



US DEPARTMENT OF VETERANS AFFAIRS OFFICE OF INSPECTOR GENERAL

Office of Audits and Evaluations

VETERANS BENEFITS ADMINISTRATION

VBA Did Not Identify All Vietnam Veterans Who Could Qualify for Retroactive Benefits

Review

23-01266-78

June 27, 2024

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Executive Summary

VA pays disability compensation on a monthly basis to veterans with service-connected disabilities based on the severity of the disability. Service connection is found when the facts, supported by evidence, show that a particular injury or disease resulting in disability was due to service in the military or was aggravated by that service.¹ In some instances, however, certain diseases are presumed to be service-connected, which means the disease is considered to have been incurred in, or aggravated by, service within the time frame specified by regulation or statute, even if there is no evidence of this disease during service.²

Under a Veterans Benefits Administration (VBA) regulation, veterans who served in the Republic of Vietnam from January 9, 1962, through May 7, 1975, are presumed to have been exposed to herbicides unless evidence shows otherwise.³ This presumption positions covered veterans to receive benefits for specific diseases related to herbicide exposure.⁴

Legal Authorities on Eligibility for VA Benefits

Nehmer v. US Department of Veterans Affairs was a class-action lawsuit brought on behalf of Vietnam veterans and their survivors in 1986 against VA.⁵ The claimants alleged VA had improperly denied their compensation claims for service-connected disabilities caused by exposure to the herbicide Agent Orange during military service. In May 1991, the parties entered into a consent decree that required VA to readjudicate claims (issue replacement decisions) filed by veterans who served in the Republic of Vietnam.⁶

The *Nehmer* consent decree authorized compensation to *Nehmer* class members based on several requirements. First, evidence must establish the class member has a diagnosis of a covered

¹ 38 C.F.R. § 3.303 (2023).

² VA Manual 21-1, “Presumptive Service Connection (SC),” in sec. V.ii.2.B, *Adjudication Procedures Manual* (updated September 27, 2022), topic 1.a.

³ 38 C.F.R. § 3.307 (2023).

⁴ 38 C.F.R. § 3.307 (a)(6)(i) (2023). Throughout this report, the term “herbicide” refers to chemicals used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, specifically 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram.

⁵ *Nehmer v. US Veterans’ Admin*, 118 F.R.D. 113 (N.D. Cal. 1987). The lawsuit was originally against the US Veterans Administration, as VA did not become a cabinet-level executive department until 1989. “History overview” (web page), VA, accessed December 20, 2023, <https://department.va.gov/history/history-overview/#:~:text=The%20VA%20was%20elevated%20to,changes%20occurred%20at%20all%20levels>. The title has since been updated to *Beverly Nehmer, et al. v. US Department of Veterans Affairs*.

⁶ A consent decree (also known as a consent order) is a decree made by a judge with the consent of all parties. It is not strictly a judgment but rather a settlement agreement approved by the court. The agreement is submitted to the court in writing after the parties have reached a settlement, and once approved by the judge, the agreement is binding and enforceable on both parties.

herbicide-related disease. Second, VBA has received a claim for service connection for a covered herbicide-related disease, or the class member has died of a covered herbicide-related disease. Finally, the claim was denied, pending, inferred, or received between specified dates.⁷

Class members are not required to file a new claim or a claim for an earlier effective date for VA to award benefits that rely on an earlier effective date when a presumptive disease is added by regulation. VA must search its records to find eligible claimants and award benefits, without requiring action by the claimant. Per VA procedures, if VA had medical evidence of a diagnosis of a now-covered disease at the time of a prior decision on any compensation or pension claim, then the disease is considered to have been part of the previously decided claim.⁸ VA criteria also state every claim must be reviewed to determine if the veteran's service qualifies for herbicide exposure. When claims processors are not able to place the veteran in a qualifying area, they are required to send a development letter that requests the details of the veteran's service.⁹

On November 5, 2020, a subsequent court order directed VA to readjudicate disability compensation claims in which VA previously denied compensation on the grounds that veterans were not entitled to the presumption of herbicide exposure because they did not set foot on the landmass of Vietnam or serve in its inland waterways.¹⁰ This was following passage of the Blue Water Navy Vietnam Veterans Act of 2019, which extended the presumption of herbicide exposure to veterans who served within 12 nautical miles of Vietnam.¹¹

The National Defense Authorization Act (NDAA), passed on January 1, 2021, introduced additional presumptions of service connection for the purposes of VA compensation benefits based on veterans' exposure to herbicides (such as Agent Orange) in Vietnam during that war for three diseases: bladder cancer, hypothyroidism (underactive thyroid), and parkinsonism

⁷ *Nehmer v. US Department of Veterans Affairs*, 712 F Supp. 1404 (N.D. Cal. May 3, 1989); VA Manual 21-1, "Determining Eligibility to Retroactive Payment Under the Nehmer Stipulation," in sec. VIII.i.2.B, *Adjudication Procedures Manual* (updated July 29, 2021), topic 1.e. A Nehmer class member is either a veteran who served in Vietnam during the Vietnam War and has a covered herbicide-related disease or a surviving spouse, child, or parent of a deceased Vietnam veteran who died from a covered herbicide-related disease. According to VA Manual 21-1 Manual Rewrite, "Determining the Issues," in sec. III.iv.6.B, (updated August 3, 2009), topic 3.a, an inferred issue is derived from the consideration or outcome of related issues. For example, if at the time of a prior decision on any compensation claim, VA had medical evidence containing a diagnosis of a now covered condition, then the condition is considered to have been part of the previously denied claim.

⁸ VA Manual 21-1, "Determining Eligibility to Retroactive Payment Under the Nehmer Stipulation," in sec. VIII.i.2.B, *Adjudication Procedures Manual* (updated July 29, 2021), topic 1.d.

⁹ Nehmer Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12, sec. *Verifying Herbicide Exposure* (standard operating procedure), updated March 24, 2023.

¹⁰ "Beverly Nehmer, et al., Plaintiffs, v. US Department of Veteran Affairs, Defendant," *Nehmer v. US Dep't of Veteran Affairs*, No. C 86-06160 WHA (N.D. Cal. Nov. 5, 2020).

¹¹ Blue Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116-23 (2019).

(a neurological disorder).¹² In response, VA stated it would identify all previous decisions involving Vietnam veterans in which VA denied compensation for any of those three diseases or granted service connection on a basis other than presumption.¹³ VA also stated it would issue a replacement decision (i.e., readjudication) that determines whether service connection is now warranted based on qualifying service and medical evidence supporting the presence of one or more of the three added presumptive diseases. If service connection is warranted, VA would determine the amount of retroactive compensation, if any, to which the veteran or the veteran's survivor (or the estate of the deceased veteran or survivor) is entitled.¹⁴

Staff at VA regional offices screen for claims that may be covered by *Nehmer* in the course of their other claims-processing duties (this report refers to these offices as *Nehmer* screening sites) and route them to 14 regional offices designated for processing all *Nehmer*-covered claims.¹⁵ In June 2021, VBA issued guidance that stated VA would review claims for *Nehmer* eligibility from approximately 70,000 veterans and survivors in its implementation of the NDAA.¹⁶ VBA acknowledged in this guidance that the data used for readjudication may not capture all *Nehmer*-covered claims.¹⁷ A VBA program analyst told VA Office of Inspector General (OIG) staff that VBA anticipated that additional veterans might be identified through document reviews conducted during the ordinary course of business. According to VBA's guidance, all the identified potential *Nehmer* class members with prospective entitlement under the NDAA and an address of record were sent an initial notice letter in June 2021.¹⁸

¹² William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (2021) § 9109. The NDAA annually authorizes funding levels and provides authorities for the US military and other critical defense priorities. Throughout this report, "NDAA" refers to only the fiscal year 2021 law.

¹³ *Nehmer* Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12, sec. *Required Readjudications Under PL 116-283* (standard operating procedure), updated March 24, 2023.

¹⁴ VBA regulations state that if VA's readjudication of a veteran's claim was favorable but the veteran had died, VA would pay the full amount of any past-due benefits to the first individual or entity listed, in the following order: (1) the veteran's spouse; (2) the veteran's children in equal shares; (3) the veteran's parents in equal shares; and (4) the veteran's estate. 38 C.F.R. § 3.816 (2023).

¹⁵ Office of Field Operations, "Blue Water Navy (BWN)-*Nehmer* Project," memorandum to all VBA regional offices, March 31, 2021.

¹⁶ *Nehmer* Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 4, sec. *Class Members Under PL 116-283* (standard operating procedure), updated June 21, 2021.

¹⁷ *Nehmer* Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12 sec. *Manual Establishment of EP Controls* (standard operating procedure), updated March 24, 2023.

¹⁸ *Nehmer* Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12, sec. *Reviewing for a Prior Claim Under Nehmer* (standard operating procedure), updated March 24, 2023.

The OIG conducted this review to determine the extent to which VBA identified Vietnam veterans in the *Nehmer* class who could qualify for readjudication and retroactive benefits under the NDAA.

What the Review Found

The OIG concluded that VBA effectively identified veterans from the populations they stated they would review. However, the OIG team identified two populations of veterans who could be eligible for retroactive benefits under the *Nehmer* consent decree and subsequent court orders but were not identified for readjudication by VBA.¹⁹ For the first population, referred to as the Veterans Health Administration (VHA) dataset in this report, the team reviewed a sample of 246 veterans to determine if they were identified for readjudication. These veterans were randomly selected from a population of veterans who served during the Vietnam War era; had medical records at a VHA facility showing a diagnosis of an NDAA-covered disease before January 1, 2021; and had a compensation or pension claim or appeal completed in a VBA system from September 25, 1985, to January 1, 2021 (the OIG review period).²⁰

Medical records alone showing a diagnosis of an NDAA-covered disease would not determine if veterans warranted readjudication because they would also need to have evidence of service in Vietnam, as previously noted, and a claim that was pending before the condition became presumptive. Using military personnel records, the team identified and included veterans shown to have served in Vietnam and its designated waters and those who may have served there based on service records noting unspecified foreign service. As previously stated, VA would need to complete additional development of the claim if they were unable to determine if the veteran served in Vietnam. The OIG review period spans the time a veteran needed to have either applied or been denied benefits for an NDAA-covered disease to be covered by the *Nehmer* consent decree.²¹

Based on the statistical sample, the OIG team estimated 86,894 veterans from the VHA dataset either met or potentially met *Nehmer* eligibility under the NDAA but were not identified by VBA for readjudication of their claims.²² This was based on evidence that VA had medical records showing a diagnosis of an NDAA-covered disease while compensation or pension entitlement was pending a decision during the review period for a veteran who served, or may have served, in Vietnam. Note that while the data pulled were *completed* benefits decisions, the

¹⁹ Unless otherwise noted, the term “veterans” used throughout this report includes other affected beneficiaries such as a surviving spouse. For more information about the review’s scope and methodology, see appendix A.

²⁰ The initial population was 240,180 veteran records, but only 90,800 were estimated to meet scope requirements (see appendix B).

²¹ VA Manual 21-1, “Determining Eligibility to Retroactive Payment Under the *Nehmer* Stipulation,” in sec. VIII.i.2.B, *Adjudication Procedures Manual* (updated July 29, 2021), topic 1.e.

²² See table B.2 in appendix B for more information on statistical sampling and the estimates in this section.

OIG team reviewed medical records in VA's possession while the claims were *pending*, as eligibility to benefits depended on VA having those records. These veterans' claims potentially warrant readjudication under *Nehmer*.

For the VHA dataset, the team also estimated 36,125 veterans who definitively served in Vietnam were entitled to approximately \$836.8 million in unpaid benefits.²³ Entitlement to compensation payments was warranted in these cases because service connection for the NDAA-covered diseases would have led to retroactive benefits.

The team also reviewed a separate statistical sample of 150 randomly selected veterans in the Camp Lejeune dataset from an initial population of 357 Vietnam War—era veterans granted service connection during the review period for bladder cancer due to exposure to contaminated water at Camp Lejeune. The in-scope population was 226 after the team determined 131 veterans did not serve in-country or in designated waters. This population was examined because an NDAA-covered disease (bladder cancer) overlaps with claims related to exposure to contaminated water at Camp Lejeune.²⁴ Veterans who served at Camp Lejeune and had bladder cancer claims for benefits may be eligible for an earlier effective date—and therefore greater retroactive benefits—if they also met the criteria related to service in Vietnam. The OIG team examined whether these veterans were identified for readjudication.

The team estimated all 226 veterans from the Camp Lejeune dataset either met or potentially met *Nehmer* eligibility under the NDAA but were not identified by VBA for readjudication.²⁵ The claims potentially warrant readjudication because the effective date for entitlement to service connection based on the *Nehmer* consent decree and subsequent court orders criteria could predate service connection based on Camp Lejeune service, entitling veterans to additional retroactive benefits. The team estimated that 102 of these veterans or their survivors were entitled to approximately \$7.5 million in benefits based on evidence definitively showing they served in Vietnam or its designated waters and met *Nehmer* eligibility under the NDAA (see appendix table B.3). However, readjudication would not have affected the benefits for 114 other veterans.

On May 27, 2021, VA published a press release noting it would send letters to veterans and survivors affected by the NDAA and the *Nehmer* consent decree and subsequent court orders.²⁶ The letters informed the recipients that VBA was reviewing claims in accordance with the *Nehmer* court decision, and they may be entitled to additional benefits. However, the OIG team

²³ See appendix table B.2. Appendix C also provides the OIG's estimates of monetary benefits associated with implementing the report's recommendations.

²⁴ The OIG team found no overlap with hypothyroidism or parkinsonism with the Camp Lejeune dataset.

²⁵ See table B.3 in appendix B for the estimates calculated for the Camp Lejeune dataset.

²⁶ VA, "Breaking: VA plans expansion of benefits for disability claims for conditions related to certain toxic exposures," news release, May 27, 2021, <https://news.va.gov/89496/breaking-news-va-plans-expansion-benefits-disability-claims-conditions-related-certain-toxic-exposures/>.

estimated that VBA did not send notification letters to 88,847 eligible or potentially eligible veterans from the VHA dataset (the total population was 90,800) or to 226 eligible or potentially eligible veterans from the Camp Lejeune dataset (the total population was 226).²⁷ Because VBA did not send these notification letters, the affected veterans or their survivors were not made aware of their potential entitlement to retroactive compensation benefits.

A senior management advisor in VBA's Office of Field Operations told the OIG team that the data request VBA used to identify Nehmer class veterans for readjudication under the NDAA did not involve VHA records to determine if veterans had a diagnosis of an NDAA-covered disease. The senior management advisor stated VHA records were not involved in readjudication determinations because VHA diagnosis data had not been routinely available to VBA for consideration.

