

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 09-275V
Filed: February 11, 2011
Published

PAUL GRIGLOCK, executor of the estate of	*	
SOPHIE GRIGLOCK, deceased	*	Damages; Statute of limitations;
	*	Plain meaning of the Act;
Petitioner,	*	Death benefit provided under
	*	§ 300aa-15(a)(2); Time for filing
v.	*	a petition for vaccine injury versus
	*	vaccine-related death; § 16(a);
SECRETARY OF THE DEPARTMENT	*	<u>Zatuchni</u> ; Influenza vaccine;
OF HEALTH AND HUMAN SERVICES,	*	Guillain-Barré Syndrome, GBS
	*	
Respondent.	*	
	*	

Ronald C. Homer, Conway, Homer & Chin-Caplan, Boston, M.A., for Petitioner.
Voris E. Johnson, U.S. Department of Justice, Washington, D.C., for Respondent.

DECISION¹

Golkiewicz, Special Master

This case involves interpreting the plain meaning of the statute of limitations section of the Vaccine Act, 42 U.S.C. § 300aa-16(a), and its interaction with the Act’s damages provisions, 42 U.S.C. § 300aa-15.² As discussed below, it is held that a petitioner must meet the different statute of limitations periods for both the injury claim and the death claim to be eligible for the compensation related to each. Since petitioner did not meet the statute of limitations for the injury claim, petitioner is entitled only to the death benefit.

¹ The undersigned intends to post this decision on the website for the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). **As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing.** Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc. See Langland v. Sec’y of the Dept. of Health & Human Servs., No. 07-36V, slip op. (Fed. Cl. Spec. Mstr. Feb. 3, 2011).

² This Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (West 1991 & Supp. 2002) (hereinafter “Program,” “Vaccine Act” or “the Act”). Hereafter, individual section references will be to 42 U.S.C. §§ 300aa of the Act.

Facts

The essential and uncontested facts are as follows. Sophie Griglock received an influenza vaccination on October 6, 2005. P Ex 1. On November 23, 2005, Ms. Griglock saw her physician and complained of her legs giving out, trouble walking and of a fall. P Ex 1. She was then admitted to the hospital. A treating neurologist felt she suffered from Guillain-Barré Syndrome (“GBS”) and noted, “one possibility exists that this is a post vaccinal acute neuropathy.” P Ex 12 at 453. Ms. Griglock received ongoing treatment, with some improvement initially, P Ex 3 at 14, but developed respiratory failure and was placed on a ventilator. P Ex 13, Vol. 1, at pp. 64-65; P Ex 13, Vol. 3, at p. 2059. Ultimately, she was never weaned off the ventilator and passed away on May 11, 2007. P Ex. 5 at 424. The death certificate lists the immediate cause of death as ventilator-dependent respiratory failure due to GBS. P Ex 7 at 1.

On April 30, 2009, petitioner filed this Petition as executor of his mother’s estate. The Petition alleges that Sophie Griglock developed GBS and ultimately died as a result of receiving an influenza vaccine on October 6, 2005. The respondent’s Rule 4(c) Report was filed on December 28, 2009. In this Report, respondent noted that “the Institute of Medicine has concluded that there is insufficient scientific and medical evidence to support a causal relationship between flu vaccines administered after 1976 and the development of GBS in adults.” R Rule 4(c) Report (“Report”). Further, “[w]ithin this context, respondent does not believe that a preponderance of the evidence supports a finding that the flu vaccine administered to Sophie on October 6, 2005, actually caused her GBS and subsequent GBS-related death.” *Id.* However, respondent stated, “respondent will not expend further resources to contest entitlement in this matter. Respondent therefore recommends that petitioner be awarded compensation in an amount not to exceed the \$250,000.00 death benefit available under 42 U.S.C. § 300aa-15(a)(2).” Report at 5. On March 1, 2010, petitioner filed a Motion for Damages, claiming petitioner was entitled to petitioner’s “actual unreimbursable expenses, pain and suffering, emotional distress, and the \$250,000.00 death benefit.” P Motion for Damages, 4-5 (“P Motion”). Based upon respondent’s Rule 4(c) Report, the records of this case, and the undersigned’s experience with similar cases involving the influenza vaccine and GBS, the undersigned finds that the vaccinee’s GBS and her death were both caused by the vaccination; therefore, petitioner is entitled to compensation under the Program, leaving in dispute the amount of that compensation.

