

**Department of
Veterans Affairs**

Memorandum

Date: December 13, 2019

VAOPGCPREC 3-2019

From: Acting General Counsel (02)

Subj: Effective Date Provision of the Blue Water Navy Vietnam Veterans Act of 2019

To: Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

1. Who is eligible to file a claim as a "survivor" under the effective date provision of the Blue Water Navy Vietnam Veterans Act of 2019 ("the BWN Act"), Pub. L. 116-23, to be codified at 38 U.S.C. § 1116A(c)?
2. Does the BWN Act authorize the Department of Veterans Affairs (VA) to pay estates, as if they were eligible payees under the Final Stipulation and Order¹ in *Nehmer v. United States Veterans Admin.*, No. CV-86-6160 (N.D. Cal. 1991) ("the *Nehmer* stipulation")?
3. Are veterans or their survivors who were granted disability compensation or survivor benefits under *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019), potentially eligible for earlier effective dates under the *Nehmer* stipulation or under the BWN Act?

HELD:

1. As used in 38 U.S.C. § 1116A(c), the term "survivors" refers to those relatives of veterans who are eligible for dependency and indemnity compensation (DIC) and/or accrued benefits under title 38, United States Code.
2. The BWN Act does not authorize VA to pay benefits to estates of claimants. The BWN Act did not adopt or extend the *Nehmer* court rulings authorizing payments to estates of certain benefits payable under the *Nehmer* stipulation. No other provisions of title 38, United States Code, authorize VA to pay benefits under 38 U.S.C. § 1116A to estates of claimants.
3. The *Nehmer* stipulation operates to void a final decision on a veteran's or survivor's benefits claim only when the Secretary of Veterans Affairs establishes a new presumption of service connection pursuant to the Agent Orange Act of 1991, Pub. L. 102-4, codified at 38 U.S.C. § 1116(b).² The *Procopio* decision does not

¹ Available at 1991 U.S. Dist. LEXIS 22110.

² Subsection (b), which directed the Secretary to create a new presumption when he determined that sound medical and scientific evidence showed a positive

2.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

establish a new presumption pursuant to the process described in section 1116(b) and accordingly does not provide authority for VA to void final decisions on benefits claims. A veteran or survivor who is granted benefits under the *Procopio* rule and whose claim for the same condition was previously denied on or after September 25, 1985, may be entitled to a retroactive award if he or she submits a claim for such award in accordance with the BWN Act.

SUMMARY:

1. VA pays disability and survivors benefits when it is established, either through direct evidence or through a legally created presumption, that a veteran was exposed to an herbicide agent during the Vietnam era, resulting in disability or death. At issue in this opinion is the intersection between the BWN Act, which establishes a mechanism for certain veterans to apply for retroactive disability benefits, and the *Nehmer* stipulation, which obligates VA to award retroactive benefits to certain veterans and survivors when VA creates a presumption of service connection for a medical condition that was not previously associated with herbicide exposure.
2. In the Agent Orange Act of 1991, Congress created statutory presumptions of service connection for certain diseases caused by exposure to herbicides, and it also established a process for VA to add additional medical conditions to the list of presumptions. Earlier this year, in *Procopio v. Wilkie*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) reversed its precedent from over a decade earlier to hold that a veteran had "served in the Republic of Vietnam" if the veteran's only service was in the territorial sea of that country, instead of having set foot on land or navigated the inland waterways. Prior to *Procopio*, such veterans—known as Blue Water Navy Veterans—did not receive the presumption of herbicide exposure afforded by the Agent Orange Act. The BWN Act codified the *Procopio* holding. The Act further authorized VA to award disability benefits retroactively to Blue Water Navy veterans, or their survivors, who had previously submitted a claim for benefits that was denied by VA for lack of service on the landmass or inland waterways of Vietnam. To obtain such a retroactive benefit award—a significant exception to the finality of VA claim decisions—the veteran or survivor must submit a claim on or after January 1, 2020, for the condition at issue in the prior claim, and the new claim must be approved under the BWN Act.
3. Since 1991, pursuant to the *Nehmer* stipulation arising from a class action case in the U.S. District Court for the Northern District of California, VA has issued retroactive benefit awards to Vietnam veterans whose disability claims were

association between a disease and exposure to an herbicide agent, expired on September 30, 2015. See 38 U.S.C. § 1116(e).

3.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

originally denied when their claimed medical conditions were not known to be associated with herbicide exposure. Pursuant to the Agent Orange Act, the Secretary was mandated to add medical conditions to the list of conditions subject to a presumption of service connection based on herbicide exposure when sound medical and scientific evidence showed a positive association between the condition and exposure to an herbicide agent. Whenever the Secretary created such a presumption, the *Nehmer* stipulation required VA to readjudicate claims that had been previously denied. Members of the *Nehmer* class were not required to request that VA conduct the readjudications, as the *Nehmer* stipulation, as interpreted in judicial decisions, requires VA to initiate readjudications of the denied claims and to locate veterans, survivors, or their estates to issue payments resulting from the readjudications.

4. This opinion concludes that neither the *Procopio* decision nor the BWN Act trigger VA's obligation under the *Nehmer* stipulation to readjudicate previously denied claims. The Secretary has not created a new presumption of service connection for a medical condition—the requisite trigger for VA's *Nehmer* obligations—and Congress in the BWN Act created a different dedicated mechanism for Blue Water Navy veterans and their survivors to apply for retroactive disability or death benefit awards based on previously denied claims.

5. Further, this opinion holds that the BWN Act does not authorize VA to pay benefits to the estates of claimants. Rather, Congress in the Act limited those eligible for benefits to survivors, which must be read and applied within the context of title 38 of the United States Code.