Vietnam veterans who had presumptive service connection for parkinsonism, bladder cancer, or hypothyroidism unrelated to a Nehmer claim were also not identified for readjudication (e.g., a veteran with bladder cancer presumptively connected to service at Camp Lejeune). A program analyst in the Office of Field Operations noted these veterans were not identified because VBA did not consider these diseases as presumptively connected to herbicide exposure until the NDAA passed.

According to a program analyst in the Office of Field Operations, VBA anticipated that veterans with claims warranting readjudication might be identified through document review when not identified through a data pull. However, all 27 claims processors interviewed by the OIG team at regional offices that screen for, but do not process, potential Nehmer claims indicated they either could not recall these procedures being communicated to them, or possible Nehmer readjudications were not considered when processing non-NDAA claims or those for increased evaluation for bladder cancer related to a Camp Lejeune claim.²⁸

On January 1, 2023, VBA provided updated standard operating procedures for screening claims for potential Nehmer eligibility and for processing.²⁹ However, the guidance noted that if a claim was not for one of the NDAA-covered diseases, the processor should skip a step requiring them to consider whether medical evidence showed a diagnosis of an NDAA-covered disease while a claim was pending before January 1, 2021. By skipping this step, staff may fail to screen

²⁷ This estimate includes veterans with readjudicated claims who also did not receive the notification letter informing them of their potential benefits entitlement.

²⁸ Of the 27 claims processors interviewed, 11 were veterans service representatives, and 16 were rating veterans service representatives from the VA regional offices in Chicago, Illinois; Des Moines, Iowa; Louisville, Kentucky; and Seattle, Washington.

²⁹ Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, or the Honoring our PACT Act of 2022 (PACT Act), Pub. L. No. 117-168, Implementation Standard Operating Procedure, January 1, 2023.

veterans for potential eligibility for benefits under the *Nehmer* consent decree and subsequent court orders.

What the OIG Recommended

The OIG made three recommendations to the under secretary for benefits. First, VBA staff should use improved methodologies to identify eligible veterans, readjudicate claims, and send outreach letters to potential *Nehmer* class members who could qualify for retroactive benefits under the NDAA. The OIG also recommended VBA ensure claims processors at screening sites understand the need to look for claims that may warrant readjudication under the *Nehmer* consent decree and subsequent court orders. Finally, VBA should update the standard operating procedures to have staff screen all claims (not just those for NDAA-related diseases) to determine whether veterans' medical records show a diagnosis of any now-covered herbicide-related disease that was documented at the time of a disability benefit claim received before January 1, 2021.³⁰

VA Comments and OIG Response

VBA, through the under secretary, for benefits, did not concur with the first recommendation to identify, readjudicate, and send outreach letters to potential *Nehmer* class members who could qualify for benefits under the NDAA. VBA claimed the OIG incorrectly concluded that medical records anywhere in VA's healthcare system at the time of a prior claim can trigger the requirements of the stipulation even if those records were not relevant to the claim or associated with the claim file. VBA contested the OIG's reliance on the VA adjudication manual over the *Nehmer* consent decree, on the basis that the decree's terms and subsequent court orders interpreting it take precedence over the VA manual. VBA also asserted that the OIG erred by including an unknown number of veterans who did not serve in Vietnam in its report findings.

However, VBA did say in the response that it plans to establish a work group to determine how to leverage improved methods of identification, within the parameters of *Nehmer* identification established within the consent decree. Although VA did not concur with the first recommendation, this action by VBA to identify all eligible veterans to ensure veterans receive benefits to which they may be entitled meets the intent of the first recommendation. The OIG will monitor and follow up on VA's proposed actions.

In response to VBA's comments, the OIG did further analysis of its findings. The OIG estimates that 80 percent of the veterans in the VHA dataset and 99 percent of the veterans in the Camp

³⁰ This recommendation is based on VBA's procedure noting if VA had medical evidence of a diagnosis of a now-covered disease at the time of a prior decision on any compensation or pension claim, then the disease is considered to have been part of the previously decided claim. VA Manual 21-1, "Determining Eligibility to Retroactive Payment Under the *Nehmer* Stipulation," in sec. VIII.i.2.B, *Adjudication Procedures Manual* (updated July 29, 2021), topic 1.d.

Lejeune dataset identified by the OIG had medical records in their VBA claims files showing a diagnosis of an NDAA-covered condition while a claim was pending during the review period. The OIG and VBA agree that veterans who had such medical records in their claims files while a claim was pending warrant readjudication. Accordingly, adopting a methodology similar to the one used by the OIG would ensure that VBA identifies all such veterans for readjudication of benefits.

Regarding the approximately 20 percent of veterans from the VHA dataset and approximately 1 percent of veterans from the Camp Lejeune dataset whose claims files did not contain evidence of an NDAA-covered disease but whose VA medical records showed a relevant diagnosis, the OIG based its findings on VBA's manual guidance provided to its claims processors since 2016. Under that guidance, these veterans would qualify for readjudication. Thus, the VBA work group can determine whether to include these claims in the readjudication process. While VBA noted the manual does not supplant the VBA's interpretation of the *Nehmer* court decree or resulting VBA regulation, as of the publication of this report, VBA has not amended the manual's language to comport with the position VBA stated in response to the OIG's report. Significantly, no court has held that the manual is inconsistent with the court decree.³¹ In fact, whether the manual should be applied to readjudications under the *Nehmer* court decree is a question being litigated before the United States Court of Appeals for Veterans Claims and, at the time of this report's publication, has yet to be resolved.³²

VBA's comments that the OIG erred by including an unknown number of veterans who did not serve in Vietnam in the report findings reflects a misunderstanding of the OIG team's analysis. The OIG team's estimate for veterans who warranted retroactive payments were all shown to have definitively served in Vietnam or its designated waters. The report was modified to clarify the analysis.

The under secretary concurred with the second and third recommendations. The OIG will monitor and follow up on VA's implementation progress until adequate documentation has been provided to demonstrate sufficient implementation steps have been taken. The full text of the VA management comments is presented in appendix D.



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³¹ In VBA's *Nehmer* Readjudication Standard Operating Procedure, VBA noted the *Nehmer* consent decree is subject to more than one interpretation. *Nehmer* Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12 (standard operating procedure), updated March 24, 2023.

³² See *Bailey v. McDonough*, 2023 WL 5603983 (August 30, 2023).

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Abbreviations

| | |
|------|--|
| ICD | International Classification of Diseases |
| NDAA | National Defense Authorization Act |
| OIG | Office of Inspector General |
| VBA | Veterans Benefits Administration |
| VHA | Veterans Health Administration |



Introduction

VA pays monthly disability compensation to veterans with military service-connected disabilities based on the severity of those disabilities. Service connection means that a particular injury or disease resulting in disability was due to service in the Armed Forces or was aggravated by that service, as established by evidence.³³ In some cases, however, VA presumes certain diseases to be service-connected, meaning VA considers the disease to have been incurred in or aggravated by military service within the time frame specified by regulation or statute, even if there is no evidence of such disease during service.³⁴ The VA Office of Inspector General (OIG) conducted this review to determine the extent to which the Veterans Benefits Administration (VBA) identified Vietnam veterans who could qualify for readjudication (replacement decisions) on eligibility for benefits and retroactive benefits compensation under the legal authorities related to presumptively service-connected diseases associated with exposure to herbicides such as Agent Orange.

Legal Authorities on Eligibility for VA Benefits

In 1986, the National Veterans Legal Service Program brought a class-action lawsuit on behalf of Vietnam veterans and their survivors in *Nehmer v. US Department of Veterans Affairs*. The veterans and survivors alleged that VA had improperly denied their compensation claims for service-connected disabilities caused by exposure to the herbicide Agent Orange during military service.³⁵ In May 1991, the *Nehmer* parties entered into a consent decree that required VA to readjudicate claims filed by veterans who served in the Republic of Vietnam.³⁶ In the event that VA's readjudication of a veteran's claim was favorable, VA would make payment of any past-due benefits to the veteran. VBA regulations further state if VA's readjudication of a veteran's claim was favorable but the veteran had died, VA would pay the full amount of any past-due benefits to the first individual or entity listed, in the following order: (1) The veteran's

³³ 38 C.F.R. § 3.303 (2023).

³⁴ VA Manual 21-1, "Presumptive Service Connection (SC)," in sec. V.ii.2.B, *Adjudication Procedures Manual* (updated September 27, 2022), topic 1.a.

³⁵ *Nehmer v. US Veterans' Admin.*, 118 F.R.D. 113 (N.D. Cal. 1987). The lawsuit was originally against the US Veterans Administration, as VA had not become a cabinet-level executive department until 1989. "History overview" (web page), VA, accessed December 20, 2023, <https://department.va.gov/history/history-overview/#:~:text=The%20VA%20was%20elevated%20to,changes%20occurred%20at%20all%20levels>. The title has since been updated to *Beverly Nehmer, et al. v. US Department of Veterans Affairs*.

³⁶ A consent decree (also known as a consent order) is a decree made by a judge with the consent of all parties. It is not strictly a judgment, but rather a settlement agreement approved by the court. The agreement is submitted to the court in writing after the parties have reached a settlement, and once approved by the judge, the agreement is binding and enforceable on both parties.

spouse; (2) the veteran's children in equal shares; (3) the veteran's parents in equal shares; and (4) the veteran's estate.³⁷

Nehmer Consent Decree and 2020 Court Order

Under the *Nehmer* consent decree, a Nehmer class member is entitled to compensation if three criteria are met. First, evidence has established a diagnosis of a covered herbicide-related disease. Second, VBA has received a claim for service connection for a covered herbicide-related disease, or the veteran has died of a covered herbicide-related disease. Third, the claim was

- denied in a decision issued between September 25, 1985, (or a date prior if the claim or legacy appeal was pending on that date) and the date VA published the final regulation acknowledging the covered herbicide-related disease;
- pending on the date of the final regulation adding a new presumptive condition;
- inferred between September 25, 1985, (or a date prior if the claim or legacy appeal was pending on that date) and the date VA published the final regulation; or
- received between September 25, 1985, (or a date prior if the claim or legacy appeal was pending on that date) and the date VA published the final regulation.³⁸

If the first claim was filed after regulations acknowledged the disease as presumptively service-connected, then the *Nehmer* requirement does not apply.

There is no requirement that *Nehmer* class-action lawsuit members file a new claim or a claim for an earlier effective date when a new presumptive disease is added by regulation. According to its own guidance, "VA must search its records to find eligible claimants and award benefits, without action on the claimant's part." The guidance further states, "**Important:** If, at the time of a prior decision on any compensation claim, VA had medical evidence containing a diagnosis of a now-covered condition ... then the condition is considered to have been part of the previously decided claim."³⁹ VA criteria also state every claim must be reviewed to determine if the

³⁷ 38 C.F.R. § 3.816 (2023).

³⁸ *Nehmer v. US Department of Veterans Affairs*, 712 F Supp. 1404 (N.D. Cal May 3, 1989). VA Manual 21-1, "Determining Eligibility to Retroactive Payment Under the Nehmer Stipulation," in sec. VIII.i.2.B, *Adjudication Procedures Manual* (updated July 29, 2021), topic 1.e. A Nehmer class member is a veteran who served in Vietnam and who has a covered herbicide-related disease or a surviving spouse, child, or parent of a Vietnam veteran who died of a covered herbicide-related disease. According to VA Manual 21-1 Manual Rewrite, "Determining the Issues," in sec. III.iv.6.B, (updated August 3, 2009), topic 3.a, an inferred issue is derived from the consideration or outcome of related issues. For example, if at the time of a prior decision on any compensation claim, VA had medical evidence containing a diagnosis of a now covered condition, then the condition is considered to have been part of the previously denied claim.

³⁹ VA Manual 21-1, "Determining Eligibility to Retroactive Payment Under the Nehmer Stipulation," in sec. VIII.i.2.B, *Adjudication Procedures Manual* (updated July 29, 2021), topic 1.d.

veteran's service qualifies for herbicide exposure. When claims processors are not able to place the veteran in a qualifying area, they are required to send a development letter that requests the details of the veteran's service.⁴⁰

A subsequent court order in November 2020 directed VA to readjudicate disability compensation claims in which VA previously denied compensation on the grounds that veterans were not entitled to the presumption of herbicide exposure because they did not set foot on the landmass of Vietnam or perform service in its inland waterways.⁴¹ This was after passage of the Blue Water Navy Vietnam Veterans Act of 2019, which extended the presumption of herbicide exposure to veterans who served within 12 nautical miles of Vietnam.⁴²

On January 1, 2021, Congress enacted the National Defense Authorization Act for Fiscal Year 2021 (NDAA), establishing a presumption of service connection for the purposes of VA compensation benefits based on veterans' exposure to herbicide (such as Agent Orange) in Vietnam during that war for three diseases: bladder cancer, hypothyroidism (underactive thyroid), and parkinsonism (a neurological disorder).⁴³

In June 2021, VBA issued guidance that VA would review claims for Nehmer eligibility from approximately 70,000 veterans and survivors to implement NDAA requirements.⁴⁴ VBA acknowledged that its data used for readjudication might not capture all claims that have potential Nehmer application.⁴⁵ A VBA program analyst stated that VBA anticipated additional veterans might be identified through document review in the ordinary course of business, where an inferred claim may not have been previously identified.

⁴⁰ Nehmer Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12, sec. *Verifying Herbicide Exposure* (standard operating procedure), updated March 24, 2023.

⁴¹ "Beverly Nehmer, et al., Plaintiffs, v. US Department of Veteran Affairs, Defendants," *Nehmer v. US Dep't of Veteran Affairs*, No. C 86-06160 WHA (N.D. Cal. Nov. 5, 2020).

⁴² Blue Water Navy Vietnam Veterans Act of 2019, Pub. L. No. 116-23 (2019).

⁴³ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (2021) § 9109. The NDAA annually authorizes funding levels and provides authorities for the US military and other critical defense priorities. Throughout this report, "NDAA" refers to only the fiscal year 2021 law, and "NDAA-covered disease" refers to bladder cancer, hypothyroidism, or parkinsonism.

⁴⁴ Nehmer Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 4, sec. *Class Members Under PL 116-283* (standard operating procedure), updated June 21, 2021.

⁴⁵ Nehmer Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12 sec. *Manual Establishment of EP Controls* (standard operating procedure), updated March 24, 2023.

