# IN THE UNITED STATES COURT OF FEDERAL CLAIMS

## OFFICE OF SPECIAL MASTERS

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| STACEY HEINZELMAN, | * | |
| | * | No. 07-01V |
| Petitioner, | * | Special Master Christian J. Moran |
| | * | |
| v. | * | Filed: May 18, 2010 |
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| SECRETARY OF HEALTH AND HUMAN SERVICES, | * | damages, offset for Social Security Disability Insurance |
| | * | |
| Respondent. | * | |
| | * | |

Richard Gage, Richard Gage, P.C., Cheyenne, Wyoming for petitioner;
Ryan Pyles, United States Dep't of Justice, Washington, D.C., for respondent.

**PUBLISHED RULING REGARDING OFFSET**[*]

Stacey Heinzelman established that the flu vaccine caused her to develop Guillain-Barré syndrome and is entitled to compensation pursuant to the National Vaccine Injury Compensation Program ("the Program"), 42 U.S.C. § 300aa–10 et seq. (2006). The parties are quantifying the amount of compensation to which Ms. Heinzelman is entitled. This process usually concludes with little judicial involvement, but, in Ms. Heinzelman's case, a legal issue has arisen. Respondent maintains that Ms. Heinzelman's compensation should be reduced by the amount of

[*] Because this published ruling contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa–12(d)(4); Vaccine Rule 18(b).

benefits that she may receive through Social Security Disability Insurance (SSDI). Ms. Heinzelman opposes respondent's proposed reduction.

As explained below, the specific statute that authorizes offsets does not authorize an offset for SSDI. Respondent's arguments also conflict with common law decisions regarding offsets. Consequently, Ms. Heinzelman's damages are not to be reduced by any SSDI payments.

## I. Facts and Procedural History

The facts of Ms. Heinzelman's case are straightforward. The parties agree that the records created contemporaneously with the events that they describe are accurate. These records reveal the following facts.

Ms. Heinzelman was born in 1971. Beginning in 1987, she earned income that was taxed as social security earnings. Exhibit R (Ms. Heinzelman's social security statement) at 2. In 2003, she was employed full-time as a hair stylist. See exhibit I at 5.

On December 10, 2003, Ms. Heinzelman received the flu vaccine. Exhibit 2. Within 30 days of receiving the flu vaccine, Ms. Heinzelman was hospitalized for Guillain-Barré syndrome. Exhibit 1 at 15. Eventually, a decision found that the flu vaccine caused Ms. Heinzelman's Guillain-Barré syndrome. Decision, 2008 WL 5479123 (Fed. Cl. Spec. Mstr. Dec. 11, 2008).

Ms. Heinzelman still suffers from the effects of the Guillain-Barré syndrome, including problems that impair Ms. Heinzelman's ability to earn income. In 2004, Ms. Heinzelman earned approximately half as much income as she earned in 2003. In 2005, Ms. Heinzelman's income increased from 2004, but was still lower than in 2003. In 2006 and 2007, Ms. Heinzelman earned relatively little income. Exhibit R. In April 2008, Ms. Heinzelman stopped working because her impairments prevent her from working on a daily basis. Exhibit 28 at 1; exhibit I at 5.

Ms. Heinzelman has not applied for SSDI benefits recently.[1] If she were to apply for benefits, she, according to both parties, would receive them. Exhibit 36 (supplemental statement by Ms. Heinzelman's life care planners) at 7-9; Exhibit P (report from respondent's expert on Ms. Heinzelman's earning capacity) at 8 ("Ms. Heinzelman will be granted Social Security Benefits when she applies for such in the future."). This agreement is the basis for assuming that Ms. Heinzelman will receive SSDI payments. Based upon Ms. Heinzelman's earning history, the amount of SSDI payment for which Ms. Heinzelman is eligible is $1,701 per month. Exhibit R at 4.

[1] Ms. Heinzelman applied for SSDI benefits but her application was rejected because she was working part-time. This rejection does not affect the outcome in this case because Ms. Heinzelman is not working presently.

