OFFICE OF SPECIAL MASTERS

March 14, 2003

DOROTHY FLANNERY, as Administratrix of the Estate of RILEY ELTON, Deceased,	*	
	*	No. 99-963V
	*	PUBLISHED
Petitioner,	*	
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Barry J. Nace, Washington, DC, for petitioner.
Lisa A. Watts, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION

Statement of the Case

On November 30, 1999, petitioner, on her own behalf, filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986[1] (hereinafter the "Vaccine Act" or the

[1] The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, 42 U.S.C.A. §300aa-1 et seq. (West 1991), as amended by Title II of the Health Information, Health Promotion, and Vaccine Injury Compensation Amendments of November 26, 1991 (105 Stat. 1102). For convenience, further references will be to the relevant subsection of 42 U.S.C.A. § 300aa.

"Act"), alleging that she suffered anaphylaxis or anaphylactic shock from her receipt of hepatitis B vaccine on December 1, 1997 and January 9, 1998.[2] She also alleged significant aggravation of her Raynaud's condition, tachycardia, arthritis, and hypothyroidism. Petitioner had satisfied the requirements for a prima facie case pursuant to 42 U.S.C. § 300aa-11(c) by showing that: (1) she had not previously collected an award or settlement of a civil action for damages arising from the alleged vaccine injury, and (2) she received hepatitis B vaccine in the United States.

Petitioner filed a report from Dr. Bimal H. Ashar, dated September 27, 2000, stating that petitioner's conditions were present before her vaccinations, specifically, her very labile blood pressure, her difficult-to-control hypothyroidism, her arthritic condition, and her tachycardia "were all present and uncontrolled prior to the time of her vaccine. Her Raynaud's disease seems to have actually improved since that time." P. Ex. 13. Dr. Ashar believed that hepatitis B vaccine caused her dermatological condition. Id. Her fatigue and memory loss worsened. Id.

On December 14, 2000, petitioner filed an expert report from Dr. J. Barthelow Classen, dated December 11, 2000. He stated petitioner had several autoimmune and inflammatory conditions associated with her Raynaud's phenomenon, many of which started prior to immunization. He stated that she had a significant immunological reaction to hepatitis B vaccine manifesting initially as a dermatological condition, followed by worsening of her preexisting conditions and the development of new inflammatory conditions in her joints and gastrointestinal system. Attached to Dr. Classen's opinion is a manuscript of his article entitled "Scientific

[2] Petitioner received her first hepatitis B vaccination on October 15, 1993. P. Ex. 2, p. 3.

Evidence Proving Vaccines Cause Autoimmunity other than Insulin Dependent Diabetes," dated July 2000.

Respondent filed his Rule 4(b) report on March 2, 2001, stating Ms. Elton's skin condition preceded her second hepatitis B vaccination as did her other health problems. Respondent provided expert medical reports from Dr. John Spandorfer (R. Ex. A), and Dr. Burton Zweiman (R. Ex. C), both of whom opined that hepatitis B vaccine did not cause petitioner's rash. Dr. Zweiman also opined that Ms. Elton's other conditions were unrelated to the vaccine.

This case was originally set for hearing on October 2, 2001, and then rescheduled per the parties' request, to October 18, 2001. However, due to the September 11, 2001 tragedy and the difficulties in travel for Dr. Zweiman due to airport problems and hospital duties, respondent moved for another delay in the hearing. Petitioner's counsel took no position on respondent's motion for postponement. The prior special master assigned this case denied respondent's motion on October 12, 2001.

During a status conference on October 16, 2001, petitioner's counsel requested a postponement of the hearing. Respondent had no objection. The hearing was rescheduled for April 16, 2002.

On March 1, 2002, petitioner died from pancreatitis, right heart failure, and pulmonary hypertension. P. Ex. A to filing dated September 12, 2002. Her sister was appointed as administratrix of her estate and, on September 26, 2002, substituted as petitioner. P. Ex. B to filing dated September 12, 2002; Order of September 26, 2002.

The September 12, 2002 filing is petitioner's status report in which petitioner's counsel states that his expert had reviewed Ms. Elton's autopsy report, which was not favorable to petitioner's pursuing a vaccine-related death claim: "Due to the expert's opinion, Petitioner wishes to continue with this case with respect to the injuries [Ms. Elton] sustained as a result of receiving the Hepatitis B vaccination while she was alive. Petitioner will not be contending that her death was directly related to the vaccination." P. filing of September 12, 2002. The prior special master set this case for trial on March 25, 2003.

This case was transferred to the undersigned on January 10, 2003. Determining that there was a legal issue whether the Vaccine Act permits the survival of a claim for personal injury (assuming arguendo that hepatitis B caused in fact the injuries herein) past the death of the vaccinee, the undersigned issued an Order dated January 16, 2003, requiring the parties to file briefs on the issue. Petitioner filed her brief on March 4, 2003 and respondent filed his brief on March 6, 2003. Determining that no subject matter jurisdiction in this case survived Ms. Elton's death, the undersigned cancels the hearing and dismisses the case.

The court may raise the lack of subject matter jurisdiction *sua sponte*.[3] However, respondent's brief is titled "Motion to Dismiss." This motion is granted.

FACTS

[3] "The rule is that the parties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress. The parties cannot waive lack of jurisdiction, whether by express consent, or by conduct, nor yet even by estoppel. The court, whether trial or appellate, is obliged to notice want of jurisdiction on its own motion [citing Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379 (1884)]...." Law of Federal Courts, 2d ed., by C.A. Wright (1970), pp. 15-16.

Ms. Elton was born on March 6, 1950. A medical record dated September 19, 1990 states she had a longstanding history of vascular headaches beginning in childhood. Med. recs. at Ex. 1, p. 1. Her migraines began at age 3. Med. recs. at Ex. 2, p. 1. She had a history of supraventricular tachycardia since at least 1985. Med. recs. at Ex. 2, p. 9. Petitioner received her first hepatitis B vaccination on October 15, 1993. P. Ex. 2, p. 3. A medical record dated June 5, 1996 noted that Ms. Elton had hypertension diagnosed in 1989, hypothyroidism diagnosed in 1976, hypercholesterolemia, and Raynaud's phenomenon. As a child, she developed a rash with Penicillin. She was intolerant to Erythromycin. Her family history was positive for myocardial infarction (her father) and strokes (her grandparents). Med. recs. at Ex. 4, p. 34.

On September 25, 1996, she saw Dr. John Koh, complaining of left-sided facial pain and purulent nasal discharge. She was also concerned that she might have Lyme disease because of a history of palpitations, arthritis, paresthesias, headaches, and other manifestations with an onset of these symptoms within two weeks of a tick bite. Med. recs. at Ex. 4, p. 53. The doctor noted elevated liver function tests on a higher dose of estrogen. Id. She returned to her doctor on October 23, 1996 with occasional right upper quadrant pain. Med. recs. at Ex. 4, p. 56.

Ms. Elton saw her doctor with dermatitis of the hands on March 27, 1997. She had a numb left middle finger. Her panic attacks and anxiety had improved on medication. Med. recs. at Ex. 4, p. 63.

Ms. Elton saw Dr. Swami Nathan, a neurosurgeon, on April 4, 1997, complaining of neck pain, and left shoulder and arm pain for a duration of two weeks. She had had neck pain for the past three or four years but it was more severe in the last two weeks. Her left index and middle

fingers were numb and her left arm was weak. Dr. Nathan diagnosed left C6-C7 radiculoneuropathy. Med. recs. at Ex. 4, p. 64.