In advancing implementation of the NDAA, VA stated it would take the following actions:

- Identify all previous decisions involving Vietnam veterans in which VA denied compensation for bladder cancer, hypothyroidism, or parkinsonism or granted service connection for one of those diseases on a basis other than presumption
- Issue a replacement decision (i.e., readjudication) that determines whether the service connection is now warranted based on qualifying service and medical evidence showing one or more of the three added presumptive diseases and, if so, the amount of retroactive compensation, if any, to which the veteran or the veteran's survivor (or the estate of the deceased veteran or survivor) is entitled under the terms of the consent decree⁴⁶

According to VBA, all identified potential Nehmer class members with prospective entitlement under the NDAA and an address of record were sent an initial Nehmer notice letter in June 2021, and processing of NDAA claims began on June 21, 2021.⁴⁷

As previously stated, the OIG conducted this review to determine the extent to which VBA identified Vietnam veterans in the Nehmer class who could qualify for readjudication and retroactive benefits under the NDAA.

VBA Compensation Claim Process

Adjudication teams are responsible for the development, rating, and award and authorization activities necessary to process a claim.⁴⁸ As shown in the development step in figure 1, after a veteran submits a claim to VA, veterans service representatives review the claim and assist the veteran in gathering evidence needed to evaluate it. Rating veterans service representatives analyze the evidence and make decisions on the claim. Then veterans service representatives implement the decision, notify the veteran, and authorize payment.

⁴⁶ Nehmer Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12 sec. *Required Readjudications Under PL 116-283* (standard operating procedure), updated March 24, 2023.

⁴⁷ Nehmer Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12, sec. *Reviewing for a Prior Claim Under Nehmer* (standard operating procedure), updated March 24, 2023.

⁴⁸ VA Manual 21-1, "Structure of the Veterans Service Center (VSC)," in sec. I.ii.1.A, *Adjudication Procedures Manual* (updated January 24, 2022), topic 1.c.



Figure 1. VA benefits claims process.

Source: VA OIG's analysis of VA Manual 21-1 and VBA training materials.

*Decisions cannot be generated (awarded) and authorized by the same veterans service representative.

Presumptive Service Connection for Diseases Associated with Environmental Exposures

Under a VBA regulation, veterans who served in the Republic of Vietnam from January 9, 1962, through May 7, 1975, are presumed to have been exposed to herbicides unless there is affirmative evidence they were not.⁴⁹ The Republic of Vietnam, as it is called in the regulation, refers to the former South Vietnam, which is now part of the Socialist Republic of Vietnam. Qualifying service areas include the land in the Republic of Vietnam, its inland waterways, or the designated offshore waters, including specific bays and harbors.⁵⁰ This presumption of service connection enables eligible veterans to receive disability benefits for specific diseases related to herbicide exposure, such as diabetes mellitus, non-Hodgkin lymphoma, and more than

⁴⁹ 38 C.F.R. § 3.307 (2023). Throughout this report, the term “herbicide” refers to chemicals used in support of the United States and allied military operations in the Republic of Vietnam from January 9, 1962, through May 7, 1975, specifically 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram.

⁵⁰ VA Manual 21-1, “Developing Claims for Service Connection (SC) Based on Herbicide Exposure,” in sec. VIII.i.1.A, *Adjudication Procedures Manual* (updated November 2, 2021), topic 1.a.

a dozen others. The covered herbicide-related diseases are established by the VA Secretary pursuant to the Agent Orange Act of 1991.⁵¹

Presumption of service connection for eligible diseases is also afforded to veterans who served no less than 30 days (consecutive or nonconsecutive) at the US Marine Corps Base Camp Lejeune in North Carolina between August 1, 1953, and December 31, 1987, due to exposure to contaminants in the base's water supply. On March 14, 2017, VBA regulations established a presumption of service connection for specific diseases, including bladder cancer, related to exposure to contaminated water at Camp Lejeune.⁵²

Designated Claims Processing Offices

Staff at VA regional offices are responsible in the course of their other claims duties to screen for claims for bladder cancer, hypothyroidism, and parkinsonism that could be covered by *Nehmer*. If the *Nehmer* requirements could apply, these claims are then routed to a designated processing site. The offices that screen and route the claims are referred to as screening sites for the purposes of this report.

In March 2021, VBA designated 14 regional offices to process all *Nehmer* claims.⁵³ Eight of these regional offices process claims from veterans and are known as *Nehmer* live-processing sites; these regional offices are located in Roanoke, Virginia; St. Petersburg, Florida; Cleveland, Ohio; St. Louis, Missouri; St. Paul, Minnesota; Lincoln, Nebraska; Oakland, California; and Reno, Nevada. The *Nehmer* sites that process claims from survivors (deceased veterans' next of kin) are located in Salt Lake City, Utah; Phoenix, Arizona; Waco, Texas; Philadelphia, Pennsylvania; Huntington, West Virginia; and Togus, Maine.

Figure 2 shows significant events that determined how claims covered by the *Nehmer* consent decree and subsequent court orders and the NDAA were processed.

⁵¹ Agent Orange Act of 1991, Pub. L. No. 102-4 (1991).

⁵² 38 C.F.R. § 3.309(f) (2023). This regulation lists presumptive diseases, including kidney cancer, liver cancer, and non-Hodgkin lymphoma, related to exposure to contaminated water at Camp Lejeune.

⁵³ Office of Field Operations, "Blue Water Navy (BWN)-*Nehmer* Project," memorandum to all VBA regional offices, March 31, 2021.

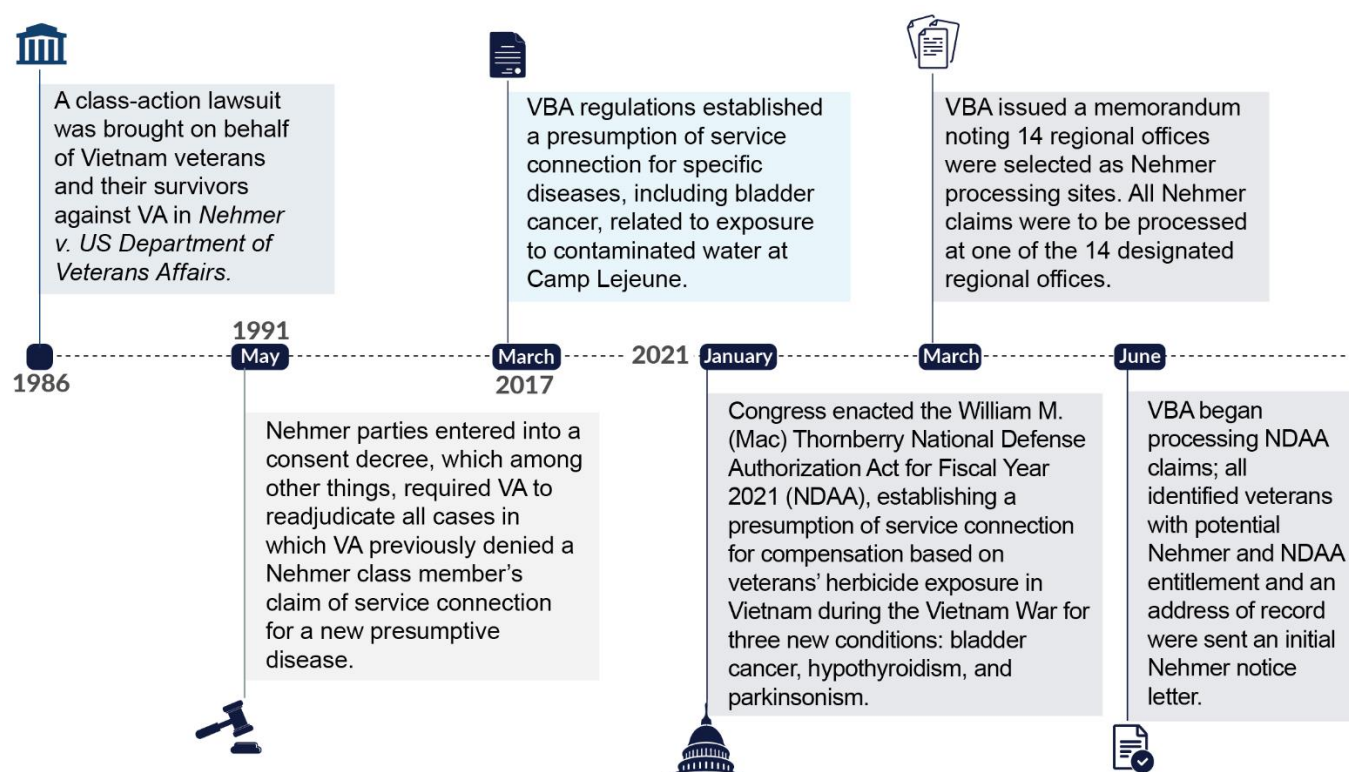


Figure 2. Timeline of events determining claims process for those affected by the Nehmer court decision and the NDAA.

Source: VA OIG's analysis of chronological events pertaining to the Nehmer court decision and the NDAA.

Results and Recommendations

Finding: VBA Did Not Identify All Vietnam Veterans Who Could Be Eligible for Retroactive Benefits

As noted earlier, VBA acknowledged that the identification of more than 70,000 veterans notified of potential eligibility for retroactive benefits under the NDAA was not exhaustive. Based on its samples, the OIG team determined that VBA had not identified an estimated 87,120 Vietnam veterans who met, or potentially met, Nehmer eligibility for readjudication of NDAA benefits.⁵⁴ This included an estimated 86,894 veterans who served, or may have served, in Vietnam and its designated waters and had Veterans Health Administration (VHA) records showing a diagnosis of a disease that is now presumptively service-connected under the NDAA while a decision for compensation or pension benefits was pending from September 25, 1985, to January 1, 2021—the date the NDAA conditions became presumptive.⁵⁵ In addition, the team estimated VBA did not identify 226 veterans who served, or may have served, in Vietnam and its designated waters and had been awarded service connection from September 25, 1985, to January 1, 2021, for the NDAA-covered disease of bladder cancer on a presumptive basis due to meeting the qualifying criteria for exposure to contaminated water at Camp Lejeune.⁵⁶ As a result, the team estimated veterans and their survivors did not receive about \$844.4 million in payments.⁵⁷ This occurred because VBA did not consider identifying Vietnam veterans' VHA records showing a prior diagnosis of a disease now presumptively service-connected under the NDAA or VBA records showing a presumptive service connection for bladder cancer at Camp Lejeune that may now have an earlier effective date for retroactive benefits under the NDAA.

What the OIG Did

The OIG team conducted two reviews based on randomly selected samples of the following populations of Vietnam War–era veterans who had a compensation or pension claim or appeal completed in a VBA system from September 25, 1985, to January 1, 2021, and

- had VHA medical records prior to January 1, 2021, showing a diagnosis of a disease that now is presumptively service-connected under the NDAA (the VHA dataset) or

⁵⁴ Unless otherwise noted, the term “veterans” used throughout this report includes other affected beneficiaries such as a surviving spouse. Appendixes A and B provide additional details on the team’s actions and methodology.

⁵⁵ This also covers a date prior to September 25, 1985, if the claim was pending or on appeal on September 25, 1985. For more information on the statistical estimates, see table B.2 in appendix B.

⁵⁶ See appendix table B.3.

⁵⁷ To calculate the overall questioned costs, the team added unrounded estimates for the VHA dataset (\$836,809,722) and the Camp Lejeune dataset (\$7,549,485) and then rounded the sum (\$844,359,207) to \$844.4 million. See appendix C for more information about the estimates of monetary benefits associated with implementing the report’s recommendations.

- were granted presumptive service connection for the NDAA-covered disease of bladder cancer due to exposure to contaminated water at Camp Lejeune (the Camp Lejeune dataset).⁵⁸

The review period was from September 25, 1985, to January 1, 2021, because for the *Nehmer* requirements to pertain, a veteran must have applied for or have been denied benefits for an herbicide-related disease with presumptive service connection during this time.⁵⁹ These populations were reviewed because the OIG team determined through testing that these categories of veterans were at risk of missing out on benefits because they were excluded from VBA's review. Although the team pulled data from *completed* benefits decisions, the team also reviewed medical records that were in VA's possession while the claims were *pending* because eligibility to benefits depended on VA having those records. Medical records alone showing a diagnosis would not determine if veterans warranted readjudication; as previously noted, they would also need to have evidence of service in Vietnam and a claim that was pending prior to the condition becoming presumptive.

The team excluded from its population any veterans who had been part of VBA's batch-established review, as VBA had stated these veterans would be reviewed for readjudication.⁶⁰ The VBA corporate database used to identify the populations for the OIG's review only had data going back to May 16, 2001. Due to this data limitation, the team identified some, but not all, veterans who submitted claims before May 16, 2001, as those claims folders for veterans identified after May 16, 2001, still contained records showing older claims and medical records.

The team interviewed staff at the following VA regional offices: Seattle, Washington; Louisville, Kentucky; Des Moines, Iowa; and Chicago, Illinois. These offices were selected because they are sites responsible for screening claims for NDAA coverage and then routing those claims to regional offices that serve as designated processing sites. Each office where staff were interviewed represents one of the four districts that comprise the VA regional offices: Northeast, Southeast, Continental, and Pacific. In addition, the team interviewed representatives from the National Veterans Legal Services Program, the advocacy group that litigated the *Nehmer* lawsuit on behalf of veterans who served in the Vietnam War and met other class requirements.

⁵⁸ These populations include veterans who served during the Vietnam War from January 9, 1962, through May 7, 1975, but not necessarily in the Republic of Vietnam or its designated waters. Veterans determined not to have served in Vietnam or its waters during the review period were classified as being outside the scope of the review.

⁵⁹ VA Manual 21-1, "Determining Eligibility to Retroactive Payment Under the *Nehmer* Stipulation," in sec. VIII.i.2.B, *Adjudication Procedures Manual* (updated July 29, 2021), topic 1.e.

⁶⁰ VBA noted they would batch-establish an end product code with a date of claim of June 21, 2021, for all veterans identified as potential *Nehmer* class members with prospective entitlement under the NDAA. The end product system is the primary workload monitoring and management tool for VBA.

The following determinations formed the basis for this finding and led to the OIG's recommendations:

- Not all Vietnam veterans were identified for claims readjudication.
- Missed readjudications were due in part to VHA and Camp Lejeune data not being considered.
- VBA practice and policy resulted in a lack of routine screening for Nehmer claims processing.

