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U.S. DISTRICT COURT  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NEHMER,

Plaintiff,

v.

UNITED STATES DEPARTMENT  
OF VETERANS AFFAIRS,

Defendant.

No. C86-6160 TEH

ORDER DENYING  
DEFENDANTS' MOTION  
FOR CLARIFICATION

**INTRODUCTION**

By previous order of the Court, defendant United States Department of Veterans Affairs ("VA") has been ordered to pay certain retroactive benefits to class members. Where such class members are entitled to benefits but are deceased, the Court ordered benefits to be paid to the estates of the respective class members. Defendants now assert that the definition of the term "estate" is ambiguous and that the parties need clarification. As discussed below, there is no need for amplification, and defendants' motion is denied.

**BACKGROUND**

This case comprises a long-standing challenge to the United States government's regulations regarding compensation of Vietnam Veterans exposed to Agent Orange. The history of the case relevant to this motion begins on February 28, 2000, when defendants filed a motion requesting that the Court allow the VA to withhold certain amounts of

1 retroactive compensation for deceased class members. On December 12, 2000, the Court  
2 ruled that the parties' 1991 Final Stipulation and Order requires the VA to pay the estates of  
3 deceased class members the full amount of retroactive compensation owed while the class  
4 members were alive. The relevant portion of the December 12, 2000 Order provides as  
5 follows: "Defendants are ... ORDERED to pay compensation to the *estates* of deceased  
6 injured class members according to the same compensation formula as class members who  
7 are alive at the time VA pays the compensation due." December 12, 2000 Order at 20-21  
8 [emphasis added]. Defendants appealed this Order to the Ninth Circuit, without seeking a  
9 stay, and the Order was affirmed. See Nehmer v. U.S. Dept. of Veterans Affairs, 284 F.3d  
10 1158 (9th Cir. 2002). Defendants did not address the precise issue of the definition of the  
11 term "estate" before the Ninth Circuit.

12 During the pendency of the Ninth Circuit ruling, the parties agreed upon procedures  
13 for the payment of retroactive benefits. In the relevant stipulation the parties agreed that  
14 where retroactive benefits are due and the class member is deceased, defendants shall  
15 transmit any notice or payment to the first individual or entity in existence listed below:

- 16 (a) the class member's spouse;
- 17 (b) the class member's children (divided equally if more than one child exists);
- 18 (c) the class member's parents (divided equally if both parents are alive);
- 19 (d) the class member's estate.

20 See August 3, 2001 Second Stipulation and Order Setting a Timetable for Promptly Paying  
21 Retroactive Benefits to Class Members. Despite having agreed to implement the  
22 December 12 Order in this manner, defendants proceed in arguing their motion with the  
23 assumption that the December 12 Order may require payment directly to class members'  
24 estates, rather than to survivors in the first instance and estates only as a last resort.

25 On this basis, defendants now argue that payment to the estates of deceased veterans  
26 is both inappropriate and impractical. Defendants propose that the December 12 Order  
27 should be modified to state that where a class member has died before being compensated,  
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1 payment would be made to his or her survivors, defined as the surviving spouse, child(ren),  
2 and dependent parents, in that order. In the absence of any such survivors, the VA would  
3 have the discretion to pay a portion of the amount necessary to reimburse the person who  
4 bore the expense of the class member's last sickness and burial. These classifications of  
5 survivors and caretaker reimbursement are found in 38 U.S.C. § 5121(a)(2)-(5). Notably, in  
6 the absence of eligible survivors or caretakers, the VA would forego making any payment to  
7 the class members' estates.

8 **DISCUSSION**

9 Defendants motion seeks "clarification" of the December 12, 2000 Order. Defendants  
10 fail to cite any legal authority for such a ruling. Moreover, defendants fail to show any lack  
11 of clarity in the term "estate." Defendants were on notice that the motion leading up to the  
12 December 12 Order concerned payment to the estates of deceased class members, since the  
13 term "estate" was used repeatedly in the briefing. After the passage of over two years, and  
14 after issuance of the Ninth Circuit's opinion, it is far to late to take any claim of lack of  
15 clarity seriously.<sup>1</sup>

16 Defendants' true argument proceeds in its alternative motion for modification under  
17 Federal Rule of Civil Procedure 60(b). Rather than basing their motion on mistake, newly  
18 discovered evidence, or any of the other specific grounds under Rule 60(b), defendants rely on  
19 the rule's catch-all clause, allowing "relief from the operation of judgment" for any reason  
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22 <sup>1</sup> Plaintiffs argue that defendants' motion is barred because the District Court is divested of  
23 power to reconsider a question decided by the Court of Appeals. See City of Los Angeles, Harbor  
24 Div. v. Santa Monica Baykeeper, 254 F.3d 882, 888-889 (9th Cir. 2001). Plaintiffs correctly point  
25 out that the Ninth Circuit ruled that retroactive payments of deceased class members shall be paid to  
26 their estates. However, the Ninth Circuit did not specifically address the precise question raised in  
27 this motion as to the meaning of the term "estate." The Court finds resolution of plaintiffs' argument  
to be a close call. However, by viewing the motion, on its face, as having the potential of focusing  
on an ambiguity not yet directly addressed by the courts, and by setting aside for the moment the  
Court's ultimate conclusion that the question presented in the motion is essentially frivolous, the  
Court does believe that it properly has the power to entertain the motion.