Ms. Elton went for a neurosurgical consultation with Dr. Francisco M. Ferraz on April 8, 1997. An MRI of her cervical spine showed degenerative disc disease at the C5-C6 level. For three weeks, she had some tingling sensation of the palm of her hand which became significantly uncomfortable over the prior three days. Med. recs. at Ex. 4, p. 65. On April 28, 1997, she saw her doctor, complaining of inability to move her right forefinger effectively. Med. recs. at Ex. 4, p. 70.

On June 9, 1997, Ms. Elton complained to her doctor that her left second and third fingers were numb, tingling, cyanotic, and painful. Med. recs. at Ex. 4, p. 73. She saw Dr. Boyd A. Dwyer, a neurologist, on June 17, 1997, complaining of pain in her entire left arm from shoulder to wrist, but most prominently in the wrist and hand. Med. recs. at Ex. 4, p. 76. Dr. Dwyer diagnosed carpal tunnel syndrome and Raynaud's. Id. at 77.

Ms. Elton saw her doctor on August 26, 1997 because she was worried. She underwent carpal tunnel syndrome release. She was quite anxious. She had a recent episode of supraventricular tachycardia. Med. recs. at Ex. 4, p. 98.

On December 1, 1997, Ms. Elton received her second hepatitis B vaccination. Med. recs. at Ex. 7, p. 2.

She saw her doctor on January 7, 1998 with a pruritic rash beginning in the neck area which had spread to the axillary areas, hands, abdominal torso, and along the lateral malleoli. She also had symptoms of an upper respiratory tract infection with nasal congestion, postnasal drip, and a productive cough. She denied any fever or chills. On examination, her tympanic

membranes were red. Her bilateral nasal passages were edematous. There was considerable excoriation and itching. Sclerae and conjunctivae were clear. The doctor's assessment was pruritic rash most consistent with scabies[4] and noted that Ms. Elton performed a considerable amount of social work and entered homes where the hygiene was not good. Med. recs. at Ex. 4, p. 106.

On January 9, 1998, Ms. Elton received her third hepatitis B vaccination. Med. recs. at Ex. 7, p. 2.

On January 29, 1998, Ms. Elton saw her doctor because of persistent rash. It was in the same distribution but not above the neckline. It was in the axillary areas, on her arms and web spaces, in the flank area, and in the upper aspects of her legs. The lesions were intensely pruritic and she was scratching them incessantly. Her doctor's diagnosis was prurigo nodularis.[5]

Ms. Elton went on Prednisone until she had a gastrointestinal virus. On seeing her doctor on February 9, 1998, she said that her skin lesions had flared. Intense pruritis persisted. She told her doctor that the lesions began after her first hepatitis B vaccination and worsened considerably after her second hepatitis B vaccination. Med. recs. at Ex. 4, p. 108. Her doctor noted numerous

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[4] Scabies is "a contagious dermatitis of humans and various wild and domestic animals... caused by the itch mite, *Sarcoptes scabiei*, transmitted by close contact, and characterized by a papular eruption over tiny, raised sinuous burrows (cuniculi) produced by digging into the upper layer of the epidermis by the egg-laying female mite, which is accompanied by intense pruritus and sometimes associated with eczema from scratching and secondary bacterial infection." Dorland's Illustrated Medical Dictionary 27th Ed. (1988) at 1487.

[5] Prurigo nodularis is "a chronic, intensely pruritic form of neurodermatitis, usually occurring in women, located chiefly on the extremities, especially on the anterior thighs and legs, and characterized by the presence of single or multiple, pea-sized or larger, firm, and erythematous or brownish nodules that become verrucuous or fissured." Dorland's, supra, at 1376.

maculopapular lesions, some excoriated secondary to her scratching. He diagnosed chronic urticaria.[6] Med. recs. at Ex. 4, p. 108.

Three days later, on February 12, 1998, Ms. Elton saw her doctor because she was concerned that her lesions were cracking and scaling more. She was itching less and also less pruritic. On examination, she had generalized plaques about her torso, arms, buttocks, and lower extremities. There was some definite clearing and demarcation of the lesions as opposed to more confluence. There was little evidence of an underlying cellulitis although she had had low-grade fevers. The doctor could not rule out a severe psoriatic or eczematous process although his initial impression was chronic urticaria. Med. recs. at Ex. 4, p. 109.

Four days later, on February 16, 1998, Ms. Elton saw her doctor. Her pruritic papules were improved, although they had flared that day. The areas of confluent rash continued to recede and there was much less induration. There was no evidence of surrounding cellulitis. The doctor was concerned about an underlying rheumatologic condition and a vasculitis. Med. recs. at Ex. 4, p. 110. Her antinuclear antibody test (dated February 24, 1998) was negative. Her rheumatoid factor was positive. Med. recs. at Ex. 4, p. 111.

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[6] Urticaria is "a vascular reaction, usually transient, involving the upper dermis, representing localized edema caused by dilatation and increased permeability of the capillaries, and marked by the development of wheals. Many different stimuli are capable of inducing an urticarial reaction, and it may be classified according to precipitating causes as: immune-mediated, complement-mediated (involving either immunologic or nonimmunologic mechanisms), urticariogenic material-induced, physical-agent-induced, stress-induced, or idiopathic. The condition may also be designated acute or chronic (depending on duration of an attack); the former evolves over a period of days or several weeks, whereas the latter is continuous or persists episodically for at least 6 weeks, and generally longer.... Called also *hives*. Dorland's, supra, at 1796.

Ms. Elton saw her doctor on February 24, 1998. The rash seemed to be improving slowly. The area of confluence was less. He noted that her rheumatoid factor was only positive at 1:2. He decided not to increase her steroid injections. Med. recs. at Ex. 4, p. 117. She returned two days later with a recrudescence of her total body rash. It had none of the papular appearance, but was more macular in nature. The doctor suspected the eruption was due to her lack of steroids. Med. recs. at Ex. 4, p. 118.

Ms. Elton returned to her doctor on March 4, 1998 with a recrudescence of her rash about her body and neck and facial areas. Her doctor suspected that hepatitis B was the inciting agent. He reinstituted steroid therapy. Med. recs. at Ex. 4, p. 119.

Ms. Elton was admitted to Loudoun Hospital Center on March 6, 1998, where she remained until March 10, 1998. She was diagnosed with chronic urticarial reaction with lichenification/erythema multiform. Because of a worsening flare of her skin rash, intense pruritis, nausea, fatigue, generalized arthralgias and myalgias, she was admitted to the hospital. Her rash went from her neck to her toes and was sporadically on her face. Work-up was unrevealing. She was given medication and liberal skin lubrication. She was weaned to oral high dose steroids and did well. She was discharged without nausea, improved in myalgias and arthralgias and somewhat in her skin rash. Her upper extremities and torso improved dramatically. Med. recs. at Ex 4, p. 122. A skin biopsy done on March 9, 1998 showed spongiotic dermatitis, non-specific. Med. recs. at Ex. 4, p. 128.

Ms. Elton saw her doctor on March 16, 1998. He noted that the skin biopsy showed no evidence of vasculitis. Ms. Elton was doing quite well and her appetite was much improved. She was much less anxious and had not been febrile. Her energy levels were better. On

examination, all the skin lesions were healing and the lichenification was much improved on the steroids and topical lotions. Ms. Elton had no supraventricular tachycardia. Her blood pressure was under excellent control. Med. recs. at Ex. 4, p. 131.