Not All Vietnam Veterans Were Identified for Claims Readjudication

VBA stated that the population of veterans it would review after the implementation of the NDAA was approximately 70,000 veterans and would consist of Vietnam veterans who had previously been

- denied compensation for an NDAA-covered disease or
- granted service connection for an NDAA-covered disease on a basis other than presumption.⁶¹

VBA acknowledged that its data used for readjudication might not capture all claims affected by the *Nehmer* consent decree and subsequent court orders. As stated earlier, a VBA analyst believed that any additional claims warranting readjudication could later be identified in the ordinary course of business, as VBA anticipated that additional eligible veterans might be found through document review. According to VBA, in June 2021, all identified potential Nehmer class members with an address of record were sent an initial notice letter of their possible entitlement to retroactive benefits.

The OIG team concluded from its review that VBA effectively identified veterans from these populations. However, the team identified two categories of Vietnam veterans who potentially were eligible for retroactive benefits under the *Nehmer* consent decree and subsequent court orders but whose claims were not flagged for possible readjudication.

VBA Did Not Identify Veterans with VA Medical Records of Diseases Now Presumptively Service-Connected and Prior Claims for Benefits

The team reviewed a statistically random sample of 246 veterans to determine whether VBA identified claims eligible for potential readjudication and retroactive benefits. The 246 veterans

⁶¹ Nehmer Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12, sec. *Class Members Under PL 116-283* (standard operating procedure), updated March 24, 2023.

were randomly selected from an initial population of 240,180 veterans with VHA medical records (the VHA dataset). These veterans

- served during the Vietnam War era;
- had medical records at a VHA facility that included a diagnosis of a presumptive disease for service connection under the NDAA prior to January 1, 2021; and
- had a compensation or pension claim or appeal completed from September 25, 1985, to January 1, 2021.

The team then removed 149,380 veterans who were out of the review's scope for various reasons, such as they did not serve in-country or in designated waters, or their medical records did not have evidence of a presumptive disease under the NDAA with a benefits claim pending during the relevant period. This left an estimated in-scope population of 90,800 veterans. The team used military personnel records to determine where each veteran served during the Vietnam War. For example, table 1 shows how a determination for each status could be made.

Table 1. Example of In-Country Vietnam Service Determination Based on Military Personnel Records

| Military personnel record information | In-country Vietnam determination |
|---|---|
| No foreign service shown | Not in scope: no in-country service |
| Service in Vietnam during the Vietnam War | In scope: in-country service shown |
| Foreign service shown but location not identified | In scope: possible in-country service shown |

Source: VA OIG analysis of military personnel records.

Of these 90,800 veterans, 86,894 (96 percent) met or potentially met Nehmer eligibility under the NDAA but were not identified by VBA for readjudication.

Figure 3 presents the estimated number of veterans from the VHA dataset who were not identified for possible claims readjudication for presumptive diseases under the NDAA.

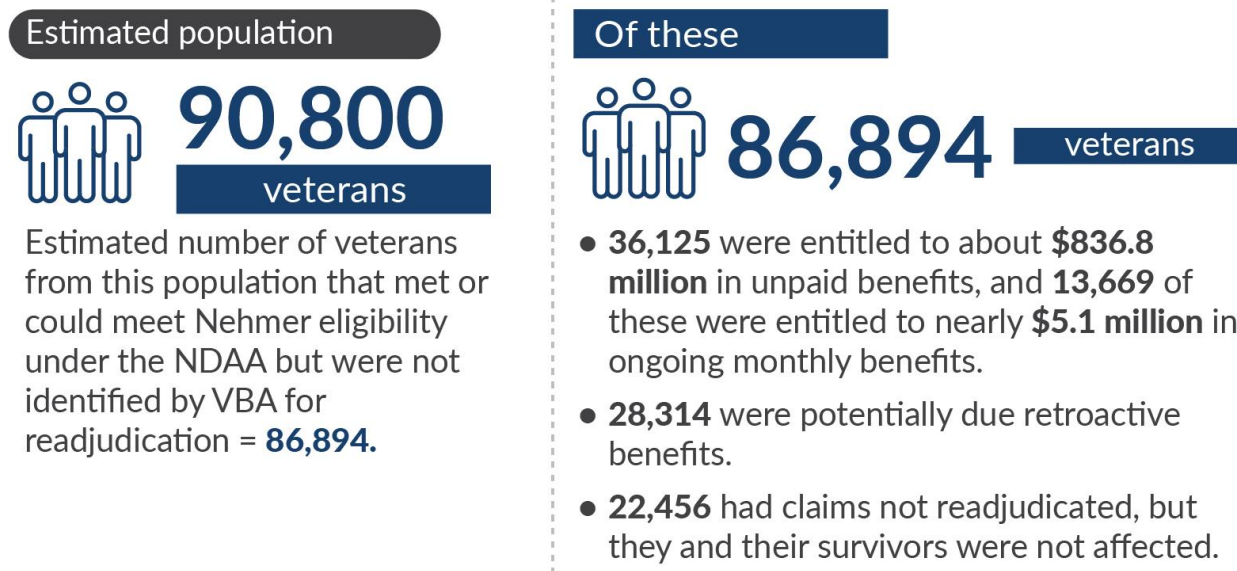


Figure 3. Estimated number of veterans from the VHA dataset that should be identified for possible readjudication.

Source: VA OIG analysis of the VHA dataset.

Note: The totals from the bullets do not sum to 86,894 due to rounding.

The estimate of 86,894 veterans was based on evidence that VA had medical records with a diagnosis of an NDAA-covered disease while a decision on entitlement to compensation or pension was pending during the review period for veterans who served, or may have served, in Vietnam. These veterans' claims would qualify for readjudication if they met Nehmer eligibility. VA procedures note, "**Important:** If, at the time of a prior decision on any compensation claim, VA had medical evidence containing a diagnosis of a now-covered condition ... then the condition is considered to have been part of the previously decided claim."⁶² The following sections describe the extent of the unpaid benefits to eligible veterans and to potentially eligible veterans and the impact on veterans or their survivors.

Eligible Veterans Were Not Paid Benefits

As shown in the first bullet of figure 3, the team estimated that 36,125 of the 86,894 Vietnam War-era veterans were entitled to approximately \$836.8 million in unpaid benefits based on serving in Vietnam or its designated waters and meeting Nehmer eligibility under the NDAA. This estimate consists only of veterans definitively shown to have served in Vietnam or its designated waters. Also, of the 36,125 veterans who did not receive benefits, an estimated 13,669 were collectively entitled to an ongoing total of \$5.1 million per month. If VBA continues to miss readjudication of these benefit claims at the rate identified and at payment rates

⁶² VA Manual 21-1, "Determining Eligibility to Retroactive Payment Under the Nehmer Stipulation," in sec. VIII.i.2.B, *Adjudication Procedures Manual* (updated July 29, 2021), topic 1.d.

in effect at the time of this review, future improper payments could total an estimated \$183 million over the next three years.⁶³

Entitlement to benefits was warranted in these cases because service connection for the NDAA-covered disease would have led to retroactive benefits. Example 1 shows a veteran who qualified for retroactive benefits but was not identified by VBA for claim readjudication.

Example 1

VBA received a claim for compensation from a veteran on March 22, 2007. The veteran served in Vietnam during the Vietnam War, and, while the claim was pending, VHA medical records in the veteran's claims file showed he had a diagnosis of hypothyroidism that was treated with medication. VA procedures note that if VA had evidence of a diagnosis of a covered herbicide-related disease, such as hypothyroidism, at the time of a prior decision on a compensation claim, then the disease is considered to have been part of the previously decided claim. Service connection for hypothyroidism is warranted because the veteran served in Vietnam, and hypothyroidism is a disease VBA presumes to be the result of herbicide exposure in Vietnam. Therefore, the veteran is entitled to over \$27,800 in retroactive benefits. However, VBA did not identify this claim for readjudication.

VBA concurred with the OIG team's analysis of this case. Table 2 shows the estimated missed payments for claims in the VHA dataset due to VBA not readjudicating entitlement to benefits under the NDAA and the *Nehmer* consent decree and subsequent court orders.

Table 2. Estimated Missed Payments Due to VBA Not Readjudicating Veterans' NDAA-Covered Nehmer Entitlement (VHA Dataset)

| Type of missed payment | Amount in dollars |
|--|-------------------|
| Estimated total of missed retroactive payments | \$836,809,722 |
| Estimated total of missed ongoing monthly payments | \$5,078,098 |
| Estimated average amount of missed ongoing monthly payment per veteran | \$372 |

Source: VA OIG analysis of the VHA dataset. Missed payments were calculated to February 2023, when the team began the review.

⁶³ The OIG typically expects all recommendations to be fully implemented within one year. Because VBA is still processing NDAA Nehmer claims more than two years since they began processing them, the OIG believes it is appropriate to project the monetary impact for three years. The three-year projection for fiscal years 2023 through 2025 merely highlights the significant impact if the recommendations are not fully implemented.

Potentially Eligible Veterans Had Claims Missed for Readjudication

As shown in the second bullet of figure 3, an estimated 28,314 veterans who served, or may have served, in Vietnam were potentially entitled to retroactive benefits if shown to have met Nehmer eligibility. In example 2, a veteran was potentially entitled to retroactive benefits but was not identified by VBA for claim readjudication.

Example 2

VBA received a disability compensation claim from a veteran on February 7, 2013. While the claim was pending, VHA medical records documented he had a diagnosis of hypothyroidism that was treated with medication. The veteran's service personnel records showed he had foreign and sea service during the Vietnam War, and his hypothyroidism could warrant presumptive service connection for herbicide exposure. VA procedures note when VBA staff are not able to determine whether a veteran served in a qualifying area, staff should send the veteran a development letter to request the details of the veteran's service.⁶⁴ In this instance, the veteran was not sent a development letter. The veteran died in October 2022. If it is determined the veteran served in Vietnam or its designated waters, his next of kin would be entitled to the retroactive compensation for his hypothyroidism.

VBA concurred with the OIG team's analysis of this case as well.

As shown in the third bullet of figure 3, the review team estimated 22,456 of the 86,894 veterans were not identified by VBA for readjudication; however, no change in benefits would have resulted. For example, in some instances the retroactive grant of an NDAA-covered disease would not have changed the combined value for a veteran's disability evaluation, and there was no potential for future increases in the combined evaluation because the veteran had died.

Veterans from the Camp Lejeune Dataset Were Not Identified for Readjudication

The OIG team reviewed a randomly selected sample of 150 veterans from an initial population of 357 veterans in the Camp Lejeune dataset to determine if they were identified for readjudication. These 150 veterans

- served during the Vietnam War era and

⁶⁴ Nehmer Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12, sec. *Verifying Herbicide Exposure* (standard operating procedure), updated March 24, 2023.

- had service connection from September 25, 1985, to January 1, 2021, for the NDAA-covered disease of bladder cancer due to exposure to contaminated water at Camp Lejeune.

This population was examined because bladder cancer has a presumed service connection both under the NDAA and due to contaminated water exposure at Camp Lejeune.⁶⁵ Veterans who had served at Camp Lejeune and had bladder cancer claims might be eligible for an earlier effective date—and therefore additional retroactive benefits—if the veterans also met the criteria related to service in Vietnam.

The team removed 131 veterans from the sample for reasons such as they did not serve in-country or in designated waters. This left an in-scope population of 226 veterans (63 percent).

Figure 4 presents the estimated number of veterans from the Camp Lejeune dataset who were not identified for readjudication.

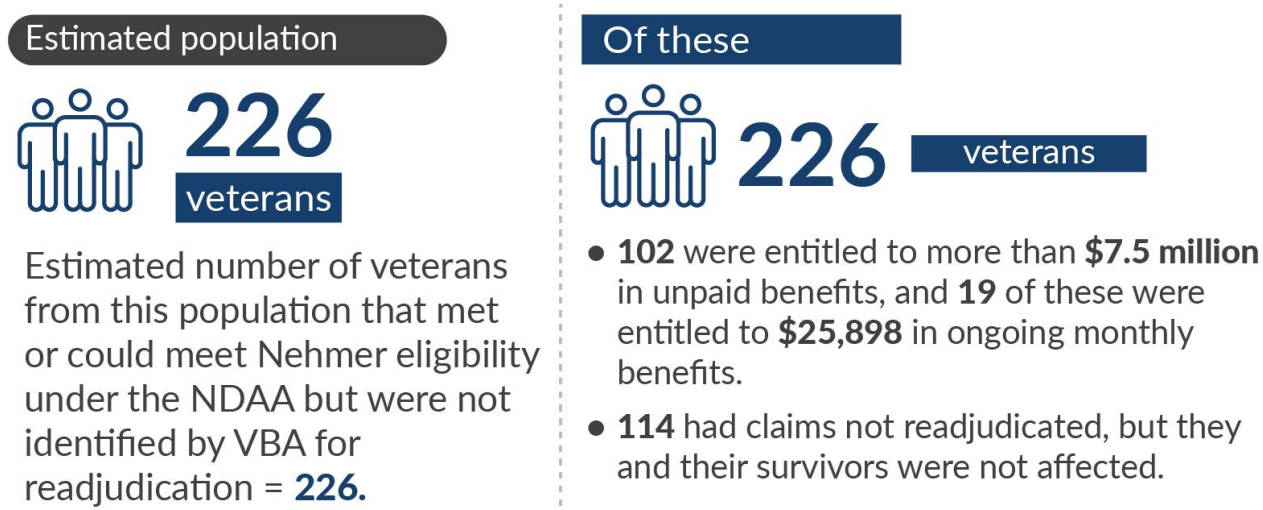


Figure 4. Estimated number of veterans from the Camp Lejeune dataset that should be identified for possible readjudication.

Source: VA OIG analysis of the Camp Lejeune dataset.

Note: The estimated number of veterans who potentially warranted retroactive benefits is not provided in this figure because the data showed a significant amount of variability, indicating a wide range of possible values, which made it difficult to provide a reliable estimate.

The team estimated all 226 veterans from the Camp Lejeune dataset met or potentially met Nehmer eligibility under the NDAA but were not identified by VBA for readjudication based on evidence showing they had been granted service connection for bladder cancer during the review period and served, or may have served, in Vietnam. These claims potentially qualify for readjudication because the effective date for entitlement to service connection based on the

⁶⁵ The OIG team found no overlap with hypothyroidism or parkinsonism in the Camp Lejeune dataset.

Nehmer consent decree and subsequent court orders criteria could predate service connection based on Camp Lejeune service, entitling veterans to additional retroactive benefits. The team also estimated that 102 of the 226 veterans were entitled to more than \$7.5 million in benefits based on serving in Vietnam or its designated waters and meeting *Nehmer* eligibility under the NDAA. As previously stated, this estimate consists only of veterans definitively shown to have served in Vietnam or its designated waters. In addition, an estimated 19 veterans were collectively entitled to an ongoing total of \$25,898 per month.

