

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

TIMOTHY J. and JOANNA L. SARVER, *
as parents and legal representatives of the *
estate of their daughter, *
ERICA LYNN SARVER, deceased, *

No. 07-307V

Special Master Christian J. Moran

Petitioners, *

Filed: November 16, 2009

Released: March 30, 2012

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *
Respondent. *

Damages, Zatuchni, wrongful death
claim distinguished from survival of
a claim for injuries death, extent of
injury claim, whether parents of
deceased child may recover for her
lost earning capacity

RULING REGARDING WHETHER PETITIONERS SHOULD BE
COMPENSATED FOR LOST EARNINGS OF ERICA LYNN SARVER*

This case presents a rare set of facts, producing a novel legal question – whether the
estate of a child whose death was caused by a vaccine may recover compensation for the lost
earnings of that child? For the reasons that follow, the answer to this question is no.

Before starting the analysis, the undersigned pauses to acknowledge that the Sarvers, as
Erica’s father and mother, have suffered a grievous loss that any award of money cannot
compensate adequately. Nevertheless, the legal system generally and the Vaccine Program
specifically attempts to provide some compensation for at least the financial losses. In doing so,

* When this ruling was originally filed, the parties were notified of their opportunity to seek
redaction before the ruling was posted on the website for the United States Court of Federal
Claims. Neither party requested any redactions.

However, due to a clerical oversight, the ruling was not made available to the public
through the website. The ruling is being made available to the public as originally issued except
for changes in this footnote.

the undersigned is limited to awarding the compensation that Congress has deemed appropriate. But, any amount of money does not compensate the Sarvers for their loss.

I. Factual and Procedural History

Erica Lynn Sarver was born on March 8, 2005. She received the measles mumps rubella (MMR) vaccine on March 9, 2006.

Erica's parents, Timothy J. Sarver and Joanne L. Sarver (the Sarvers), filed a petition seeking compensation for Erica's injuries pursuant to the National Childhood Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq. (2006). When the Sarvers filed this petition, they were acting in their capacity as guardians for Erica. Petition, filed May 17, 2007, at 1; see also 42 U.S.C. § 300aa-11(b)(1)(A) (including as "petitioners" "the legal representative of such person [who was injured by a vaccine] if such person is a minor").

Respondent conceded that the Sarvers were entitled to compensation. Resp't Rep't, filed Aug. 3, 2007; see also 42 C.F.R. § 100.3 ¶ III (associating MMR vaccine with encephalopathies that develop 5-15 days after vaccination). The parties began the process for determining the extent of Erica's damages. See order, filed Aug. 13, 2007.

Typically, the process for determining compensation for a child with a serious condition, such as Erica, takes at least one year. In these types of cases, the parties retain life care planners. The life care planners obtain up-to-date medical information about the injured person. They meet with doctors and, sometimes, school officials. After they gather as much relevant information as possible, the life care planners present life care plans projecting what type of care the injured person will need and how much that care will cost. The parties proceeded along this course.

The Sarvers also requested an opportunity to retain an annuity expert. Pet'r Mot., filed Oct. 14, 2007. The Sarvers made this request concurrently with a request made by another set of petitioners who also were represented by the attorney who represents the Sarvers. Briefing about whether the Sarvers could retain an annuity expert extended until October 3, 2008. Unfortunately, Erica died on December 7, 2008. She was almost four years old. Ultimately, Erica's death made this planning unnecessary. (Of course, the Sarvers did not know how Erica would fare when they made their request to retain an annuity broker.)

The Sarvers filed a motion to amend the caption of the case to reflect that they were prosecuting this action on behalf of Erica's estate. This motion was granted.

Thereafter, the Sarvers filed medical records and other documents relating to Erica's death. Exhibit 79-83. Respondent conceded that Erica's death was a sequella to the encephalopathy. Thus, the Sarvers were entitled to compensation for Erica's death.

The parties have agreed about some components of the amount of compensation to which the Sarvers are entitled. However, the parties dispute whether the Sarvers are entitled to compensation for Erica's loss of earnings. The parties have filed briefs and this issue of law is ready for adjudication.

