OFFICE OF SPECIAL MASTERS
No. 94-646V
(Filed: April 6, 1998)

PAULA JELLY,	*	
Petitioner,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Charles Rappaport, Melville, New York, appeared for petitioner.

Vincent Matanoski, Department of Justice, Washington, D.C., appeared for respondent.

RULING CONCERNING "TAX OFFSET" ISSUE

HASTINGS, Special Master.

This is an action seeking an award under the National Vaccine Injury Compensation Program (hereinafter "the Program").[(1)] For reasons set forth elsewhere, I have concluded that petitioner is entitled to such an award, and that included in the award should be an amount to compensate petitioner for an employment earnings loss caused by her vaccine-caused condition. The issue to be resolved in this Ruling is whether, in calculating the amount to be awarded to petitioner for this "lost earnings" element of Program compensation, I should reduce petitioner's *gross* lost earnings by the amount of *taxes* that petitioner likely would have paid on the earnings in question had she in fact received those earnings. In other words, should petitioner be awarded "pre-tax" lost earnings or "after-tax" lost earnings? Respondent has argued that a reduction for taxes should be made, while petitioner has argued to the contrary. I conclude that respondent is correct.

I

BACKGROUND

A. Relevant facts

The facts relevant to this issue are straightforward. Petitioner has demonstrated that she has a chronic vaccine-caused condition, and that this condition has caused her to lose some earnings in the past and will likely reduce her future earnings. It is also relevant that the vaccination in question was received in 1991, when petitioner was more than 18 years of age.

B. Relevant statutory provision

The statute provides that a petitioner who has demonstrated that he or she was injured by a vaccination administered after October 1, 1988, may receive, among other elements of compensation, the following:

[i]n the case of any person who has sustained a vaccine-related injury after attaining the age of 18 and whose earning capacity is or has been impaired by reason of such person's vaccine-related injury for which compensation is to be awarded, compensation for actual and anticipated loss of earnings determined in accordance with generally recognized actuarial principles and projections.

§ 300aa-15(a)(3)(A).

II

DISCUSSION

As noted above, the issue to be resolved in this Ruling is whether, in calculating the amount to be awarded for a petitioner's "lost earnings," I should reduce the petitioner's *gross* "lost earnings" by the amount of *taxes* that the petitioner likely would have paid had she in fact received the earnings in question. In other words, should petitioner be awarded "pre-tax" lost earnings or "after-tax" lost earnings? I conclude that a tax reduction is appropriate.

I begin by noting that the statutory language itself, set forth above, does not specifically answer the question; it simply directs that I make an award for "actual and anticipated loss of earnings," failing to specify whether "pre-tax" or "after-tax" earnings should be awarded. I also note that I have found no direct precedent concerning this legal issue in the published jurisprudence with regard to the Program. There have been, to be sure, a number of published decisions concerning the computation of lost earnings involving persons who were injured by vaccinations received when the vaccinee was *less than 18 years old. See, e.g., Euken v. Secretary of HHS*, 34 F. 3d 1045 (Fed. Cir. 1994); *Edgar v. Secretary of HHS*, 989 F. 2d 473 (Fed. Cir. 1993). In such cases, however, a *different* section of the statute--namely, part (B) of § 300aa-15(a)(3)--applies.[(2)] I have found no published opinion, on the other hand, dealing with part (A) of § 300aa-15(a)(3), relating to "lost earnings" of an individual who was *more than 18 years* of age when vaccinated, so the issue here is one of first impression. I also have found no legislative history bearing directly upon the issue here.

In this absence of a definitive statutory provision, on-point legislative history, or precedential case law, I note that there nevertheless are several factors that lead me to the conclusion that only

"after-tax" earnings should be awarded. I will discuss each of those factors, in turn, below.