Zatuchni v. Secretary of the Department of Health and Human Services

Before summarizing the parties’ briefing on damages, it may be helpful to the reader to discuss the Federal Circuit’s decision in Zatuchni and how it relates to the issue presented in this case. Zatuchni v. Secretary of the Department of Health and Human Services, 516 F.3d 1312 (Fed. Cir. 2008). In Zatuchni,³ the Federal Circuit held that “a petitioner who has suffered a

³ Prior to Zatuchni, decisions of special masters and the Court of Federal Claims reached seemingly inconsistent outcomes regarding compensation available with a vaccine-related injury coupled with a vaccine-related or non-vaccine-related death. See Sanders v. Sec’y of the Dept. of Health & Human Servs., 2009 WL 1759452 (Fed. Cl. Spec. Mstr. May 27, 2009)(Order Denying Motion to Dismiss)(discussing pre-Zatuchni Vaccine Act case law dealing with survival of a claim); Flannery v. Sec’y of the Dept. of Health & Human Servs., 2003 WL 1699396 (Fed. Cl. Spec. Mstr. March 14, 2003)(reviewing Vaccine Act cases with

vaccine-related injury and dies from vaccine-related causes while her petition for compensation under § 300aa-15(a) is pending may recover, in addition to the death benefit provided under § 300aa-15(a)(2), compensation under subsections (a)(1), (3), and (4).” Zatuchni, 516 F.3d at 1318. The essential sequence of events in Zatuchni involved a Petition that was filed by the injured vaccinee within the thirty-six month time frame for a petition claiming compensation for a vaccine-related injury, see § 16(a)(2); while the Petition was pending, the petitioner-vaccinee died, her estate was substituted as petitioner, and her death was found to be vaccine-related. Her estate claimed compensation for both the injury and the death. Analyzing the text of the Act and under that particular sequence of events (**1.** vaccine-related injury, **2.** petition timely filed for a vaccine injury, **3.** vaccine-related death of petitioner), the Federal Circuit found petitioner was entitled to all forms of compensation available under the damages provision of the Vaccine Act, § 15(a).⁴ Zatuchni, 516 F.3d at 1313-14, 1324.

Sophie Griglock’s case differs from the sequence of events examined in Zatuchni. While Zatuchni was an injury case timely filed by the vaccinee and became a death case while it was pending, petitioner herein suffered her vaccine injury and death **prior** to filing the Petition. The additional critical wrinkle in the case at hand is that while petitioner’s **claim for compensation related to Ms. Griglock’s death was timely filed** under the Act’s statute of limitations section regarding compensation for vaccine-related death, § 16(a)(3), **her claim for injury compensation would not be timely** if filed for compensation for the vaccine-related injury, § 16(a)(2). Essentially, petitioner contends that the timely filing of the death claim obviates the need to establish the timeliness of the injury claim.

To understand the timing issues, it is important to review the sequence of events in this case. Here, Sophie’s onset of GBS was at latest evidenced by the first doctor visit on November 23, 2005; petitioner notes she had difficulty walking by November 21, 2005. P Motion at 1. Utilizing the date of the documented doctor visit as the date from which to calculate the statute of limitations, **the thirty-six month requirement for filing a petition for compensation for a vaccine-related injury expired on November 24, 2008.** § 16(a)(2). The Petition was actually filed on April 30, 2009.

The filing period for a claim for compensation for a vaccine-related death is within twenty-four months of the date of death **and** no more than forty-eight months after the first symptom or manifestation. § 16(a)(3). Ms. Griglock passed away on May 11, 2007. Therefore, utilizing the November 23, 2005, date for the onset of her condition, the claim for vaccine-related death compensation had to be filed before May 11, 2009, in order to satisfy both the

conflicting rulings regarding whether compensation for injuries are exclusive from compensation for a death). A portion of those inconsistencies were put to rest by Zatuchni v. Sec’y of the Dept. of Health & Human Servs., 516 F.3d 1312 (Fed. Cir. 2008).

⁴ A more recent decision by a fellow special master held that a similar, but different, sequence of events (vaccine-related injury, petition timely filed for a vaccine injury, but followed by a **non-vaccine-related death**) allowed for the estate to claim compensation for the vaccine-related injury following the petitioner’s non-vaccine-related death when the claim was timely filed by the decedent. Sanders v. Sec’y of the Dept. of Health & Human Servs., No. 99-403, 2009 WL 1759452 (Fed. Cl. Spec. Mstr. May 27, 2009)(order denying Motion to Dismiss, finding petitioner). Other cases, with distinguishable facts regarding the sequence of filing and the cause of death, have denied petitioner’s right to compensation. See, e.g., Sigal v. Sec’y of the Dept. of Health & Human Servs., No. 07-489, 2008 WL 2465790 (Fed. Cl. Spec. Mstr. May 23, 2008)(finding petitioner, the estate of the vaccinee, who died of a non-vaccine related injury **prior** to filing the petition, was not a proper petitioner under § 11(b)(1)(A)).

forty-eight month time period **and** the twenty-four month time period. Since the Petition was filed on April 30, 2009, the claim for death was timely filed. **It is critical to note that had Sophie not tragically passed away, her claim for vaccine-related injury compensation would have been barred as it was not filed by November 24, 2008.**

It is important to understand the difference between the facts of Zatuchni and the case at hand. Zatuchni involved a petition for vaccine-injury compensation that was timely filed by the injured vaccinee herself, and met the thirty-six month requirement for seeking injury compensation under § 16(a)(2). In this case, petitioner filing met the statute of limitations for the claim for death compensation but was untimely as to the injury compensation claim. Zatuchni is not helpful in addressing the timing issues presented here as there was no discussion of any such statute of limitations issues in any of the Zatuchni decisions.