Ms. Elton saw her doctor on March 25, 1998. She was feeling well. Her lesions were largely resolved. She was concerned about some small pruritic papules which occurred about her arms, legs, and abdominal areas. Her anxiety was under much better control. She was down to 30 mg. of Prednisone twice daily. Med. recs. at Ex. 4, p. 132.

Ms. Elton saw her doctor on April 13, 1998. She continued to do well. She was down to 15 mg. of Prednisone. Her only difficulty was nausea from the Imuran. Her mood was good and her anxiety levels decreased tremendously. Med. recs. at Ex. 4, p. 134.

Ms. Elton saw her doctor on May 11, 1998. She had short-lived transient outbreaks of her rash when she decreased her Prednisone dose (down to 10 mg. daily). Med. recs. at Ex. 4, p. 136. She saw her doctor on June 1, 1998, down to 5 mg. of Prednisone daily. With each decrease, the urticaria flared briefly but then quickly resolved. Her energy levels were good. Med. recs. at Ex. 4, p. 137.

On July 10, 1998, Ms. Elton saw her doctor with reemergence of painful lesions on her fingertips, reminiscent of her Raynaud's. He restarted her on 5 mg. of Prednisone. Her skin manifestations had been largely quiescent. Med. recs. at Ex. 4, p. 150. She also saw Dr. J. Richard Casuccio who diagnosed vasospastic disease and Raynaud's Phenomenon, probably collagen vascular disorder, and hypertension. Med. recs. at Ex. 4, pp. 151-52.

Ms. Elton saw Dr. Gregory A. Kujala, a rheumatologist, on June 18, 1998, which he discussed in a letter to Dr. Koh dated July 16, 1998. Ms. Elton had called him on July 15th,

saying her right index and left pinkie fingertips were discolored and bothering her. Med. recs. at Ex. 4, p. 154.

Ms. Elton saw Dr. Koh on August 14, 1998, complaining of generalized aches and pains, fatigue, and persistent Raynaud's. She had necrotic areas on the tips of her fingers on both hands. She did not like her rheumatologist. Med. recs. at Ex. 4, p. 157.

On August 26, 1998, Ms. Elton returned to Dr. Koh with a cold. She noted that her Raynaud's and arthralgias were much improved on a higher dose of Prednisone. She was taking 10 mg. daily. Med. recs. at Ex. 4, p. 163.

Ms. Elton saw Dr. Robin Wode on September 16, 1998, who noted that on delving deeper into Ms. Elton's history, she discovered that sometime prior to her receipt of her second hepatitis B vaccination, Ms. Elton removed a tick from the top of her head. She stated that the tick was engorged and evidently had been in her scalp for some time prior to her observation and removal. She recalled that all of her problems, both the rash and the rheumatological problems, came after that exposure. She denied any treatment for Lyme disease. Dr. Wode thought Lyme disease should be considered. Ms. Elton did not receive any treatment for the exposure to the deer tick, but developed all these manifestations afterward. On examination, Ms. Elton had a diffuse maculopapular rash throughout her entire body, particularly in the neck area. She also had a bull's eye rash with raised borders in the right antecubital fossa. Dr. Wode opined that the second hepatitis B vaccination most likely represented an incidental finding. Med. recs. at Ex. 4, pp. 164-65.

Ms. Elton stopped working in October 1998. P. Ex. 32, p. 1. She saw Dr. Wode on October 6, 1998 with a complaint of tachycardia and acute exacerbation of her rash. She was also extremely hypertensive. Med. recs. at Ex. 4, p. 174.

On October 21, 1998, Dr. Ciro R. Martins evaluated Ms. Elton. He felt that she had subacute to chronic eczematous dermatitis which could be due to several different causes, including adult-onset dermatitis, generalized contact dermatitis, or a drug hypersensitivity reaction. He opined that a reaction to hepatitis B vaccine would be included in that category, although in her case with a history of multiple medications in the past several years, it was unlikely that the hepatitis B vaccine was the agent responsible for triggering her reaction. Med. recs. at Ex. 13, p. 2.

From November 6 to 10, 1998, Ms. Elton was hospitalized at Johns Hopkins Hospital for pneumonia, hypertension, recurrent supraventricular tachycardia, eczematous dermatitis, and Raynaud's disease. Med. recs. at Ex. 23, p. 80.

On November 25, 1998, Ms. Elton had catheter ablation to relieve her from her continued frequent episodes of tachycardia despite calcium blocker treatment. Her paroxysmal supraventricular tachycardia had a history of greater than ten years. Dr. Ronald D. Berger, of the Johns Hopkins University Division of Cardiology performed the procedure. Following the ablation, she no longer had inducible tachycardia. She was discharged home after a four-hour period of observation. Her medication was aspirin as well as her current medical treatment for Raynaud's disease. P. Ex. 27, p. 69.

Ms. Elton went to Jefferson Memorial Hospital on January 15, 1999 for a colonoscopy due to anemia and diarrhea. P. Ex. 28, p. 13. She was noted to have chronic inflammatory cells.

P. Ex. 28, p. 15. On April 16, 1999, Ms. Elton had gastroscopy at Jefferson Memorial due to anemia, abdominal pain, and indigestion. P. Ex. 28, p. 24. The gastroscopy showed a hiatal hernia at the gastroesophageal junction, but no tumor, inflammation, esophagitis, or diverticulosis. P. Ex. 28, p. 28.

On May 2, 2000, Ms. Elton went to the Johns Hopkins University Sleep Disorders Center for consultation concerning obstructive sleep apnea. P. Ex. 40, p. 1. She reported that she snored loudly, gasped and choked, with sudden awakenings. She had occasional palpitations. She went to bed between midnight and 12:30 a.m. and awakened two to three times a night until she awakened at 6:00 a.m. Id. She reported decreased energy throughout the day. She had fallen asleep talking to someone in person as well as on the phone. She napped throughout the day for 20 to 30 minutes at a time. She reported gaining 70 to 80 pounds while on Prednisone in 1998. She reported gaining 100 pounds over the last two years. Id. at 3. Dr. Philip Smith diagnosed her after polysomnogram testing with severe sleep apnea with severe episodic nocturnal hypoxemia. Id. at 8.

Ms. Elton went back to the sleep clinic on May 3, 2000. She had no complaints. Dr. Alan R. Schwartz recommended a slow weight loss regimen, nasal CPAP therapy, and abstinence from alcohol late at night. P. Ex. 40, pp. 10-11.

Dr. David Kafonek did an endoscopy on Ms. Elton on June 23, 2000 which showed findings in the hepatic branches compatible with cirrhosis of the liver. Med. recs. at Ex. 37, p. 24.

Ms. Elton was admitted to Jefferson Memorial Hospital on May 11, 2001 for severe abdominal pain and nausea/vomiting. Dr. Jan Kletter opined that she had possibly passed a

stone. P. Ex. 33, pp. 1-2. She was discharged on May 20, 2001. Dr. William S. Miller noted that the prior summer, Ms. Elton had a liver biopsy done at Johns Hopkins because of elevated liver enzymes. Dr. Miller recorded that she was taken to surgery on May 16, 2001 and noted to have an abnormal gallbladder and a nodular liver. No biopsy was done. P. Ex. 33, p. 3. Dr. Miller diagnosed probable acute inflammation in the gallbladder with dyskinesia, nodular findings on the liver compatible with cirrhosis, and anemia, most likely related to chronic liver disease, in addition to her history of severe hypertension, eczematous dermatitis, and severe hypothyroidism. P. Ex. 33, p. 4. Dr. Jan Kletter noted micronodular cirrhosis of the liver. P. Ex. 33, p. 6. Her gallbladder showed chronic cholecystitis with focal cholesterolosis, according to Dr. Rene P. Buenvenida. P. Ex. 33, p. 10.