A. General purpose of statutory provision

The first factor in my analysis is consideration of the general purpose behind the statutory provision in

question. That is, the basic rationale for my conclusion starts with the fact that the obvious purpose of an award for "lost earnings" under the Program is to put the petitioner in the same financial situation where she would have been "but for" the vaccine-caused injury. And had the petitioner been able to work the hours here in question, unquestionably she would have been taxed on the wages that she received for her work. Therefore, if I were to award petitioner the full, gross amount of wages that her employer would have paid, *without* any reduction for taxes, she would receive *more* than she would have actually been able to receive and enjoy had she worked the hours in question. Therefore, the tax reduction suggested by respondent seems conceptually appropriate, in order to ensure that petitioner will receive only those amounts that she would have actually received had she been able to work.

B. Analogous case law

Moreover, my conclusion here also is consistent with the recent federal case law in other non-Program situations in which awards have been made on account of lost earnings. In such situations, since 1980 the Supreme Court and other federal courts have repeatedly held that a claimant should receive only that amount which he would *actually have been able to receive and use* on account of his labor, which is the amount of gross pay *less* any taxes that would have been subtracted. *See, e.g., Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. 490, 493-94 (1980); *Jones and Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 534 (1983); *United States v. English*, 521 F.2d 63, 72 n.8 (9th Cir. 1975); *Harden v. United States*, 688 F.2d 1025, 1029 (5th Cir. 1982); *Newmann v. United States*, 938 F.2d 1258, 1264 (11th Cir. 1991); *Fanetti v. Hellenic Lines Ltd.*, 678 F. 2d 424, 431 (2d Cir. 1982), *cert. denied* 463 U.S. 1206 (1983); *Deakle v. John E. Graham & Sons*, 756 F. 2d 821, 830 (11th Cir. 1985), rehearing denied, 763 F. 2d 419 (1985); *Shaw v. United States*, 741 F. 2d 1202, 1206 (9th Cir. 1984); *Kendrick v. Jefferson County*, 13 F. 3d 1510, 1514 (11th Cir. 1994). And the petitioner has suggested no reason why the computation should be any different with respect to Program "lost earnings" awards pursuant to § 300aa-15(a)(3)(A). I find this case law to be compelling, adding weight to my conclusion that a tax offset is appropriate here.

In this regard, I do note that the federal case law is not completely uniform on this point. In some cases even since *Liepelt* in 1980--*i.e.*, cases under the Federal Tort Claims Act and federal diversity jurisdiction cases--federal courts have declined to instruct juries to award "after-tax" rather than "pre-tax" wages for "lost earnings." But in those cases the courts were applying *state law*, which is not the case here. See, *e.g., Childs v. United States*, 923 F. Supp. 1570 (S.D. Ga. 1996) (applying Georgia law); *Savic v. United States*, 702 F. Supp. 695, 698 (N.D. Ill. 1988) (applying Illinois law). Further, there also exist some federal court opinions, *not* applying state law, in which courts upheld jury instructions to the general effect that taxes should not be a consideration in computing a damages award for lost earnings. *See, e.g., Anderson v United Air Lines*, 183 F. Supp. 97 (S.D. Cal. 1960); *McWeeney v. New York*, 282 F. 2d 34 (2d Cir. 1960). But those cases were decided prior to *Liepelt*, and have been effectively overruled by *Liepelt* and the other cases cited in the preceding paragraph. I conclude that the cases cited in the preceding paragraph set forth the current controlling federal precedent[(3)] on this issue, and should be followed here.[(4)]

C. Consideration of part (B) of § 300aa-15(a)(3)

The next factor involves consideration of another part of the statute closely related to the statutory provision here at issue. That is, part (B) of § 300aa-15(a)(3), which, as noted above, concerns lost earnings of individuals injured *prior to age 18*, contains a specific provision for a reduction on account of taxes;[(5)] this specific provision is in contrast to part (A) of § 300aa-15(a)(3), at issue here, which generally authorizes an award for lost earnings for individuals injured *after* age 18, but contains no specific direction that a reduction for taxes is to be made in arriving at the amount of such an award. A question thus arises: Is any inference, as to the proper interpretation of part (A), to be drawn from the fact

that a tax offset is *specifically* provided in part (B), but no such specific provision is contained in part (A)?