Parties' Briefing on Damages

On March 1, 2010, petitioner filed a Motion for Damages, claiming petitioner was entitled to petitioner's "actual unreimbursable expenses, pain and suffering, emotional distress, and the \$250,000.00 death benefit." P Motion for Damages, 4-5 ("P Motion"). Citing Zatuchni, petitioner argues, "the Federal Circuit in Zatuchni made clear that if a person suffered from vaccine-related injuries and also died of a vaccine-related cause, damages for both the vaccine-related injuries and death are available, regardless of whether the petition for compensation was filed by that person or the person's estate." P Motion at 7. Petitioner bases his claim for the above-categories of damages on a broad reading of Zatuchni, the interpretation of § 15(a) as discussed in that same case, and upon the policy objectives of the Act.

On March 26, 2010, respondent filed Respondent's Response to Petitioner's Motion for Damages, and Cross Motion to Dismiss Petitioner's Claim for Vaccine-Related Injury ("R Response"). Respondent notes that petitioner relies heavily upon *dicta* in the Zatuchni decision and further notes that Zatuchni involved a different fact scenario and did not settle the question pertinent to Ms. Griglock's case. Respondent argues that petitioner generally lacks standing to pursue a claim for Sophie's vaccine injury and, alternatively, argues that petitioner's claim for vaccine-related injury compensation is time-barred by the Act's statute of limitations. R Reply at 3.

First, respondent argues that, according to § 11(b)(1), an estate of a person who died as a result of a vaccination only has standing to petition for the death benefit. Respondent resurrects general arguments made and dismissed in its appeal in Zatuchni and wishes to strictly limit its holding to the facts of the Zatuchni petitioner. R Response at 6 ("While the Federal Circuit held in Zatuchni that a petitioner in an appropriate case may seek damages for a vaccine injury in a case also alleging a vaccine-related death, the Act is unambiguous that each category of damages relates specifically to either the injury claim or the death claim, but not both."); R Response at 9-10, n. 6. Respondent argues that the estate of a person who dies of non-vaccine-related causes, **which is not the case here**, does not have standing to file a petition. R Response at 4.

Alternatively, respondent argues that petitioner's claim for Sophie's vaccine-related injury is time-barred due to a plain reading of the Act's thirty-six month statute of limitation for

vaccine-related injury claims found in § 16(a)(2). R Response at 5-9. Respondent also states that “[a]t the very least, Section 15(a)(1)(B) clearly bars petitioner’s claim for past unreimbursable expenses in this case, which indisputably was not filed in compliance with the time requirement set forth in Section 16(a)(2).” R Response at 9, n. 5. Section 15(a)(1)(B) states, compensation is to be awarded, “[s]ubject to section 300aa-16(a)(2) of this title, actual unreimbursable expenses incurred before the date of the judgment” § 15(a)(1)(B) (emphasis added). Section 16(a)(2), previously discussed, establishes the thirty-six month statute of limitations for claims for vaccine-related injury compensation. Similar language is not contained in the sections awarding damages post-judgment, § 15(a)(1)(A), and for pain and suffering, § 15(a)(4).

Thereafter, on April 9, 2010, petitioner filed a Response to Respondent’s Response to Petitioner’s Motion for Damages and Cross Motion to Dismiss Petitioner’s Claim for a Vaccine-related Injury (“P Response”). Petitioner points out that § 11(b)(1) refers to who may file a petition and does not limit what compensation is available. P Response at 3. Citing Zatuchni, petitioner argues that the Act does not distinguish a vaccine-related injury from a vaccine-related death for purposes of awarding the types of compensation available under § 15. P Response at 4. Petitioner claims respondent’s objection to the vaccine-injury compensation being time-barred relies upon faulty logic that vaccine injury is distinct from vaccine-related death. The statute of limitations set forth in the Act, per petitioner, applies to compensation as a whole, regardless of how the section is divided. P Response at 5. Petitioner claims it is illogical to apply a different statute of limitations to compensation for injuries versus compensation for death. *Id.* Petitioner further argues that restricting Sophie’s injury claims runs contrary to the broad policy considerations of the Act. P Response at 7-8.

A Scheduling Order was issued on May 21, 2010, with an extension of time granted on June 21, 2010, directing petitioner to file a brief responding to respondent’s argument regarding the reference to the statute of limitations. Respondent’s reply was due thereafter.

On June 25, 2010, petitioner filed his brief. P Brief Regarding the Reference to § 300aa-16(a)(2) in § 300aa-15(a)(1)(B) (“P Reply”). Petitioner relies heavily upon the language of the statute as interpreted in Zatuchni to conclude that Congress intended to allow all forms of compensation found under § 15(a)(1-4) when a petitioner qualifies to file a petition under § 11(b)(1). Petitioner reads § 16 as a statute of limitations for petitions as a whole, not for the individual types of compensation claimed. Regarding § 16(a)(2), petitioner asserts that the language of the Act is ambiguous, or contrary to the intent of the Congress, and offers extrinsic evidence and speculations to prove his reading of the Act. Finally, returning to the argument regarding the policy objectives of the Act, petitioner asserts respondent’s reading of the Act is contrary to those objectives, P Reply at 8-9, and would foreclose petitioner opportunity to pursue civil damages for past unreimbursed expenses, P Reply at 23-26.

