

5/4/86

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

GERSHON M. RATNER
BARTON F. STICHMAN
MARK A. VENUTI
National Veterans Legal
Services Project
2001 S Street, N.W.
Suite 610
Washington, D.C. 20009
202-265-8305

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEVERLY NEHMER, et al.,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES VETERANS)
ADMINISTRATION, et al.,)
)
Defendants.)
_____)

Civil Action No.
CV-86-6160 (TEH)

FINAL STIPULATION AND ORDER

1
2 Plaintiffs filed an Emergency Motion for Enforcement and
3 Supplementation of Prior Orders. As a result of subsequent
4 discussion of the matters raised by plaintiffs' motion,
5 plaintiffs and defendants, through their undersigned counsel,
6 hereby stipulate as follows:

7 1. The Veterans' Advisory Committee on Environmental
8 Hazards, ("Advisory Committee" or "Committee") created
9 pursuant to the Veterans' Dioxin and Radiation Exposure
10 Compensation Standards Act of 1984, 38 U.S.C. § 354 note,
11 Sect. 6, will complete its analysis as to whether the scien-
12 tific or medical evidence reveals a connection between
13 exposure to dioxin and diabetes, lung cancer and peripheral
14 neuropathy (hereafter referred to as the "three diseases") at
15 or shortly after its May 23-24, 1991 meeting and convey its
16 evaluations and any recommendations to the Secretary forth-
17 with.

18 2. The Secretary will review the Committee's report and
19 all other relevant scientific or medical evidence he deter-
20 mines appropriate and, for each of the three diseases, make
21 one of the following determinations: (a) to initiate rule-
22 making to service connect the disease through the issuance of
23 a proposed positive rule and a final rule as appropriate
24 following public comment on the proposed rule; (b) to initiate
25 rulemaking to issue a negative proposed rule, i.e., rejecting
26 service connection (based on a finding of a lack of evidence
27 establishing a significant statistical association between the
28

1 disease and exposure to dioxin) and a final rule as appropri-
2 ate following public comment on the proposed rule; or (c)
3 defer issuing any rule (for example, but not limited to,
4 circumstances where there is a decision that there is insuffi-
5 cient current information). The Secretary's determination for
6 each of the three identified diseases will be made and
7 communicated to the Court and plaintiffs no later than July 1,
8 1991.

9
10 3. As soon as a final rule is issued service connect-
11 ing, based on dioxin exposure, any of the three diseases, soft
12 tissue sarcoma, and any other disease which may be service
13 connected in the future pursuant to the Agent Orange Act of
14 1991, 38 U.S.C. § 316(b), the VA shall promptly thereafter
15 readjudicate all claims for any such disease which were voided
16 by the Court's Order of May 3, 1989, as well as adjudicate all
17 similar claims filed subsequent to the Court's May 3, 1989
18 Order, without waiting for final rules to be issued on any
19 other diseases.

20 4. Prior to conducting the adjudications referred to in
21 paragraph 3, above, VA will provide individual notice to each
22 claimant denied benefits under the previous regulation (as
23 identified from the Special Issue Rating System ("SIRS") or as
24 a result of a VA finding based on information brought to its
25 attention by a claimant or claimant's representative, that,
26 although the individual is not on SIRS, he or she had a claim
27 denial that was voided by the Court's Order) that the claims

1 will be readjudicated with all of the procedural rights
2 normally applicable to such VA proceedings. The notice will
3 inform the claimant: that the claim is in the process of
4 being readjudicated; that the claimant will be afforded a
5 reasonable and specified time within which to present evidence
6 or reasons why the claim is meritorious under the new regula-
7 tions, and that if the claimant does not present such evidence
8 or reasons, VA will readjudicate the claim on the basis of the
9 previous adjudicatory record alone; and that VA will provide
10 notice of the final result. The VA shall conduct all adjudi-
11 cations referred to in paragraph 3 above, in accordance with
12 all the terms of the notice specified in this paragraph.
13

14 5. For any of the three diseases for which the Secre-
15 tary determines to issue a final positive rule, as well as
16 soft tissue sarcoma, as to which the Secretary has issued a
17 proposed rule providing service connection in certain circum-
18 stances, and any other disease which may be service connected
19 in the future pursuant to paragraph 3 above, as to any denials
20 of claims which were voided as a result of the Court's May 3,
21 1989 Order, the effective date for disability compensation or
22 dependency and indemnity compensation ("DIC"), if the claim is
23 allowed upon readjudication pursuant to paragraphs 3 and 4
24 above, will be the date the claim giving rise to the voided
25 decision was filed (except as otherwise provided in 38 U.S.C.
26 § § 3010(b)(1), or 3010(d)(1)), assuming the basis upon which
27 compensation is granted after readjudication is the same basis
28

