

*Not published*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 18-7044

DOUGLAS A. CONSTANTINE,

APPELLANT,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before BARTLEY, GREENBERG, and MEREDITH, *Judges*.

**ORDER**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

On December 14, 2018, veteran Douglas A. Constantine appealed through counsel an October 31, 2018, decision of the Board of Veterans' Appeals (Board) that denied entitlement to an effective date earlier than August 31, 2010, for the award of service connection for coronary artery disease, concluding that the veteran was not entitled to the special effective date provisions provided to members of the class action suit *Nehmer v. U.S. Veterans' Admin.*, 118 F.R.D. 113, 115-16 (N.D. Cal. 1987). On August 28, 2020, this matter was referred to a panel of the Court, which held oral argument on November 4, 2020.

Before this Court, Mr. Constantine argued that the Board erred in concluding that he was not a member of the *Nehmer* class because the U.S. District Court of the Northern District of California, the *Nehmer* court, already decided that class relief, as provided for in the consent decree, *Nehmer v. U.S. Veterans' Admin.*, No. CV-86-6160, 1991 U.S. Dist. LEXIS 22110 (N.D. Cal. May 17, 1991), covered veterans, like himself, who were exposed to Agent Orange but did not serve in the Republic of Vietnam. We disagreed, concluding that Mr. Constantine's arguments about the geographic scope of the consent decree had not been previously addressed by the *Nehmer* court. *Constantine v. McDonough*, 35 Vet.App. 81, 90-91 (2022). Therefore, and because we concluded that Mr. Constantine's arguments involved fundamental questions about the scope of the certified class and VA's compliance with the consent decree, we abstained from addressing his arguments and held that the proper recourse for Mr. Constantine to pursue those novel arguments was to file a motion for enforcement of the consent decree with the *Nehmer* court. *Id.* at 89-93. Accordingly, we dismissed Mr. Constantine's appeal. *Id.* at 92-93.

Mr. Constantine appealed our decision to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), which set aside and remanded our decision. *Constantine v. McDonough*, No. 2022-1648, 2024 WL 4675441, at \*7 (Fed. Cir. Nov. 4, 2024). The Federal Circuit agreed with our principal conclusion that the *Nehmer* court has not litigated the issue of the consent decree's

coverage of non-Vietnam veterans and resolved that issue against the Government such that issue preclusion against VA would apply. *Id.* at \*5. However, the Federal Circuit held that we committed legal error by failing to consider the consequences of dismissing Mr. Constantine's appeal rather than staying the appeal and allowing the veteran to file a motion for enforcement in the *Nehmer* court. *Id.* at \*7. Thus, the Federal Circuit remanded the appeal for this Court "to provide Mr. Constantine a reasonable period for him to seek relief from the *Nehmer* court and to hold his appeal in abeyance during that period and, if he seeks relief, until final disposition of his request for that relief." *Id.* The Federal Circuit entered mandate on December 26, 2024.

Upon consideration of the foregoing, it is

ORDERED that Mr. Constantine file, within 45 days of the date of this order, notice with the Court that he has filed a motion for enforcement of the *Nehmer* consent decree with or otherwise sought relief from the U.S. District Court for the Northern District of California, providing the Court with pertinent documentation. It is further

ORDERED that proceedings in this matter are otherwise stayed pending further order of this Court.

DATED: January 14, 2025

PER CURIAM.

Copies to:

Christopher F. Attig, Esq.

VA General Counsel (027)