If VBA does not take corrective action for these veterans, based on the rate identified and at payment rates in effect at the time of this review, future improper payments would total an estimated \$932,000 over the next three years.

Entitlement to retroactive compensation under the *Nehmer* consent decree and subsequent court orders was warranted because the earlier effective date for service connection of bladder cancer would have led to retroactive benefits. As shown in example 3, a veteran was entitled to retroactive benefits but was not identified by VBA for readjudication.

Example 3

VBA received a claim for bladder cancer compensation from a veteran on May 2, 2014. The veteran served in Vietnam during the Vietnam War. While the claim was pending a decision, medical records in the veteran's claims file showed he had a diagnosis of bladder cancer. The veteran was denied service connection for bladder cancer on September 9, 2014, because at that time bladder cancer was not a presumptive disease for herbicide exposure in Vietnam or for contaminated water exposure at Camp Lejeune. The veteran was eventually granted service connection for bladder cancer based on Camp Lejeune service, with March 14, 2017, as the effective date for entitlement. However, because the veteran served in Vietnam and had evidence of a diagnosis of bladder cancer in May 2014, service connection for bladder cancer is effective from his original claim date. As a result, the veteran is entitled to over \$72,100 in retroactive benefits. However, VBA did not identify this veteran's claim for readjudication.

VBA concurred with the OIG team's analysis of this case. Table 3 shows the estimated missed payments for claims from the Camp Lejeune dataset due to VBA not readjudicating veterans' entitlement to benefits under the NDAA and the *Nehmer* consent decree and subsequent court orders.

Table 3. Estimated Missed Payments Due to VBA Not Readjudicating Veterans' NDAA-Covered Nehmer Entitlement (Camp Lejeune Dataset)

| Type of missed payment | Amount in dollars |
|--|-------------------|
| Estimated total of missed retroactive payments | \$7,549,485 |
| Estimated total of missed ongoing monthly payments | \$25,898 |
| Average amount of missed ongoing monthly payment | \$1,360 |

Source: VA OIG analysis of the Camp Lejeune dataset. Missed payments were calculated to February 2023, when the team began the review.

Not All Veterans Received Notification Letters Informing Them That They Might Be Entitled to Benefits

In a press release published on May 27, 2021, VA reported it would send letters to veterans and survivors affected by the NDAA and the provisions of the *Nehmer* consent decree and subsequent court orders.⁶⁶ These letters informed the recipients that VBA was reviewing claims in accordance with the *Nehmer* court decision and that they may be entitled to additional compensation benefits. However, the OIG team estimated that 88,847 eligible or potentially eligible veterans from the VHA dataset and 226 eligible or potentially eligible veterans from the Camp Lejeune dataset were not sent notification letters.⁶⁷ Because VBA did not send these notification letters, veterans were not made aware of their potential entitlement to retroactive compensation benefits and would be less likely to submit a claim for benefits to which they might be entitled.

The review team interviewed representatives from the National Veterans Legal Services Program, the advocacy group that litigated the *Nehmer* lawsuit on behalf of Vietnam War veterans, to determine if their agency was aware that VBA did not identify all veterans' claims for readjudication. The representatives noted they were not aware and stated VBA should identify and readjudicate claims from these veterans to ensure they receive the benefits to which they are entitled.

Missed Readjudications Were Due in Part to VHA and Camp Lejeune Data Not Being Considered

A senior management advisor in VBA's Office of Field Operations told the OIG team that the data request VBA used to identify *Nehmer* class veterans for readjudication under the NDAA did

⁶⁶ VA, "Breaking: VA plans expansion of benefits for disability claims for conditions related to certain toxic exposures," news release, May 27, 2021, <https://news.va.gov/89496/breaking-news-va-plans-expansion-benefits-disability-claims-conditions-related-certain-toxic-exposures/>.

⁶⁷ This includes veterans with readjudicated claims who still did not receive the notification letter informing them of their potential entitlement.

not involve VHA records to determine if veterans had a diagnosis of bladder cancer, hypothyroidism, or parkinsonism. The senior management advisor stated VHA records were not involved because the VBA cross-business-line work group had not discussed medical records as something that should be considered. The management advisor also noted the focus was based on what was in VBA's data population, as VHA diagnosis data had never been routinely available to VBA's data sources.

VBA also did not identify Vietnam War-era veterans who had presumptive service connection for an NDAA-covered disease (such as those in the Camp Lejeune dataset). A program analyst in the Office of Field Operations noted these veterans were not identified because VBA did not consider these diseases as presumptively connected to herbicide exposure until the NDAA passed. In these cases, VBA acknowledged there was a small possibility of entitlement to benefits with an earlier effective date than those currently assigned.

The OIG's first recommendation is for VBA to use methodologies similar to the team's review to identify eligible veterans, readjudicate claims, and send outreach letters to potential Nehmer class members who could qualify for retroactive benefits under the NDAA.

VBA Practice and Policy Resulted in a Lack of Routine Screening for Nehmer Claims Processing

A program analyst in the Office of Field Operations also noted that VBA anticipated veterans with claims warranting readjudication might be identified through document review when not found through a data pull. However, all 27 claims processors interviewed by the review team at screening sites reported that they either did not recall being instructed on these procedures, or possible Nehmer readjudications were not considered when processing non-NDAA claims or those for increased evaluation for bladder cancer related to a Camp Lejeune claim.⁶⁸

The claims processors interviewed stated their experience levels ranged from five months to 23 years. Of these 27 claims processors, 17 stated they did not recall receiving instructions to make this determination, and 16 stated they were not routinely considering Nehmer entitlement when processing those types of claims.⁶⁹ Most of the claims processors (22 of 27) reported they either had never processed a Nehmer claim or did not recall processing any.

The OIG's second recommendation addresses the need for VBA to ensure claims processors at screening sites understand the need to look for claims that may meet Nehmer eligibility and should be referred for readjudication.

⁶⁸ The review team interviewed 27 claims processors: 11 veterans service representatives and 16 rating veterans service representatives from VA regional offices in Chicago, Illinois; Des Moines, Iowa; Louisville, Kentucky; and Seattle, Washington.

⁶⁹ Totals do not sum to 27 because responses overlapped.

VBA provided updated standard operating procedures on January 1, 2023, for screening claims to potentially be processed at a Nehmer centralized site.⁷⁰ However, the steps in the guidance noted that if a claim was not for one of the NDAA-covered diseases, the processor should skip a step requiring them to consider whether medical evidence showed a diagnosis of an NDAA-covered disease while a claim was pending prior to January 1, 2021. By skipping this step, staff may fail to screen veterans for potential eligibility under the *Nehmer* consent decree and subsequent court orders.

The OIG's third recommendation addresses the need for VBA to update its standard operating procedures to have staff consider whether veterans' medical records showed a diagnosis of the now-covered herbicide-related diseases at the time of any prior claim for any condition before January 1, 2021, regardless of whether a current claim is for an NDAA-covered disease.

Conclusion

The OIG determined VBA did not identify all potential Nehmer class members who could qualify for readjudication and retroactive benefits under the NDAA. This occurred because VBA did not consider identifying Vietnam War-era veterans who met certain criteria for readjudication. Until VBA takes steps to ensure these veterans are identified, some of the veterans in the VHA and Camp Lejeune datasets may not receive benefits to which they are entitled.

Recommendations 1–3

The OIG made three recommendations to the under secretary for benefits:

1. Ensure Veterans Benefits Administration staff use improved methodologies similar to the Office of Inspector General's review to identify eligible veterans, readjudicate claims, and send outreach letters to potential Nehmer class members who could qualify for retroactive benefits under the National Defense Authorization Act.
2. Ensure claims processors at screening sites understand the need to identify any claims that may warrant readjudication by meeting the *Nehmer* consent decree and subsequent court orders.
3. Update the standard operating procedures to have staff consider whether veterans' medical records show a diagnosis of the now-covered herbicide-related diseases at the time of any prior disability benefits claim before January 1, 2021, regardless of whether a current claim is for a disease recognized by the National Defense Authorization Act.

⁷⁰ Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, or the Honoring our PACT Act of 2022 (PACT Act), Pub. L. No. 117-168, Implementation Standard Operating Procedure, January 1, 2023.

VA Management Comments

VBA, through the under secretary for benefits, did not concur with recommendation 1 to identify, readjudicate, and send outreach letters to potential *Nehmer* class members who could qualify for retroactive benefits under the NDAA. VBA's response stated, "To the extent the OIG report functions as quality control, making sure that all Veterans eligible for payment under the scope of the *Nehmer* consent decree as properly understood are identified, VA agrees with it, and indeed appreciates OIG's efforts to make sure that no Veteran or survivor who is entitled to a payment fails to receive it due to administrative error." Although VBA did not concur with recommendation 1, the comments state that "VBA plans to establish a work group to determine how to leverage improved methods of identification, within the parameters of *Nehmer* identification established within the consent decree."

VBA noted two major concerns with the report:

First, VBA and the Office of General Counsel did not agree with the scope of the *Nehmer* consent decree articulated in the report stating that OIG erred on the question of what counts as a previous final denial for purposes of triggering VA's *Nehmer* obligations. Specifically, they stated "OIG incorrectly concludes that medical records anywhere in VA's health care system at the time of a prior claim can trigger the requirements of the stipulation regardless of whether those records were relevant to the claim or associated with the claim file."

VBA's comments also contested the OIG's reliance on the VBA adjudication procedures manual on the basis that the *Nehmer* consent decree's terms and subsequent court orders interpreting it take precedence over the manual. It states that the OIG's expansive interpretation of what constitutes a previously denied claim does not align with the historical understanding of the consent decree. Further, the OIG did not identify which veterans warranted readjudication under VBA's interpretation of the *Nehmer* consent decree and which veterans would only be included based on the OIG's interpretation of *Nehmer*. The comments state that, according to the Constitution, only Congress can allocate public funds, and VBA payments must comply with veterans' benefits laws; applying *Nehmer* without proper authorization would breach these limits, making payments unauthorized.

Second, VBA states that the OIG erred "by including an unknown number of Veterans who did not serve in the Republic of Vietnam in its report." VBA further objected to the OIG's conclusions based on the review population of veterans entitled to *Nehmer* readjudications:

[The review population did not] distinguish between Veterans who served in the Republic of Vietnam from Veterans who served outside the United States in countries other than the Republic of Vietnam ... The *Nehmer* consent decree does not apply to all Veterans with Vietnam War-era service; it is limited to Veterans with verified service in the Republic of Vietnam. As the *Nehmer* court made clear, "while the consent decree does not use the words 'Republic of Vietnam,' its

applicability turned on veteran eligibility for benefits under the Agent Orange Act, and so its provisions are limited, like the Act, to veterans who ‘served in the Republic of Vietnam.’” ... Given the apparent failure to account for, or otherwise verify, Veterans’ duty stations in drafting this report, we have serious concerns that OIG’s report of 36,125 veterans being owed \$836.8 million in unpaid benefits overstates the number of impacted Veterans and creates an expectation of payment that is not authorized under statute or under the current understanding of the *Nehmer* consent decree.⁷¹

VBA noted that at various points the “OIG’s report implies that VA need not readjudicate claims for each of the Veterans identified in the two datasets cited.” However, they stated this “speculative language is at odds with the more definitive points in the report that state, unequivocally, that the Veterans in question are not only entitled to readjudications, but to over \$830 million in benefits.”

Compounding these concerns, the comments assert that the “OIG makes no effort to differentiate which Veterans may be deserving of a readjudication as a matter of quality control under a correct understanding of the *Nehmer* consent decree, and which Veterans would only be included if one adopts OIG’s expanded understanding of *Nehmer*.”

VBA concurred with recommendation 2 and noted that it would communicate and provide training to employees at screening sites to clarify their responsibility for screening cases to fully meet the *Nehmer* duty to readjudicate.

VBA concurred with the third recommendation as well, reporting it would update the procedures to have staff consider whether veterans’ medical records in VBA claims folders show a diagnosis of the now-covered herbicide-related diseases at the time of any prior disability benefits claim before January 1, 2021, regardless of whether a current claim is for a disease recognized by the NDAA. Appendix D provides the full text of VBA’s comments.

OIG Response to VA Comments

Although VBA does not concur with the first recommendation, it has stated there are plans to establish a work group to determine how to incorporate improved methods of identifying veterans eligible for *Nehmer* entitlement. This action by VBA to identify all eligible veterans to ensure they receive benefits to which they may be entitled meets the intent of the first recommendation. The OIG will monitor and follow up on VA’s proposed actions.

To more fully address VBA’s concern that the OIG made “no effort” to differentiate which veterans may be deserving of a readjudication under VBA’s understanding of the *Nehmer*

⁷¹ For full text of quote from VBA, see Appendix D. For more on the Agent Orange Act see Agent Orange Act of 1991, Pub. L. No. 102-4 (1991).

consent decree, the OIG conducted additional analyses of the findings. The OIG confirmed that most of the veterans in the VHA and Camp Lejeune datasets had claims files that contained a medical record showing a diagnosis for an NDAA-covered condition while a claim was pending, which VBA appears to agree warrant readjudication. Specifically, the OIG estimates that 69,320 of the 86,894 veterans (80 percent) from the VHA dataset who were not identified by VBA for readjudication had such medical records in their claims files while a compensation or pension claim was pending during the review period. Similarly, the OIG estimates that 224 of the 226 veterans (99 percent) from the Camp Lejeune dataset who were not identified by VBA for readjudication had medical records in their claims files showing a diagnosis of an NDAA-covered condition while a claim was pending during the review period. As VBA seems to agree that these veterans warrant readjudication, using a similar methodology to the one used by the OIG to identify veterans for readjudication of benefits would ensure that these veterans are properly identified.

For the approximately 20 percent and 1 percent of veterans who VBA claimed the OIG incorrectly included for the analysis, the OIG approach was based on VBA's own manual guidance it has provided to claims processors since 2016. The guidance states, "If, at the time of a prior decision on any compensation claim, VA had medical evidence containing a diagnosis of a now-covered condition ... then the condition is considered to have been part of the previously decided claim."⁷² Based on that guidance, these veterans would qualify for readjudication. The VBA work group can determine whether to include these claims in the readjudication process.