In his Reply, petitioner asserts that the reference to § 16(a)(2) in § 15(a)(1)(B) is present because of the pre-1998 requirement that a petitioner incur unreimbursable expenses in an amount greater than \$1,000.00 within the applicable statute of limitations period. P Reply 12-21. Petitioner states that § 11, § 15, and § 16 “work in concert to define what a petition must contain, when a petition must be filed, and what categories of damages are available when a petition is

properly filed.” P Reply at 13. Citing Black v. Sec’y of the Dept. of Health & Human Servs., 93 F.3d 781 (Fed. Cir. 1996), and May v. Sec’y of the Dept. of Health & Human Servs., No. 91-1057, 1995 WL 298554 (Fed. Cl. Spec. Mstr. May 1995), petitioner discusses how a petitioner had to incur unreimbursable expenses in an amount greater than \$1,000.00 before the running of the statute of limitations contained in § 16(a)(2). P Reply at 15-16. Petitioner quotes the decision in Black, stating, “a petitioner must file a petition within the applicable statutory limitations period, 42 U.S.C. § 300aa-16, and in order to file a qualifying petition, the injured person must have incurred at least \$1,000 in unreimbursable expenses, 42 U.S.C. § 300aa-1(c)(1)(D)(i).” P Reply at 16 (quoting Black, 93 F.3d at 787). Petitioner states the \$1,000 requirement was included because Congress intended the Program to cover cases of a certain severity. Id. (citing Black, 93 F.3d 789). As death itself would be considered sufficiently severe, petitioner states such cases were covered by the Act without the \$1,000 expense requirement. P Reply at 16. In 1998, the requirement that a petitioner incur \$1,000 in unreimbursed past expenses was eliminated. Vaccine Injury Compensation Program Modification Act, S. 2585, 105th Cong. (1998); 144 Cong. Rec. 24560-61(1998)(remark by Sen. Daschle on introduction of S.2585); Pub. L. No. 105-277, Title XV, 112 Stat. 2581-741-742. From this change and without citation, petitioner speculates that the reference to § 16(a)(2) neglectfully remains despite the removal of the \$1,000.00 requirement for unreimbursable expenses in the 1998 amendments to the Act. P Reply 18.

Petitioner also argues that respondent’s interpretation of § 16(a)(2) as referenced in § 15(a)(1)(B) would foreclose petitioner from pursuing a state civil tort action for past unreimbursed expenses, creating broader statutory ambiguities. In this argument, petitioner states that, under respondent’s interpretation of § 15(a)(1)(B), the claim for past unreimbursed expenses was not filed in accordance with § 16 and petitioner is therefore precluded from filing a civil action under § 11(a)(2)(A). Finally, petitioner argues that because the Act is vague, petitioner’s due process has been violated and equitable tolling should apply.⁵ P Reply at 26-30.

Finally, on July 9, 2010, respondent filed a reply to Petitioner’s Brief regarding the reference to § 16(a)(2) in § 300aa-15(a)(1)(B) (“R Reply”). Respondent renews previous objections and addresses the question posed by the May 21, 2010, Order regarding the time to file for vaccine-injury compensation. Respondent argues that the plain meaning of the Act prohibits petitioner from being awarded **past** unreimbursable expenses since the Petition was filed more than thirty-six months after the onset of Sophie’s injury. R Reply at 3-6.⁶

⁵ Similar Due Process and equitable tolling arguments have been raised and rejected in past cases. See, e.g., Leuz v. Sec’y of the Dept. of Health & Human Servs., 63 Fed. Cl. 602, 605-12 (Fed. Cl. 2005)(discussing petitioner’s challenge of the Act’s statute of limitations based on due process grounds, the special master’s authority to hear petitioner’s constitutional challenges and finding the Act’s statute of limitations under § 16(a)(3) does not violate petitioners’ rights to due process or equal protection); Brice v. Sec’y of the Dept. of Health & Human Servs., 240 F.3d 1367 (Fed. Cir. 2001)(holding that equitable tolling is unavailable with respect to the status of limitations set forth in § 300aa-16(a)(2) for a “post-Act” case). The decision regarding equitable tolling in Brice will be the subject of discussion in the rehearing *en banc* of Cloer v. Sec’y of the Dept. of Health & Human Servs., No. 2009-5052, 2010 WL 4269396 (Fed. Cir. 2010)(Order granting rehearing *en banc* and setting out three questions for the parties to address, including whether the holding in Brice should be overruled to permit equitable tolling).

⁶ What respondent does not explain is why the damages for past expenses are explicitly subjected to § 16(a)(2) but the provisions regarding future damages, and pain and suffering do not contain a similar provision. § 15(a)(1), (4). One could argue that the lack of a specific reference to § 16(a)(2) in the damages section for future damages, and pain and suffering supports petitioner’s argument that they should be awarded whether or not the injury claim was timely filed. However, as discussed below, the contrary is found.