1 other than those enumerated in the rule. Fed. Rule Civ. Proc. 60(b)(6). However, even the  
2 single case cited by defendants makes clear that the operation of this clause is reserved for  
3 "extraordinary" circumstances, lest it obliterate the faith in finality necessary for the operation  
4 of court orders generally. See Washington v. Penwell, 700 F.2d 570, 573 (9th Cir. 1983)  
5 ("[r]elief under Rule 60(b)(6) is extraordinary"); United States v. Alpine Land Reservoir Co.,  
6 984 F.2d 1047, 1049 (9th Cir. 1992), cert. denied 510 U.S. 813 (1993) ("The rule is to be  
7 utilized only where extraordinary circumstances prevented a party from taking timely action  
8 to prevent or correct an erroneous judgment.").

9       It is clear from defendants' argument that extraordinary circumstances do not exist  
10 here. First, the fact that the veterans benefits statute, 38 U.S.C. § 5121(a)(2)-(4), provides for  
11 the payment of benefits to survivors rather than estates, does not bind this Court in giving  
12 effect to the 1991 Final Stipulation and Order. As the Court has held previously, the  
13 Stipulation and Order is both a contract and a judgment, and congressional legislation does  
14 not restrict the Court in its enforcement. In addition, as the Court noted in the December 12  
15 Order, another provision of the U.S. Code, 38 U.S.C. § 503, overrides § 5121 in the present  
16 circumstances by expressly authorizing the VA to pay retroactive disability benefits to a  
17 surviving spouse, child of a veteran, or "any person" where the Secretary determines that  
18 benefits administered by the VA "have not been provided by reason of administrative error on  
19 the part of the Federal Government or any of its employees." December 12, 2000 Order at 20;  
20 see also Nehmer, 284 F.3d at 1162. Furthermore, the VA itself has agreed to pay benefits to  
21 deceased veterans' estates, without perceiving itself as being limited by the veterans benefits  
22 statute, in another class action. See Disabled American Veterans v. U.S. Dept. of Veterans  
23 Affairs, C.A. No. 91-CIV-1413 SWK (S.D.N.Y.), Final Stipulation and Order of Settlement  
24 and Dismissal, Dec. 8, 1993.

25       Second, defendants argue that the focus by the parties and the Court always has been  
26 limited to class members and survivors, without the inclusion of estates. Defendants  
27 emphasize that the stipulation setting a timetable for payment of retroactive benefits refers to  
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1 a determination of "whether the veteran or survivor class member is entitled" to such benefits.  
2 See February 12, 2001 Stipulation and Order Setting a Timetable for Promptly Paying Class  
3 Members Retroactive Benefits. However, defendants are confusing the definition of class  
4 members with who is entitled to compensation. The stipulation refers to the composition of  
5 the plaintiff class as including veterans and their survivors. See Nehmer I, 712 F.Supp. 1404,  
6 1408 (defining the class as "Vietnam veterans and survivors of veterans".) The stipulation  
7 does not even address who is entitled to compensation if the class member is deceased. Yet, a  
8 subsequent stipulation, which defendants conveniently ignore, specifically provides for  
9 payment to the estates of deceased class members. See August 3, 2001 Second Stipulation  
10 and Order Setting a Timetable for Promptly Paying Retroactive Benefits to Class Members.

11 Third, defendants argue that they are looking out for plaintiffs' best interests, because  
12 if VA payments were to become assets of a veteran's estate they arguably may lose the  
13 protection of 38 U.S.C. § 5301(a), which makes payment of veteran benefits exempt from  
14 taxation, claims of creditors, attachment, levy, or seizure. The mere fact that plaintiffs  
15 disagree and believe that their best interests are served by leaving the ruling as it stands is  
16 enough reason for questioning defendants' position. Moreover, it is clear, as defendants  
17 concede, that benefits paid to survivors are protected by § 5301. See In re Norma Howard  
18 Smith, 242 B.R. 427, 433 (E.D. Tenn. 1999) (veteran's insurance proceeds resulting from a  
19 service-connected disability that were paid to his beneficiary wife were protected from  
20 creditors pursuant to 38 U.S.C. § 5301). Thus, only in the event that no surviving immediate  
21 family members exist would the payment even arguably be subject to taxation or other claims.  
22 The VA's proposed solution is to prevent payments to the estates altogether. Plaintiffs clearly  
23 see it differently, and in the unusual circumstance where payment goes to the estate, they are  
24 willing to risk (if there is any risk) the payment being deemed non-exempt. The Court is in no  
25 position to require plaintiffs to forego their entitlement altogether simply because some of the  
26 money might be taken from the estate.

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1 Finally, defendants argue that paying the estates of deceased class members presents  
2 too many "practical difficulties." The Court finds defendants' explanations to be nothing  
3 other than a reflection of the VA's desire to limit its workload at the expense of fulfilling its  
4 legal obligations. It is clear from the briefing that the VA has the proven capacity to gather  
5 the necessary information about the estates of deceased class members, and it has presented  
6 no legitimate reason why it cannot do so.

7 **CONCLUSION**

8 For the reasons discussed above, and with GOOD CAUSE APPEARING, the Court  
9 hereby ORDERS that defendants' motion for clarification or modification of the December  
10 12, 2000 Order is DENIED. Defendants shall continue to abide by the August 3, 2001  
11 Second Stipulation and Order Setting a Timetable for Promptly Paying Retroactive Benefits to  
12 Class Members, whereby notification and payment of retroactive benefits shall be made to the  
13 first individual or entity in existence listed below:

- 14 (a) the class member's spouse;
- 15 (b) the class member's children (if more than one child exists, payment of the  
16 retroactive benefits owed shall be divided into equal shares, and accompanied by an  
17 explanation of the division);
- 18 (c) the class member's parents (if both parents are alive, half of the retroactive benefits  
19 owed shall be paid to each parent, and accompanied by an explanation of the division);
- 20 (d) the class member's estate.

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22 **IT IS SO ORDERED.**

23  
24 DATED

4/21/03

  
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SHELTON E. HENDERSON  
UNITED STATES DISTRICT JUDGE