II. Analysis

"The first and most important step when interpreting a statute is, of course, analyzing its text." Terran v. Sec'y of Health & Human Servs., 195 F.3d 1302, 1310 (Fed. Cir. 1999). The Vaccine Act defines the extent of compensation available to petitioners in the Vaccine Program.

Compensation awarded under the Program to a petitioner ... for a vaccine-related injury or death associated with the administration of a vaccine ... shall include the following:

(1) [medical expenses];

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

(3)(A) [lost earnings for people older than 18]

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

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

42 U.S.C. § 300aa-15(a) (emphasis added). Here, the parties dispute the import of the emphasized portion, which has not received much attention from appellate authorities.

Two factors contribute to the novelty of the question presented by Erica's case. Legally, the possibility that the Sarvers could demand compensation for lost earnings after Erica had died was opened by the Federal Circuit's ruling in Zatuchni v. Sec'y of Health & Human Servs., 516 F.3d 1312, 1318-19 (Fed. Cir. 2008). Before Zatuchni, the general rule was that if a vaccine caused a person's death, then the person's estate was limited to the damages set forth in section 15(a)(2). E.g. Sanders v. Sec'y of Health & Human Servs., No. 99-430V, 2009 WL 1759452, at *5 (Fed. Cl. Spec. Mstr. May 27, 2009) (collecting cases decided before Zatuchni). Thus, before Zatuchni, once a person died, there was no need to examine the meaning of section 15(a)(3). However, as discussed below, Zatuchni changed this general rule.

A second reason why Erica's case raises a new question is due to the factual circumstances. Erica's case is unusual in that Erica died due to a vaccine-related injury while her claim for compensation was pending.

Erica's case differs from cases commonly seen in the Vaccine Program. In most cases, petitioners claim that a vaccine caused them (or their ward) an injury. In these cases, the typical vaccinee is still living and suffering from the injury allegedly caused by the vaccine. Usually, the vaccinee remains alive while the petition is adjudicated.

In other cases, the petitioners represent the estate of someone who claims that a vaccine caused the decedent to die. In these cases, the petitioners usually have sought the "death benefit" provided in section 15(a)(2).

Erica's case is a rare case in which the vaccine caused Erica an injury (an encephalopathy), the injury caused problems for Erica for more than two years, and the injury caused her death while the case was pending. If Erica's case had proceeded more quickly such that the Sarvers were awarded compensation for Erica's injuries before Erica died on December 7, 2008, it is likely that the Sarvers would be entitled to lost earnings as set forth in section 15(a)(3)(B). Conversely, if Erica were alive on the date of judgment, the Sarvers would not be entitled to the death benefit set forth in section 15(a)(2).¹

Erica's case resembles and differs from Zatuchni. In Zatuchni, the person who received an MMR vaccine was E. Barbara Snyder. Ms. Snyder received this vaccination in 1992, and developed chronic arthralgia and fibromyalgia. In 1994, Ms. Snyder filed a petition seeking compensation for both conditions. Ultimately, the parties litigated whether Ms. Snyder was entitled to compensation. Snyder v. Sec'y of Health & Human Servs., No. 94-58V, 2005 WL 1230787, at *16 n.24 (Fed. Cl. Spec. Mstr. May 6, 2005).

Ms. Snyder's petition remained pending for approximately 11 years. On May 6, 2005, the special master determined that Ms. Snyder had failed to establish that she was entitled to compensation for fibromyalgia. Zatuchni, 516 F.3d at 1314 (citing Snyder v. Sec'y of Health & Human Servs., No. 94-58V, 2005WL 1230787, at *20 (Fed. Cl. Spec. Mstr. May 6, 2005)). However, at the time the special master decided the case, the attorneys were not aware that Ms. Snyder had died on April 28, 2005. Id.