The prospect that Ms. Heinzelman will receive payments through SSDI has been treated differently by the parties. Ms. Heinzelman has not adjusted any calculations of her damages to reflect that she may receive SSDI in the future. For example, Ms. Heinzelman retained an economist, Thomas H. Mayor, Ph.D., to calculate the amount of income that she has lost due to her inability to work. Dr. Mayor's report does not reduce the total amount of lost income by SSDI payments. See exhibit 19 at 2. Similarly, a life care plan proposed by Ms. Heinzelman notes that she is not working, but does not comment upon her eligibility for SSDI payments. See exhibit 28 at 1.

In contrast, respondent maintains that anticipated SSDI payments should offset Ms. Heinzelman's damage award. Resp't Resp., filed Dec. 4, 2009; see also exhibit P at 8. If respondent prevails on her motion, then respondent intends to ask her experts to offset Ms. Heinzelman's damages by the amount of SSDI benefits.[2]

Consequently, the only issue is assuming that Ms. Heinzelman is entitled to receive SSDI payments, whether, as a matter of law, these payments should offset her award of compensation. The parties have filed briefs on this matter and the issue is ready for adjudication.

## II. Analysis

This case raises the issue of whether compensation for SSDI benefits reduces the amount of compensation authorized by the Vaccine Act. "In interpreting the statute, the court must look not only at the particular statutory provision in question, but also at the language and design of the statute as a whole." Youngblood v. Sec'y of Health & Human Servs., 32 F.3d 552, 554 (Fed. Cir. 1994), citing K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). The analysis begins with a review of the plain language of the statute. Flowers v. Sec'y of Health & Human Servs., 49 F.3d 1558, 1560 (Fed. Cir. 1995).

Two provisions of the Vaccine Act, section 15(a) and section 15(g), are relevant. Section 15(a) generally defines four types of compensation to which petitioners are entitled. The pertinent part of section 15(a) for the issue in Ms. Heinzelman's case is located in the third paragraph, which awards compensation for lost earnings.[3] For purposes of calculating lost earnings, the statute distinguishes between people, including Ms. Heinzelman, who are older than age 18 (subparagraph A) and people who are younger than age 18 (subparagraph B). According to subparagraph A, when the person's "earning capacity is or has been impaired by reason of such vaccine-related injury for which compensation is to be awarded," then the injured person

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[2] In status conferences, the parties have stated that except for whether SSDI benefits offset Ms. Heinzelman's damages, they have resolved all other damages issues.

[3] In addition to lost wages, petitioners may receive compensation for (1) unreimbursed expenses, (2) a death caused by a vaccine, and (4) emotional distress.

shall receive "compensation for actual and anticipated loss of earnings determined in accordance with generally recognized actuarial principles and projections." 42 U.S.C. § 300aa–15(3)(A).

While section 15(a) establishes the general limits of compensation, those limitations are narrowed in section 15(g). Section 15(g) eliminates some items of compensation to which petitioners would otherwise be entitled. Section 15(g) states:

> Payment of compensation under the Program shall not be made for any item or service to the extent that payment has been made, or can reasonably be expected to be made, with respect to such item or service (1) under any State compensation program, under an insurance policy, or under any Federal or State health benefits program (other than Title XIX of the Social Security Act), or (2) by an entity which provides services on a prepaid basis.

42 U.S.C. § 300aa–15(g). For both section 15(a)(3)(A) and section 15(g), respondent presents arguments that Ms. Heinzelman's anticipated receipt of SSDI payments should reduce the amount of compensation awarded.

### A. Section 15(a)(3)(A)

As explained above, when certain qualifications are met, section 15(a)(3)(A) authorizes "compensation for actual and anticipated loss of earnings." Respondent contends that "[t]o the degree that SSDI substitutes a portion of those wages that petitioner earned prior to her injury, petitioner cannot be said to have a 'loss of earnings' for the amount that SSDI pays." Resp't Resp., filed Dec. 4, 2009, at 2. Respondent appears to be arguing that the phrase "loss of earnings" means a net loss of earnings, which is calculated first by determining the gross (or total) loss of earnings and then subtracting alternative sources of income, such as SSDI benefits.

