Agent Orange exposure in Vietnam.
Nehmer Phase I

- Service connection for IHD, PD, or BCL was granted in approx. 65% of those “Phase I” cases.

- Approx. 35% of those claims were denied, usually due to:
  - No Vietnam Service
  - No diagnosis of IHD, PD, or BCL
Nehmer Phase I: Summary

- VA has nearly completed its adjudication of the initial approx. 150,000 cases identified for Nehmer Phase I review.
- The few remaining cases appear to be difficult survivor cases.
- Over $2.7 billion in retroactive benefits have been awarded.
Nehmer Phase II

Important Update: VA has agreed to review additional cases under Nehmer.

- In April 2012, NVLSP complained to the Dept. of Justice that VA’s process to ID Nehmer class members was flawed because VA failed to search for veterans who had been granted, rather than denied, service connection for one of the 3 new presumptive conditions prior to 10/13/09.
In May 2012, in response to NVLSP’s complaint, VA identified additional eligible cases for Vietnam Veterans who:

- Were granted SC for IHD, PD, or BCL between 9/25/1985 and 10/13/09

  AND

- Were not among the initial 150,000 cases reviewed under the Nehmer Court Orders.
Nehmer Phase II

- Vietnam Vets who were granted S/C prior to the addition of the 3 diseases to VA’s Agent Orange presumptive list might be entitled to add’l comp under Nehmer if:
  - the vet had filed an even earlier explicit claim that had been denied;
  - there is a “Footnote 1” claim; or
  - SC was originally granted because the condition was aggravated by another SC condition, and the eval was discounted to represent only the level of aggravation.
Nehmer Phase II

- If VA determines there is a potential basis for entitlement to additional benefits, it will readjudicate the claim under the Nehmer rules.
Nehmer Phase II

- VA has culled the initial list of 69,000 newly identified class members to:
  - Eliminate cases that were adjudicated during Phase I AND
  - Eliminate Veterans who died prior to 9/25/85.

- The number of cases identified for Phase II review now stands at 64,425.
Nehmer Phase II

- VA hired and trained contractors who recently began pre-screening the identified C-files to determine if there is potential entitlement to *Nehmer* benefits.

- VA anticipates that about 10%-15% of these cases will ultimately require full *Nehmer* readjudication.
Nehmer Phase II

- On 8/9/2012, 98 Phase II cases originating from one VA regional office were released to two Nehmer Subject Matter Experts for use in training the contractor that would be conducting the screenings.

- Training took place over the course of several months.
Nehmer Phase II

- Additional shipments of cases to the contractor began on 11/2/12.
- 243 cases were screened by the contractor between 8/9/12 and 12/7/12.
- Of those cases, 73 were forwarded to VA adjudicators for readjudication.
Nehmer Phase II

- In general, cases identified by the contractors as having potential Nehmer entitlement are forwarded to VA personnel for adjudication.
Nehmer Phase II

- VA plans to gradually increase Phase II production over the course of the next 5-8 months.

- Unlike in Phase I, Phase II work is being completed primarily at VA regional offices.

- In January 2013, VBA’s Southern Area began issuing Nehmer decisions in these “Phase II” cases.
Nehmer Phase II

- Readjudication of Phase II cases will expand to each of the other 3 VBA Areas of Operation approximately every three months.
  - VA expects that the next VBA area to be added in May 2013

- Accordingly, VA will continue making Nehmer decisions throughout 2013, and likely into 2014.
VA’s Most Common Errors in *Nehmer* Cases: Background – Class Counsel

- NVLSP is Class Counsel in the *Nehmer* Lawsuit.

- We have written to approx. 75,000 class members (CMs) to help ensure that VA awarded the correct effective date for service connection for IHD, PD, and BCL.
VA’s Most Common Errors in *Nehmer* Cases: Background – Class Counsel

- Over 10,000 CMs have responded and had their decision reviewed by NVLSP attorneys.

- NVLSP has identified over 825 VA effective date or payment errors in those cases.

- VA correction of those errors has resulted in over $16.3 million of additional *Nehmer* benefits for CMs.
VA’s Most Common Errors in *Nehmer* Cases: Summary

- NVLSP review of over 10,000 *Nehmer* cases has revealed some common VA errors:
  
  1. Misapplication of Footnote 1 of the *Nehmer* Final Stipulation and Order.
  2. Failure to award SMC(s).
  3. Failure to identify DIC claims for readjudication.
  4. Failure to apply rules for liberalizing regulation.
VA’s Most Common Errors in *Nehmer* Cases: Footnote 1 Claims

- The most common VA error in *Nehmer* decisions is misapplication of footnote 1 of the 1991 *Nehmer* Final Stipulation and Order – “FN 1 Claims.”

- FN1 claims must be readjudicated pursuant to *Nehmer*. 