¹ This statement does not consider whether petitioners who already had recovered compensation for a vaccine-related injury could seek to amend the judgment. It should be noted that if a person filed a petition alleging that a particular vaccination caused him (or her) an injury, then the estate of this person could not later file a different petition alleging that the vaccination also caused his (or her) death. See 42 U.S.C. § 300aa-11(b)(2) (stating, "[o]nly one petition may be filed with respect to each administration of a vaccine."); Zatuchni, 516 F.3d at 1322.

After a motion for review of the special master's decision was filed, Ms. Zatuchni, as representative of Ms. Snyder's estate, was substituted for Ms. Snyder as the petitioner. Snyder v. Sec'y of Health & Human Servs., 69 Fed. Cl. 390 (2006).²

A judge of the Court of Federal Claims reversed the entitlement decision of the special master. The judge found that Ms. Snyder had demonstrated that the MMR vaccine had caused her fibromyalgia. The judge remanded the case to the special master to determine the amount of compensation for these injuries and whether Ms. Snyder's death was related to a vaccine. Zatuchni v. Sec'y of Health & Human Servs., 69 Fed. Cl. 612, 622-24 (2006).

On remand, the special master complied with the judge's instructions. First, the special master found that Ms. Snyder's death was causally related to the MMR vaccine. This finding entitled Ms. Zatuchni, the representative of Ms. Snyder's estate, to the \$250,000 death benefit in section 15(a)(2). Zatuchni v. Sec'y of Health & Human Servs., No. 94-58V, 2006 WL 1499982, at *6 (Fed. Cl. Spec. Mstr. May 10, 2006).

The second part of the special master's decision after remand concerned the compensation for Ms. Snyder's injuries. The special master held that, as a matter of law, Ms. Zatuchni could not recover this compensation for Ms. Snyder's injuries (as opposed to compensation for Ms. Snyder's death) because the claims for injuries did not survive Ms. Snyder's death. Id. at *16-26. However, the special master also took the step of determining the amount of compensation for Ms. Snyder's injuries if Ms. Zatuchni were entitled to an award. The special master found that the amount of compensation for Ms. Snyder's injuries caused by the vaccine was \$554,323.90. This sum would compensate Ms. Snyder for past medical expenses, pain and suffering, and past lost earnings. The component of lost earnings was \$129,443.41, which was based on a series of calculations. The starting point was the amount that Ms. Snyder would have earned between her injury in 1992, and her death in 2005. Id. at *7-8.

Ms. Zatuchni filed a motion for review, which a judge granted. The judge ordered that Ms. Zatuchni receive \$250,000 in compensation for Ms. Snyder's death and the \$554,323.90 in compensation for Ms. Snyder's injuries. Zatuchni v. Sec'y of Health & Human Servs., 73 Fed. Cl. 451, 459 (2006). The government appealed this decision.

The Federal Circuit affirmed the award of compensation for both Ms. Snyder's death and Ms. Snyder's injuries. The respondent argued that the death benefit authorized in section 15(a)(2) was the "sole remedy" for a person who dies as a result of a vaccine. Zatuchni, 516 F.3d at 1315. The Federal Circuit rejected the respondent's argument and concluded that compensation authorized by paragraphs (1), (3), and (4) of section 15(a) were also available. Id. at 1318.

² As noted in Sanders, whether an attorney was authorized to file the notice of review of behalf of a person who died was apparently not raised. Sanders, 2009 WL 1759452, at *3 n.14.

The Federal Circuit reasoned:

the fact that a vaccine-related death followed a vaccine-related injury in a particular case does not alter the fact that certain expenses were incurred, wages lost, or pain and suffering endured in the interim, and these damages are no less related to or caused by a vaccine-related injury within the meaning of subsections (a)(1), (3), and (4) simply because the vaccine-injured person in question is no longer living

Id. at 1318-19. The Federal Circuit also analyzed the text and structure of the statute to hold that an award of death benefits and injury benefits was permitted.