The meaning of the phrase "loss of earnings" is not clear. The term is not defined in the statute. To the extent that "loss of earnings" could mean either a gross loss of earnings or a net loss of earnings, the term is ambiguous. To resolve this ambiguity, the structure of the Vaccine Act as a whole should be considered. See Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc., 576 F.3d 1348, 1363 (Fed. Cir. 20009) (stating a "fundamental canon of statutory construction [is] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

The structure of section 15 indicates that paragraph (a)(3) authorizes compensation for a loss of earnings in gross. Section 15(a) serves the function of explaining the different types of compensation that are available. So, section 15(a) can be seen as "giving" types of compensation, including compensation for lost earnings. In section 15(a)(3), the phrase "actual and anticipated loss of earnings" refers to earnings that have already been lost (sometimes known as "past lost wages") and earnings that will be lost after judgment enters (sometimes known as

"future lost wages"). A similar structure appears in section 15(a)(1), in which unreimbursed expenses are divided between "projected" amounts (section 15(a)(1)(A)) and "actual unreimbursed expenses incurred before the date of judgment" (section 15(a)(1)(B)). In this case, Ms. Heinzelman anticipates a loss of earnings from her previous job as a hair stylist. She fulfills the criteria for compensation pursuant to section 15(a)(3)(A).

In contrast to section 15(a), section 15(g) reduces what could be awarded, that is, section 15(g) "takes away" compensation that is "given" in section 15(a). Congress located offsets in section 15(g). Respondent's argument that section 15(a)(3)(A) authorizes compensation only for a net loss of earnings conflates the distinction between section 15(a) and section 15(g) in that, in respondent's view, section 15(a) would serve both as a basis for an award and as a basis for reducing the award. This argument does not comport with the structure of section 15.

In short, to extent that respondent wants a reduction in Ms. Heinzelman's compensation, the statutory source for such a reduction must be found in section 15(g). Section 15(g), therefore, is discussed in the following section.

### B. Section 15(g)

Section 15(g) explains when a petitioner cannot receive compensation in the Vaccine Program because certain outside (or collateral) sources provide compensation. One of the collateral sources is a "Federal . . . health benefits program." Respondent argues that SSDI constitutes a "Federal . . . health benefits program." Resp't Resp., filed Dec. 4, 2009, at 1-2.[4]

Respondent's first argument is straightforward. Section 15(g) explicitly requires an offset for payments received from a "Federal . . . health benefits program." According to respondent, SSDI is a "Federal . . . health benefits program" because individuals qualify for SSDI by becoming disabled, that is, by experiencing a health problem. Resp't Resp., filed Dec. 4, 2009, at 1-2; Resp't Reply, filed Jan. 8, 2010, at 2.

Respondent's conclusion that SSDI is a health benefits program is flawed. It is correct that one criterion for receiving SSDI benefits is not being able to work. Another criterion is that applicants for SSDI benefits also must establish that they worked for certain number of quarters. 42 U.S.C. § 423(c)(1)(B)(i); 20 C.F.R. § 404.130; Desselle v. Barnhart, 415 F.3d 861 (8th Cir. 2005). Thus, receiving SSDI is not premised on a person's health entirely.

[4] A "Federal . . . health benefits program" is the only category to which SSDI could belong. Respondent does not advance an argument that SSDI could be considered to be any of the other statutory categories including "any State compensation program," "an insurance policy," a "State health benefits program," or "an entity which provides health services on a prepaid basis."

Moreover, once a person is found eligible to receive SSDI benefits, the recipient does not receive "health benefits," at least not directly. Recipients of SSDI benefits receive money that can be spent for any purpose. Respondent has not identified any regulation that mandates SSDI benefits be used to pay for medical care. Although SSDI benefits may be used to pay for health care, this potential use of SSDI benefits does not make SSDI a "Federal . . . health benefits program."[5] Consequently, respondent has not established that SSDI is a "Federal . . . health benefits program."

Respondent's second argument for treating SSDI as a Federal health benefits program draws upon other tools for statutory interpretation, such as context and legislative history. As related to context, respondent focuses on language in section 15(g) set off by parentheses. Section 15(g) provides that the Vaccine Program does not pay for items paid by "any Federal . . . health benefits program (other than Title XIX of the Social Security Act)." Title XIX of the Social Security Act is the Medicaid program. Respondent argues that because one portion of the Social Security Act is specifically not an offset, then other portions of the Social Security Act, therefore, are offsets. See Resp't Resp., filed Dec. 4, 2009, at 1-2.