Dr. Esteban Mezey and Dr. Zhiping Li saw Ms. Elton on July 17, 2001 at Johns Hopkins and concluded that her symptoms of fatigue and her liver disease were most likely due to non-alcoholic steatohepatitis (NASH).[7] Ms. Elton weighed 187 pounds. (On visits May 18, 2000 and May 30, 2000, she weighed 222 pounds, and 216.6 pounds, respectively.) Med. recs. at Ex. 35, pp. 5, 10.

Dr. Mezey saw Ms. Elton on August 28, 2001. Her weight was 181 pounds. She felt fine and had no complaints. She had normal liver enzymes except for an elevated alkaline phosphatase at 441. She had skin eczema on her chest which she blamed on the hepatitis B vaccine, but Dr. Martin, a dermatologist at Hopkins, thought it was most likely due to contact dermatitis. P. Ex. 35, p. 14.

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[7] "Steato-" means fat. Stedman's Medical Dictionary, 27th ed.(2000), at 1694.

Ms. Elton saw Dr. Samina Anwar, a neurologist, on September 19, 2001. Ms. Elton complained of arthritic symptoms predominantly in her right wrist and right ankle, and she had a constant rash in both lower extremities. No one could figure out the cause of the rash. Her father died at age 58 due to a heart attack. She had normal mental status, and her speech and memory were intact. Cognitive function was intact. No confusion, disorientation, or significant cognitive deficit was found. She had normal muscle bulk and tone, but her right wrist, right hand, and right ankle had restricted range of movement. Dr. Anwar's impression was osteoarthritis involving predominantly the right wrist and right ankle. P. Ex. 32, pp. 1-2.

Ms. Elton died on March 1, 2002. Her autopsy states the cause of death was pulmonary hypertension. P. Ex. 42. She also had acute pancreatitis, liver failure, renal failure, and cardiovascular collapse. Id. The death certificate attributes cause of death to pancreatitis, right heart failure, and pulmonary hypertension. R. Ex. A attached to Motion for Substitution of Party, filed September 12, 2002.

DISCUSSION

The United States is sovereign and no one may sue it without the sovereign's waiver of immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). When Congress waives sovereign immunity, courts strictly construe that waiver. Library of Congress v. Shaw, 478 U.S. 310 (1986); Edgar v. Secretary of HHS, 29 Fed. Cl. 339, 345 (1993); McGowan v. Secretary of HHS, 31 Fed. Cl. 734, 740 (1994); Patton v. Secretary of HHS, 28 Fed. Cl. 532, 535 (1993); Jessup v. Secretary of HHS, 26 Cl. Ct. 350, 352-53 (1992) (implied expansion of waiver of sovereign immunity was beyond the authority of the court). A court may not expand on the

waiver of sovereign immunity explicitly stated in the statute. Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1550 (Fed. Cir. 1991).

Case law in the Office of Special Masters and in the United States Court of Federal Claims is mixed on the question of whether a personal injury claim under the Vaccine Act survives the death of the claimant when the death is unrelated to vaccination. The statute itself is silent, but there are other federal statutes which expressly permit survival actions of personal injury claims. At federal common law, until a case decided in the context of civil rights, there was no right of survivorship.

Vaccine Cases Distinguishing Death Claims from Injury Claims

In Sheehan v. Secretary of HHS, 19 Cl. Ct. 320 (1990), the issue was whether petitioners could receive more than the statutory death benefit of $250,000.00. The Honorable Moody R. Tidwell, III, held that the Act does not permit any award for a vaccine-related death above the amount of $250,000 except for the additional award of attorney's fees. Id. at 320-21. Judge Tidwell stated:

> This holding is governed by binding precedent which mandates a strict interpretation in favor of the United States of any statutory waiver of sovereign immunity. *See, e.g., Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983); *Zumerling v. Marsh*. 783 F.2d 1032, 1034 (Fed. Cir. 1986). Moreover, the statutory scheme for the national vaccine injury program, as well as the legislative history, compels the court to limit petitioner's award to death benefits and attorneys [sic] fees. The statutory scheme consistently draws a distinction between vaccine-related injury and vaccine related [sic] death. Sections which apply to both injuries or deaths specifically refer to "injuries or death." *See, e.g.,* 42 U.S.C. §§ 300aa-11 & 300aa-15(a).

Id.

Judge Tidwell continued:

> Because compensation for vaccine-related deaths are explicitly limited by the plain language of section 300aa-15(a)(2) to $250,000, plus reasonable attorneys' fees and other costs as provided in section 300aa-15(e), this court will not now reach beyond that clear statutory mandate to award additional compensation for lost wages or pain and suffering in the present action.

Id. at 321.

Judge Tidwell stated that his interpretation is consistent with legislative intent:

> A House Report on this issue states that "allowable death benefits for a vaccine-related death are set at a level of $250,000." H.R. Rep., No. 99-908, 99th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Admin. News 6287, 6344, 6362 (1986); *see also* H.R. Rep. No. 100-391(I), 100th Cong., 1st Sess., *reprinted in* U.S. Code Cong. & Admin. News 2313-1, 2313-2661 (1987) ("compensation in the case of a vaccine-related death is set in law at $250,000.").
>
> In addition, in articulating the difference between an award for pain and suffering and an award for a vaccine-related death, legislators stated that "as contrasted with the fixed death benefit, the award for pain and suffering is to be set at the discretion of the Master and of the Court." H.R. Rep. No. 99-908, 99th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Admin. News 6344, 6362 (1986). From these statements, as well as the plain language of the statute, the court finds it abundantly clear that Congress intended to distinguish between deaths and injuries by limiting the waiver of sovereign immunity for a vaccine-related death to an award of $250,000 plus reasonable attorneys' fees and costs.

Id.

Although Sheehan concerns the death benefit and the instant case does not, Judge Tidwell's holding is based on his analysis that Congress, in passing the Vaccine Act, clearly differentiated between death and personal injury claims.

In Vijil v. Secretary of HHS, No. 91-1132V, 1993 WL 177007 (Fed. Cl. Spec. Mstr. May 7, 1993), petitioner on behalf of the estate of her son sought not only the $250,000 death benefit,

but also $133,00 for unreimbursed medical expenses. Special Master George L. Hastings rejected petitioner's argument, stating:

> Congress' election to use "injury or death" in most places, but only "injury" or only "death" in a few specific provisions, suggests that Congress viewed the two situations as quite distinct for analytical purposes.
>
> This inference is buttressed by the fact that in those few instances where Congress referred only to an "injury" or only to a "death," a clear intent to treat the two situations *differently* is apparent.

Id. at *2. See also, Clifford v. Secretary of HHS, No. 01-424V, 2002 WL 1906520 (Fed. Cl. Spec. Mstr. July 30, 2002) (petitioner on behalf of estate of decedent whose death was vaccine-related not entitled to damages above $250,000 even though that amount would not cover all of actual unreimbursable medical expenses, the decedent's actual lost earnings, and pain and suffering for 14 months).