It should be noted that during the course of the OIG's work, VBA's quality review specialists concurred with the OIG's finding that a veteran warranted retroactive benefits for an NDAA-covered condition based on medical records within VA's constructive possession, but not in the claims file, while a past claim was pending. The criteria OIG provided to VBA's quality review specialists that led to their concurrence, cited VBA's manual guidance and US Court of Appeals for Veterans Claims case *Bailey v. McDonough*.⁷³ The appeals case reversed the prior Board of Veterans Appeals (board) decision and found VA records of a diagnosis in existence at the time a previous decision was made would be considered constructively before VA, even if not explicitly mentioned by the veteran, and directed the board to consider the relevance of the manual guidance, even if not binding. *Bailey v. McDonough* is a nonprecedential decision, and it does not find that the existence of such records constitutes a claim for the disability or legally obligates VBA to search for relevant records outside of a veteran's claims file in other cases. However, it does suggest that VBA is exposed to litigation risk over such claims based on the current manual guidance since the question of whether the manual should be applied to

⁷² VA Manual 21-1, "Determining Eligibility to Retroactive Payment Under the Nehmer Stipulation," in sec. VIII.i.2.B, *Adjudication Procedures Manual* (updated July 29, 2021), topic 1.d.

⁷³ *Bailey v. McDonough*, 2023 WL 5603983 (August 30, 2023).

readjudications under the *Nehmer* consent decree is currently being litigated before the board and, as of the publication date of this report, has yet to be resolved.

VBA acknowledged in their *Nehmer* Readjudication Standard Operating Procedure that the *Nehmer* consent decree was subject to more than one interpretation.⁷⁴ VBA stated that it was reasonable to assume that, in 1991, the court and the parties intended to provide a remedy for persons with diagnosed herbicide-related conditions who either received a rating decision denying an expressed claim for service connection for that condition; received a rating decision that addressed an unclaimed herbicide-related condition; or received a rating decision that failed to address a noted condition. In the standard operating procedure, VBA further stated that another less pro-veteran interpretation was that the consent decree merely prescribed how to determine the correct effective date for prior denials.

The standard operating procedure reported that *Nehmer* class counsel intended to bring the interpretation issue to the district court's attention if VBA did not amend their regulations. The standard operating procedure concluded that,

the Final Stipulation is subject to two reasonable interpretations, only one of which could be viewed as expanding the remedy available to the *Nehmer* class members. Clearly, the district court has every reason to select the interpretation proposed by class counsel, as it is a reasonable, pro-veteran interpretation that is consistent with the purpose of the Final Stipulation. In addition, the court could conclude that application of the alternative interpretation would lead to an absurd result. For example, a veteran who, in 1986, filed a claim for service connection for respiratory cancer and received a rating decision denying that claim would be entitled to retroactive benefits under *Nehmer*. However, another veteran, who was also diagnosed with a respiratory cancer and who deliberately limited his 1986 claim to a back condition, knowing that VA could not service-connect his cancer in the absence of a presumption, would not be entitled to retroactive benefits under *Nehmer*.

The pro-veteran interpretation would require a minor amendment to [VBA regulations], which governs effective dates for decisions voided by the district court's May 3, 1989, order.

Currently, VBA's position that the *Nehmer* stipulation, as written, is limited to *Nehmer* veterans whose claims files contained a diagnosis of an NDAA-covered condition is inconsistent with its manual guidance. Significantly, no court has held that the manual is inconsistent with the court decree. Acknowledging that VBA is entitled to interpret the *Nehmer* consent decree as they deem appropriate and issue regulations accordingly, the under secretary for benefits should consider

⁷⁴ *Nehmer* Readjudication Standard Operating Procedure (SOP): Blue Water Navy (BWN) and Public Law (PL) 116-283, version 12 (standard operating procedure), updated March 24, 2023.

taking appropriate steps to ensure VBA's position and manual guidance are consistent. This will not only assist claims processors but will rectify discrepancies between VBA's *Nehmer* consent decree interpretation and VBA's manual guidance that, as discussed above, are exposing VBA to litigation risk.

VBA's comments that the OIG erred by including an unknown number of veterans who did not serve in the Republic of Vietnam in its report findings reflects a misunderstanding of the OIG's analysis. The report noted that "36,125 of the 86,894 Vietnam War-era veterans were entitled to approximately \$836.8 million in unpaid benefits based on serving in Vietnam or its designated waters and meeting *Nehmer* eligibility under the NDAA." In other words, the estimated 36,125 veterans who were eligible for the \$836.8 million in benefits were all shown to have definitively served in Vietnam or its designated waters. If a veteran was shown to have foreign service during the Vietnam War, but the service was not confirmed to be in Vietnam, they were not part of the 36,125 estimate and had no monetary effect estimated. Veterans shown to have foreign service during the Vietnam War, but no location specified, were part of estimates reporting they were *potentially* entitled to benefits. This final report clarified the analysis further.

Regarding recommendations 2 and 3, VBA provided acceptable action plans. The OIG will monitor VBA's progress and follow up on VA's implementation progress until adequate documentation has been provided to demonstrate sufficient implementation steps have been taken.

Appendix A: Scope and Methodology

Scope

The VA Office of Inspector General (OIG) team conducted its review work from February 2023 through February 2024. The team reviewed two statistical samples of veterans: the Veterans Health Administration (VHA) dataset and the Camp Lejeune dataset. To be in scope, the VHA dataset consisted of veterans who

- served or may have served at least one day in the Republic of Vietnam (to include designated waters) from January 9, 1962, through May 7, 1975;
- had a rating bundle end product closed from September 25, 1985, to January 1, 2021;⁷⁵
- did not have an established control for Nehmer readjudications under the National Defense Authorization Act (NDAA) dated June 21, 2021;⁷⁶ and
- had medical records within VA's possession showing a diagnosis of an NDAA-covered disease—bladder cancer, hypothyroidism, or parkinsonism (without a definitive etiology other than herbicide exposure)—while a compensation or pension claim or appeal had a decision completed from September 25, 1985, to January 1, 2021.⁷⁷

Instances in which veterans' survivors had only pending dependency indemnity compensation or burial claims, and the service-connected death benefits were granted, were marked out of scope because these instances would not need readjudication.⁷⁸

To be in scope, the Camp Lejeune dataset included veterans who

- served or may have served at least one day in the Republic of Vietnam (to include designated waters) from January 9, 1962, through May 7, 1975;
- did not have an established control for Nehmer readjudications under the NDAA dated June 21, 2021;

⁷⁵ The end product system is the primary workload monitoring and management tool for the Veterans Benefits Administration (VBA). Rating bundle end products include claims for disability compensation, dependency and indemnity compensation for survivors, and veterans' pension benefits, including both original and supplemental claims.

⁷⁶ VBA noted they would batch-establish end products with a date of claim of June 21, 2021, for all veterans identified as potential Nehmer class members with potential entitlement under the NDAA.

⁷⁷ In the case of parkinsonism, if the veteran received a diagnosis of Parkinson's disease that was service connected, and no earlier effective date could be granted, then the claim was out of the review scope.

⁷⁸ Dependency and indemnity compensation is a tax-free monetary benefit paid to eligible survivors of military service members who died in the line of duty or eligible survivors of veterans whose death resulted from a service-related injury or disease.

- had an NDAA-covered disease from September 25, 1985, to January 1, 2021, that was service-connected based on exposure to contaminated water at Camp Lejeune;
- had a compensation or pension claim or appeal completed with a decision from September 25, 1985, to January 1, 2021; and
- did not have an original claim dated March 1, 2017, or later (as no earlier effective date would be warranted).

To ensure findings would not be duplicated, the team removed samples that met the criteria for the Camp Lejeune dataset from the VHA dataset.

Methodology

To accomplish the objective, the OIG team completed the following actions:

- Reviewed applicable laws, policies, and procedures related to the Veterans Benefits Administration (VBA)'s process of identifying Vietnam veterans in the Nehmer class who could qualify for readjudication and retroactive benefits under the NDAA.
- Assessed statistically random samples from populations of Vietnam War-era veterans who had a compensation or pension claim or appeal completed from September 25, 1985, to January 1, 2021, and
 - had VHA medical records showing a diagnosis of an NDAA-covered disease (the VHA dataset) or
 - had bladder cancer that was presumptively service-connected due to exposure to contaminated water at Camp Lejeune (the Camp Lejeune dataset).
- Interviewed and obtained information from managers and staff from VA's central office and personnel in the following VA regional offices: Seattle, Washington; Louisville, Kentucky; Des Moines, Iowa; and Chicago, Illinois.
- Interviewed representatives from the National Veterans Legal Services Program.

Scope Limitations

The VBA corporate database used to identify the populations for the OIG's review only had data going back to May 16, 2001. Due to this data limitation, the team could not identify all veterans who submitted claims before May 16, 2001.

Internal Controls

The team assessed VBA's internal controls significant to the objective. This included an assessment of the five internal control components: control environment, risk assessment, control activities, information and communication, and monitoring.⁷⁹ In addition, the team reviewed the principles of internal controls as associated with the objective. The team identified the following component and three principles as significant to the objective.⁸⁰ The team identified internal control weaknesses during this review and proposed recommendations to address the following control deficiencies in the Information and Communication component:

- Principle 13: Management should use quality information to achieve the entity's objectives.
- Principle 14: Management should internally communicate the necessary quality information to achieve the entity's objectives.
- Principle 15: Management should externally communicate the necessary quality information to achieve the entity's objectives.

Fraud Assessment

The review team assessed the risk that fraud and noncompliance with provisions of laws, regulations, contracts, and grant agreements, significant within the context of the review objectives, could occur during this review. The team exercised due diligence in staying alert to any fraud indicators by

- identifying laws, regulations, and procedures related to the review subject matter to help detect noncompliance or misconduct;
- completing the OIG Fraud Indicators and Assessment Checklist; and
- reviewing relevant OIG hotline complaints for related reports of fraud.

The OIG did not identify any instances of fraud or potential fraud during this review.

Data Reliability

The review team used data from VBA and computer-processed data from VBA's corporate database and VHA's corporate data warehouse. To test for data reliability, the team assessed data missing from key fields, obvious duplication of records, alphabetic or numeric characters in

⁷⁹ Government Accountability Office, *Standards for Internal Control in the Federal Government*, GAO-14-704G, September 2014.

⁸⁰ Since the review was limited to the internal control components and underlying principles identified, it may not have disclosed all internal control deficiencies that may have existed at the time of this review.

incorrect fields, illogical relationships among data elements, and data outside the time frame requested. For the VHA dataset, the team compared veterans' names, file numbers, and record of diagnoses. For the Camp Lejeune dataset, the team compared veterans' names, file numbers, and diagnostic codes. The team also used information from electronic claims folders to review completed dates from the data received in the reviewed samples from both datasets.

Testing of the data disclosed that the data were sufficiently reliable based on the review objectives. Comparison of the data with information from the electronic claims folders disclosed no problems with data reliability.

Government Standards

The OIG conducted this review in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation*.

Appendix B: Statistical Sampling Methodology

Approach

To accomplish the objective of determining the extent to which the Veterans Benefits Administration (VBA) identified potential Vietnam veterans in the Nehmer class who could qualify for readjudication and retroactive benefits under the National Defense Authorization Act (NDAA), the team assessed statistically random samples from populations of Vietnam War-era veterans who from September 25, 1985, to January 1, 2021,

- had a compensation or pension claim or appeal completed and Veterans Health Administration (VHA) medical records showing a diagnosis of an NDAA-covered disease (the VHA dataset) or
- had bladder cancer that was presumptively service-connected due to exposure to contaminated water at Camp Lejeune (the Camp Lejeune dataset).

For the VHA dataset, the end product codes used to identify completed claims and appeals were 110, 140, 180, 010, 020, 030, 070, 040, and 335. To exclude veterans who had been part of VBA's batch-established review, the team did not include claims that had an end product of 688 with a date of claim of June 21, 2021. VBA noted they would batch-establish an end product of 688 with a date of claim of June 21, 2021, for all cases identified as potential Nehmer class members with prospective entitlement under the NDAA.

In addition, the VHA dataset included International Classification of Diseases (ICD) codes listed in table B.1.⁸¹

⁸¹ The International Classification of Diseases (ICD), Clinical Modification is a system of codes and terminology that arranges diseases and injuries into groups according to established criteria.

Table B.1. List of ICD Codes Included in the VHA Dataset

| Disease covered | ICD, tenth revision, clinical modification code | ICD, ninth revision, clinical modification code |
|------------------------|--|--|
| Bladder cancer | R97.1 | 233.7 |
| | D41.4 | 236.7 |
| | C67.5 | 239.4 |
| | D09.0 | 188 |
| | C67 | 188.1 |
| | C67.1 | 188.2 |
| | C67.2 | 188.3 |
| | C67.3 | 188.4 |
| | C67.4 | 188.5 |
| | C67.6 | 188.8 |
| | C67.7 | 188.9 |
| | C67.8 | V10.51 |
| | C67.9 | |
| Hypothyroidism | E03.8 | 244.9 |
| | E03.9 | 244.3 |
| | E03 | 244.8 |
| | E03.2 | 244 |
| | E03.0 | 244.1 |
| | E89.0 | 244.2 |
| | E03.3 | |
| | E02 | |
| Parkinsonism | E03.1 | |
| | G21.9 | 332.1 |
| | G21.19 | 094.82 |
| | G21.3 | |
| | G21.8 | |
| | G21.4 | |
| | G21 | |
| | G21.11 | |
| | G21.1 | |
| | G21.2 | |

Source: <https://www.cms.gov/medicare/coding-billing/icd-10-codes/2022-icd-10-cm> and
<https://www.cms.gov/Medicare/Coding/ICD9ProviderDiagnosticCodes/codes>

For the Camp Lejeune dataset, the end product codes used to identify completed claims and appeals were 110, 120, 140, 170, 180, 010, 020, 030, 070, 040, 165, and 335. In addition, the Camp Lejeune dataset included veterans who had diseases that were service-connected on a presumptive basis for at least one of the following diagnostic codes: 7343 or 7528 (bladder cancer); 7903 (hypothyroidism); and 8004 (parkinsonism).⁸²

For both the VHA and Camp Lejeune datasets, veterans were selected who served at least one day from January 9, 1962, through May 7, 1975.

Population

The review population for the VHA dataset included 240,180 veterans' medical records who served at the time of the Vietnam War. For the purposes of the review, the team estimated the population that met scope requirements to be 90,800 veterans. The difference between the review population and the estimated population occurred because the team estimated 149,380 veterans to be out of scope because they did not meet requirements for reasons such as the following:

- The veteran was determined not to have served in Vietnam or designated waters.
- The veteran's medical records did not show a diagnosis of an NDAA-covered disease when a compensation or pension claim was pending from September 25, 1985, to January 1, 2021.