Responding to petitioner’s numerous other arguments, respondent asserts those arguments lack merit since the Act is unambiguous. The issue is ripe for resolution.

Discussion

The facts in the present case differ from those found in Zatuchni. Specifically, Zatuchni did not address the key issue presented here: whether both the injury claim and death claim must comply with the applicable statute of limitations in § 16(a)(2) and § 16(a)(3). The undersigned believes the outcome here is determined by the plain meaning of the statute of limitations section of the Act, § 16(a). Youngblood v. Sec’y of the Dept. of Health & Human Servs., 32 F.3d 552, 555-56 (citing Johns-Manville Corp. v. United States, 855 F.2d 1556, 1559 (Fed. Cir. 1988)) (“[A]bsent a very clear legislative intent, the plain meaning [of the statute] will prevail.”).

As an initial matter, the undersigned agrees with petitioner’s reading of Zatuchni as it relates to the standing, § 11, and compensation, § 15, sections of the Act.⁷ It appears that the questions of standing, § 11, and allowable compensation, § 15, were implicitly answered by the Federal Circuit in Zatuchni. However, while the undersigned believes that Zatuchni allows this petitioner standing and would permit him to receive compensation for the injury, **if the injury portion of the case was timely filed**, it is unnecessary to resolve those issues in light of the determination that the statute of limitations prevents the vaccine-injury award in this case. For completeness, those issues are briefly discussed below, followed by the undersigned’s analysis of the statute of limitations as it pertains to compensation for the vaccine injury claim.

A. Standing to File the Petition, 42 U.S.C. § 300aa-11

Section 11(b) sets forth who is a proper petitioner under the Act. As stated previously, in light of the Federal Circuit’s decision in Zatuchni, the undersigned does not accept respondent’s objection that petitioner lacks standing to claim vaccine injury compensation due to the Act’s section that sets out who may be a petitioner, § 11. The Act simply sets forth three categories of people who may file a petition. § 11(b)(1)(A). Those classes are: any person who sustained a vaccine-related injury, the legal representative of a person who sustained a vaccine-related injury if that person is a minor or disabled, or the legal representative of any person who died as a result of the administrations of a vaccine. In this case, petitioner is the legal representative for the Estate of Sophie Griglock. There was no issue of whether Sophie’s death was vaccine-related. R Report at 5; see also R Report at 4 (citing P Ex 7 at 1) (“The death certificate lists the immediate cause of death as ‘sepsis vs. mucous plug,’ due to ventilator-dependent respiratory failure, due to GBS.”).

In Zatuchni, the Federal Circuit stated that the Act’s provision that sets out who may file a petition “plainly does not dictate that a properly filed petition by the estate of a person who suffered both vaccine-related injuries and a vaccine-related death . . . may not contain a request for any and all types of compensation listed” in the Act. Zatuchni, 516 F.3d at 1321. Although this could be considered *dicta* in Zatuchni, since that case was originally filed by the injured vaccinee, it speaks directly to the issue in this case. Therefore, it appears to the undersigned that

⁷ As respondent notes, the undersigned is bound by the Federal Circuit’s ruling in Zatuchni. R Reply at 5, n. 1.

the question of whether Sophie's estate has standing was implicitly answered in the affirmative by the Federal Circuit in Zatuchni.

B. Compensation Available under 42 U.S.C. § 300aa-15

What compensation is available to petitioner is limited by the facts of this case. First, the parties agree that petitioner should be awarded the death benefit provided by § 15(a)(2). See, e.g., Report at 5; P Motion at 4-5. Second, as Ms. Griglock is deceased, there will be no prospective vaccine-injury expenses incurred from the date of judgment on into the future, § 15(a)(1)(A). Third, Ms. Griglock was retired at the time of the vaccination and thereafter passed away; therefore, no lost earnings are at issue under § 15(a)(3). See P Motion at 5, n. 3. The categories of compensation for the vaccine-related injury that remain in contention are those for actual unreimbursable expenses incurred before the date of judgment, § 15(a)(1)(B), and for pain and suffering, § 15(a)(4).

The Federal Circuit held that the Zatuchni petitioner was entitled to all forms of compensation available under § 15.⁸ It found that this section of the Act lists what compensation is available and it does not place a limit on which sections are available in cases of injury versus those available in cases of death. "Most important, the text and structure of § 300aa-15(a) indicate that the death benefit provided by subsection (a)(2) is not the exclusive remedy where a petitioner has experienced both a vaccine-related injury and a vaccine-related death." Zatuchni, 516 F.3d at 1318. Further:

the fact that a vaccine-related death followed a vaccine-related injury in a particular case does not alter the fact that certain expenses were incurred, wages

⁸ The categories of what may be awarded are set forth in § 300aa-15(a). In that section, the Act states:

Compensation awarded under the Program to a petitioner under section 300aa-11 of this title for a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, shall include the following:

(1)(A) Actual unreimbursable expenses incurred from the date of the judgment awarding such expenses and reasonable projected unreimbursable expenses [which are not claimed in this case] . . .