Respondent's argument fails to address the plain meaning of the words used in the statute. Respondent appears to be reading the statute as if section 15(g) said that the Vaccine Program does not pay for items paid by "the Social Security Act (other than Title XIX of the Social Security Act)." If the statute used this language, then respondent's argument could be persuasive. But, the statute actually uses the term "any Federal . . . health benefits program." For the reasons explained above, SSDI does not constitute a "Federal . . . health benefits program."

The language of the statute is also more important than the legislative history. Respondent cites to portions of the legislative history to support her argument that SSDI benefits should be an offset. Resp't Resp., filed Jan. 26, 2010, at 2. In pertinent part, one report provides: "Payment of compensation is not to be made for items or services for which payment has been made or can be expected to be made by other public or private entities." H. Rep. Rept. No. 99-908, at 22, as reprinted in 1986 U.S.C.C.A.N. 6344, 6363. If the statute repeated the same phrase found in the legislative history ("other public . . . entities"), then respondent's argument regarding SSDI would be much more forceful. The statute, however, is not phrased that broadly. Section 15(g) limits offsets to those Federal programs that provide "health benefits." Thus, respondent's reliance on legislative history is not persuasive because "[i]n the absence of a conflict between reasonably plain meaning and legislative history, the words of the statute must prevail." Aaron v. SEC, 446 U.S. 680, 700 (1980). Here, to repeat, the words of section 15(g) require an offset for a "Federal . . . health benefits program" and respondent has not shown that SSDI is such a program.

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[5] Respondent argues that two years after a person receives SSDI benefits, the person is eligible for Medicare. Resp't Reply, filed Jan. 8, 2010, at 2; Resp't Resp., filed Jan. 26, 2010 at 6. This conclusion is correct. See 42 U.S.C. § 426(b). Ms. Heinzelman's eligibility for Medicare benefits, however, is not the issue.

The foregoing analysis of section 15(a)(3)(A) and section 15(g) is sufficient to resolve the specific question presented, which is whether Ms. Heinzelman's amount of compensation should be reduced by the amount of SSDI benefits for which she is eligible. The answer to this question is "no," because section 15(a)(3)(A) does not describe any offsets and because section 15(g), which does list offsets, does not encompass SSDI benefits. This examination of the language of the statute is sufficient. See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (stating "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"). Nevertheless, respondent argues for a different outcome based upon either canons of construction or policy. For the sake of completeness these arguments are discussed below.

Citing cases such as United States v. Nordic Village, 503 U.S. 30, 37 (1992), and Brice v. Sec'y of Health & Human Servs., 240 F.3d 1367, 1370 (Fed. Cir. 2001), respondent argues that the doctrine of sovereign immunity requires that the waiver of sovereign immunity to be construed narrowly. Resp't Reply, filed Jan. 8, 2010, at 2-3. This argument, too, is not persuasive in this case. The doctrine of sovereign immunity is "a tool for interpreting the law" that is useful when the statute is ambiguous. When the statute is not ambiguous, "[t]here is no need for us to resort to the sovereign immunity canon." Richlin Sec. Service Co. v. Chertoff, 533 U.S. 571, ___, 128 S.Ct. 2007, 2019 (2008). Here, as discussed above, the statute's meaning is plain – payments by "any Federal . . . health benefits program" reduce the amount of compensation in the Vaccine Program. It is also clear that SSDI is not a "Federal . . . health benefits program." Thus, resorting to the canon of sovereign immunity is not necessary.

Even if section 15(g) were ambiguous, the canon of sovereign immunity is not the only tool useful in interpreting unclear provisions in the Vaccine Act. When the Federal Circuit has found a lack of precision in the Vaccine Act, it has looked to the Restatement (Second) of Torts. Shyface v. Sec'y of Health & Human Servs., 165 F.3d 1344, 1351-52 (Fed. Cir. 1999).