The review population for the Camp Lejeune dataset included 357 veterans' records. For the purposes of the review, the team estimated the population that met scope requirements to be 226 veterans. The difference between the review population and the estimated population occurred because the team estimated 131 records to be out of scope because they did not meet scope requirements for reasons such as the veteran was determined not to have served in Vietnam or designated waters.

Sampling Design

The team coordinated with the VA Office of Inspector General (OIG) statisticians to review a statistical sample from each dataset. The VHA dataset comprised 246 veterans in its sample, and the Camp Lejeune dataset comprised 150 veterans in its sample, for a total of 396 samples reviewed. In both reviews, samples were randomly selected. Sample sizes for the respective reviews were based on a 90 percent confidence level with the following design precisions and expected finding rates:

⁸² Diagnostic codes are numbers showing the basis for ratable disabilities for the purpose of statistical analysis in VA.

- The VHA dataset had a design precision of 4.8 percent and an expected finding rate of 30 percent (80 percent out of scope rate).
- The Camp Lejeune dataset had a design precision of 4.1 percent and an expected finding rate of 20 percent (60 percent out of scope rate).

Weights

Samples were weighted to represent the population from which they were drawn, and the weights were used in the estimate calculations. For example, the team calculated estimates by first summing the sampling weights for all sample records that contained the given finding, then dividing that value by the sum of the weights for all sample records.

Projections and Margins of Error

The projection is an estimate of the population value based on the sample. The associated margin of error and confidence interval show the precision of the estimate. If the OIG repeated this review with multiple sets of samples, the confidence intervals would differ for each sample but would include the true population value 90 percent of the time.

The OIG statisticians employed statistical analysis software to calculate estimates, margins of error, and confidence intervals that account for the complexity of the sample design.

The sample size was determined after reviewing the expected precision of the projections based on the sample size, potential error rate, and logistical concerns of the sample review. While precision improves with larger samples, the rate of improvement decreases significantly as more records are added to the sample review.

Figure B.1 shows the effect of progressively larger sample sizes on the margin of error.

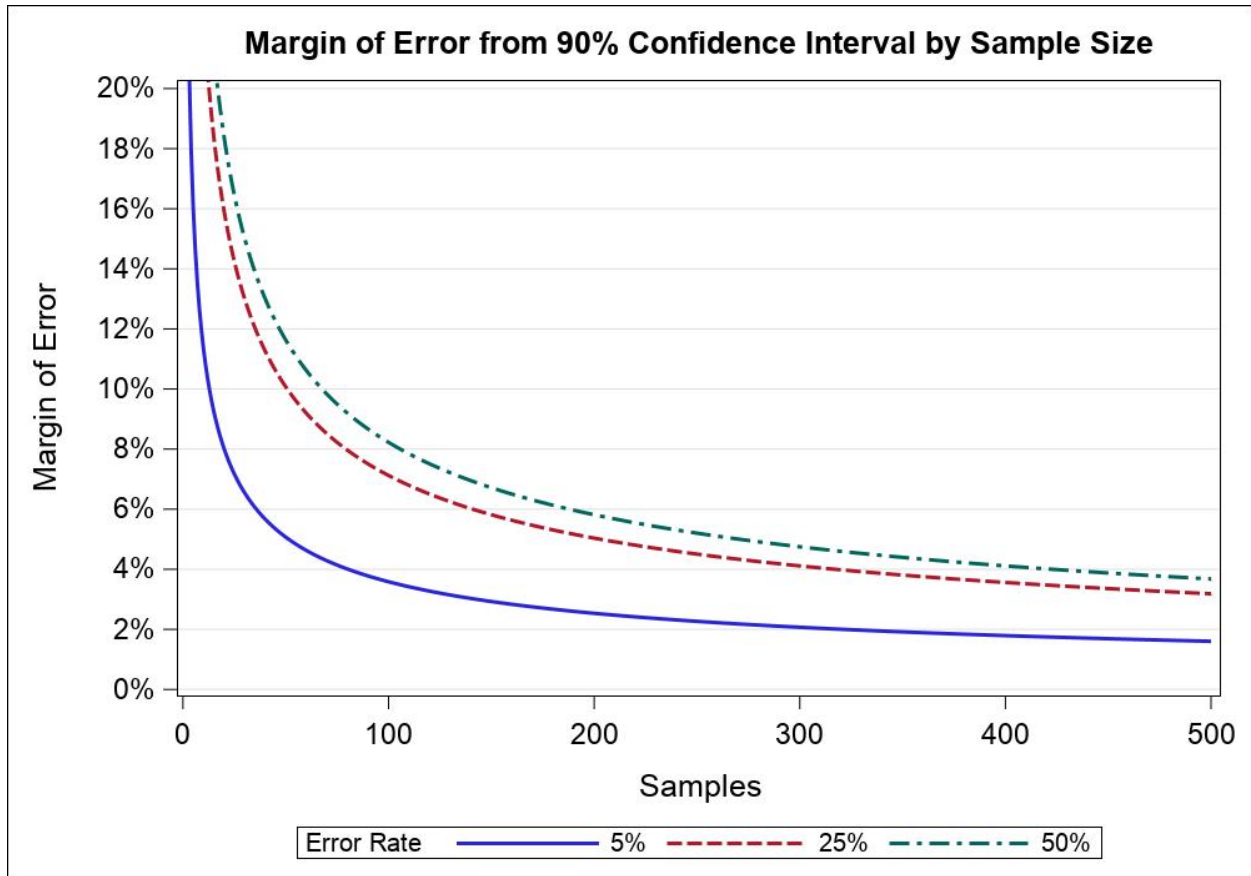


Figure B.1. Effect of sample size on margin of error.

Source: VA OIG statisticians' analysis

Projections

The tables below detail the review team's analysis and projected results.

Table B.2. Statistical Projections Summary for Veterans in the VHA Dataset

| Estimate name | Estimate number | 90 percent confidence interval | | | Count from sample (denominator for each estimate) |
|---|-----------------|--------------------------------|-----------------|------------------|---|
| | | Margin of error | Lower limit | Upper limit | |
| Veterans found to be in scope | 90,800 (38%) | 12,285 (5%) | 78,515 (33%) | 103,085 (43%) | 93 (246) |
| Veterans not identified by VBA for readjudication | 86,894 | 3,191 | 83,703 | 90,086* | 89 (93) |

| Estimate name | Estimate number | 90 percent confidence interval | | | Count from sample (denominator for each estimate) |
|--|-----------------|--------------------------------|---------------|-----------------|---|
| | | Margin of error | Lower limit | Upper limit | |
| Veterans who warranted readjudication and missed benefits | 36,125 | 7,589 | 28,536 | 43,714 | 37 (89) |
| Amount in payments missed by veterans who warranted readjudication | \$836,809,722 | \$325,841,808 | \$510,967,914 | \$1,162,651,530 | 37 (37) |
| Veterans who warranted readjudication and missed ongoing monthly benefits | 13,669 | 4,930 | 8,739 | 18,599 | 14 (37) |
| Amount in ongoing monthly payments missed by veterans who warranted readjudication | \$5,078,098 | \$2,289,441 | \$2,788,657 | \$7,367,540* | 14 (14) |
| Average amount of ongoing monthly payments missed by veterans who warranted readjudication | \$372 | \$167 | \$204* | \$539 | 14 (14) |
| Veterans who could warrant readjudication and potentially missed benefits | 28,314 | 7,217 | 21,097 | 35,531 | 29 (89) |
| Veterans who warranted readjudication but did not miss benefits | 22,456 | 6,741 | 15,715 | 29,197 | 23 (89) |

| Estimate name | Estimate number | 90 percent confidence interval | | | Count from sample (denominator for each estimate) |
|--|-----------------|--------------------------------|-----------------|-----------------|---|
| | | Margin of error | Lower limit | Upper limit | |
| Veterans who did not receive notification letters regarding NDAA and Nehmer eligibility | 88,847 | 2,282 | 86,565 | 91,129 | 91 (93) |
| Veterans whose claims were not readjudicated and had medical records in their claims files showing a diagnosis of an NDAA condition while a claim was pending during the review period | 69,320 (80%) | 6,185 (7%) | 63,135 (73%) | 75,505 (87%) | 71 (89) |

Source: VA OIG statisticians' projection of estimated population based on the team's findings.

* Projections and confidence intervals may not total precisely due to rounding.

Table B.3. Statistical Projections Summary for Veterans in the Camp Lejeune Dataset

| Estimate name | Estimate number | 90 percent confidence interval | | | Count from sample (denominator for each estimate) |
|---|-----------------|--------------------------------|---------------|--------------|---|
| | | Margin of error | Lower limit | Upper limit | |
| Veterans found to be in scope | 226 (63%) | 23 (7%) | 203 (57%)* | 249 (70%) | 95 (150) |
| Veterans not identified by VBA for readjudication | 226 | 0 | 226 | 226 | 95 (95) |
| Veterans who warranted readjudication and missed benefits | 102 | 19 | 83 | 122 | 43 (95) |
| Veterans who warranted readjudication but did not miss benefits | 114 | 19 | 95 | 134 | 48 (95) |

| Estimate name | Estimate number | 90 percent confidence interval | | | Count from sample (denominator for each estimate) |
|---|-----------------|--------------------------------|-----------------|--------------|---|
| | | Margin of error | Lower limit | Upper limit | |
| Amount in payments missed by veterans who warranted readjudication | \$7,549,485 | \$3,740,521 | \$3,808,964 | \$11,290,005 | 43 (43) |
| Veterans who warranted readjudication and missed ongoing monthly benefits | 19 | 10 | 9 | 29 | 8 (43) |
| Amount in ongoing monthly payments missed by veterans who warranted readjudication | \$25,898 | \$11,230 | \$14,668 | \$37,128 | 8 (8) |
| Average amount of ongoing monthly payments missed by veterans who warranted readjudication | \$1,360 | \$590 | \$770 | \$1,950 | 8 (8) |
| Veterans who did not receive notification letters regarding NDAA and Nehmer eligibility | 226 | 0 | 226 | 226 | 95 (95) |
| Veterans who had medical records in their claims files showing a diagnosis of an NDAA condition while a claim was pending during the review period | 224 | 4 | 220 | 228 | 94 (95) |
| Percentage of veterans whose claims warranted readjudication with medical records in their claims files showing a diagnosis of an NDAA condition while a claim was pending during the review period | 99 | 1 | 97 [†] | 100 | 94 (95) |

Source: VA OIG statisticians' projection of estimated population based on the team's findings. Note that projections and confidence intervals may not total precisely due to rounding.

*The margin of error varies from the previous row, as this projection is from the population of samples in scope. The previous row was from entire dataset population.

[†]Projections and confidence intervals may not total precisely due to rounding.

Appendix C: Monetary Benefits in Accordance with Inspector General Act Amendments

| Recommendation | Explanation of Benefits | Better Use of Funds | Questioned Costs ⁸³ |
|----------------|--|---------------------|--------------------------------|
| 1–3 | The OIG estimated not identifying veterans from the VHA dataset could result in \$836.8 million in missed payments. In addition, the OIG estimated approximately \$183 million in improper payments could occur over the next three years unless VBA takes corrective action. | \$0 | \$1 billion |
| 1–3 | The OIG estimated not identifying veterans from the Camp Lejeune dataset could result in \$7.5 million in missed payments. In addition, the OIG estimated approximately \$932,000 in improper payments could occur over the next three years unless VBA takes corrective action. | \$0 | \$8.4 million |
| | Total | \$0 | \$1 billion |

Note: If VBA staff do not take corrective action to prevent underpayments, as estimated in tables B.2 and B.3 in appendix B and based on rates at the time of the review, this could lead to an estimated \$183.7 million in improper payments over the next three years. The three-year projection is an extrapolation of the monthly estimate of \$5 million as noted in table B.2 and \$25,900 as noted in table B.3. The OIG typically expects all recommendations to be fully implemented within one year. As VBA is still processing NDAA Nehmer-related claims more than two years after they began processing them, the OIG believes it is appropriate to project the monetary impact for three years. The three-year projection for fiscal years 2023 through 2025 merely highlights the significant impact if the recommendations are not fully implemented.

⁸³ The OIG questions costs when VA action or inaction (such as spending or failure to fully compensate eligible beneficiaries) is determined by the OIG to violate a provision of law, regulation, contract, grant, cooperative agreement, or other agreement; when costs are not supported by adequate documentation; or when they are expended for purposes that are unnecessary or unreasonable under governing authorities. Within questioned costs, the OIG must, as required by section 405 of the IG Act, report unsupported costs. Unsupported costs are those determined by the OIG to lack adequate documentation at the time of the audit. To calculate the overall questioned costs, the team added unrounded estimates for the VHA dataset (\$836,809,722) and the Camp Lejeune dataset (\$7,549,485) and then rounded the sum (\$844,359,207) to \$844.4 million. Of the \$844.4 million in questioned costs, \$0 were unsupported costs.

Appendix D: VA Management Comments

Department of Veterans Affairs Memorandum

Date: March 22, 2024

From: Under Secretary for Benefits (20)

Subj: Office of Inspector General (OIG) Draft Report - VBA Did Not Identify All Vietnam Veterans Who Could Qualify for Retroactive Benefits [Project No. 2023-01266-AE-0049] — [VIEWS 11381602]

To: Assistant Inspector General for Audits and Evaluations (52)

1. Thank you for the opportunity to review and comment on the OIG draft report: VBA Did Not Identify All Vietnam Veterans Who Could Qualify for Retroactive Benefits. The Veterans Benefits Administration (VBA) provides the attached response to the draft report.

The OIG removed point of contact information prior to publication.

(Original signed by)

Joshua Jacobs

Attachment

Attachment

Veterans Benefits Administration (VBA)
Comments on OIG Draft Report
VBA Did Not Identify All Vietnam Veterans Who Could Qualify for
Retroactive Benefits

VBA provides the following management comments:

Overview

In the *Nehmer* litigation, VA entered into a consent decree requiring it to readjudicate previous final denials for claims it later adds to its list of presumptive conditions associated with exposure to herbicides in the Republic of Vietnam. If a claim was previously denied but the claimed condition later became a presumptive condition, *Nehmer* allows and requires VA to readjudicate that claim as though the presumption had been in effect as of the date of the previous claim. VA must do this on its own initiative, without any further requirement for the claimant to file a current claim. If the Veteran has died in the intervening years, VA must pay benefits to a set of survivors broader than those authorized by statute, including estates.

To the extent the OIG report functions as quality control, making sure that all Veterans eligible for payment under the scope of the *Nehmer* consent decree as properly understood are identified, VA agrees with it, and indeed appreciates OIG's efforts to make sure that no Veteran or survivor who is entitled to a payment fails to receive it due to administrative error.