DISCUSSION:

Background on Presumptions of Service Connection

6. To receive disability compensation, a veteran must show that his or her disability is service connected, which means that it was "incurred or aggravated . . . in line of duty in the active military, naval, or air service." 38 U.S.C. § 101(16); *see also* 38 U.S.C. § 1110. Establishing service connection generally requires showing: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service – the so-called nexus requirement." *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (citation and internal quotations omitted). "Except as otherwise provided by law, a claimant has the responsibility to present and support" his or her claim for benefits for service-connected disability. 38 U.S.C. § 5107(a). When service connection is granted, VA pays a monthly benefit that begins running as of the claim's effective date. 38 U.S.C. §§ 1114, 5110.

4.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

7. In establishing rules for entitlement to service connection, Congress or VA has in several instances provided presumptive service connection when veterans may have faced exposure to toxins during service, but where establishing the “nexus” requirement would be difficult or impossible due to evidentiary limitations, even for potentially meritorious claims. In February 1991, Congress enacted the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (1991) (AOA), codified in relevant part at 38 U.S.C. § 1116. Section 2 of the AOA established statutory presumptions of service connection for veterans who “served in the Republic of Vietnam” and were diagnosed with non-Hodgkin’s lymphoma, chloracne, or soft tissue sarcoma. It also directed VA to add presumptions for additional diseases if the Secretary determined based on sound medical and scientific evidence that a positive association existed between the disease and exposure to an herbicide agent. 38 U.S.C. § 1116(b). VA has added several diseases to the presumption list, which is codified at 38 C.F.R. § 3.309(e).

The Rule of Finality

8. VA’s decision on a claim for benefits becomes final within one year of the issuance of a rating decision or when the Board of Veterans’ Appeals (Board) issues a decision on appeal. See 38 U.S.C. §§ 7104(a) and 7105(c).³ “The purpose of the rule of finality is to preclude repetitive and belated readjudication of veterans’ benefit claims.” *George v. Wilkie*, 30 Vet. App. 364, 372 (2019) (quoting *Cook v. Principi*, 318 F.3d 1334, 1339 (Fed. Cir. 2002) (*en banc*)). Principles of finality and *res*

³ All statutes cited in this opinion, other than the BWN Act, refer to the versions in effect prior to implementation of the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. 115-55. Due to the timing of the mandate issuing in *Procopio* and a related administrative stay in VA, any prior final decisions relevant to the issues addressed in this opinion would have been issued under the law existing before the new appeals system went into effect. See *VA Claims and Appeals Modernization*, 84 Fed. Reg. 138, 165 (Jan. 18, 2019) (final rule) (setting the effective date of the new system as Feb. 19, 2019); VBA Letter 20-19-05, at 2 (Feb. 15, 2019) (“Until *Procopio* litigation and subsequent determinations have been resolved, rating decisions in these claims cannot take place.”); Mandate, *Procopio v. Wilkie*, Fed. Cir. No. 17-1821 (Mar. 22, 2019). Also, the Secretary of Veterans Affairs exercised his discretion under the BWN Act to stay decisions on pending claims until the statutory amendments go into effect on January 1, 2020. See *Stay of Pending Claims under the Blue Water Navy Vietnam Veterans Act of 2019* (H.R. 299), Memorandum from the Secretary of Veterans Affairs (Jul. 1, 2019) (Stay Memorandum); Pub. L. 116-23, § 2(c)(3) (authority to stay). Although some cases were granted under an exception to the stay, Stay Memorandum at ¶ 6, the stay did not allow claims to be denied during that period.

5.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

judicata apply to final VA benefits decisions. *Cook*, 318 F.3d at 1336-37 (citing *Astoria Fed. Savs. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08 (1991)). "Unless otherwise provided by law, the cases are closed and the matter is thus ended." *Routen v. West*, 142 F.3d 1434, 1438 (Fed. Cir. 1998). There are only two statutory exceptions to the finality of VA decisions – when new or material evidence is submitted or when the decision "is subject to revision on the grounds of clear and unmistakable error." 38 U.S.C. §§ 5108, 5109A, and 7111; *Cook*, 318 F.3d at 1337.

9. A newly issued judicial interpretation will not vitiate the finality of a VA benefits decision. "The new interpretation of a statute can only retroactively affect decisions still open on direct review, not those decisions that are final." *Jordan v. Nicholson*, 401 F.3d 1296, 1299 (Fed. Cir. 2005) (quoting *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 698 (Fed. Cir. 2000)); see also VAOPGCPREC 9-94. The rule of finality is sacrosanct in the American judicial system. "The Supreme Court has repeatedly denied attempts to reopen final decisions in the face of new judicial pronouncements or decisions finding statutes unconstitutional." *Jordan*, 401 F.3d at 1299 (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374-75 (1940)).

10. Notwithstanding the finality of previous VA decisions, veterans or survivors may become entitled to additional or increased benefits pursuant to a new "Act or administrative issue." See 38 U.S.C. § 5110(g). When benefits are granted under that scenario, the default statutory rule is that "the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue." *Id.*; see also 38 C.F.R. § 3.114(a).

The Nehmer Class Action

11. On October 31, 1986, eleven individual veterans benefits claimants and the Vietnam Veterans of America filed a complaint in the U.S. District Court for the Northern District of California against what was then the Veterans Administration, along with the Veterans' Advisory Committee on Environmental Hazards, the Scientific Council of the Veterans' Advisory Committee on Environmental Hazards, and the VA Administrator. *Nehmer v. United States Veterans Admin.*, No. CV-86-6160 (N.D. Cal. 1991) (docket). The plaintiffs challenged VA's implementation of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. 98-542 (Oct. 24, 1984) ("Dioxin Act"). Amended Complaint, at 2, *Nehmer*, No. CV-86-6160 (Feb. 2, 1987) (Am. Compl.). VA's herbicide regulations granted a presumption of service connection for chloracne, a skin disorder, but no other diseases. *Id.* at 9-10. Plaintiffs alleged that VA and the scientific advisory committee violated the Dioxin Act by requiring a "cause and effect relationship" between dioxin exposure and a disease to establish a presumption of service