Zatuchni is a binding decision. But, the parties disagree about whether Erica Sarver's case is analogous. The Sarvers argue that Erica suffered a loss of her earning capacity when the MMR vaccine injured her, not when she reached age 18 or when she would have attempted to earn wages. Pet'r Br., filed June 22, 2009, at 9. Thus, the Sarvers compare Erica's case to Zatuchni. Id. at 6.

Respondent distinguishes Zatuchni. In Zatuchni, Ms. Snyder was 45 when she received the MMR vaccine. Ms. Zatuchni did not receive compensation for the future earnings that Ms. Snyder would have received but for her death. Resp't Br., filed Sept. 4, 2009, at 9. The Respondent emphasized the portions in the Federal Circuit's decision that limited Ms. Snyder's compensation for vaccine-related injuries to the time when Ms. Snyder was living. Respondent quoted Zatuchni as stating that "Put simply, the fact that a vaccine-related death followed a vaccine-related injury in a particular case does not alter the fact that certain expenses were incurred, wages lost, or pain and suffering endured in the interim." Resp't Br, at 9 (quoting Zatuchni, 516 F.3d at 1318-19) (all emphasis added in respondent's brief). Thus, respondent argued that "Zatuchni does not discuss the legal issue specific to this case, i.e., whether future lost wages are awardable under section 15(a)(3)(B), after the vaccine-injured claimant has died." Id. at 8.

Respondent is correct that Zatuchni does not mandate an award for Erica's lost future earnings to the Sarvers. As explained below, compensating an estate for money actually lost by the decedent ("lost" either because the decedent spent money on medical treatment or because the decedent did not earn as much money as she could have earned) is one thing. Compensating the estate for losses that are not out-of-pocket is another thing.

Various reasons support not awarding the Sarvers compensation for Erica's future lost earnings. These reasons include: the distinction between survival actions and wrongful death actions implicitly recognized in the text of the Vaccine Act; the policies reflected in an award of future lost wages; and, finally, the doctrine of sovereign immunity.

Because Zatuchni does not dictate the result that an award of compensation is or is not mandated, an analysis of the statute is required. The statute waives the United States’s sovereign immunity and permits the legal representative of a deceased person to seek compensation for the decedent’s wrongful death. 42 U.S.C. § 300aa–11(b)(1)(A). The Vaccine Act also specifies the amount of compensation to be awarded when a covered vaccine causes a person’s death. The decedent’s estate is awarded \$250,000.00. 42 U.S.C. § 300aa-15(a)(2).

In setting the compensation for wrongful death at \$250,000.00, the statute does not permit the recovery of additional types of compensation for the person’s death. In this case, the Sarvers cannot recover the earnings that Erica would have made but for her vaccine-caused injury and vaccine-caused death. Erica’s “future” earnings – meaning the earnings that she would have made after her death – are supplanted by the \$250,000.00 award. If the Sarvers were awarded Erica’s future loss earnings, then the \$250,000 would appear superfluous. Nothing indicates that Congress intended for an estate to be awarded both the death benefit and future lost earnings.

A minority of jurisdictions allows an estate to recover the “future” earnings of the decedent as part of an action for the decedent’s wrongful death. See 1Stuart M. Speiser & James E. Rooks, Jr., Recovery for Wrongful Death §§ 6:52 through 6:55 (4th ed. 2005).³ Even in the jurisdictions that do authorize awards of compensation for future earnings, this authorization derives from a statute. These statutes appear not to mandate a particular amount of compensation for wrongful death. Thus, the statutes that permit an award for the loss of future earnings differ from the Vaccine Act.