(B) Subject to section 300aa-16(a)(2) of this title, actual unreimbursable expenses incurred before the date of the judgment awarding such expenses which--

(i) resulted from the vaccine-related **injury** for which the petitioner seeks compensation,

(ii) were incurred by or on behalf of the person who suffered such **injury**, and

(iii) were for diagnosis, medical or other remedial care, rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary.

(2) In the event of a vaccine-related death, an award of \$250,000 for the estate of the deceased.

(3) . . . loss of earnings [which are not claimed in this case] . . .

(4) For actual and projected pain and suffering and emotional distress from the vaccine-related **injury**, an award not to exceed \$250,000.

42 U.S.C. § 300aa-15(a) (emphasis added).

lost, or pain and suffering endured in the interim, and these damages are no less related to or caused by a vaccine-related injury within the meaning of subsections (a)(1), (3), and (4) simply because the vaccine-injured person in question is no longer living.

Zatuchni, 516 F.3d at 1318-19. The Federal Circuit examined § 15 thoroughly, including how damages are awarded in pre-Act cases under the second subsection, and found that this section did not apply a limitation on what compensation a petitioner may claim according to whether the person was vaccine-injured or died as a result of the vaccine. Again, it appears to the undersigned that the Federal Circuit made clear in its interpretation of the damages section of the Act, § 15, that areas of compensation for injuries and deaths, to an otherwise qualified petitioner, are not exclusive of each other.

C. Limitation on Compensation found in 42 U.S.C. § 300aa-16, the Statute of Limitations

The critical question herein is whether § 16(a)(2), the statute of limitations for compensation for injury claims, bars petitioner's claim for compensation related to Sophie's vaccine injury.⁹ As pointed out by respondent, when interpreting the Act, one must "first look to the plain language of the statute." R Response at 5 (citing Sharp v. United States, 580 F.3d 1234, 1237 (Fed. Cir. 2008)(citations omitted)). Further, the Federal Circuit in Zatuchni observed, "[t]he Program imposes firm deadlines for both the filing and resolution of petitions" Zatuchni, 516 F.3d at 1316. Thus, the major obstacle for petitioner's claim for compensation for the vaccine-related injury is that it was filed after thirty-six months after onset of the injury.

The relevant part of the Act is set forth under § 16(a)(2) (emphasis added):

In the case of a vaccine set forth in the Vaccine Injury Table which is administered after the effective date of this subpart, if a vaccine-related injury occurred as a result of the administration of such vaccine, **no petition may be filed for compensation under the Program for such injury** after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury[.]

The relevant statute of limitations for filing an action for a vaccine-related death, which petitioner met, is set forth under § 16(a)(3) (emphasis added):

⁹ This case resembles a Vaccine Act case that was decided many years before Zatuchni. In Vijil v. Sec'y of the Dept. of Health & Human Servs., 1993 WL 177007 (Fed. Cl. Spec. Mstr. 1993), the estate of the deceased vaccinee filed a Petition for compensation and sought damages for a vaccine-related death, as well as damages for the vaccine-related injury that lead to the child's death. The special master found petitioner was not entitled to compensation for the injury along with the death benefit. There is no discussion of whether the petition was filed after the limitation of thirty-six months after the date of onset found in § 16(a)(2). At that time, the special master in Vijil sagely noted that if the word injury, as found in the Act, were read to include death, subparts (2) and (3) of § 16 would be nonsensical; the forty-eight month requirement for filing death claims would become superfluous. Vijil, 1993 WL at *2, n. 8.

In the case of a vaccine set forth in the Vaccine Injury Table which is administered after the effective date of this subpart, if a death occurred as a result of the administration of such vaccine, no petition may be filed **for compensation under the Program for such death** after the expiration of 24 months from the date of the death and no such petition may be filed more than 48 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of the injury from which death resulted.

Contrary to petitioner's argument that § 16 applies to a petition as a whole, the plain language of § 16 sets forth separately and distinctly the prescribed times to file for **compensation** for an injury and **compensation** for a death. Section 16(a)(2) provides a thirty-six month period for filing a claim for compensation for a vaccine injury after the date of onset; § 16(a)(3) provides a different period for filing a claim for compensation for a vaccine-related death, which is within twenty-four months after the date of death **and** forty-eight months after the date of onset of the injury. Petitioner's death claim met the applicable provision; the injury claim did not. Petitioner's argues that § 16 should be read as a whole, and a petition that is timely filed for either the death or injury claim makes the claim for death **and** injury compensation timely, whether or not either the death or injury claim is untimely. This is similar to the arguments made regarding § 11 and §15 in Zatuchni wherein the petitioner argued, and the Federal Circuit agreed, that the language in § 11 and § 15 does not limit a proper petitioner to only the death benefit or only the injury compensation. Although the Federal Circuit found that these other sections of the Act do not make compensation for injury and death exclusive of one another, the statute of limitations section clearly does, with separate and distinct subparts devoted to each. Petitioner's argument, if accepted, would essentially give a petitioner the option of meeting either of those two provisions when filing a claim for compensation for both an injury and a death. The plain language of those sections dictates a different result. Filing a timely petition for a death benefit cannot convert an otherwise untimely injury claim into a timely event. There is no logical or legal justification for such a result.