6.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

connection for the disease. *Id.* at 8-12. Plaintiffs alleged that VA acted arbitrarily and capriciously by "requiring a higher burden to establish service connection for diseases associated with exposure to herbicides containing dioxin or service in Vietnam than that used to establish service connection for other latent diseases." *Id.* at 15. Plaintiffs sought class action status on behalf of all veterans and their next of kin who were eligible to apply, had a pending claim, or were denied benefits for diseases alleged to have arisen from exposure to herbicides containing dioxin while serving in Vietnam. *Id.* at 6. They estimated that there were 20,000 members of the class. *Id.*

12. The court granted the plaintiffs' motion to certify the class. *Nehmer v. U.S. Veterans Admin.*, 118 F.R.D. 113, 125 (N.D. Cal. 1987) (order certifying class). The court found that proposed class members shared "a common threat of future harm" because any class member who had already filed a claim or would file a claim after that point in time for any condition other than chloracne would be denied under the challenged regulation. *Id.* at 117. The court noted that the class was "almost identical" to the class of plaintiffs certified in the products liability litigation against the manufacturers of Agent Orange. *Id.* at 125 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 788 (E.D.N.Y. 1980)). The *Nehmer* court further noted that the judge in the products liability matter, Judge Weinstein, had "great expertise in adjudicating the problem of Vietnam Veteran's exposure to dioxin." *Id.* When adjudicating a related case, Judge Weinstein observed, "Class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability." *Ryan v. Dow Chem. Co.*, 781 F. Supp. 902, 919-20 (E.D.N.Y. 1991).

13. After certifying the class, the court ruled on the parties' cross-motions for summary judgment. *Nehmer v. U.S. Veterans Admin.*, 712 F. Supp. 1404, 1406 (N.D. Cal. 1989) (May 3, 1989, Order). The court held that VA failed to comply with the Dioxin Act. *Id.* The court invalidated a portion of VA's regulation that denied a presumption of service connection for all diseases other than chloracne. *Id.* at 1409. The court also voided all benefit denials made by VA under the regulation. *Id.* at 1423.

14. After additional litigation, the *Nehmer* class plaintiffs and VA entered into a final stipulation to memorialize the remedial obligations agreed to by the parties. The district court judge signed the order approving the stipulation on May 17, 1991. *Nehmer v. U.S. VA*, 1991 U.S. Dist. LEXIS 22110, at *8. Paragraph 3 of the stipulation reads in full:

7.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

As soon as a final rule is issued service connecting, based on dioxin exposure, any of the three diseases,⁴ soft tissue sarcoma, and any other diseases which may be service connected in the future pursuant to the Agent Orange Act of 1991, 38 U.S.C. § 316(b),⁵ the VA shall promptly thereafter readjudicate all claims for any such disease which were voided by the Court's Order of May 3, 1989, as well as adjudicate all similar claims filed subsequent to the Court's May 3, 1989 Order, without waiting for final rules to be issued on any other diseases.

Under the *Nehmer* stipulation, claims readjudicated and allowed under paragraph 3 are entitled to an effective date for disability compensation or dependency and indemnity compensation that corresponds with the effective date that would have been assigned if the earlier claim had been granted. *Id.* at ¶ 5.

15. The court entered its final judgment on October 9, 1991. *Nehmer*, No. CV-86-6160. The court's judgment expressly incorporated the terms of its summary judgment order and the final stipulation. Order 1 (Oct. 9, 1991). In the summary judgment order, the court stated, "The class consists of all current or former service members (or their survivors) who are eligible to apply for benefits based on dioxin exposure or who have already applied and been denied claims for benefits based on dioxin exposure." *Nehmer*, 712 F. Supp. at 1409.

16. The court's incorporation of the summary judgment order and stipulation into the final judgment accorded with Rule 23(c)(3)(A) of the Federal Rules of Civil Procedure, which requires the class to be described in the judgment. The drafters of the rule added the requirement of including a description of the class in the judgment to eliminate "one-way intervention." Advisory Committee Notes, 1966 Amendments to Fed. R. Civ. P. 23(c)(3) ("Under proposed subdivision (c)(3), one-way intervention is excluded"). One-way intervention is when "class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision." *Id.* Before the 1966 rule change, "one-way intervention had the effect of giving collateral estoppel effect to the judgment of liability in a case where the estoppel was not mutual. This was thought to be unfair to the defendant." *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995). Under the rule in effect at the time of the *Nehmer* judgment, the court "in framing the

⁴ The "three diseases" are defined earlier in the stipulation as diabetes, lung cancer, and peripheral neuropathy. 1991 U.S. Dist. LEXIS 22110, at ¶ 1.

⁵ 38 U.S.C. § 316(b) has been renumbered as 38 U.S.C. § 1116(b). See Department of Veterans Affairs Codification Act, Pub. L. 102-83, § 7 (Aug. 6, 1991).

8.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered." Advisory Committee Notes, 1966 Amendments to Fed. R. Civ. P. 23(c)(3).

17. In 1999, the district court interpreted the language of the *Nehmer* stipulation in response to a dispute about which claims decisions were voided by the May 3, 1989, Order. *Nehmer v. U.S. VA*, 32 F. Supp. 2d 1175 (N.D. Cal. 1999), *aff'd*, 284 F.3d 1158 (9th Cir. 2002). The court clarified that the May 1989 Order

did not void every pre-May 1989 decision; rather it only voided those decisions *in which the disease or cause of death is later found – under valid Agent Orange regulation(s)—to be service connected*. This is a discrete group of benefit decisions, the scope of which is defined by the VA's own regulations which later service connect certain diseases based on their link to Agent Orange.

