APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

NO. 16-2407

SAMANTHA J. CHANDLER,

Appellant,

v.

DAVID SHULKIN,
Secretary of Veterans Affairs,

Appellee

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STATEMENT OF THE ISSUES

1. Whether the BVA's refusal to award entitlement to an earlier effective date, hereinafter "EED", for service connection based on coronary artery disease diagnosed in 1990 because the "Veteran did not file a formal or informal claim for service connection prior to May 5, 1994" constitutes reversible error. The April and May 1990 treatment records were submitted to the VA and placed in the veteran's claims file prior to the December 10, 2012 RO's decision. Appellant claims that this is error and violative of the *Nehmer I* effective date and, therefore, must be reversed.

2. Whether the RO's and the BVA's refusal to pay retroactive compensation from 1990 through March 2012 is error and violative of the 1991 *Nehmer* Court Order.

3. Whether the BVA's failure to apply 38 C.F.R. § 3.816(c) and the applicable provisions of the VA Training Letter of 10-04 is clear and unmistakable error, hereinafter "CUE", when the Veteran demonstrated evidence through 1990 medical records, maintained in the claims file, prior to the December 10, 2012 decision is sufficient to code a condition that qualifies under the *Nehmer* provisions.

STATEMENT OF CASE

William L. Chandler, Veteran, served in the United States Army from October 25, 1966 to October 24, 1969. (R. at 85). The Veteran served 7 months and 23 days of combat infantry duty in the Republic of Vietnam. (R. at 85) He served as a combat field artillery operator until his honorable discharge on October 24, 1969. (R. at 85)

During said combat duty the Veteran received extensive fragment wounds as a result of hostile enemy action that led to experiencing daily traumatic events with continuous feelings of helplessness and imminent fear of death. He continued to suffer with nightmares and flashbacks of fellow personnel losing limbs from explosion and suffered depression, insomnia, anxiety and excessive stress that led to his chest pains and elevated blood pressure. His discharge records do not indicate any anxiety, mental health or coronary complications.

The Veteran returned home after Vietnam. He experienced extreme difficulty in establishing and maintaining social relationships and marriage. (R. 44) The Veteran was not able to obtain and maintain meaningful industrial relationships and continuous gainful employment as a construction laborer from discharge until approximately April 1990.

In the early 1990's the Veteran's chest pains progressed requiring treatment at the VA Medical Center, Waco, Texas, and transfer by ambulance to Hillcrest Baptist Medical Center located in Waco, Texas for emergency treatment and

admission. (R. at 208-40; R. at 242-83, R. at 284-340). He was diagnosed with myocardial infarction (IHD) after appropriate exam and testing. (R. at 211-12) He was readmitted to the VA Medical Center for a subsequent myocardial infarction on May 4, 1990. (R. at 284). The Veteran was not able to obtain or maintain heavy or medium exertion employment. He had numerous unsuccessful attempts at sedentary employment from May 1990 until April 1994 due to his unstable coronary artery disease. (R. at 906-07) In 1995, the Veteran filed a claim to receive service connection for said disease that prevented sedentary employment, but the VARO denied said claim due to a lack of evidence of military treatments and diagnoses for said disease.

The disease continued to worsen in 1995, through 1996, preventing light employment. (R. at 767-68, 774, 897). In 1999 the VA administered a thallium treadmill test that revealed the Veteran had severe left ventricle dysfunction with an ejection fraction of 25%. (R. at 11). The Veteran passed away on May 29, 2000 due to heart failure. (R. at 431).