Holding that the Vaccine Act limits the amount an estate can recover for the wrongful death of its decedent is consistent with the result in Zatuchni. The question in Zatuchni was whether Barbara Snyder’s claim for compensation for her vaccine-caused injury survived her death. See Zatuchni, 516 F.3d at 1315 (stating that the government argues that certain types of compensation “do not survive the death of a vaccine-injured person”); id. at 1324 (Dyk, J., concurring) (stating “This case presents a simple question: whether a claim for compensation for a vaccine-related injury under the National Childhood Vaccine Injury Act . . . survives the death of a petitioner.”). In Zatuchni, the majority of the panel held that the injury claims survive.⁴

³ In most jurisdictions, a wrongful death action does not encompass a claim for the decedent’s loss of earnings. Instead, the wrongful death seeks to compensate the decedent’s survivors for the survivors’ losses. See id. at § 6:3 and § 6:12 (explaining that a majority of jurisdictions award compensation for the survivor’s losses and the decedent’s loss of earnings is not the correct measurement of damages)

⁴ The concurring opinion also held that Ms. Snyder’s injury claims survived, although it reached this result by drawing upon federal common law. See Zatuchni, 516 F.3d at 1324-31 (Dyk, J., concurring).

As discussed above, Zatuchni did not enlarge the amount of compensation that could be awarded to an estate for a person's wrongful death. Ms. Zatuchni did not seek any compensation (other than the \$250,000) for Ms. Snyder's death, that is, Ms. Zatuchni did not seek future lost earnings.

Thus, if the Sarvers were entitled to compensation for Erica's lost earnings, the source of the remedy must be as part of the injury claim. However, the survival of an injury claim differs from a claim for wrongful death. One treatise, which was cited by Judge Dyk in Zatuchni, explained:

Conceptually, the survival statute is quite different from the wrongful death act, as each provides a remedy for a different kind of loss. Wrongful death acts compensate either the survivors, or the estate of the deceased, for losses they have sustained. Survival statutes, on the other hand, permit recovery by the decedent's personal representative, generally on behalf of the estate . . . for damages which the decedent could have recovered had he lived. The prime difference between the theories underlying the two types of statutes — as continually noted throughout this work in other contexts — is that the survival statute merely continues in existence the injured person's claim after death as an asset of his estate, while the usual wrongful death statute creates a new cause of action, usually for the benefit of decedent's statutory survivors.

1 Speiser & Rooks, Recovery for Wrongful Death § 1:13 (all emphases in original, footnotes deleted without notation); accord Green ex rel. Estate of Green v. City of Welch, 467 F. Supp. 2d 656, 660 (S.D. W.Va. 2006) (relying upon an earlier edition of Speiser and Rooks).

This treatise specifically noted that the recovery for injuries pursuant to a survival statute is limited. "In a survival action, a claim for lost earnings embraces only the earnings lost up to the time of death." Id. at § 1:14, citing Jones v. Flood, 716 A.2d 285 (Md. 1998). Other cases have reached the same result. See Sacco v. Allred, 845 So. 2d 528, 538 (La. Ct. App. 1st Cir. 2003) (stating the "survival action permits recovery only for damages actually suffered by the deceased from the time of injury until death, including pain and suffering, loss of earnings, and any other damages sustained before death.").

The Restatement (Second) of Torts also limits the amount of compensation that can be recovered in a survival action.

Under statutes providing for the survival or revival of tort actions, the damages for a tort not involving death for which the tortfeasor is responsible are not affected by the death of either party before or during trial, except that

- (a) the death of the injured person limits recovery for damages for loss or impairment of earning capacity, emotional distress and all other harms, to harms suffered before the death, and
- (b) the death of the tortfeasor terminates liability for punitive damages.

Restatement (Second) of Torts § 926 (1979) (emphasis added). The summary of the Restatement (Second) of Torts is significant because the Federal Circuit has looked to the Restatement (Second) of Torts to interpret the Vaccine Act. Shyface v. Sec’y of Health & Human Servs., 165 F.3d 1344, 1351-52 (Fed. Cir. 1999).

Thus, it appears to be a generally accepted (but perhaps not universally accepted) principle that a statute that permits a claim for a person’s injury to survive that person’s death limits the recovery to when the person actually was living. That is, an injury-based claim does not extend past the person’s actual death. This principle is reflected in the portion of the Vaccine Act that authorizes an award of lost wages.