Id. at 1183 (emphasis in original). In affirming the district court's interpretation, the Ninth Circuit reasoned that "it serves the remedial purpose of the [*Nehmer* stipulation] by helping ensure that any delay in the effort to determine Agent Orange's devastating effects, due to VA's issuance and defense of its earlier invalid regulations, shall not be borne by ailing veterans." *Nehmer v. U.S. VA*, 284 F.3d at 1162.

18. In 2000, the district court held that VA must pay retroactive benefits to the class member's estate when the class member dies before he or she receives payment under the *Nehmer* stipulation. See *Effective Dates of Benefits for Disability or Death Caused by Herbicide Exposures; Disposition of Benefits After Death of Beneficiary*, 68 Fed. Reg. 4,132, 4,137 (Jan. 28, 2003) (proposed rule) (describing the court order). VA has encountered numerous challenges in implementing the court's order, both because of the impracticality of identifying the beneficiaries of the class member's estate and because the order conflicted with statutory law. *Id.* (discussing the accrued benefits statute).

19. In its 2003 proposed rulemaking notice, VA also cited the district court's invocation of contract law that limits the reach of the *Nehmer* stipulation:

In its December 12, 2000, order, the district court held that the 1991 stipulation and order must be interpreted in accordance with general principles of contract law. It is well established that, unless the parties provide otherwise, a

9.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

contract is presumed to incorporate the law that existed at the time the contract was made. See *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 129-30 (1991). A subsequent change in the law cannot retrospectively alter the terms of the agreement. See *Florida East Coast Ry. Co. v. CSX Transportation, Inc.*, 42 F.3d 1125, 1129-30 (7th Cir. 1994).

Id. at 4,139.

20. In a subsequent dispute about the temporal scope of the *Nehmer* stipulation, the Ninth Circuit agreed that the *Nehmer* stipulation, also called the "consent decree," must be "construed with reference to ordinary contract principles." *Nehmer v. VA*, 494 F.3d 846, 861 (9th Cir. 2007) (quoting *City of Las Vegas v. Clark County*, 755 F.2d 697, 702 (9th Cir. 1985)). The court further explained:

[I]t is particularly appropriate in class action litigation to resolve the meaning of a consent decree based on its plain language, if possible, because a member of the class who was not present at any negotiations would be at a disadvantage in presenting extrinsic evidence of the meaning of the consent decree.

Id. (quoting *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003) (internal quotation marks omitted)).

21. In 2003, the district court issued another order, requiring VA to issue payments in the event of a class member's death, modeled on a stipulation the parties entered into on August 3, 2001. *Effective Dates of Benefits for Disability or Death Caused by Herbicide Exposures; Disposition of Benefits After Death of Beneficiary*, 68 Fed. Reg. 50,966, 50,967 (Aug. 25, 2003) (final rule). "VA must release the payments to the first of the following individuals or entities who is in existence when payment is made: (a) The class member's spouse; (b) the class member's children (in equal shares); (b) the class member's parents (in equal shares); (d) the class member's estate." *Id.*

22. The plain language of the *Nehmer* stipulation is unambiguous as to when it applies. The first clause of paragraph 3 begins, "As soon as a final rule is issued service connecting . . . any of the three diseases . . . and any other disease which may be service connected in the future pursuant to the [AOA] . . ." *Nehmer v. U.S. VA*, 1991 U.S. Dist. LEXIS 22110, at *3. This clause describes the triggering event. When this triggering event occurs, "VA shall promptly thereafter readjudicate all claims for any such disease which were voided by the Court's Order of May 3,

10.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

1989.” *Id.* As discussed above, the court has clarified that the final decisions voided by the court’s May 1989 order were only those decisions where the claimed disease or cause of death later became a presumptive disease through regulations issued by VA under the authority of the AOA, codified at 38 U.S.C. § 1116(b). See *Nehmer*, 32 F. Supp. 2d at 1183. Thus, VA’s obligation, and authority, to vitiate previously final decisions arises only when this specific contingency occurs—when the Secretary of Veterans Affairs determines that a disease is to be added to the presumptive list under 38 U.S.C. § 1116(b). No other event will trigger VA obligations under the *Nehmer* stipulation.

The Procopio Decision

23. In *Procopio v. Wilkie*, the Federal Circuit interpreted “served in the Republic of Vietnam” in 38 U.S.C. § 1116(a)(1) to unambiguously include service in the territorial sea of that country. *Procopio*, 913 F.3d at 1376. The court expressly overruled *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), which had upheld VA’s “foot-on-land” requirement over a decade earlier. *Id.* at 1373, 1380.

24. The *Procopio* decision did not interpret 38 U.S.C. § 1116(b) or adjudicate any issue related to the promulgation of regulations to create new presumptions for diseases under the AOA. In fact, it was undisputed that Mr. Procopio suffers from diabetes mellitus and prostate cancer. See *id.* at 1374. VA promulgated a final rule to create a prostate cancer presumption in 1996 and a final rule for type 2 diabetes mellitus in 2001. *Diseases Associated With Exposure to Certain Herbicide Agents (Prostate Cancer and Acute and Subacute Peripheral Neuropathy)*, 61 Fed. Reg. 57,586 (Nov. 7, 1996); *Diseases Associated With Exposure to Certain Herbicide Agents: Type 2 Diabetes*, 66 Fed. Reg. 23,166 (May 8, 2001). Mr. Procopio filed his claim for service connection for diabetes mellitus in October 2006 and for prostate cancer in October 2007. *Procopio v. McDonald*, 2016 U.S. App. Vet. Claims LEXIS 1751, *2-3 (2016). The April 2009 VA decision that Mr. Procopio appealed was not denied on the basis that no presumption existed for the diseases he claimed, but rather, it was denied based on his service not meeting the “foot-on-land requirement” upheld in *Haas*. See *id.* at *4, 14-15.