1 upon which the original claim was filed,¹ or the date the
2 claimant became disabled or death occurred, whichever is
3 later. In the event the basis upon which a claim for compen-
4 sation benefits is granted after readjudication is different
5 than the basis for the original claim giving rise to the
6 voided decision,² the effective date for beginning disability
7 compensation or DIC will be the date on which the claim
8 asserting the basis upon which the claim is granted was filed,
9 or the date the claimant became disabled or death occurred,
10 whichever is later. For any claim for any such disease which
11 was not filed until after May 3, 1989, the effective date for
12 beginning disability compensation or DIC will be the date the
13 claim was filed or the date the claimant became disabled or
14 death occurred, whichever is later.
15

16 6. For any of the three diseases for which the Secre-
17 tary determines, pursuant to paragraph 2(c) above, not to
18 issue any rule, and for all other diseases for which the
19 Secretary has not already issued a proposed or final rule, the
20 Agent Orange claims of plaintiff class will not be denied at
21 least until the Secretary acts on the first report from the
22 National Academy of Sciences, or another entity in its stead,

23 ¹ The basis upon which the original claim was filed
24 refers to the disease[s] or condition[s] which Chapter 46 of
25 VA Manual M21-1, paragraph 46.02 required to be coded in the
ratings decision contained in the claimant's claim file, which
ratings decision was voided by the Court's May 3, 1989 Order.

26 ² E.g., the original claim giving rise to the voided
27 decision was based on a disease different than the disease
upon which the claim is granted under the final regulations.

1 pursuant to Section 2 of the Agent Orange Act of 1991, Pub. L.
2 102-4, amending 38 U.S.C. § 316(c). The claims for any of the
3 identified diseases may be denied only if the Secretary makes
4 a determination for such disease, in accordance with 38 U.S.C.
5 § 316(c), as amended, to the effect that there is no positive
6 association for such disease.

7
8 7. Pursuant to the court's protective order, VA will
9 provide to plaintiffs' counsel at plaintiffs' expense, mailing
10 lists of those individuals listed on the Agent Orange Registry
11 and of all Agent Orange claimants identified from SIRS whose
12 names are not currently on the Registry and whose addresses
13 are obtained through computer matches and searches of VA
14 files. Mailing lists, with addresses updated through sources
15 other than Internal Revenue Service, as described below, will
16 be provided within 10 days of any request by plaintiffs'
17 counsel. The "court's protective order" referred to above is
18 Attachment B to the Stipulation and Order of January 12, 1990
19 entered in this case, the terms of which protective order are
20 incorporated herein by reference. As explained in the court's
21 protective order, the mailing list of individuals will not at
22 this time include current addresses of individuals obtained
23 from Internal Revenue Service taxpayer returns, the disclosure
24 of which may be prohibited by 26 U.S.C. § 6103.

25 8. Upon the Court's signing this proposed Final
26 Stipulation and Order, plaintiffs agree to dismiss their
27 Emergency Motion for Enforcement and Supplementation of Prior
28

1 Orders with prejudice.

2 9. Upon expiration of 30 days after VA has notified the
3 Court and plaintiffs of the determinations the Secretary has
4 made pursuant to paragraph 2, above, with respect to the three
5 diseases, assuming that there are no motions pending before
6 the Court which directly relate to the parties' compliance
7 with the terms of this Final Stipulation and Order,³ final
8 judgment will be entered. The final judgment will provide
9 that it incorporates the terms of the Court's May 3, 1989
10 decision and this Final Stipulation and Order, but that any
11 provisions of the January 12, 1990 Stipulation and Order which
12 have not been expressly incorporated into this Final Stipula-
13 tion and Order are superseded. The parties will seek to agree
14 to the contents of a proposed Final Judgment and submit it to
15 the Court at least 10 days prior to the expiration of the 30
16 day period referred to above. Consistent with the Court's
17 practice, the Final Judgment also will result in the case
18 being closed.

19
20 10. Nothing in the Final Stipulation and Order is
21 intended by the parties to waive arguments concerning the
22 Court's jurisdiction after August 6, 1991, except that the
23 parties agree not to dispute the jurisdiction of the Court to
24 enter Final Judgment in accordance with the terms of paragraph
25

26 ³ This proviso is without prejudice to, and does not
27 encompass, any claim either party could make with respect to
28 attorney's fees, expenses or costs in this action.

1 9 above, or to rule on attorney's fees after August 6, 1991.

2
3 Respectfully submitted,

4
5 Theodore C. Hirt / by c
6 Theodore C. Hirt

Gershon M. Ratner
Gershon M. Ratner

7
8 Charles W. Sorenson, Jr.
9 Charles W. Sorenson, Jr.
10 U.S. Dept. of Justice
11 Civil Division, Room 3531
12 10th & Penn. Ave., N.W.
13 Washington, D.C. 20520
14 202-514-4020

Barton F. Stichman
Barton F. Stichman
Mark A. Venuti
National Veterans Legal
Services Project
2001 S Street, N.W., Suite 610
Washington, D.C. 20009
202-265-8305

12 Attorneys for Defendants

Attorneys for Plaintiffs and
their Class

13
14 May 14, 1991

May 14, 1991

15 It is so ORDERED this _____ day of May 1991:

16
17
18
19 Thelton E. Henderson
United States District Judge