“In the case of any person who has sustained a vaccine-related injury,” the Vaccine Act mandates an award for lost earnings when, among other things, “the vaccine-related injury is of sufficient severity to permit reasonable anticipation that such person is likely to suffer impaired earning capacity at age 18 and beyond.” 42 U.S.C. § 300aa-15(a)(3)(B). Paraphrasing the statute slightly, the statute indicates that the special master must reasonably anticipate that the injured person will suffer an impaired earning capacity at age 18.

The question, then, becomes when does the special master do this anticipating? The answers from the Sarvers and the respondent diverge. The parties assume that the special master should consider different information when anticipating whether the vaccine-related injury is so severe that the child “is likely to suffer impaired earning capacity at age 18 and beyond.” The Sarvers, implicitly, argue that this determination should be made based upon the information that exists once the child suffers the injury. To the Sarvers, events occurring after the injury – such as the child’s death – do not affect the evaluation of whether the injury is so severe that the child’s earning capacity is impaired. See Pet’r Br., filed June 22, 2009, at 5.

The respondent presents a different view. Respondent argues that events occurring after the severity of the vaccine-related injury is established can affect whether a loss of earning capacity can be reasonably anticipated. Here, Erica’s death, which occurred almost three years after she was injured, changes the outcome. Before Erica died, it was reasonably possible to anticipate that her earning capacity was impaired. But, after Erica died, it was not reasonably possible to anticipate that she suffered any losses at age 18 or beyond. See Resp’t Br. at 8 (arguing that “future damages (like the lost future wages here), would never actually be incurred in cases where the claimant has died.”) (emphasis in original).

Respondent’s argument is more persuasive for two reasons. First, it is in agreement with another decision from the Federal Circuit, McAllister v. Sec’y of Health & Human Servs., 70

F.3d 1240 (Fed. Cir. 1995), about how to determine damages. Second, it is consistent with the practice in the Vaccine Program. In contrast, on a practical level, the Sarvers' argument is internally inconsistent.

The primary reason for considering Erica's death is McAllister. In McAllister, the legal question before the Federal Circuit was what information should be considered when the special master determines damages. The Federal Circuit held that the special master should consider all information. "[I]f there is a change in the victim's condition or expenses prior to the date of the final calculation of the award, the compensation decision should take that matter into account." Id. at 1243. Later, the Federal Circuit stated "compensation in a Vaccine Act case is ordinarily calculated as of the time of the special master's decision that leads to the final judgment in the case." Id.

Here, after Erica's death on December 7, 2008, it was impossible to anticipate that Erica "is likely to suffer impaired earning capacity at age 18 and beyond." The statute requires that the special master find that the person who "sustained a vaccine-related injury . . . is likely to suffer impaired earning capacity at age 18 and beyond." "Suffer" implies that the person is alive. Decedents do not "suffer."⁵

If the holding in McAllister were different, such that the special master evaluated damages at one arbitrarily selected time, then the result might be different. But, once it is the rule, as announced in McAllister, that special masters consider information through the date of decision, the Sarvers cannot establish that Erica is likely to suffer a loss of earning capacity at age 18.

⁵ The injured person's continued survival – after judgment – is not a condition of an award for lost earning capacity. Edgar v. Sec'y of Health & Human Servs., 989 F.2d 473, 477 (1993). What is required is that the special master reasonably anticipate, when making his (or her) decision about damages, that the person is likely to be alive at age 18 and beyond. For example, if the special master decided on March 1, 2009, that it was reasonably likely that the injured person who was then four years old would suffer an impaired earning capacity 14 years in the future (when the child was 18 years old), the special master would award an appropriate amount for lost earnings. (To simplify the hypothetical, assume that the decision was not subject to an appeal, such that judgment entered.) If the child died unexpectedly, such as in a car accident, on October 1, 2009, this change in condition after the judgment would not affect the accuracy of the special master's "reasonable anticipation" on March 1, 2009.