The Procopio Decision Did Not Trigger the Nehmer Stipulation

25. *Procopio* interpreted only the section 1116(a)(1) service requirement, whereas the *Nehmer* stipulation addressed only the section 1116(b) process for adding new disease presumptions based on new medical and scientific evidence. The court’s opinion in *Procopio* does not purport to expand the scope of the *Nehmer* stipulation. To the contrary, the court acknowledges acting against the *stare decisis* principle by overruling *Haas*, but the court insists its action does not disrupt reliance interests. *Procopio*, 913 F.3d at 1380 n.7 (“While there are certainly situations where parties’

11.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

reliance on our settled law is of paramount concern . . . , no such reliance concern exists here.”). If *Procopio* were read to vitiate the finality of final VA benefits decisions in the absence of any triggering event contemplated by the *Nehmer* stipulation, that result certainly would belie the *Procopio* court’s own interpretation of the effect of its decision.

26. If a claim was denied due to lack of qualifying service under the *Haas* rule, a new claim granted under the *Procopio* rule would not vitiate the finality of the old decision. See *Jordan, supra*. When a claim falls outside the scope of the *Nehmer* stipulation, VA is obligated to apply the ordinary statutory rules to establish the effective date of the new award. See 38 U.S.C. § 5110; 38 C.F.R. § 3.816(c)(4); *Williams v. Principi*, 310 F.3d 1374, 1380-81 (Fed. Cir. 2002).

27. It is clear and unambiguous that the *Nehmer* stipulation cannot void final decisions based on *Procopio*’s reinterpretation of the geographical scope of the presumption of dioxin exposure. As discussed above, as the Ninth Circuit has previously held, the *Nehmer* stipulation is to be interpreted using ordinary contract law principles. *Nehmer*, 494 F.3d at 861. Under California law, “the intention of the parties as expressed in the contract is the source of contractual rights and duties,” and “[a] court must ascertain and give effect to this intention by determining what the parties meant by the words they used.” *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 69 Cal. Rptr. 561, 442 P.2d 641, 644 (Cal. 1968) (en banc). Under this standard, “extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract.” *Id.* at 645. However, extrinsic evidence may be admitted to show “‘the parties’ understanding and intended meaning of the words used in their written agreement.’” *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 777 (9th Cir. 2003) (quoting *Brawthen v. H&R Block, Inc.*, 28 Cal. App. 3d 131, 104 Cal. Rptr. 486, 490 (Cal. Ct. App. 1972) (emphasis in original)). In other words, extrinsic evidence may serve to show “that the language of a contract, in the light of all the circumstances, is fairly susceptible of either one of the two interpretations contended for.” *Pacific Gas*, 442 P.2d at 646 (internal punctuation and citations omitted). Here, we find no evidence to suggest that the operative terms of the stipulation, which refer specifically to “final rule[s] . . . service connecting . . . diseases . . . pursuant to the [AOA],” were intended to apply upon the occurrence of other events, such as the issuance of judicial decisions addressing different statutory or regulatory elements affecting entitlement to VA benefits. As discussed above, the sole dispute in the *Nehmer* case was about whether VA improperly required a “cause and effect” standard of scientific evidence that disqualified any disease other than chloracne from becoming a presumption under the Dioxin Act. See Am. Compl. 8-12, 15, *Nehmer*, No. CV-86-6160. The Ninth Circuit clarified that the stipulation is triggered “if and when” new diseases are added under the AOA. See *Nehmer*, 284 F.3d at 1161-62. *Procopio* did not add any new diseases to the presumption list.

12.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

28. The 1989 *Nehmer* order invalidated “the portion of the Dioxin regulation which denies service connection for all other diseases but chloracne. 38 C.F.R. section [3.]311a(d).” *Nehmer*, 712 F. Supp. at 1423. It further “void[ed] all benefit denials made under section [3.]311a(d).” *Id.* The parties referenced that holding in the 1991 stipulation, stating that, once VA issued a “final rule service connecting, based on dioxin exposure, any of [four specific diseases] and any other disease that may be service connected in the future pursuant to the [AOA], the VA shall promptly thereafter readjudicate all claims for any such disease which were voided by the Court’s Order of May 3, 1989, as well as adjudicate all similar claims filed subsequent to the Court’s May 3, 1989, Order.” The claim denials voided by the court were those that were made “under” the invalidated regulatory provision listing the conditions VA found to be associated with herbicide exposure. Correspondingly, the provisions of the stipulation specifying VA’s duty and authority to readjudicate decisions that are otherwise final under governing statutes are triggered by VA’s issuance of final rules establishing a presumption of service connection for a specific disease under the AOA. Nothing in the circumstances surrounding the stipulation suggests that the language of the stipulation was intended to have the much broader effect of authorizing VA to void otherwise final decisions in other circumstances, such as the issuance of judicial decisions, like *Procopio*, addressing different statutory or regulatory elements affecting entitlement to VA benefits. Even acknowledging that the *Nehmer* stipulation’s remedial purpose has enabled the district court to interpret the stipulation more broadly than VA anticipated when the terms have been litigated over the decades, the district court and Ninth Circuit have always confined their analyses to remedying the class plaintiffs’ specific concerns about how VA would add new diseases to the presumption list or readjudicate earlier denials of claims based on those diseases. *See Nehmer*, 284 F.3d at 1161-62; *Nehmer*, 494 F.3d at 861-64. The district court overseeing the *Nehmer* stipulation has never addressed expanding the number of veterans eligible for the presumption of dioxin exposure based on a new judicial interpretation of the service requirement.