The special master in Vijil discussed the distinction between the statutes of limitations for petitions brought for vaccine injuries (36 months from onset of injury) and vaccine-related deaths (24 months from death or 48 months from onset of symptoms), and the (now-defunct) requirement for expending $1,000 in unreimbursable medical expenses for a vaccine injury but not for a vaccine-related death in order to have a valid petition. See §§ 16(a)(2) and (3), and 11(c)(1)(D)(i) and (ii). He concluded:

> Thus, this *overall* pattern of statutory usage of the terms "injury" and "death" lends credence to the argument of respondent here, that in § 300aa-15(a)(1)(B), the term "vaccine-related injury" was intended to limit compensation to those cases in which the vaccine recipient is *not* deceased. Simply put, the inference can be drawn that when Congress intended a provision to apply to situations where the recipient was *either* alive or dead, the phrase "injury or death" was used; when Congress intended application only to living persons, the term

> "injury" was used; and when Congress intended application only to deceased persons, the term "death" was used.

Id. at *3.

The special master cited further support for his interpretation than Judge Tidwell did in Sheehan, supra. Legislation modified the Vaccine Program in 1987. The House Report pertaining to that modification contains a document that the Congressional Budget Office prepared, stating, "Compensation in the case of a vaccine-related death is set in law at $250,000." H.R. Rep. No. 100-391(I), 100th Cong., 1st Sess., p. 695, *reprinted in* 1987 U.S. Code Cong. & Admin. News, pp. 23113-61. Id.

The special master quoted from three predecessor vaccine compensation bills in 1983 and 1984 which provided not only for a particular range of death benefit, but also for any unreimbursed expenses occurring prior to death. The bill that ultimately became the Vaccine Act omitted the provision providing for unreimbursed expenses. The special master concluded that Congress considered the prior language proferred in the three previous bills, but decided not to include it in the bill that it enacted into law, while setting the death benefit at a fixed $250,000. Id. at *5.

The Vijil case also emphasizes the clear demarcation in the legislative history of the Vaccine Act between compensation for vaccinees who are alive and for those who died.

In Buxkemper v. Secretary of HHS, 32 Fed. Cl. 213 (1994), the Honorable Judge Marian Blank Horn held that the estate of a boy who purportedly suffered a vaccine injury, but died from causes unrelated to his vaccination, was not entitled to any award for pain and suffering dating

from the putative vaccine injury until death, reversing the special master's decision for petitioners. Id. at 225. Judge Horn, after reviewing Vijil, supra, stated:

> [T]his court is persuaded that the conferees, as manifested in the words of the statute and in the legislative history, intended either compensation for individuals who continue to suffer from a vaccine injury and will have to deal with the costs of that injury for the remainder of his/her life, or death benefits, of up to $250,000.00, to the estates of those who have died as a result of a vaccine-related injury.

Id.

In discussing whether state law permitting survival of personal injury damages in death cases should apply to the case, Judge Horn rejected petitioners' argument for application, stating:

> The United States Court of Federal Claims, however, does not incorporate state laws in their [sic] standards. *Van Epps v. Sec'y DHHS*, 26 Cl. Ct. 650, 653 (1992). The Vaccine Act is a federal act.

Id. Buxkemper is directly on point concerning whether Ms. Elton's personal injury claims herein survive her death under the Vaccine Act.

In Van Epps, supra, to which Judge Horn referred in Buxkemper, petitioner appealed the dismissal of her case for failure to satisfy her burden of proof by arguing that she had proved causation in fact under Illinois law, which recognizes testimony of medical possibility, rather than probability, as satisfying plaintiff's burden of proof. Id. at 653. The Honorable Judge Christine O.C. Miller (then Nettesheim) rejected petitioner's argument, holding:

> However, in advocating that the applicable law is that of the state in which the injury occurred, petitioner operates under the mistaken assumption that Illinois state law governs decisions under the Vaccine Act. The Vaccine Injury Compensation Program is a federal program, operated within a federal court by administrative fact finders. The controlling precedents to date apply exclusively federal law developed under the Administrative Procedure Act and the Vaccine Act. Unlike the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1988), for example, the Vaccine Act does not incorporate state standards. Therefore, the

> court rules that the Vaccine Act does not attribute state law to petitioner's evidentiary burden under the Program.

Id. Thus, an analogy to state survival statutes does not avail a petitioner any more than reference to state standards of evidence.

Following Buxkemper is Cohn v. Secretary of HHS, 44 Fed. Cl. 658 (1999), in which the Honorable Christine O.C. Miller held that the court had no jurisdiction for petitioners' claim for damages for pain and suffering following a vaccine injury when they filed their petition after their daughter died from a non-vaccine-related cause. In comparing state laws which permit personal injury claims to survive death (contrary to common law), Judge Miller stated:

> Given that Congress intended to provide a speedy resolution to vaccine-injury claims, while at the same time stem the rising tide of vaccine-related litigation, it is reasonable to presume that in drafting the Vaccine Act, Congress sought, in part, to revert to the common law principle that personal injury claims do not survive the death of the injured party. ... Petitioners who file an injury claim on behalf of an estate do not qualify for compensation under a plain reading of the Vaccine Act.

Id. at 661.

Cases Permitting Survival of Injury Claims

In Andrews v. Secretary of HHS, 1995 WL 262264 (Fed. Cl. Spec. Mstr.), aff'd, 33 Fed. Cl. 767 (1995), which was a pre-Act (or retrospective) case, the vaccinee's parents brought a petition for vaccine injury before their daughter died. Rather than bring a petition for vaccine-related death (since her death was not related to her vaccine injury), the parents continued their vaccine injury petition, seeking pain and suffering damages, which Special Master Richard B. Abell awarded. Since it was a pre-Act case, his award was limited to the statutory $30,000.00

which encompasses both attorney's fees and costs as well as pain and suffering and lost wages. 42 U.S.C. § 300aa-15(b)(3).

Judge Tidwell affirmed the award. He noted, "Under the common law, courts routinely held that personal injury actions did not survive the death of either party." 33 Fed. Cl. at 771. He then discussed the existence of state statutes permitting survival of tort actions at the time Congress enacted the Vaccine Act and recounted the intent of Congress to replace the state law civil tort system, intending to be generous in compensation, even if occasionally compensation was unwarranted. Id. Regarding dismissal of a personal injury claim after the non-vaccine-related death of a vaccinee as unfair, not expeditious and not generous, particularly since the Vaccine Act requires petitioners to bring their actions first in this Court before electing to reject the judgment and sue civilly in their state courts, Judge Tidwell reasoned that awarding petitioners compensation after the vaccinee died was consistent with congressional intent. Id. Moreover, to rule otherwise would be to increase litigation against manufacturers and vaccine administrators, when one goal of Congress was to limit this litigation. Id. at 771-72.

In rejecting respondent's argument that the estate of a vaccinee who died before he could file a petition would be unfairly penalized because it could not receive compensation under the Act, whereas, under Judge Tidwell's holding, the estate of someone who filed a vaccine claim and then died a non-vaccine-related death could recover, Judge Tidwell blamed the unfairness on the Vaccine Act, not on his decision. Id. at 773. He noted that in individual cases, following his holding, a decedent's estate might recover more in pre-judgment damages than the statutory death benefit for the estate of a vaccinee whose death was vaccine-related, again attributing the unfairness to Congress. Id.

In Lawson v. Secretary of HHS, 1999 WL 603693 (Fed. Cl. Spec. Mstr.), vacated and remanded, 45 Fed. Cl. 236 (1999), another pre-Act case, the undersigned dismissed, holding that Jennifer Lawson's death due to exsanguination from the rupture of a large blood vessel caused by an old tracheostomy was unrelated to her putative vaccine injury. Petitioners appealed and, in remanding for determination of whether there had been a vaccine injury, the Honorable James T. Turner, held that petitioners were entitled to recover for Jennifer's vaccine-related injury up to the $30,000.00 statutory amount for attorney's fees and costs, lost earnings, and pain and suffering if petitioners proved their allegation of a vaccine injury even though her death was unrelated to vaccination. Judge Turner assumed that the Vaccine Act's permission of suits for personal injury survived the death of the petitioner even when the death was not vaccine-related. 45 Fed. Cl. at 237.