This example is merely a specific application of the well-established principle that events occurring after a judgment cannot be the basis for altering the judgment. See Fiskars, Inc. v. Hunt Mfg. Co., 279 F.3d 1378, 1384 (Fed. Cir. 2002). The only exception seems to be those set out in Rule 60(b) of the Rules of the Court of Federal Claims, which parallels Rule 60(b) of the Rules of Federal Civil Procedure.

The rule from McAllister matches what typically happens in the Vaccine Program. As explained above, during the process of determining damages, the parties present life care planners. Producing life care plans sometimes takes many months (even more than a year) to complete because the life care planners are attempting to gather as current information as possible to make as accurate projections as possible regarding the future care of the petitioner. In effect, the life care planners present a snapshot in the sense that they capture the person's condition at a particular moment in time and then make projections from that snapshot. Sometimes, however, the parties complete their life care plans and then the condition of the injured person changes drastically. (Almost always, the change is a worsening in the person's health.) In this case, the snapshot is no longer accurate. Typically, the parties will request and the special master will extend additional time for completing a supplemental life care plan.

Zatuchni is consistent with the idea that the special master's snapshot should be based upon information known through the date that the special master determines the amount of damages to which the person is entitled. In Zatuchni, the special master determined the compensation as of the date of the May 10, 2006 decision. Zatuchni, 2006 WL 1499982. On this date, the following was known. The MMR vaccination in 1992 caused Ms. Snyder an injury. This injury caused Ms. Snyder to incur unreimbursed medical expenses for approximately 13 years, to earn less money than she otherwise would have for 13 years, to suffer emotional distress for 13 years, and, finally, to die. The Federal Circuit determined that Ms. Zatuchni, as executrix of Ms. Snyder's estate, was entitled to receive compensation for all these elements. A single snapshot presents all the relevant information.

The Sarvers, in effect, advocate for the use of two snapshots. The first picture would be taken when Erica was alive, say November 1, 2008. See Pet'r Br., filed June 22, 2009, at 5-6 (stating "Erica's death should have absolutely no bearing on her entitlement for lost earning capacity/loss of earnings.") This snapshot is a basis for the special master to anticipate that Erica would suffer a loss of earning capacity at age 18. This snapshot, however, would not entitle the Sarvers to the death benefit provided in section 15(a)(2). The second point of examination would be after Erica's death and would entitle the Sarvers to the compensation for Erica's death.

If the hypothetical November 1, 2008 snapshot constituted a valid basis for projecting a loss of earnings for Erica, would this same snapshot constitute a valid basis for making a reasonable projection that Erica would incur medical expenses to treat her vaccine-caused encephalopathy? See exhibits 40 (petitioners' life care plan filed May 7, 2008). An award for future (post-judgment) unreimbursed medical expenses for someone who has already died would not make sense. It is difficult to distinguish medical expenses not incurred from wages not lost. See McAllister, 70 F.3d at 1243 (stating "we find nothing in the language of the statute or the policies underlying it that calls for treating the calculation of past pain and suffering differently from the calculation of past medicals expenses.").

Congress authorized different types of compensation to people who suffer an injury caused by a vaccine. People injured by a vaccine are entitled to recover compensation for their

various medical expenses, for their lost earnings, and for their emotional distress. 42 U.S.C. § 300aa-15(a)(1), (3) & (4). These different forms of compensation have different purposes – the compensation for medical expenses eliminates any financial burden for treating the person’s illness; the compensation for the lost wages offsets the person’s lack of earnings, which would have otherwise provided the income necessary to sustain the person; and the compensation for the emotion distress ameliorates, to some extent, the person’s pain and suffering. Each part of the compensation award contributes to making the injured person as whole as possible.

The lost wage component replaces the income that the injured party would have earned and then used to support himself (or herself). Some of the person’s income would be used for basic necessities.⁶ In providing that an injured child can recover the amount of income equal to the “the average gross weekly earnings of workers in the private, non-farm sector, less appropriate taxes and the average cost of a health insurance policy,” 42 U.S.C. § 300aa-15(a)(3)(B); Congress has indicated that these basic living expenses would be borne by the person receiving the lost income. A person who has died no longer needs income to pay expenses. Thus, an award for income not earned after the person’s death would not be in line with the policy goal that apparently motivated Congress to authorize compensation for lost earnings.