Samantha J. Chandler, Appellant, is the biological daughter of the Veteran, William L. Chandler. She, through the undersigned counsel, appeals the April 8, 2016 decision of the Board of Veterans' Appeals, hereinafter "BVA" that denied entitlement to EED under *Nehmer I*; earlier than May 5, 1994, for the grant of presumptive service connection and retroactive benefit payments due to the

Veteran's April and May 1990 treatment by a VA and Private Cardiologist that diagnosed myocardial infarction requiring hospital admissions. Counsel submits Appellant's Initial Brief pursuant to Vet. App. R. 28(a) and presents the following substantial facts of record that indicate: (1) the Regional Office, hereinafter "RO" and the Board of Veterans Appeals, hereinafter "BVA" on two prior occasions, cognizantly refused to pay *Nehmer* retroactive compensation to appellant from the date disability arose, April 29, 1990, to the date of filing said claim on March 12, 2012. Appellant argues that said refusal violated the *Nehmer* 1991 Final Stipulation and Order at footnote (fn) 1; (2) the BVA refused at hearing and post-hearing to apply the effective date rules under 38 C.F.R. § 3.816(c) and the applicable provisions of the VA Training Guide Letter 10-04 (rev. ed. Feb. 10, 2011) to appellant's *Nehmer* claim which is CUE that renders the BVA's decision erroneous and requires reversal. Counsel represents that remand is not the appropriate remedy in this appeal. The RO and the BVA have each had two different opportunities to comply with the *Nehmer* Order, but have refused to do so.

The Veteran's previous wife timely filed a claim in 2000 for their minor daughter, Appellant, seeking dependents indemnity compensation, hereinafter "DIC" benefits due to his service connected post-traumatic stress disorder and hypertension that caused his death. The RO denied said claim and appeal was timely filed. (R. at 28-30, 31). Counsel was retained in 2005 to represent

Appellant. (R. at 483). A personal hearing was held at the RO and a subsequent 2007 RO decision awarded entitlement to DIC and DIC "accrued" benefit payments due to the Veteran's service connected PTSD being a contributory cause that combined to significantly hasten his death. (R. at 413-15, R. at 401-04).

Further, in approximately 2011 or 2012, Appellant became dissatisfied with the RO's failure to award benefits after the RO notified her by mail that she was more likely entitled to a completely separate retroactive payment, other than DIC "accrued" payments; specifically, *Nehmer* retroactive payments due to the Veterans herbicide exposure in Vietnam. (R. at 197-201). Appellant retained counsel to perfect her *Nehmer* claims. (R. at 363-65). Counsel reviewed the claims file and determined that she had not received any retroactive payment under *Nehmer*. On March 6, 2012 Appellant filed her initial claim for benefits under *Nehmer* for the Veteran's ischemic heart disease, hereinafter "IHD" due to his herbicide exposure in Vietnam. (R. at 346-49,351).

On December 12, 2012, the RO awarded entitlement to retroactive payment under *Nehmer* effective May 5, 1994 through May 29, 2000, but the RO erroneously issued an "accrued" pension back payment check for the total amount of $2, 284.00 purported to be the said retroactive payment due under *Nehmer*. (R. at 188-189). Appellant timely filed her notice of disagreement and a VA Form 9 was filed. Appellant claims that the RO decision is based upon CUE due to the

RO's failure to provide her with an effective date of 04/12/1990, which is the date the disability arose for IHD. Appellant asserted that she filed a claim for *Nehmer* benefits with the RO on 03/03/2012. (R. at 351). While her claim was pending, IHD diagnosis dated April 12, 1990 was added to the claims file on December 4, 2012. (R. at 208-240, R. at 242-83, R. at 284-340). The *Nehmer* claim was finally decided by the RO on December 10, 2012, without considering the 1990 IHD in the rating decision. (R. at 199-201). Appellant claims that the effective date under *Nehmer* footnote #1 is 1990. Also, the RO refused to apply 38 C.F.R. § 3.816(c) and the VA Training Letter 10-04 (revised Feb. 10, 2011) to her effective date claim under *Nehmer*. (R. at 194-96, R. at 208-240, R. at 242-83, R. at 284-341). Absent this CUE the EED under *Nehmer,* other than May 1994, would have been granted at the outset with a separate retroactive payment, but not a reopened "accrued" death pension claim. (38 C.F.R. § 1318). (R. at 194) Effective April 12, 1990 and April 5, 1990 a 100% disability rating was warranted because the veteran was unable to do more than sedentary work; and a 60% disability rating from November 5, 1990 through November 5, 1994, was warranted with an individual unemployability rating effective April 5, 1994 and entitlement to Special Monthly Compensation, hereinafter "SMC" under 38 U.S.C. § 1114(l). The Veteran, being so nearly helpless as to require the regular aid and attendance of another person from 1996 until his death, entitled him to same. 38 C.F.R. § 3.351(b) (2015).