At first blush, one might infer that the absence of such a specific provision in part (A) might suggest that Congress intended that no tax reduction be made. Upon careful consideration, however, I conclude that no such inference is warranted. Rather, there exists a very good explanation for this difference between the two parts of § 300aa-15(a)(3). That is, as respondent has pointed out, part (B) deals with individuals who were injured as *children*, prior to establishing any earnings history, and therefore provides a *complete, specific formula* for computing such an individual's future lost earnings. As part of that precise formula, a tax offset is specified. In contrast, part (A) deals with an individual injured *after age 18*, who might already have established an earnings history that could allow a Program special master to more precisely determine how the vaccine-related injury affected that person's earning capacity. Thus, no specific formula whatsoever for determining lost earnings was provided, so there was no need for Congress to *specify* an offset for taxes as part of a formula. Therefore, it would be unreasonable to infer from the absence of a specific tax offset provision in part (A) that Congress intended that no reduction for taxes be made in computing lost earnings of persons injured after age 18.

Indeed, in my view, if any inference is to be drawn from a comparison of part (B) to part (A) of § 300aa-15(a)(3), it is in fact the *contrary* inference that would be appropriate. That is, while Congress imposed no specific formula in part (A), the inclusion of a tax offset in part (B) indicates that Congress did find the *general principle* of a tax offset to be an appropriate one, indicating that Congress intended that only "after-tax" lost earnings be awarded under part (A) as well. Moreover, it is also fair to infer that Congress assumed that in awarding lost earnings under part (A), without a specific formula having been provided, a Program special master would look to lost earnings awards in *other types of federal cases* in which damage awards for personal injuries are made. In other words, Congress likely intended that a special master look to the very cases set forth at p. 3 above, which, as already discussed, indicate that a reduction for taxes *is* appropriate.

D. Consideration of tax status of Program award

A final point that is important here is highlighted by a discussion in one of the federal cases cited above, a discussion which raises an important point concerning the rationale of those cases. That is, the court in *Kendrick* explained that the holdings in *Liepelt*, *Jones and Laughlin Steel*, and the other cases cited above are in effect predicated on the assumption that when the plaintiff in each case *actually receives* the award for lost earnings, he or she will *not* be subject to paying income and employment taxes on that award. 13 F. 3d at 1514-15. In other words, if the award were computed on the basis of "after-tax" lost earnings, and then the plaintiff nevertheless had to pay income taxes upon receiving the award, obviously the plaintiff would be *undercompensated* for his or her earnings loss. Therefore, the *Kendrick* court noted that in determining whether to award "pre-tax" or "after-tax" lost earnings, a court should first attempt to determine whether the award will be taxable when received by the plaintiff in question. *Id*.

In this case, then, under the rationale set forth in *Kendrick*, it is appropriate for me to consider whether the award for lost earnings to be received by petitioner in this Program proceeding will be taxable to petitioner when received by her. On this point, again I am aware of no specific case law concerning the taxability of a Program award. However, I find very strong evidence in the Program statutory language, the Program legislative history, and the basic law involving the taxation of personal injury awards, all indicating that the award in this case, including the amount awarded for petitioner's lost earnings, will *not* be subject to income taxation.

First, I note that, as discussed above, in part (B) of § 300aa-15(a)(3) Congress specifically provided for a reduction for taxes in computing the lost earnings of an individual injured by a vaccination *prior to age*

18. Obviously, Congress would not have done so if Congress expected that Program awards--even that portion thereof attributable to lost earnings--would be subject to income and employment taxation.

Second, a review of the law concerning the taxation of personal injury awards makes it appear virtually certain that Program awards--even that portion attributable to "lost earnings"--will *not* be subject to federal income taxation. The applicable statute, § 104(a)(2) of the Internal Revenue Code (26 U.S.C.), specifically excludes from gross income "the amount of any damages received * * * on account of personal injuries or sickness." And the case law and regulatory rulings have made it clear that when an award is received for a personal injury in a tort or tort-type proceeding, the *whole award* is excludable from income under 26 U.S.C. § 104(a), even if included in the award is an amount for *lost earnings*. See, *e.g.*, *Liepelt*, 444 U.S. at 495; *United States v. Burke*, 504 U.S. 229, 233-237 (1992); *Threlkeld v. Commissioner*, 848 F. 2d 81, 83-84 (6th Cir. 1988); Rev. Rul. 85-97, 1985 Cum. Bull. 50. And a *Program award*, an award for a physical injury which is specifically designed to take the place of an award that the petitioner otherwise might have obtained by filing a *personal injury tort suit* against the vaccine manufacturer or administrator, would almost certainly be considered to be received "on account of personal injury," and therefore be excluded from federal gross income under 26 U.S. § 104(a)(2).