(On remand to determine if Jennifer had suffered a vaccine injury as a baby, the undersigned ruled that petitioners failed to prove their allegation and dismissed. 2000 WL 246234 (Fed. Cl. Spec. Mstr. Feb. 14, 2000).)

Federal Law

With all due respect, Judge Tidwell's reasoning in Andrew that survivability of a personal injury suit should be implied under the Vaccine Act and Judge Turner's assumption that survivability is permissible under the Act are both unpersuasive.

In re Inflight Explosion on Trans World Airlines, Inc. Approaching Athens, Greece on April 2, 1986, 779 F. Supp. 625 (EDNY 1991), rev'd sub nom. Ospina v. Trans World Airlines, Inc., 975 F.2d 35 (2d Cir. 1992), cert. denied, 507 U.S. 1051 (1993), provides a full discussion of the law of survivability in federal cases. The case concerned a suit for damages under the

Warsaw Convention (a treaty) for pain and suffering for a passenger's widow after a terrorist bomb blew her husband out of a plane. The Second Circuit had ruled in In re Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267, 1278 (2d Cir. 1991), that federal common law must be applied to construe the Warsaw Convention. So did the DC Circuit[8] and the 9th Circuit.[9]

Judge Weinstein in In re Inflight Explosion on Trans World Airlines, Inc., supra, recounted the law of survival actions which continue the injured person's own claim for injuries which accrued before death, an action which common law did not recognize. 778 F. Supp. at 629. Survival actions are designed to avoid "an ancient common law rule: *actio personalis moritur cum persona* ("a personal action dies with the person").... This rule is ancient; it was common among the English courts of the fifteenth century." Id. at 630.

Judge Weinstein noted that there were federal statutes that permitted survival recovery, including the Federal Employers' Liability Act (FELA), 45 U.S.C. § 59, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 903(a), the Jones Act, 46 U.S.C.App. §688(a) (Supp. 1991) (with a reference to the same remedies as FELA), the Civil Rights Act, 42 U.S.C. §§ 1983, 1986, and the Federal Tort Claims Act, 28 U.S.C. § 1346 (b).

That Congress has enacted other federal statutes with survivability provisions highlights the fact that it did not include survival of personal injury claims in the Vaccine Act, invoking the maxim, "Exceptio probat regulam" (the exception proves the rule, i.e., when Congress inserts a

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[8] In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475, 1484-90 (DC Cir. 1991).

[9] Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003-04 (9th Cir. 1987).

survivability provision, it is the exception to federal statutes in which it has not inserted this provision, meaning the general rule is no survivability or the insertion would be superfluous).

Judge Weinstein, in reviewing survivability actions under federal law, also discussed a separate federal constitutional civil rights action that supports both death and survival actions. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971), permitting damages action against officials for Fourth Amendment violation. 778 F. Supp. at 634.

The Seventh Circuit in Green v. Carlson, 581 F.2d 669, 673-74 (7th Cir. 1998), aff'd sub nom. Carlson v. Green, 446 U.S. 14, 27 (1980), noted the absence of any applicable federal survivorship rule in a civil rights action brought by the administratrix of the estate of a federal prisoner whose civil rights federal officials allegedly deprived when they failed to administer timely and appropriate medical treatment to him. The district court ruled that Indiana's survival statute was applicable which limited the amount the administratrix could recover, and dismissed for lack of subject matter jurisdiction because her claim fell below the federal jurisdictional requirement of $10,000.00 under 28 U.S.C. § 1331. Referring to Robertson v. Wegmann, 436 U.S. 584 (1978), a suit under 42 U.S.C. § 1983 for bad faith prosecution, in which plaintiff died before trial, and the case was dismissed because Louisiana law[10] did not countenance the substituted plaintiff's legal status on behalf of plaintiff's estate, the Seventh Circuit in Green, supra, rejected this analysis because the case arose under Bivens. To follow Indiana law would create an inconsistency in the policy of preventing officials' abuse of power. Unlike the decedent

[10] The court referred to section 1988 of 42 U.S.C., describing jurisdiction in civil rights actions, which provides that when federal law is deficient as to a suitable remedy, the relevant state law shall govern "so far as the same is not inconsistent with the Constitution and laws of the United States." 581 F.2d at 672.

in Robertson, the decedent in Green allegedly died as a result of the deprivation of his civil rights. The necessity of supporting the Bivens policy of maintaining consistency in preventing unconstitutional deprivation resulted in the Seventh Circuit's "creation of a federal common law of survival in a case such as that before us." 581 F.2d at 674.

The United States Supreme Court, per J. Brennan, affirmed, stating that "only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct." 446 U.S. at 23. The court agreed with the reasoning of the Seventh Circuit that uniform treatment of civil rights claims was essential in order to completely vindicate constitutional rights. Id. at 24.

The question, then, is does the Vaccine Act rise to the level of civil rights claims such that a federal common law rule of survivorship applies? One must note, at the onset, that the defendants in civil rights claims, whether under statute or under Bivens, are not the United States, but officials. When the Supreme Court considers cases in which sovereign immunity, whether of the states or the federal government, is involved, it does not issue a holding of implied subject matter jurisdiction.

Thus, in FMC v. S.C. State Ports Authority, 535 U.S. 743 (2002), the Supreme Court held that state sovereign immunity from judicial suit barred a federal commission from administratively adjudicating a complaint that a private vessel owner filed against a state port agency for allegedly violating federal maritime law. In Raygor v. Regents of the University of Minnesota, 534 U.S. 533 (2002), the Supreme Court dismissed an employees' age discrimination suit on the ground of state sovereign immunity. In Board of Trustees v. Garrett, 531 U.S. 356 (2001), the Supreme Court held that Congress had not abrogated 11th Amendment immunity by

showing a pattern of unconstitutional state discrimination against the disabled, and dismissed. In Vermont Agency of Natural Resources v. United States, Ex Rel., Jonathan Stevens, 529 U.S. 765 (2000), the Supreme Court held that a state is not a "person" under the False Claims Act and cannot be held liable in a qui tam action in federal court. In Kimel v. Florida Board of Regents, the Supreme Court held that Congress's abrogation of states' immunity in an age discrimination case against state employers was invalid. In Alden v. Maine, the Supreme Court held that states did not consent to suits under the Fair Labor Standards Act of 1938 and dismissed suits for overtime pay and liquidated damages. In College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999), the Supreme Court held that the sovereign immunity of the state prevents a false advertising suit under the Lanham Act, stating it could not construe a state waiver of immunity in the statute, and that a waiver of immunity must be explicit. In Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999), the Supreme Court held that the Patent Remedy Act was not a valid congressional abrogation of the states' 11th Amendment immunity under the Due Process Clause of the 14th Amendment. In Printz v. United States, 521 U.S. 898 (1997), the Supreme Court held that federal law requiring state law enforcement officials to participate in a federal regulatory scheme for gun control unconstitutionally violated state autonomy.