The Restatement (Second) of Torts provides some guidance about when offsets to awards of damages are appropriate. Section 920A(2) provides, in pertinent part: "Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." Further guidance as to the meaning of section 920A is found in the comments. Comment c states: "The rule that collateral benefits are not subtracted from the plaintiff's recovery applies to the following types of benefits: . . . (4) Social legislation benefits. Social security benefits . . . are subject to the collateral-source rule." Consequently, the Restatement (Second) of Torts is consistent with the statutory analysis.

Additionally, cases adjudicated in the Swine Flu Immunization Program, 42 U.S.C. § 247b (1976), provide some information about how courts compensated people harmed by a vaccine. These cases did not reduce compensation by the amount of SSDI benefits, although these cases relied upon state law. See Manko v. United States, 830 F.2d 831, 836-37 (8th Cir. 1987); Carroll v. United States, 625 F. Supp. 1, 8 (D. Md. 1982); Barnes v. United States, 516

F. Supp. 1376, 1388-89 (W.D. Pa. 1981), aff'd in part, 678 F.2d 10, and judgment aff'd, 685 F.2d 66 (3d Cir. 1982).

The results of adjudications in the Swine Flu Immunization Program and the treatment of collateral sources in the Restatement (Second) of Torts are presumed to be known by Congress when Congress enacted the Vaccine Act. See Canadian Lumber Trade Alliance v. United States, 517 F.3d 1319, 1343 n.25 (Fed. Cir. 2008) ("We presume that Congress is knowledgeable about existing law pertinent to legislation it enacts.") (citation omitted). If Congress had intended to depart from this background, that is, if Congress had intended to permit SSDI payments to reduce compensation in the Vaccine Program, Congress could have easily broadened the offsets listed in section 15(g). For example, Congress could have permitted offsets for payments under "any Federal program." Congress did not. Courts should not add to what Congress has written. See International Business Machine Corp. v. United States, 201 F.3d 1367, 1374 (Fed. Cir. 2000).

Finally, respondent argues that if SSDI payments are not offset, then Ms. Heinzelman will receive a windfall because she will receive approximately $50,000, which was her earning capacity, from the Vaccine Program and approximately $20,000 in SSDI benefits.[6] In support of this argument, respondent cites to Zatuchni v. Sec'y of Health Human Servs., No. 94-58V, 2006 WL 1499982, at *7-8 (Fed. Cl. Spec. Mstr. May 10, 2006), vacated in part on other grounds, 73 Fed. Cl. 451 (2006), aff'd 516 F.3d 1312 (Fed. Cir. 2008). Zatuchni carries limited value as a precedent because the petitioner agreed to the offset. Id.

Thus, Ms. Heinzelman will receive more income following her injury than she received before her injury. This result is not unprecedented in the general civil arena. Many states have enacted legislation to address how the receipt of benefits from other sources affects the amount of compensation to which a litigant is entitled. See Bryce Benjet, A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damage Awards, 76 Def. Counsel J. 210 (2009). So, too, Congress may address this situation. See Resource Conservation Group, LLC v. United States, 597 F.3d 1238, 1246 (Fed. Cir. 2010).

## III. Conclusion

To aid the parties as they attempt to quantify the damages to which Ms. Heinzelman is entitled, respondent sought a ruling as to whether anticipated SSDI payments should reduce the compensation to which Ms. Heinzelman would otherwise be entitled. For the reasons explained above, the Vaccine Act does not require this reduction.

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[6] Respondent demonstrated that the Social Security Administration will not offset Ms. Heinzelman's receipt of compensation from the Vaccine Program when calculating the amount of Ms. Heinzelman's disability payments. Resp't Resp., filed Jan. 26, 2010, at 4-5 (citing Social Security Administration, Program Operations Manual System, Disability Insurance, Sections 52125.001, 52125.005, & 52130.001, and Social Security Administration, Social Security Handbook, Section 504.6).

The parties have previously stated that after this issue was resolved, they should be able to agree to the calculations of damages. Respondent is ordered to submit a status report regarding damages by **June 10, 2010**.

IT IS SO ORDERED.

S/ Christian J. Moran
Christian J. Moran
Special Master