Finally, I note that in certain *legislative history*, Congress explicitly indicated the understanding that Program awards would not be subject to federal income taxation. That is, at various times Congress has considered amendments to the vaccine tax that supports the Program, and reports of both House and Senate committees considering such legislation have stated as follows:

The committee wishes to clarify its understanding that amounts received by a claimant from the Vaccine Trust Fund constitute damages received on account of personal injuries or sickness for purposes of the exclusion from gross income provided by the general rules of section 104(a)(2).

H.R. Rept. No. 103-111, May 25, 1993, n.202, *reprinted at* 1993 WL 181528, *1861 (Legis. Hist.); 138 Cong. Rec. 21,057, n.4 (1992). The cited statement indicates that it was Congress' intent that awards received under the Program, even when such awards included amounts for "lost earnings," would be *excluded* from the recipient's taxable income for federal income tax purposes, pursuant to Section 104(a)(2) of the Internal Revenue Code.

Thus, the fact that the Program award in this case is likely to be fully excluded from the petitioner's federal[(6)] taxable income under 26 U.S.C. § 104(a)(2) further supports the result that I reach here. That is, since the petitioner in this case will not need to pay federal income taxes on her Program award, including the portion awarded for her lost earnings, it makes sense to award her only *after tax* lost earnings in order to avoid giving her a windfall.

III

CONCLUSION

In sum, the for the reasons set forth above, I conclude as a matter of law that when an award for lost earnings is made under § 300aa-15(a)(3)(A), the amount of any gross earnings lost by the petitioner should be reduced by the income taxes and employment (F.I.C.A.) taxes[(7)] that would have been deducted from such earnings. In other words, only "after-tax" lost earnings should be awarded.

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George L. Hastings, Jr.

Special Master

1. The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (1994 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (1994 ed.).

2. For the text of part (B) of § 300aa-15(a)(3), see p. 4, fn. 5, below.

3. For additional discussion of the federal case law on this point, *see* Randall G. Vaughn, *Tax Issues of Personal Injury and Wrongful Death Awards*, 19 Tulsa Law J. 702, 712 (1984).

4. Similarly, the New York state cases cited by petitioner in this case are inapposite, since New York law does not apply to the calculation of the award here. I conclude that in interpreting the federal statute here in question, I should be guided by the *federal* cases rather than state law.

5. Part (B) of § 300aa-15(a)(3) specifies that a Program award will include the following (emphasis added):

(B) In the case of any person who has sustained a vaccine-related injury before attaining the age 18 and whose earning capacity is or has been impaired by reason of such person's vaccine-related injury for which compensation is to be awarded and whose vaccine-related injury is of sufficient severity to permit reasonable anticipation that such person is likely to suffer impaired earning capacity at age 18 and beyond, compensation after attaining the age of 18 for loss of earnings determined on the basis of the average gross weekly earnings of workers in the private, non-farm sector, *less appropriate taxes* and the average cost of a health insurance policy, as determined by the Secretary.

6. Though the authorities cited above refer only to federal income taxation, I note that it also seems extremely likely that petitioner's Program award will be subject neither to state income tax nor federal employment (F.I.C.A.) tax. Most states utilize federal taxable income as the basic figure for computing state taxable income, therefore excluding amounts that have been excluded from federal taxable income. And I am aware of no precedent for, or mechanism for, subtracting F.I.C.A. tax from personal injury awards for lost earnings.

7. In *Euken v. Secretary of HHS*, 34 F. 3d 1045 (Fed. Cir. 1994), the court determined that in a computation of "lost earnings" under part B of § 300aa-15(a)(3), it is appropriate to deduct F.I.C.A. tax as well as federal and state income tax. I conclude that the same rule should apply under part (A) of § 300aa-15(a)(3).