The Blue Water Navy Vietnam Veterans Act of 2019

29. While VA was in the process of implementing the *Procopio* decision, Congress passed the BWN Act, and the President signed it into law on June 25, 2019. Pub. L. 116-23. The BWN Act adds section 1116A to title 38 of the United States Code, to be effective January 1, 2020. *Id.* at §§ 2(a), 2(g) (effective date). The new section 1116A extends the existing AOA presumption codified at section 1116 to veterans who served “offshore of the Republic of Vietnam” during the time period specified in the BWN Act. 38 U.S.C. § 1116A(a). Congress intended the BWN Act to codify the Federal Circuit’s *Procopio* decision, and to ensure that VA defines “the Republic of Vietnam” broadly. H.R. Rep. 116-58, at 11 (May 10, 2019). The BWN Act defines “offshore” as a geographical area “not more than 12 nautical miles

13.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting" eleven points of latitude and longitude listed in a table. 38 U.S.C. § 1116A(d).

30. The BWN Act creates an extraordinary effective date structure modeled from some components of the *Nehmer* stipulation. While the Act provides that the effective date of an award granted under the new section will be determined in accordance with the ordinary effective date principles found in 38 U.S.C. § 5110, see 38 U.S.C. § 1116A(c), it also creates a significant exception to this rule. The exception is that VA is to treat the date of a prior claim that has been finally denied as the date on which a new claim was filed in certain circumstances. Claims will receive this special treatment when:

(i) The veteran or survivor submitted a claim for disability compensation on or after September 25, 1985, and before January 1, 2020, for a disease covered by this section, and the claim was denied by reason of the claim not establishing that the disease was incurred or aggravated by the service of the veteran[, and]

(ii) The veteran or survivor submits a claim for disability compensation on or after January 1, 2020, for the same condition covered by the prior claim under clause (i) and the claim is approved pursuant to this section.

38 U.S.C. § 1116A(c)(2)(B) (emphasis added).

"Survivors" Under Existing Title 38 and Prior Legislation

31. Because the BWN Act does not define "survivor" or include any definition section, we must look to the surrounding text of the BWN Act to determine how the special effective date provision is to operate within title 38. See *Laerdal Med. Corp. v. ITC*, 910 F.3d 1207, 1212-13 (Fed. Cir. 2018) (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[W]e must read the words in their context and with a view to their place in the overall statutory scheme."); see also *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.")).

32. The word "survivor" appears in the BWN Act only in the effective date section of the new 38 U.S.C. § 1116A. Pub. L. 116-23, § 2(a); 38 U.S.C. § 1116A(c)(2)(B). This indicates that Congress did not intend to create a new category of entitlement for survivors. Rather, Congress was modifying an entitlement that is defined

14.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

elsewhere in title 38 – an entitlement that would have received an effective date in accordance with section 5110, but for the new section 1116A(c)(2)(B).

33. A survivor's "claim for disability compensation" in section 1116A(c)(2)(B) is most logically interpreted as a claim for DIC or for accrued benefits; otherwise, the provision would not make sense because "survivors" are unable to file claims for disability compensation. The basic entitlement statute for disability compensation authorizes payment only "to any *veteran*" that meets the statutory criteria, not to survivors. See 38 U.S.C. § 1110 (emphasis added); see also *Richard ex rel. Richard v. West*, 161 F.3d 719, 722 (Fed. Cir. 1998) ("the substantive compensation provisions found in chapter 11 of title 38 clearly distinguish between disability compensation, generally available only to veterans, and death and pension benefits, payable to survivors"). Survivors may only file claims for DIC or accrued benefits. See generally 38 U.S.C. §§ 1310-18, 5121, 5121A. Narrowly construing the statute to apply only to claims of disability compensation would render the reference to a "survivor" superfluous, contrary to established principles of statutory construction. See *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (citations and internal quotation marks omitted)). Construing that term to include claims for DIC and accrued benefits is consistent with congressional intent because those are the survivors' benefits most closely associated with disability compensation. See *Zevalkink v. Brown*, 102 F.3d 1236, 1241 (Fed. Cir. 1996) ("an accrued benefits claim is derivative of the veteran's claim for service connection"); 38 U.S.C. § 1301(a) (authorizing DIC for deaths due to service-connected disability as determined using the "standards and criteria for determining whether or not a disability is service-connected . . . under chapter 11 of this title").

34. Title 38 definitions are located in sections 101, 1101, and 1301, but "survivor" is not listed among the definitions. However, DIC is defined as a monthly payment made to "a surviving spouse, child, or parent." 38 U.S.C. § 101(14); see 38 U.S.C. § 1310(a). Each of those terms is defined. 38 U.S.C. § 101(3) (surviving spouse), (4)(A) (child), and (5) (parent).

35. The three general categories of DIC beneficiaries generally mirror accrued benefits beneficiaries. See 38 U.S.C. § 5121(a)(2). "Accrued benefits" describe the amount of money owed by VA to a veteran at the time of the veteran's death, as determined "under existing [VA disability] ratings or decisions or those based on evidence in the [VA claims] file at date of death." 38 U.S.C. § 5121(a). An eligible accrued benefits beneficiary may also be substituted as the claimant to pursue a claim that is pending at the time of the veteran's death. 38 U.S.C. § 5121A; see also *Breedlove v. Shinseki*, 24 Vet. App. 7, 20-21 (2010) (per curiam) (allowing substitution at court if appellant would be eligible for accrued benefits under

15.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

section 5121). Accrued benefits are paid to the veteran's surviving spouse, and if there is no spouse, then to the veteran's children in equal shares, and if there are no children, then to the veteran's dependent parents in equal shares. 38 U.S.C. § 5121(a)(2). If a claimant is not a relative eligible under that paragraph, "only so much of the accrued benefits may be paid as may be necessary to reimburse the person who bore the expense of the last sickness and burial." 38 U.S.C. § 5121(a)(6). The categories of persons who may receive accrued benefits are exclusive, and do not include estates. "No other categories of payee at death are provided in the statute." *Youngman v. Shinseki*, 699 F.3d 1301, 1303 (Fed. Cir. 2012). "No payment can be made to the veteran's estate, or any heir other than as designated in § 5121(a)." *Id.* at 1304 (holding that where the veteran "died without any heirs in the categories qualifying under § 5121, his unpaid benefits died with him"); see also *Morris v. Shinseki*, 26 Vet. App. 494, 499 (2014) (listing examples of cases where courts affirmed denials of accrued benefits claims by claimants lacking eligibility under section 5121(a)).