(R.198-200). Appellant formally asked the BVA to review the specific issues stated in her VA Form 9 because the VA refused to apply the correct statutory and regulatory provisions to the relevant facts of her claim under *Nehmer*. (R.187). The BVA on April 18, 2016 affirmed the VA's refusal to comply with the Nehmer Court Order, footnote #1, by refusing to apply the EED rules under *Nehmer* and provide Appellant with the award of retroactive payment from April 12, 1990 through December 12, 2013. (R. at 2-14, R. 198). Appellant contends that remand is unnecessary in this claim because it would result in this Court unnecessarily imposing additional burdens on the Board and the Secretary with no benefits flowing to the Veteran. *Soyini v. Derwinski*, 1 Vet. App. 540, 546 (1991).

SUMMARY OF THE ARGUMENT

The BVA's refusal at a 2015 Travel Board Hearing and a subsequent April 8, 2016 determination to pay retroactive compensation to the Veteran, an IHD claimant and the estate of the deceased Veteran violated the applicable standard. See 38 C.F.R. § 3.816(f)(1); and *Nehmer v. Dept of Veterans Affairs*, No. CV-86-6160 at ¶ 5, n.1 (N.D. Cal. May 14, 1991) (Final Stipulation and Order); and applicable provisions of the VA's "*Nehmer* Training Guide-Letter" (rev. ed. Feb. 10, 2011) at 20-21. (R.8, 9). The BVA's decisions deprived Appellant from receiving her rights during this disability compensation proceeding. *Gray v.*

McDonald, 27 Vet. App. 313, 327 (2015); *Nehmer* v. *United States Veterans Administration*, Civ. No. 86-6160 (TEH) (Class Action Order Dec. 12, 2000).

ARGUMENT

The BVA denied entitlement to an EED for service connection for coronary artery disease (IHD) because it determined that the Veteran did not file a formal or informal application for service connection prior to May 5, 1994, and stated that the BVA was precluded as a matter of law from granting entitlement to an EED because the Veteran did not provide any communication indicating an intent to apply for compensation for heart disease prior to May 5, 1994. (R. at 5-6, 8). The BVA committed CUE because there was no intent requirement to establish a claim under 38 C.F.R. § 3.816(c)(2) (ii) at the time of this decision. Had it not been for this CUE in law at the time of said decision, it is unequivocal the BVA would have awarded the benefit sought and an EED under the *Nehmer* effective date rules. See VA "Nehmer Training Guide" (rev. ed. Feb. 10, 2011) at 20-21. *King v. Shinseki*, 26 Vet. App. 433, 441 (2014).

Clear and unmistakable error exists because the BVA violated the 1991 Court Order by refusing to find the *Nehmer* effective date regulations were applicable to the March 12, 2012 *Nehmer* claim. It is undisputed by the record in this case that the Veteran qualifies as a *Nehmer* class member with a qualifying covered herbicide disease listed in 38 C.F.R. § 3.309(e) (August 31, 2010). The

BVA, in reaching their determination, failed to discuss whether, under 38 C.F.R. § 3.816(c) and the applicable provisions of the *Nehmer* VA Training Letter, the Appellant unequivocally demonstrated the existence of a claim prior to May 5, 1994 sufficient to qualify under the *Nehmer* provisions. The "*Nehmer* VA Training Letter" 10-04 (revised Feb. 10, 2011) notes that if there was medical evidence of record sufficient to code a condition, then the condition qualifies as a claim under the *Nehmer* provisions. (R. at 198, 200, R. at 208-40, R. at 242-83, R. at 284-340). See VA Adjudication Procedure Manual (M21-1), ¶ 46.02 (1991).