The result in this case may appear to be arbitrary in that if Erica had lived until there was a decision awarding the Sarvers compensation for Erica’s vaccine-caused illness, the Sarvers could legitimately claim (and probably be awarded) compensation for Erica’s loss of earning capacity pursuant to section 15(a)(3)(B). It is only because Erica has died that the Sarvers are precluded from receiving this compensation. The fact that Erica’s death, itself, was caused by the vaccine may seem to increase the unfairness. Certainly, the Sarvers claim for compensation has a compelling emotional component.

Nevertheless, the legal system differentiates people who were injured and are still alive from people who were injured and have died. See Restatement (Second) of Torts § 926. Congress appears to have adopted this system in creating the Vaccine Program, which also includes an award of \$250,000.00 to the estate of someone who dies due to a vaccine.

In other spheres, Congress has distinguished claims that survive a person’s death from claims that do not survive a person’s death. For example, a veteran’s claim for disability compensation terminates with the veteran’s death. But, other forms of compensation are available to the veteran’s survivors. See Richard v. West, 161 F.3d 719, 723 (Fed. Cir. 1998). The conclusion here is comparable.

⁶ See 1 Speiser & Rooks, Recovery for Wrongful Death § 6:52 through § 6:55 (discussing different ways to determine the amount of compensation for a decedent’s loss of earnings).

Finally, a decision not to award the Sarvers compensation for Erica's loss of future earnings is supported by the doctrine of sovereign immunity. The doctrine of sovereign immunity is one canon of statutory interpretation. Richlin Sec. Service Co. v. Chertoff, ___ U.S. ___, 128 S.Ct. 2007, 2019 (2008). The doctrine of sovereign immunity should be invoked when the government offers a "plausible" interpretation of the statute. Zatuchni, 516 F.3d at 1323. For the reasons stated above, the undersigned holds that respondent's interpretation is more than "plausible." To the undersigned, respondent's interpretation that the statute does not permit an award of future lost earnings to a person's survivors is correct.

However, if respondent's interpretation were merely a plausible one, then the doctrine of sovereign immunity still requires the undersigned to interpret the statute narrowly. Lane v. Pena, 518 U.S. 187, 192 (1996); see also Martin v. Sec'y of Health & Human Servs., 62 F.3d 1403, 1405 (Fed. Cir. 1995); Burch v. Sec'y of Health & Human Servs., No. 96-946V, 2001 WL 180129, at *2-7 (Fed. Cl. Spec. Mstr. Feb. 8, 2001). The doctrine of sovereign immunity, thus, provides additional (albeit secondary) support for the holding here.⁷

In sum, the structure of section 15 distinguishes between compensation for wrongful death and compensation for injuries. Although claims for injuries survive a person's death (Zatuchni), the injury claim extends only so far as the person is anticipated to be alive. Section 15(a)(3)(B) requires that for an award for loss of earning capacity, the undersigned reasonably anticipate that Erica is likely to suffer a reduced earning capacity at age 18. McAllister indicates that the scope of information to be considered in deciding whether Erica will suffer a loss of earning capacity includes current information, including the fact that Erica has died. Because Erica has died, the Sarvers are not entitled to compensation for Erica's loss of earnings that she would have suffered if she lived after the judgment.

A status conference will be held on **Thursday, December 3, 2009 at 4:00 P.M. Eastern Time**. The parties should be prepared to discuss other elements of compensation to which the Sarvers are entitled.

IT IS SO ORDERED.

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

⁷ Zatuchni rejected the government's argument that the doctrine of sovereign immunity required the Federal Circuit to limit Ms. Zatuchni's compensation to the death benefit. The panel majority held that the government's interpretation was not "plausible." Zatuchni, 516 F.3d at 1323. For reasons explained in the text, in this case, the government's interpretation, to the undersigned, is "plausible." Thus, Zatuchni is distinguishable.