36. The historical use of the term "survivor" in prior Agent Orange legislation supports the view that this term referred to individuals eligible to receive DIC benefits. First, all references to "survivors" in the 1984 Dioxin Act contemplate DIC under chapter 13 of title 38, U.S. Code. See, e.g., Veterans' Dioxin and Radiation Exposure Compensation Standards Act ("Dioxin Act"), Pub. L. 98-542, § 9(d)(2), 98 Stat. 2733 ("A death benefit payable under this section to the survivors of a veteran shall be paid to such survivors based upon the eligibility requirements . . . and at the rates that are applicable to dependency and indemnity compensation under chapter 13 of that title."); *id.* § 3, 98 Stat. 2727 (part of the Dioxin Act's purpose is to ensure "that Veterans' Administration dependency and indemnity compensation is provided to survivors of those veterans for all deaths resulting from such disabilities").

37. The sole reference to "survivor" in the AOA occurs in the DIC context. Pub. L. 102-04, § 2(d)(2). Under section 2(d)(2),⁶ if a disease is later removed from the list of presumptive conditions, a survivor who was awarded DIC on the basis of the presumption shall continue to receive the benefits. This language is also replicated in 38 U.S.C. § 1117 ("Compensation for disabilities occurring in Persian Gulf War veterans").

38. "Survivor" is used elsewhere in title 38, and those instances do not support the proposition that Congress intended the term in new section 1116A(c)(2)(B) to have broader meaning than those prior usages in title 38. See 38 U.S.C. §§ 1312(a)(3) (employing the term as used under the Social Security Act, 42 U.S.C. § 402, to

⁶ Section 2(d)(2) is codified at 38 U.S.C. § 1116(d)(2), but the provision ceased to be effective on September 30, 2015. 38 U.S.C. § 1116(e).

16.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

address a point of intersection with Social Security Administration benefits), 1781(b) (authorizing VA care for survivors when facilities not in use by veterans), 1970(a) (insurance payments); 5101 ("Claims and Forms"); and 8520(a) (where veterans or survivors die intestate at a VA facility, their property escheats to the Federal government).

39. Congress's placement of section 1116A within a statutory scheme that uses the term "survivor" in terms of DIC eligibility and accrued benefits provides the only indication of Congress's intent on the matter. The BWN Act's legislative history does not define the term.

House Committee Report's Discussion of *Nehmer*

40. The House Veterans' Affairs Committee explained that the BWN Act would provide retroactive benefits to veterans who were denied benefits between 1985 and 2020 if the veteran "or survivor beneficiary" re-files the claim under the new law. H.R. Rep. 116-58, at 12. The committee report further noted that the BWN Act's effective date provision "is consistent with special effective date rules given to Vietnam veterans who served on land or on inland waterways under *Nehmer v. United States Department of Veterans Affairs*, to the extent that decision contemplated retroactive awards for benefits." *Id.*

41. But the House committee report also explains that the procedure for obtaining the retroactive benefit under the BWN Act differs from *Nehmer*. The BWN Act does not require VA to automatically readjudicate previously denied Blue Water Navy claims—instead, the responsibility falls on "a [Blue Water Navy] veteran, or beneficiary" to submit a new claim on or after January 1, 2020, for the same condition that was previously denied in order to be eligible for retroactive benefits. *Id.*

The BWN Act Did Not Adopt the *Nehmer* Requirement to Pay Estates

42. The *Nehmer* stipulation's effective date provision is at significant odds with the rest of the veterans benefits system created by Congress in title 38. Within the statutory law, Congress mandated that the effective date for an award granted on the basis of a new law or regulation "shall not be earlier than the effective date of the Act or administrative issue." 38 U.S.C. § 5110(g). "VA's obligation to comply with both 38 U.S.C. [§] 5110(g) and the *Nehmer* court orders necessarily requires disparate treatment of claims that are similar in many respects." 68 Fed. Reg. at 50,968. It is VA's longstanding view that "[t]o the extent the *Nehmer* court orders require action seemingly at odds with section 5110(g), we believe they are most reasonably viewed as creating a non-statutory exception to section 5110(g)'s requirements." *Id.* at 50,969. "[I]t would be inappropriate, however, to disregard the

17.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

clear requirements of section 5110(g) in cases that are not within the scope of the *Nehmer* court orders.” *Id.* The Federal Circuit held that unless a claim falls within the scope of the stipulation, *Nehmer* does not operate to alter the result under ordinary effective date rules, even if the claim pertains to Agent Orange. *Williams*, 310 F.3d at 1380-81 (characterizing appellant’s “view of the *Nehmer* Stipulation [as] too expansive”). As discussed above with regard to the *Procopio* decision, the *Nehmer* stipulation was not triggered by that decision because it did not add any new diseases to the list of diseases presumed to be related to Agent Orange exposure. Likewise, the BWN Act did not add any new diseases. The new statutory text explicitly states that it applies to “disease[s] covered by section 1116 of this title becoming manifest as specified in that section.” 38 U.S.C. § 1116A(a).

43 The text of the BWN Act indicates Congress’s acknowledgement that expanding the presumption of Agent Orange exposure, either through the *Procopio* court decision or the legislation itself, would not trigger the *Nehmer* stipulation. If Congress had understood either *Procopio* or the BWN Act to trigger the *Nehmer* stipulation, there would have been no need to establish a mechanism in the Act specifically recreating some features of the extraordinary *Nehmer* effective date rules.