"To overcome the plain meaning of the statute, the party challenging it by reference to legislative history must establish that the legislative history embodies 'an extraordinary showing of contrary intentions.'" R Response at 8-9 (quoting Sharp, 580 F.3d at 1237 (quoting Garcia v. United States, 469 U.S. 70, 75 (1984))). Petitioner has not offered an extraordinary showing, nor has the undersigned's review of the legislative history given evidence to overcome the plain meaning of the statute.

One of petitioner's overarching arguments focuses on the policy statements often referenced regarding the Act. Petitioner recites objectives such as the Act's intentions to be "expeditious and fair" and with "relative certainty and generosity." P Motion at 8 (citing H.R. Rep. 99-908 at 12-13). In light of the years of suffering endured by Ms. Griglock, petitioner argues that denying compensation for the injury portion would be contrary to the intent of the statute. P Motion at 9. To do so, in petitioner's view, would be inconsistent with the Act. Id. In response to respondent's arguments, petitioner states the intent of the Act was to divert potential plaintiffs from the traditional tort system. P Response at 7.

Petitioner argues that “it is illogical to apply a different statute of limitations to compensation for injuries versus compensation for death,” P Response at 5, and that limiting petitioner’s right to collect compensation for the injury in this situation would be to “become blind to the fact that vaccine-related injuries necessarily preface a vaccine-related death.” P Response at 7 (emphasis omitted). However, what petitioner fails to recognize and address is the Act’s plain language that differentiates between claims for compensation for an injury and those for a death. The undersigned acknowledges that a vaccine-related death is necessarily preceded by a vaccine injury; however, claims for compensating the vaccine injury must meet the statute of limitations set out in § 16(a)(2).

Furthermore, the Act was never intended to be limitless, nor was it intended to be the sole remedy for vaccine-injured persons. “Congress is not obligated to extend the coverage of the Vaccine Act cases to all persons suffering a vaccine-related injury.” Leuz v. Sec’y of the Dept. of Health & Human Servs., 63 Fed. Cl. 602, 608 (Fed. Cl. 2005)(citing Black v. Sec’y of the Dept. of Health & Human Servs., 93 F.3d 781, 788 (Fed. Cir. 1996); Califano v. Boles, 443 U.S. 282, 296 (1979)). Arguments regarding the policy considerations of the Act have been offered before regarding the application of the Act’s statute of limitations. In both Brice v. Sec’y of the Dept. of Health & Human Servs., 240 F.3d 1367 (Fed. Cir. 2001) and Weddel v. Sec’y of the Dept. of Health & Human Servs., 100 F.3d 929 (Fed. Cir. 1996), the Federal Circuit found that “enforcement of a statutory cut-off date ‘provides claimants with certainty and in no way reduces the generosity of the program or speed with which the claims are adjudicated.’” Brice, 240 F.3d at 1373-74 (quoting Weddel, 100 F.3d at 932).

Further in Zatuchni, the Federal Circuit discussed the different limitations and trade-offs built into the Act. The limitations the Federal Circuit specifically enumerated were “the statute of limitations, the filing requirements of § 300aa-11, the single petition rule, the limitation on the number of pre-Act petitions for which compensation may be awarded, and limits on the amount of compensation that may be paid under certain subsections of § 15.” Zatuchni, 516 F.3d at 1322. The Federal Circuit acknowledged that these limitations prevent “certain individuals who have undoubtedly suffered as a result of a vaccine from receiving full (or any) compensation.” Id. That this results, according to the Federal circuit, “is beyond question.” Id.

Petitioner cites various portions of the Zatuchni decision for support. But these references are inapposite. The undersigned agrees, and is bound to find, that a **properly filed petition** is entitled to all of the benefits provided by § 15. The time for filing the petition, according to § 16(a), is the difference between Zatuchni and the case *sub judice*.¹⁰ The Federal Circuit’s decision discussed § 16, finding only that the section “**does not necessarily** reflect a broader goal of separating ‘injury’ cases and ‘death’ cases.” Zatuchni, 516 F.3d at 1322, n. 11 (emphasis added). However, as discussed, that is not the case here. The injury claim is simply untimely. Nothing stated or found in Zatuchni suggests a different finding.

¹⁰ The Federal Circuit dismissed respondent’s argument in Zatuchni that the distinction between injury and death in § 16 had bearing on the types of compensation available in 15. Zatuchni, 516 F.3d at 1322, n. 11. However, the Federal Circuit did not discuss application of the individual subsections of § 16 that distinguish claims relating to injury and death and how an untimely filed petition, under either § 16(a)(2) or § 16(a)(3), affects compensation. As such, this discussion of § 16 is unhelpful to petitioner here.

Although the undersigned reads Zatuchni as opening the door for compensation to be awarded for both injury and death, the specific fact scenario in the present case focuses on a window of time set out in the Act that bars an award for this petitioner’s vaccine-related injury compensation. In this particular set of circumstances, a portion of petitioner’s claim does not comply with a specific limitation, the statute of limitations for filing a claim for injury benefits, and petitioner is prevented from recovering even though the vaccinee “undoubtedly suffered as a result of a vaccine.”