However, the Veterans Benefits Administration (VBA) and the Office of General Counsel (OGC) cannot agree with the scope of the *Nehmer* consent decree articulated in the report. OIG errs on the question of what counts as a previous final denial for purposes of triggering VA's *Nehmer* obligations. Specifically, OIG incorrectly concludes that medical records anywhere in VA's health care system at the time of a prior claim can trigger the requirements of the stipulation regardless of whether those records were relevant to the claim or associated with the claim file. OIG further errs by including an unknown number of Veterans who did not serve in the Republic of Vietnam in its report. Compounding these errors, OIG makes no effort to differentiate which Veterans may be deserving of a readjudication as a matter of quality control under a correct understanding of the *Nehmer* consent decree, and which Veterans would only be included if one adopts OIG's expanded understanding of *Nehmer*.

Claims Eligible for Readjudication under *Nehmer*

Certainly any explicitly claimed and denied condition qualifies as a previous final denial for *Nehmer* purposes. The question is what conditions not explicitly claimed may also be included. Under rules implementing the statutory law that VA ordinarily administers, the mere presence of a condition in a veteran's medical records is insufficient to constitute an original claim or establish one by operation of law. See *MacPhee v. Nicholson*, 459 F.3d 1323, 1326 (Fed. Cir. 2006) (in the bygone informal claim era, a medical report may be considered a claim "when the report relates to a disability for which service connection has previously been established"); *Brokowski v. Shinseki*, 23 Vet. App. 79, 86 (2009) ("[T]he use of the phrase 'all disabilities of record' is insufficient to satisfy the specificity required by § 3.155(a)'s requirement that a claim must 'identify the benefit sought.'"). Therefore, this is the rule that applies unless *Nehmer* displaces it.

VA's obligations under the *Nehmer* consent decree are outlined directly from the stipulation, which OIG has repeatedly mischaracterized in its report.

In several instances, OIG provides recitations of the procedures and processes VA undertakes pursuant to the consent decree – which the parties entered into in 1991 – but cites the current M21-1. This fails to acknowledge that the present-day manual does not reflect a contemporaneous understanding of the M21-1's relevant provisions at the time the parties entered the consent decree. Rather, per footnote 1 of the consent decree, the readjudication provisions apply to cases where “the disease or condition 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.” This is substantially narrower than OIG's interpretation of the consent decree throughout its report, which is that *any* medical evidence within VA's possession – regardless of whether it was in the claimant's claims file or required to be included in the claims file as part of the development of a pending claim – of any administration within VA sufficiently triggers VA's *Nehmer* obligations. To this point, paragraph 46.02, as it existed at the time the consent decree was signed, limited the diseases or conditions required to be coded in a rating decision to “[a]ll disabilities *claimed*” or “*noted*” at the time the rating decision was issued (emphasis added), with certain enumerated exceptions. Further, paragraph 46.02 refers to paragraph 49.18 by reference. Paragraph 49.18 stated that “[d]iagnostic codes will be assigned, in accordance with the Schedule for Rating Disabilities, for disabilities *considered by the rating board* in granting or denying entitlement.” (emphasis added). Taken together, paragraphs 46.02 and 49.18 require the coding of conditions explicitly claimed, and those that the rating board considered or was required to consider. It necessarily follows that if a condition was neither claimed nor considered by the rating board, then it would not be coded in the rating decision pursuant to paragraph 46.02.

This read of the consent decree is consistent with VA's duty to assist benefits claimants in obtaining and developing record evidence. Under the authority that existed at the time the parties entered into the consent decree, VA assisted claimants in “developing the facts pertinent to the claim,” see 38 U.S.C. § 5107(a) (1991); 38 C.F.R. § 3.159(a) (1990), and “necessary evidence” to support the claim. 38 C.F.R. § 3.159(b) (1990). Presently, VA's duty to obtain records in developing a claim is similarly limited to records that are “relevant to the claim.” See 38 U.S.C. § 5103A(c).⁸⁴ Although the statutory and regulatory citations and language may have changed over the years, VA's obligation to associate records with a claim is nevertheless limited to evidence relevant to that claim. See *Golz v. Shinseki*, 590 F.3d 1317, 1321 (2010) (“The language of [38 U.S.C. § 5103A] is explicit: not all medical records... must be sought – only those that are relevant to the veteran's claim. To conclude that all medical records... are relevant would render the word ‘relevant’ superfluous in the statute.”). As such, to the extent the Veterans Health Administration (VHA) was in possession of a medical record containing a diagnosis of a subsequently covered condition, and that record was not related to a claimed or considered condition at the time of a prior rating decision, the record alone would be insufficient to trigger the *Nehmer* consent decree.

At bottom, in *Nehmer*, VA committed to readjudicate previously denied claims that later became presumptive conditions, and to liberally construe what would count as a previously denied claim. VA did *not* commit to discard the straightforward principles of relevance discussed above and effectively turn medical records unrelated to any contemporaneously pending adjudicative proceeding into claims. But that is precisely what OIG has done.

Moreover, we have concerns about OIG's reliance on the M21-1 as the primary authority in describing VA's *Nehmer* obligations, rather than as an interpretive document. To the extent there is a conflict between the consent decree and VA's interpretation within the M21-1, the M21-1 is not substantive law

⁸⁴ See *Holliday v. Principi*, 14 Vet. App. 280, 285 (2001), *overruled by* *Kuzma v. Principi*, 341 F.3d 1327 (Fed. Cir. 2003) (noting that The Veterans Claims Assistance Act of 2000 transferred the duty-to-assist provisions from section 5107 to new section 5103A).

that supplants the consent decree. See *Guerra v. Shinseki*, 642 F.3d 1046, 1050 (Fed. Cir. 2011) (M21-1 is “not intended to establish substantive rules” and must yield to any “formal expression of the agency’s position”). The terms of the consent decree and subsequent court orders interpreting the decree are what control the parties’ obligations. See *Nehmer v. U.S. Dep’t of Veterans Affs.*, 494 F.3d 846, 860 (9th Cir. 2007) (“[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 and transfer it to the Federal Circuit simply by issuing a regulation interpreting that order or declining to follow it.... [A] party—whether a private or public entity—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.”). What the Ninth Circuit made clear in the context of enforcing VA’s obligations under the consent decree remains equally true in the context of OIG taking the view that VA has expanded them through the current M21-1 provision. But the analytically proper way to resolve this matter is to look to the terms of the consent decree and the documents it directly incorporates. To the extent there is any tension between the consent decree and the current M21-1, the consent decree governs. We have not found any direct support for OIG’s proposition – that medical records generated by VHA showing a diagnosis of an NDAA-covered disease that were unrelated to the previously denied claim can be a prior final denial for purposes of triggering VA’s *Nehmer* obligations – in the decree, the historical M21-1 provisions cited in the consent decree, or any of the *Nehmer* court or Ninth Circuit opinions construing and interpreting the consent decree.

OIG’s interpretation of the *Nehmer* consent decree is at odds with the text of the consent decree, its enforcement history in the courts, and the parties’ understanding of the agreement. To this point, the National Veterans Legal Services Program (NVLSP), which represents the *Nehmer* plaintiffs, filed an amicus brief in March 2021 with the United States Supreme Court in *Sellers v. McDonough* (http://www.supremecourt.gov/DocketPDF/20/20-1148/172894/20210324164450886_NVLSP%20-%20Amicus%20Brief%20-%20Sellers%20v.%20McDonough%20-%20Final.pdf), stating that “paragraph 46.02 of the M21-1 Manual required agency officials to evaluate whether service-connected disability compensation or non-service-connected pension benefits were warranted for *all* of the disabilities noted in the veteran’s VA claims file,” not all disabilities noted in the veteran’s VHA records. Br. at 15 (second emphasis added). This statement is consistent with the understanding of the consent decree’s requirements shared by OGC and VBA over the last 30+ years, and demonstrates that neither party to the *Nehmer* litigation has understood the consent decree to be as expansive as OIG’s interpretation.

Service in the Republic of Vietnam

Additionally, we note that OIG’s conclusions regarding which Veterans are entitled to *Nehmer* readjudications do not distinguish between Veterans who served in the Republic of Vietnam from Veterans who served outside the United States in countries other than the Republic of Vietnam. See, e.g., Report at p.11 (stating that veterans with “[f]oreign service shown, but location not identified” were “[i]n scope”); p. 12 (providing OIG’s estimate of 86,894 veterans with a diagnosis of an NDAA-covered disease “who served, or may have served, in Vietnam,” and concluding that “36,125 of the 86,894 Vietnam War-era veterans were entitled to approximately \$836.8 million in unpaid benefits”) (emphasis added); p. 20 (describing the scope of OIG’s dataset as veterans who “served or may have served at least one day in the Republic of Vietnam (to include designated waters) from January 9, 1962, through May 7, 1975) (emphasis added). The *Nehmer* consent decree does not apply to all Veterans with Vietnam-era service; it is limited to Veterans with verified service in the Republic of Vietnam. As the *Nehmer* court made clear, “while the consent decree does not use the words ‘Republic of Vietnam,’ its applicability turned on veteran eligibility for benefits under the Agent Orange Act, and so its provisions are limited, like the Act, to veterans who ‘served in the Republic of Vietnam.’” *Nehmer v. United States Dep’t of Veteran Affairs*, 2020 WL 6508529, at *3 (N.D. Cal. Nov. 5, 2020). Given the apparent failure to

account for, or otherwise verify, Veterans' duty stations in drafting this report, we have serious concerns that OIG's report of 36,125 Veterans being owed \$836.8 million in unpaid benefits overstates the number of impacted Veterans and creates an expectation of payment that is not authorized under statute or under the current understanding of the *Nehmer* consent decree.

We note that at various points OIG's report implies that VA need not readjudicate claims for each of the Veterans identified in the two datasets cited. See, e.g., Report at p. v (asserting there are claims by veterans in the VHA and Camp Lejeune datasets that "potentially warrant readjudication" under *Nehmer*). However, this speculative language is at odds with the more definitive points in the report that state, unequivocally, that the Veterans in question are not only entitled to readjudications, but to over \$830 million in benefits. See, e.g., Report at p. v ("For the VHA dataset, the team also estimated 36,125 Vietnam veterans or their survivors were entitled to approximately \$836.8 million in unpaid benefits."); p. 12 (estimating that "13,669 [veterans in the VHA data set] were collectively entitled to an ongoing total of \$5.1 million per month"); p. 16 (estimating that "102 of the 226 [Camp Lejeune] veterans were entitled to more than \$7.5 million in benefits"); p. 19 (concluding that, until VBA readjudicates veterans' claims using "methodologies similar to [OIG]" then "veterans in the VHA and Camp Lejeune datasets may not receive benefits to which they are entitled").

Nehmer Displaces Statutory Law

Nehmer has three core features that are irreconcilable with the statutory law VA ordinarily administers: (1) sua sponte action without a currently pending claim (2) a retroactive effective date notwithstanding the finality of the previous claim and (3) payments to remote survivors. Because *Nehmer* displaces statutory law whenever it applies, VA cannot simply expand *Nehmer* solely on its own initiative, as OIG seems to assume. Accordingly, VA's recognition that it could not sua sponte readjudicate claims of Veterans who are not *Nehmer* class members is not only consistent with the consent decree, but with statutory and constitutional restrictions on VA's authority to pay compensation benefits.

Under the Appropriations Clause of the Constitution, only Congress is vested with power to allocate public monies: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" Constitution, Art. I, § 9, cl. 7. As the Supreme Court has explained, "[m]oney may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute." *OPM v. Richmond*, 496 U.S. 414, 424 (1990). As it pertains to the payment of compensation benefits, Congress explicitly requires those funds to be disbursed in accordance with Veterans' benefits statutes. See, e.g., Pub. L. 109-114, Title II (authorizing \$33.8 billion for, among other programs, "the payment of compensation benefits to or on behalf of veterans... as authorized by law (38 U.S.C. 107, chapters 11, 13, 18, 51, 53, 55, and 61)"). To apply *Nehmer* when it has not actually been triggered would violate these fundamental structural limits and any payment on that basis would be an unauthorized use of Federal funds.

The following comments are submitted in response to the recommendations in the OIG draft report:

Recommendation 1: Ensure Veterans Benefits Administration staff use improved methodologies similar to the Office of Inspector General's review to identify eligible veterans, readjudicate claims, and send outreach letters to potential *Nehmer* class members who could qualify for retroactive benefits under the National Defense Authorization Act.

VBA Response: Non-concur. In the *Nehmer* litigation, VA entered into a consent decree requiring it to readjudicate previous final denials for claims it later adds to its list of presumptive conditions associated with exposure to herbicides in the Republic of Vietnam. If a claim was previously denied but the claimed

condition later became a presumptive condition, *Nehmer* allows and requires VA to readjudicate that claim as though the presumption had been in effect as of the date of the previous claim. VA must do this on its own initiative, without any further requirement for the claimant to file a current claim. If the Veteran has died in the intervening years, VA must pay benefits to a set of survivors broader than those authorized by statute, including estates.

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For additional information regarding VA's specific disagreements with OIG's interpretation, please see management comments, above.

VBA plans to establish a workgroup to determine how to leverage improved methods of identification, within the parameters of *Nehmer* identification established within the consent decree.

Target Completion Date: TBD

Recommendation 2: Ensure claims processors at screening sites understand the need to identify any claims that may warrant readjudication by meeting the *Nehmer* consent decree and subsequent court orders.

VBA Response: Concur. VBA will communicate identification responsibilities and provide training to employees at screening sites to clarify the responsibility for screening cases to fully meet the *Nehmer* duty to readjudicate.

Target Completion Date: September 30, 2024

Recommendation 3: Update the standard operating procedures to have staff consider whether veterans' medical records show a diagnosis of the now-covered herbicide-related diseases at the time of any prior disability benefits claim before January 1, 2021, regardless of whether a current claim is for a disease recognized by the National Defense Authorization Act.

VBA Response: Concur. VBA will update the procedures to have staff consider whether Veterans' medical records in the VBA claims folder show a diagnosis of the now-covered herbicide-related diseases at the time of any prior disability benefits claim before January 1, 2021, regardless of whether a current claim is for a disease recognized by the National Defense Authorization Act.

Target Completion Date: May 31, 2024

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| <p><i>For accessibility, the original format of this appendix has been modified to comply with Section 508 of the Rehabilitation Act of 1973, as amended.</i></p> |
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OIG Contact and Staff Acknowledgments

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