44. Congress added 38 U.S.C. § 1116A(c) to create a special effective date rule for claimants awarded benefits under the new statute. Within that special subsection, Congress first indicated that it was creating an exception to the general rule of assigning effective dates under title 38. See 38 U.S.C. § 1116A(c)(2)(A) (“[n]otwithstanding subsection (g) of section 5110 of this title”). Then, Congress laid out the criteria for entitlement to an earlier effective date under the special subsection. 38 U.S.C. § 1116A(c)(2)(B). A veteran or survivor could be entitled to an effective date as early as September 25, 1985, which mirrors the earliest effective date available under the *Nehmer* stipulation. See 38 C.F.R. § 3.816(c)(1). The legislative history supports this textual reading. The House committee expressed its intent to “ensure[] parity for BWN veterans and their survivors.” H.R. Rep. 116-58, at 12. When Congress intended to depart from the general effective date rules in title 38, it did so explicitly.

45. Like the special effective date rule, *Nehmer*’s requirement that VA pay a deceased veteran’s estate, in the absence of other eligible beneficiaries, is also in direct conflict with title 38, which does not allow payment based on a deceased veteran’s service to anyone other than those who are eligible under 38 U.S.C. § 5121. See *Youngman*; *Morris*, both *supra*. Unlike with the *Nehmer* orders, the BWN Act does not include any provision that would authorize payment to estates. Because there is no special provision authorizing a departure from section 5121 and the case law that has consistently interpreted it, we conclude that Congress did not intend such a departure. It is inappropriate to infer a Congressional intent to apply

18.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

some features of the *Nehmer* orders that Congress did not actually adopt to claims under the BWN Act, when Congress did adopt other features of the *Nehmer* orders and explained why it adopted those features in the legislative history. See H.R. Rep. 116-58, at 12. This reasoning is only strengthened by the recognition that the *Nehmer* requirement to pay persons other than those eligible for accrued benefits under section 5121 is directly contrary to the United States Code. Because the *Nehmer* stipulation was not triggered, and Congress expressed no intent to adopt the *Nehmer* obligation regarding payees, we conclude that Congress intended for the title 38 DIC and accrued benefits understanding of “survivor” to govern.

Claims Granted Under *Procopio*

46. The Board granted and remanded a small number of appeals after the Federal Circuit issued its *Procopio* decision but before VA stayed pending claims prior to implementation of the BWN Act. See Memorandum from Secretary (July 1, 2019); Pub. L. 116-23, § 2(c)(3) (authorizing stay of pending claims). We conclude that these decisions are not subject to the requirements of *Nehmer*, for the reasons explained above, but that they may be eligible for retroactive awards under the BWN Act.

47. The BWN Act states that a claimant is entitled to an earlier effective date if, among other things, “the claim is approved pursuant to this section.” 38 U.S.C. § 1116A(c) (effective Jan. 1, 2020). A hyper-technical reading of the text would exclude claims that were granted under the *Procopio* court rule because those decisions issued prior to the January 1, 2020 effective date of section 1116A, and thus, the claims were not granted under that section. See Pub. L. 116-23, § 2(g) (stating effective date of statutory amendments). However, Congress clearly intended for the Act’s retroactive benefit provision to apply to these granted claims. See H.R. Rep. No. 116-58, at 12 (“[B]ecause [Blue Water Navy] veterans have generally been unable to successfully apply for benefits for conditions that may have been caused by service in Vietnam due to the lack of a presumption of exposure, [38 U.S.C. § 1116A], would provide retroactive benefits for veterans who were denied benefits between September 1, 1985, and January 1, 2020, if the individual veteran or survivor beneficiary of a deceased veteran re-files a claim for benefits.”). Therefore, it is a reasonable interpretation of the Act that veterans and survivors whose claims were granted under the *Procopio* rule are within the ambit of the Act’s retroactive benefit provision.

Scope of Potential Judicial Review of This Opinion

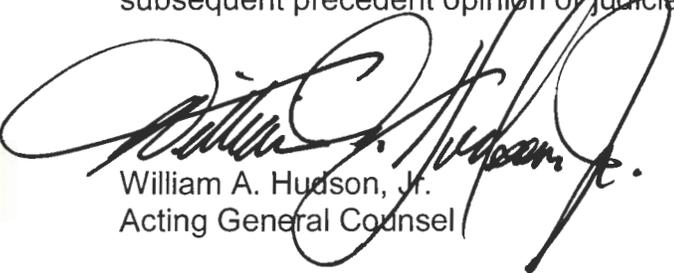
48. Matters concerning VA benefits generally are subject to judicial review only in the U.S. Court of Appeals for Veterans Claims, U.S. Court of Appeals for the Federal Circuit, and U.S. Supreme Court. See 38 U.S.C. §§ 502, 511, 7252, 7292. Although

19.

Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

the Ninth Circuit Court of Appeals has held that VA "cannot dictate the meaning of the [*Nehmer*] decree to the [U.S. District Court for the Northern District of California] or relieve itself of its obligations under the decree without the district court's approval," see *Nehmer*, 494 F.3d at 860, this opinion interprets the meaning and effect of the BWN Act, not the *Nehmer* stipulation. Moreover, this opinion does not purport to relieve VA of any of its obligations under the *Nehmer* stipulation, and VA continues to perform those obligations in the ordinary course. Nonetheless, VA is cognizant that the conclusions stated in this opinion regarding the stipulation are not binding upon the district court and do not limit that court's jurisdiction to determine the meaning of the stipulation. VA will notify the district court of this opinion.

49. Subject to any court order to the contrary, however, this opinion is binding on VA officials and employees who are tasked with implementing grants of disability compensation and survivor benefits under the BWN Act. See 38 C.F.R. § 14.507(b) ("An opinion designated as a precedent opinion is binding on Department officials and employees. . . unless. . . the opinion has been overruled or modified by a subsequent precedent opinion or judicial decision.").



William A. Hudson, Jr.
Acting General Counsel