The VA "*Nehmer* Training Letter" 10-04 provides that:

If the VA received medical records documenting a diagnosis of the now-covered disease, then the first rating decision issued after receipt of those records is deemed to have denied service connection for that condition, and the claim denied by that decision is deemed to have included a claim for the now-covered disease. Id. at 20-21. (R. at 198, R. at 208-240, R. at 242-283, R. at 284-341).

Appellant contends that the BVA erred in failing to discuss the *Nehmer* effective-date regulations because, contrary to the BVA's conclusion, the law governing effective dates does not necessarily preclude an EED in this case given the Veteran's status as a *Nehmer* class member. 38 C.F.R. § 3.816(c). *Damrel v. Brown*, 6 Vet. App. 242, 245 (1994).

Appellant represents that the BVA cognizantly violated the *Nehmer* Court Order in refusing to pay retroactive payment to appellant from April 29, 1990 through December 10, 2013, as required under 38 C.F.R. §§ 3.816; 3.816(f)(1). Instead of complying with said 1991 Order, the BVA upheld the RO 2007 accrued benefits payments to appellant for her 2000 DIC claim but purported it to be the *Nehmer* benefits retroactive payment by reopening said 2007claim. (R.at 194, R. at 9-10).This BVA determination is based on CUE. The appellant filed a claim in 2012 seeking retroactive payments under *Nehmer*, but the BVA misconstrued the provisions of 38 U.S.C. 5121(c) (2014) and 38 C.F.R. § 3.1000(c) (2014) to file claims for accrued benefits, (R. 9-11); applicable to *Nehmer* payments under 38 C.F.R. §§ 3.816; 3.816 (f)(2). It is clear that said BVA determination relied on an inaccurate factual premise and failed to apply the correct statutory and regulatory provisions at the time of said decision. Said decision was fatally flawed at the time it was made. *King v. Shinseki*, 26 Vet. App. at 441.

Counsel contends that, based on the BVA's refusal to consider and apply specified correct statutory and regulatory provisions in effect at the time of said decision to the correct and relevant facts in this claim, is not mere misinterpretation of facts. *Oppenheimer v. Derwinski*, 1 Vet. App. 370, 372 (1991). This is not a free standing claim, but a timely appeal to the BVA from a RO decision of December 10, 2012 that denied Appellant's March 3, 2012 claim. The RO, in 2012,

and the BVA in 2015 and 2016, refused to apply the *Nehmer* EED rules, and retroactive payment under *Nehmer* requires reversal because the BVA had two opportunities to either vacate with remand or vacate and issue a decision applying the provisions of 38 C.F.R. § 3.816 (f) and the applicable provisions of the VA Nehmer Training Guide. The BVA's decision is clearly erroneous. *Hicks v. Brown*, 8 Vet. App. 417,422 (1995). Absent the above and foregoing specifically stated multiple CUE's the benefits sought under Nehmer would have been granted at the outset. *King*, 26 Vet. App. at 442.; *Tucker v. West*, 11 Vet. App. 369, 374 (1998).

CONCLUSION

Appellant prays this Court reverse the decision of the BVA and award an earlier effective date of April 29, 1990 through March 12, 2012 with a retroactive compensation payment under *Nehmer* effective April 29, 1990 to March 12, 2012.

Respectfully submitted,

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Date: April 27, 2017

CERTIFICATE OF SERVICE

Pursuant to Rule 25 (c) a true and correct copy of Appellant's Brief was electronically served on this 27th day of April, 2017 to all parties of record.

/s/ Michael B. Roberts
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