Recognizing how zealous the Supreme Court has been to protect states' sovereign immunity from suit, even when Congress has explicitly made states liable, one must ask how zealous the Supreme Court would be to protect the federal government's sovereign immunity in the absence of an explicit waiver. Lane v. Pena, 518 U.S. 187 (1996), is instructive. The case concerned a student separated from a military academy because he had the disqualifying

condition of diabetes. He sued a federal agency for compensatory damages under the Rehabilitation Act and lost because the Act lacked a clear expression of the waiver of sovereign immunity against awards of monetary damages. The Supreme Court stated, at 192:

> A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, see, *e.g.*, *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34...(1992), and will not be implied, *Irwin v. Department of Veteran Affairs*, [498 U.S. 89], 95 [(1990)]. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign. See, *e.g.*, *United States v. Williams*, 514 U.S. 527, 531...(1995) (when confronted with a purported waiver of the Federal Government's sovereign immunity, the Court "will construe ambiguities in favor of immunity"). To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims, *Nordic Village*, 503 U.S. at 34. A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text." *Id*. at 37.

The Supreme Court continued, at 196: "[W]hen it comes to an award of money damages, sovereign immunity places the Federal Government on an entirely different footing than private parties." And, at 197, the Supreme Court cited the Government's brief: "[W]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived."

Thus, one may conclude that the Supreme Court's view that an explicit waiver is essential in order to find a waiver of sovereign immunity, even where damages may be appropriate, would cast the decisions in Andrews and (on the appellate level) Lawson in disfavor.

If this court has no subject matter jurisdiction over this case because the Vaccine Act does not permit survivorship of personal injury claims, Congress may remedy the absence of a survivorship provision in the Vaccine Act by amending it.

Petitioner states at p. 4 of her brief that the Vaccine Act does not "preclude the survival of claims commenced before a petitioner's non-vaccine-related death." But in interpreting a statute that waives sovereign's immunity, the undersigned must ask whether the statute permits a type of suit, not whether the statute does not preclude it. The Vaccine Act is silent as to survival of injury claims.

Petitioner raises the question not only of the letter of the statute, but also its spirit (p. 2). The statute's express purpose regarding compensation for injury claims is to pay the injured vaccinee and not his or her parents, spouses, or close relatives. As respondent states in his brief (p. 4), the Vaccine Act directs payment under section 15(b) only to a petitioner who is defined in section 11(b) as the vaccinee, or his legal representative if the vaccinee is a minor or disabled or if the vaccinee died due to the effects of the vaccine.

Compensation for pre-Act cases is limited to future medical, institutional, and therapy expenses for the vaccinee, with a limitation on his or her pain and suffering, wage loss, and attorney's fees and costs of $30,000.00. 42 U.S.C. § 300aa-15(a)(1)(A) and (b). Compensation for post-Act cases is limited to past and future medical, institutional, and therapy expenses of the vaccinee, with a limit on pain and suffering of $250,000.00 and a formula to calculate wage loss. 42 U.S.C. § 300aa-15(a)(1), (3), and (4). In neither case did Congress envision paying the relatives of the injured vaccinee for their loss of society, needs for psychological therapy, or other conceivable items of damage in addition to the vaccinee's needs. This contrasts with the remedies available in most state courts for the relatives of an individual who sustained a personal injury due to someone's action. They may seek loss of society and other types of damage. See Schafer v. American Cyanamid Co., 20 F.3d 1, 5-6 (1st Cir. 1994) (husband and daughter of

person injured by polio vaccine permitted to sue for their own damages, i.e., loss of consortium; cases restrict award of damages solely to vaccinee under the Act).

Where, however, a petition is brought for a vaccinee's death that a vaccine caused, Congress did envision payment to someone other than the vaccinee, i.e., the estate, and that amount is statutorily limited to $250,000.00. 42 U.S.C. § 300aa-15(a)(2). This is the only instance in which compensation goes to someone other than the vaccinee (unless he is a minor or disabled), other than in a contact case.[11]

In Huber v. Secretary, HHS, 22 Cl. Ct. 255 (1991), the Honorable John P. Wiese held, inter alia, that the special master was correct in disallowing compensation for therapy for the family of an injured vaccinee Respondent stated in his brief that "the statute is clear that all compensation must be directly associated with the injured person." Id. at 257.

Judge Wiese stated he agreed with respondent's statement of the law:

> The Vaccine Act restricts compensation for a vaccine-related injury to those expenses which "have been or will be incurred by or on behalf of the person who suffered such injury." 42 U.S.C.A. § 300aa-15(b) (incorporating by reference the language found at 42 U.S.C.A. § 300aa-15(a)(1)(A)(ii)). We understand this language to allow only compensation for expenses that have been incurred at the request of or for the immediate benefit of the vaccine claimant.

Id. Judge Wiese concluded that "counseling for the sake of the parents' own mental rehabilitation would not be compensable." Id.

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[11] In a contact case, an individual has been exposed to someone who received oral polio vaccine and contracted polio from that exposure. He or she may recover under the Act even though the person is not a vaccinee. Section 12(c)(1)(B)(ii). The Act expressly provides for "such person [who] did not receive such a vaccine but contracted polio from another person who received an oral polio vaccine...." Id. This waiver of sovereign immunity is express and limited to this circumstance.

For the undersigned to permit recovery of personal injury damages on behalf of the estate of a vaccinee would be to ignore Congress's express limitations on recovery of compensation in vaccine injury cases to the vaccinee himself or herself or his or her representative if the vaccinee is a minor or disabled, or someone in a contact case dealing with oral polio. The undersigned does not have the power to usurp Congress's waiver of sovereign immunity by creating an exception to the statutory language that compensation for vaccine injury goes solely to a living vaccinee or someone who contracted polio from a vaccinee unless the vaccine caused his or her death. The availability of the estate of the vaccinee to receive compensation for the vaccinee's past injuries when his or her death is unrelated to the vaccine is not encompassed under the provisions of the Act.

Were it otherwise, the peculiar situation could arise in which estates of decedents whose deaths were not vaccine-related might recover more under the Act that the estates of decedents whose deaths were vaccine-related and who are statutorily limited to $250,000.00. Andrews was a pre-Act case and the special master awarded up to the statutory limit of $30,000.00 for pain and suffering and attorney's fees. In the instant action, which is a post-Act case, or any other post-Act case with the same issue, the estate of the dead vaccinee could conceivably recover millions of dollars, far above the statutory limit of $250,000.00 for vaccine-related death claims, if the past medical expenses, wage loss, and pain and suffering reached a high enough figure.

Reading the congressional record supports the conclusion that Congress intended the court to award compensation for vaccine injury only to living vaccinees with ongoing disabilities. In 1987, Congress eliminated a $1,000 deductible then required under the Act:

> The Act allows persons to file claims for compensation if they incur expenses over $1,000, regardless of whether injuries are ongoing or not. Under this legislation, individuals would no longer be eligible [to] file for compensation on this basis. Thus, the Committee believes it is appropriate to eliminate the $1,000 deductible as well, inasmuch as **the only persons eligible for compensation will now be those with ongoing disabilities**. [emphasis added].

Report of the Committee on the Budget, House of Representatives, to accompany H.R. 3545, Omnibus Budget Reconciliation Act of 1987, 100th Cong., 1st Sess. 697 (1987), as reprinted in 1987 USCCAN 2313-1, 371.