It should be noted that the Zatuchni court appeared to comment, in *dicta*, on a sequence of events akin to those herein. Respondent in Zatuchni argued that § 11(b)(1)(A), which dictates that the estate of a person who died as a result of a vaccine may file a petition, makes it apparent that “a person who dies **before** the filing of a petition cannot request compensation for a vaccine-related injury.” Zatuchni, 516 F.3d at 1320 (emphasis in original). Respondent continued, claiming vaccine-related injury claims do not survive the death of the vaccine-injured person. Id. The Federal Circuit found the government’s interpretation “goes too far.” Id. The court declined to decide “whether § 11(b)(1)(A) permits the estate of a person who suffered vaccine-related injuries but died of a non-vaccine-related cause to file a petition for vaccine-related injury compensation” Id. at 1320-21. However, the majority stated that § 11(b)(1)(A) “does not dictate that **a properly filed petition** by the estate of a person who suffered both vaccine-related injuries and a vaccine-related death (and thus had standing to file under § 11(b)(1)(A)) may not contain a request for any and all of the types of compensation listed in § 15(a).” Id. at 1321 (emphasis added). This pronouncement, however, does not help petitioner herein because whether or not the injury and death claims in Zatuchni were timely filed was not discussed or was not apparently in contention.

Finally, petitioner argues that applying the statute of limitations found in § 16(a)(2) to the injury portion of the claim would preclude a civil action. P Reply at 25. Section 11(a)(2)(A) of the Act prohibits persons from bringing a civil action in state or federal court unless a petition has been timely filed, judgment has entered and the person has elected to file a civil action or the person exits the program under § 21(b) of the Act. Requiring compliance with the Act is one mechanism by which Congress intended to protect the vaccine supply and promote vaccine manufacturers to remain in the vaccine market. See, e.g., H.R. Rep. 99-908 at 6-7, 12-13 (discussing the burden of complex litigation on both an injured vaccinee and vaccine manufacturers). Petitioner’s untimely filing for injury compensation in this case and subsequent potential barring from a civil action is no different than untimely filings in other cases where petitioners have not complied with the Act’s timing provision and have been barred from filing a civil action. Additionally, to reiterate, had Ms. Griglock not passed away, her claim for vaccine injury compensation would be unquestionably time-barred as it was not filed within thirty-six months of the onset of her symptoms.

Petitioner timely filed a claim for compensation for the death benefit and it is so awarded. However, petitioner’s claim for injury benefits was untimely and thus is denied.

- D. Limitation on Compensation found in 42 U.S.C. § 300aa-15(a)(1)(B): The purpose and effect of referencing the statute of limitations when awarding past, unreimbursable expenses

One provision of the Act warrants pause when examining this issue. Regarding unreimbursable past expenses, § 15(a)(1)(B), the section specifically references the thirty-six month statute of limitations period, § 16(a)(2). Respondent argues that this reference is reinforcement that compensation in this case is limited to the death benefit. Petitioner's argument is more complex; citing prior case law dealing with requirements of the Act and interplay between the Act's sections, petitioner suggests the reference to the thirty-six month limitations period is a useless vestige of the Act's prior requirement that a petitioner incur \$1,000 in expenses.

Petitioner's arguments regarding this reference may seem appealing, see P Reply at 12-21, but rely on no direct or mandatory authority. Furthermore, the undersigned was unable to find reference to either § 15(a)(1)(B) or § 16(a)(2) in a review of legislative history regarding the 1998 amendment that removed the \$1,000 unreimbursed past expenses requirement. Vaccine Injury Compensation Program Modification Act, S. 2585, 105th Cong. (1998); 144 Cong. Rec. 24560-61(1998)(remark by Sen. Daschle on introduction of S.2585). One might argue that the specific reference to the thirty-six month limitation in this one compensation section implies that the differing statute of limitations does not broadly distinguish between injury and death compensation. If this reference to the thirty-six month limitation in the section on unreimbursable past expenses implicates that other compensation sections may be awarded regardless of § 16, then this petitioner would be entitled to an award for pain and suffering. See supra p.8, section B (discussing the lack of projected expenses and lost wages and the parties' agreement regarding the death benefit). However, ultimately, the undersigned disposes with this concern by relying upon the plain and specific language of § 16, the statute of limitations section of the Act, as well as the knowledge that the injury claim would be barred by the statute of limitations had Ms. Griglock lived.

Conclusion

Accordingly, the undersigned awards compensation in the amount of \$250,000.00, representing compensation due under § 15(a)(2). Petitioner's request for compensation under the remaining subparts of § 15(a) is denied as barred by § 300aa-16(a)(2). **Specifically, petitioner is awarded a lump sum of \$250,000.00 in the form of a check payable to petitioner.**

The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.¹¹

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
Special Master

¹¹ This document constitutes a final "decision" in this case pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of the Court shall enter judgment in accord with this decision. Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.