© NVLSP 2013
VA’s Most Common Errors in Nehmer Cases: Footnote 1 Claims

FN1 states:

- “The basis upon which the original claim was filed refers to the disease[s] or condition[s] which Chapter 46 of VA Manual M21-1, paragraph 46.02 required to be coded in the ratings decision contained in the claimant’s claim file, which ratings decision was voided by the Court’s May 3, 1989 Order.”
VA’s Most Common Errors in Nehmer Cases: Footnote 1 Claims

- Manual M21-1, Ch. 46.02, Change 400, 3/28/85, DISPOSITION OF DISABILITIES NOTED OR CLAIMED:
  a. Compensation Ratings. All disabilities claimed will be given consideration as to service connection and be coded as a disability rating on VA Form 21-6796. ... Any additional disabilities noted will be coded, except:
    (1) Acute transitory conditions that leave no residuals.
    (2) Noncompensable residuals of venereal disease.
    (3) Disabilities noted only on the induction examination, or conditions recorded by history only.
    (4) Disabilities found by authorization to have not been incurred “in line of duty”.

© NVLSP 2013
b. **Pension Ratings.** Code all claimed or noted disabilities on VA Form 21-6796 and show the percent of disablement for each unless the disabilities have been held to be due to the claimant’s own willful misconduct by Administrative Decision....

c. **Supplemental Ratings.** (1) All previously rated service-connected and nonservice-connected disabilities must be brought forward on supplemental ratings on VA Form 21-6796....
Simply put, if a disability was coded or should have been coded in a rating decision pursuant to a provision in the VA Adjudication Procedures Manual in effect at the time of the 1991 Final Stipulation and Order, there is a Nehmer claim.
VA’s Most Common Errors in *Nehmer* Cases: Footnote 1 Claims

- A disability should have been coded in a rating decision if it was “noted.”
- In other words:
  - If during the development of a claim for service connection for Disability A, VA obtained a diagnosis of Disability B, then Disability B should have been coded in the rating decision for Disability A.
VA’s Most Common Errors in *Nehmer* Cases: Footnote 1 Claims

The effective date of a FN 1 claim is the later of:

a) the date of the claim that gave rise to the rating decision that coded or should have coded the disability now on the Agent Orange Presumptive List, or

b) the date of diagnosis.
VA’s Most Common Errors in *Nehmer* Cases: Footnote 1 Claims

So what type of errors is VA making with respect to FN 1?
VA’s Most Common Errors in *Nehmer* Cases: Footnote 1 Claims – Misapplication

a) VA misapplies FN1:

- In the first 4 months of *Nehmer* readjudications (11/2010 - 2/2011), VA provided incorrect guidance to its adjudicators on FN1.

- VA assigned the date the VA (RO or BVA) received medical evidence of IHD, PD, or BCL as the effective date, rather than the date of the oldest claim that was pending when they received the medical evidence.
VA’s Most Common Errors in Nehmer Cases: Footnote 1 Claims - Misapplication

- For example,
  - 6/2005: vet diagnosed with IHD
  - 4/2006: vet filed a claim for SC for hearing loss
  - 7/2006: RO received evidence of IHD
  - 10/2006: RO issued decision on hearing loss
  - VA erroneously assigned 7/2006 as the effective date for IHD
- The correct effective date for SC for IHD is 4/2006.
VA’s Most Common Errors in Nehmer Cases: Footnote 1 Claims - Misapplication

- NVLSP estimates that approx. 20% of Nehmer decisions issued from November 2010 through February 2011 have FN1 errors.

- Some VA adjudicators continued to misapply FN1 even after VA corrected its erroneous instructions in February 2011. But the error rates have been much lower since that date.
VA’s Most Common Errors in Nehmer Cases: Footnote 1 Claims – Failure to Identify

b) VA Fails to Identify a FN1 Claim

- Although less common than misapplication of FN1, NVLSP has found several cases in which VA completely failed to identify a FN1 claim.
- VA missed medical evidence of IHD, PD, or BCL in the C-file prior to the veteran’s explicit claim for SC for one of those diseases.
VA’s Most Common Errors in *Nehmer* Cases:
Failure to Award SMC(s)

- In many cases, VA adjudicators have failed to award Special Monthly Compensation for a 100% rating plus 60% (“SMC(s)”).
- The veteran is not required to specifically claim SMC(s) – VA should award it automatically.
VA’s Most Common Errors in Nehmer Cases: Failure to Award SMC(s)

- The veteran qualifies for SMC(s) if he/she has:
  a. One SC disability rated 100%; and
  b. Other service-connected disability(ies) that
    a. (i) involve a different bodily system than the 100% disability, and
    b. (ii) are rated at a combined disability rating of 60% or higher.
VA’s Most Common Errors in *Nehmer* Cases: Failure to Award SMC(s)

- IMPORTANT NOTE: The single disability rated 100% does not have to be 100% disabling under the rating schedule.
If the disability alone supports TDIU, then the disability satisfies the requirement of a single SC disability rated 100%.