Continuing its discussion of persons who did not have ongoing effects from a vaccine injury, the Committee stated that these individuals need not go through the Vaccine Program before proceeding to civil courts and would not be limited in tort actions. Id. at 698-99, as reprinted in 1987 USCCAN 2313-1, 372-73. But they could not proceed in a tort action if they then amended their complaint to allege an ongoing disability, which would have required they first pursue a petition under the Vaccine Program. Id. at 699, as reprinted in 1987 USCCAN 2313-1, 373. Thus, Congress realized that there would be vaccine injury cases that would not be compensable under this Program, but would be compensable only if the parties sought relief from civil courts (e.g., those with vaccine injuries who did not have ongoing disabilities).

An individual, such as the decedent herein, who purportedly had a vaccine injury but does not have ongoing disabilities because she is deceased is encompassed within the group about which the House Committee wrote. Her estate is not entitled to seek compensation for her past vaccine injuries under this Program but may seek compensation in the civil courts, just as a living vaccinee without ongoing disabilities (i.e., under the current version of the Act, without injuries lasting more than six months) may seek compensation in the civil courts.

Petitioner, in her brief's conclusion, raises the concern that a state court may find her suit time-barred. But the Act, under section 16(c) states that a state's statute of limitations shall be stayed starting on the date the petition was filed and ending on the date an election is made under section 21 (a) or (b) of the Act.

The 1987 House Committee Report referenced above also states:

> [L]imitations on tort actions apply only to persons qualified to file a petition for compensation under the terms of the Act and this legislation. **Thus, a person who has incurred an injury that does not have ongoing effects and who is, therefore, not eligible to apply for compensation under the terms of the Act as amended...would not be required to go through the compensation system before proceeding to court and would not be limited in tort actions.** It is important to note that both at the time of original enactment and in passing this legislation, the Committee acted with the understanding that tort remedies were and are available. Without this understanding, such provisions of the Act as those allowing rejection of compensation, trifurcation of trial, and limitation of punitive damages would be meaningless.
>
> It is not the Committee's intention to preclude court actions under applicable law. The Committee's intent at the time of considering the Act and in these amendments was and is to leave otherwise applicable law unaffected, except as **expressly** altered by the Act and the amendments. [emphasis added].

Id. at 698-99, 691, as reprinted in 1987 USCCAN 2313-1, 372-73, 365.

Besides the Vaccine Act's omission of remedies for the estates of persons who had a putative vaccine injury but died from unrelated causes is the obstacle respondent has highlighted in his brief that the sister of the decedent herein has no standing to represent her under this Program. The statute states that a petitioner may be only one of the following: (1) "any person who has sustained a vaccine-related injury," (2) "the legal representative of such person if such person is a minor or is disabled, or" (3) "the legal representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table...." 42 U.S.C. § 300aa-11(b)(1)(A). The sister of decedent herein is not the person who sustained a vaccine

injury, or the legal representative of a minor or disabled person, or of a person who died as a result of a vaccination. (Petitioner's counsel filed a statement expressly denying that the vaccine caused decedent's death.) Decedent was a competent adult who, when she was alive, had standing to file a petition, but her sister, under the terms of the Vaccine Act, does not have standing to substitute as petitioner in this case.

In Andrews, a case like this one except decedent was a minor, respondent raised the same point about the lack of standing of the parents to proceed on the petition once the vaccinee died a non-vaccine-related death. The special master rejected the argument of standing, citing it was illogical. 1995 WL 262264, at *5. But the issue is one of jurisdiction, i.e., does the sister of decedent whose death is not vaccine-related have standing to be a petitioner so that she may continue the case? The answer is no. The special master in Andrews cited Matos v. Secretary, HHS, 35 F.3d 1549, 1553 (Fed. Cir. 1994) for the proposition that "[u]nless Congress provides otherwise, the jurisdiction of the Court of Federal Claims is determined at the time of filing,." implying that this statement means a court may never lose jurisdiction after the time of filing.

But Matos did not deal with the substitution of a bona fide petitioner with one who does not satisfy the statutory requirements. It dealt with a petitioner whose civil action had not been dismissed at the time he filed his petition, contrary to the Vaccine Act's requirements in section 11(a)(5)(B), nor did he seek dismissal of his civil action within two years of October 1, 1988, the effective date of the statute, under section 11(a)(5)(A), or even avail himself of the "escape hatch" provision of section 11(a)(5)(A) by requesting dismissal before judgment. After judgment in the state court, on August 25, 1992, he obtained a *nunc pro tunc* order vacating the default judgment against him, dated December 18, 1999, a date before he filed his now-dismissed

petition. The Federal Circuit held that this was an improper use of a *nunc pro tunc* order because it cannot cure a jurisdictional defect which was apparent at the time of filing. The Federal Circuit affirmed the dismissal.

The Federal Circuit's decision in Matos is unrelated to the issue in the instant action. Matos in no way stands for the proposition that if the court initially had jurisdiction (which in Matos it did not), it maintains jurisdiction regardless of the standing of the person suing. It held that a party could not create jurisdiction by artful pleading in order to circumvent the jurisdictional requirements of section 11 of the Vaccine Act.

Respondent raises the point in his brief (pp. 2-4) herein that federal case law requires that standing continue in order for the court to maintain jurisdiction. Karcher v. May, 484 U.S. 72 (1987), involved the issue of whether public officials who had participated in a lawsuit solely in their official capacities could appeal an adverse judgment after they had left their official positions. The United States Supreme Court held that they could not. Id. at 74. Although the public officials initially had standing to defend the lawsuit, once their official status changed, they lost standing and the case had to be dismissed.

The former speaker of the New Jersey General Assembly and the president of the New Jersey Senate intervened and participated in a lawsuit defending the constitutionality of a New Jersey statute that required schools to permit a minute of silence at the beginning of the school day. The Supreme Court held that these officials could not appeal the adverse judgment of the Court of Appeals in their capacities as individual legislators and as representatives of the expired New Jersey legislative body that enacted the challenged statute after they lost their official status as presiding legislative officers, and were now just individual legislators. Id. at 81. The

authority to pursue the lawsuit on behalf of the legislature belonged to those who had succeeded the former speaker of the New Jersey General Assembly and the president of the state Senate, who chose not to pursue an appeal. Thus, the appeal of the judgments of the district court and Court of Appeals holding the statute unconstitutional had to be dismissed for want of jurisdiction.

In the instant action, decedent's sister cannot pursue a petition in this court under the Vaccine Act because: (1) compensation under the Act for a vaccine injury is directed solely to a living vaccinee (for medical care, therapies, etc.) in comparison to the death payment of $250,000 to the representative of the estate for a vaccine-related death; (2) the Act is silent as to permitting survival of injury suits; (3) a waiver of sovereign immunity cannot be presumed but must be explicit; and (4) the representative of the estate of a dead vaccinee has standing only when the death is related, not when it is unrelated, to vaccination.

It is not sufficient to maintain jurisdiction herein that when the petition was initially filed, this court had jurisdiction. Once the vaccinee died from causes unrelated to vaccination, her sister could not maintain the standing that decedent had when she was alive. Just as the New Jersey legislators as individual legislators could not maintain standing to defend in Karcher, supra, although they initially had standing as speaker and president of the New Jersey legislature, so the decedent's sister cannot maintain Ms. Elton's standing in this case because her death was not vaccine-related, nor is she representing a minor with a vaccine injury, nor does she herself have a vaccine injury. See section 11(b)(1)(A).

Contrary to the holding in Andrews, the capacity to sue does remain a legally important question after the filing of the petition even though the court had jurisdiction initially. A change

in a party's capacity may result in a want of jurisdiction and, in the instant action, it does so. This case is dismissed for lack of subject matter jurisdiction.

CONCLUSION

This case is dismissed with prejudice. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

_____ _____

DATE Laura D. Millman
Special Master