VA’s Most Common Errors in *Nehmer* Cases: Failure to Award SMC(s)

- If the Veteran was awarded TDIU based on multiple disabilities, but one of those disabilities alone could support TDIU, VA is obligated to determine whether that disability would support TDIU if it could result in an award of SMC(s).
VA’s Most Common Errors in *Nehmer* Cases: Failure to Award SMC(s)

- VSOs should ensure that VA awards SMC(s) where appropriate.

- VSOs should be particularly vigilant that VA addresses eligibility for SMC(s) and undertakes necessary development when TDIU is based on several SC disabilities, but one alone would be sufficient to support TDIU.
VA’s Most Common Errors in *Nehmer* Cases: Failure to Identify DIC Claims

- Based on VA’s method of identifying cases for *Nehmer* review, many DIC claims in which the veteran’s death was caused by IHD, PD or BCL may have been missed.

- To identify previously denied claims that require *Nehmer* readjudication, VA primarily relied on a computer search of diagnostic codes associated with veterans.
VA’s Most Common Errors in *Nehmer* Cases: Failure to Identify DIC Claims

- If the veteran never filed a benefits claim for IHD, PD, or BCL during his lifetime, it is unlikely the condition would have been coded and identified by a diagnostic code search.

- A diagnostic code is not typically assigned in decisions only addressing DIC or death pension.
VA’s Most Common Errors in *Nehmer* Cases: Failure to Identify DIC Claims

- If you know of or become aware of a previously denied DIC claim in which IHD, PD, or BCL caused or contributed to the death of a Vietnam veteran, request *Nehmer* readjudication and notify NVLSP.
VA’s Most Common Errors in *Nehmer* Cases: Failure to Identify DIC Claims

- Based on special *Nehmer* payment rules, even if the claimant is now deceased, there is likely a beneficiary who is entitled to the DIC payment.
  - DIC claimant’s surviving spouse
  - DIC claimant’s children (even adult children)
  - DIC claimant’s parents
  - DIC claimant’s estate
VA’s Most Common Errors in Nehmer Cases: Failure to Apply Liberalizing Regulation Rules

- The *Nehmer* effective date rules do not apply to claims that were filed after 8/31/10, the publication date of the final rule adding IHD, PD, and BCL to the Agent Orange presumptive list.
VA’s Most Common Errors in *Nehmer* Cases: Failure to Apply Liberalizing Regulation Rules

- However, many claims filed after 8/31/10, are subject to special effective date rules applicable when there is a favorable or “liberalizing” change in VA regulation.

  38 C.F.R. § 3.114; 38 U.S.C. § 5110(g)
VA’s Most Common Errors in *Nehmer* Cases: Failure to Apply Liberalizing Regulation Rules

- NVLSP has seen many cases in which VA failed to apply these special effective date rules to claims for SC for IHD, PD, and BCL due to Agent Orange exposure, and DIC based on those diseases, that were filed after 8/31/10.
VA’s Most Common Errors in *Nehmer* Cases: Failure to Apply Liberalizing Regulation Rules

1. If the veteran was diagnosed with IHD, PD, or BCL, or died due to one of those diseases, before 8/31/10; and
2. Filed first claim for SC for IHD, PD or BCL, or for DIC, on or after 8/31/10,
3. The effective date should be the more recent of:
   - 8/31/10; or
   - one year prior to the date the claim was filed.
VA’s Most Common Errors in Nehmer Cases: Failure to Apply Liberalizing Regulation Rules

- If the veteran was first diagnosed with IHD, PD, or BCL, after 8/31/10, the special effective date rules for liberalizing regulations do not apply and the effective date will be the later of the date of claim or date of diagnosis.
VA’s Most Common Errors in *Nehmer* Cases: Failure to Apply Liberalizing Regulation Rules

- For DIC claims, if the veteran died after 8/31/10, the effective date will be:
  - the first day of the month in which the veteran died, if the claim is filed within one year of the death; or
  - The date the claim was filed, if filed more than one year after the veteran’s death.
VA’s Most Common Errors in *Nehmer* Cases: Failure to Apply Liberalizing Regulation Rules

**Hypo 1**

A Vietnam veteran dies from IHD on 5/15/09. The veteran’s widow files for DIC for the first time on 1/1/11. The correct effective date for the widow’s DIC claim is:

8/31/10 (the effective date of the regulation adding IHD).
VA’s Most Common Errors in *Nehmer* Cases:
Failure to Apply Liberalizing Regulation Rules

**Hypo 2**

A Vietnam veteran was diagnosed with IHD on 11/13/10. He filed a claim for SC for IHD on 1/15/11. The correct effective date for service connection is:

January 15, 2011, because the veteran was not diagnosed with IHD on or before the date of the final regulation adding IHD to the list of Agent Orange-related diseases.
Questions?