IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 99-430V
Filed: May 27, 2009
To Be Published

ELIZABETH A. SANDERS, as Executor of the Estate of Ronnie D. Sanders, Sr.,	*	
Petitioner,	*	Proper Petitioner; Survival of Cause of Action; Standing; Substitution of Estate
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES	*	
Respondent.	*	

Clifford Shoemaker, Shoemaker & Associates, Vienna, VA, for Petitioner
Melonie J. McCall, U. S. Department of Justice, Washington, DC, for Respondent

ORDER DENYING MOTION TO DISMISS[1]

Vowell, Special Master:

I. Procedural History.

On July 2, 1999, Ronnie D. Sanders, Sr., filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq*.[2] [the "Vaccine Act" or "Program"], alleging that he received hepatitis B vaccinations on January 27, 1994, and February 24, 1994, that caused him to suffer an unspecified adverse reaction later identified as rheumatoid arthritis ["RA"]. Petition ["Pet."] ¶ 2 and

[1] Because I have designated this order to be published, petitioner has 14 days to request redaction of any material "that includes medical files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b), Rules of the United States Court of Federal Claims, Appendix B ["RCFC"]. Otherwise, the entire decision will be publicly available. 42 U.S.C. § 300aa12(d)(4)(B).

[2] Part 2, National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa.

Petitioner's Status Report ["Pet. Stat. Rep."], filed August 5, 2005.

None of the statutorily required supporting documentation accompanied the petition.[3] For over two years, the petitioner failed to file his affidavit or any medical records.[4] The first records filed were the result of an order to file a single medical record, or risk dismissal for failure to prosecute. *See* Order, dated August 29, 2001. Petitioner filed numerous medical records and other documents in response to this order, but by March 21, 2002, petitioner had filed neither proof of immunization nor his affidavit. *See* Respondent's Status Report, dated March 21, 2002, and Petitioner's Exhibits ["Pet. Ex."] 1-7. Petitioner later identified his adverse reaction as RA. *See* Pet. Stat. Rep., dated August 5, 2005.[5]

On December 5, 2002, this case was reassigned to Chief Special Master Golkiewicz. At the request of petitioner's counsel, this case was grouped with a number of other cases also alleging that the hepatitis B vaccine caused RA. Five "test cases" for this theory were tried in an omnibus proceeding on June 11-12, 2003, in which petitioner's counsel participated and over which Chief Special Master Golkiewicz presided. He ruled in *Capizzano v. Sec'y, HHS* ["*Capizzano I*"], No. 00-759V, 2004 U.S. Claims LEXIS 149 (Fed. Cl. Spec. Mstr. June 8, 2004), that the hepatitis B vaccine could cause RA.[6]

After the omnibus hearing, Chief Special Master Golkiewicz ordered petitioner to file a status report indicating how he intended to proceed, in light of the decision in *Althen v. Sec'y, HHS,* 59 Fed. Cl. 270 (Fed. Cl. 2003). *See Capizzano* Order, dated

---

[3] Section 300aa–11(c) of the Vaccine Act requires the petition to be accompanied by certain documentary evidence, including an affidavit, proof of vaccination and relevant medical records. *See also* Vaccine Rule 2(e), RCFC.

[4] At petitioner's request, the proceedings in this case were suspended for 180 days of this period. *See* Order, dated March 13, 2000.

[5] Petitioner orally identified this case as involving RA prior to the RA omnibus causation hearing, but none of the status reports filed prior to August 5, 2005, explicitly stated that RA was the injury claimed.

[6] *Capizzano I* had a long appellate history. The Chief Special Master's entitlement ruling that, although the hepatitis B vaccine could cause RA, Mrs. Capizzano had failed to prove that it was causal in her case, was reviewed by the Court of Federal Claims. That court's decision, *Capizzano v. Sec'y, HHS*, 63 Fed. Cl. 227 (2004) [*"Capizzano II"*], was appealed to the Court of Appeals for the Federal Circuit, which reversed and remanded it. *Capizzano v. Sec'y, HHS*, 440 F.3d 1317 (Fed. Cir. 2006) ["*Capizzano III*"]. On remand, the Chief Special Master ruled that the hepatitis B vaccine did cause Mrs. Capizzano's RA. *Capizzano v. Sec'y, HHS*, No. 00-759V, 2006 U.S. Claims LEXIS 355 (Fed. Cl. Spec. Mstr., 2006) ["*Capizzano IV*"].

October 3, 2003.[7] Petitioner complied. A more specific order, issued on February 1, 2005, directed petitioner to describe with particularity how his case compared to the facts of the *Capizzano I* decision, and warned that the opinion of a qualified expert was required to substantiate the claim for compensation. *Anderson* Order, dated February 1, 2005.[8]

A March 17, 2005 status report reflected that the medical records were not yet complete, and petitioner requested a 60 day delay in filing the remaining records plus an additional 120 days to obtain an expert opinion. Although additional medical records were filed between April 7 and August 26, 2005, no expert report was filed. At a status conference on June 1, 2006, the parties discussed the effect of the Federal Circuit's *Capizzano III* decision. After another status conference on July 14, 2006, petitioner was ordered to file all outstanding medical records by August 16, 2006, and the case was reassigned to me. Order, dated July 19, 2006.

Petitioner filed a status report on August 16, 2006, indicating that he had been ill, and a motion on August 17, 2006, requesting additional time to file the outstanding medical records. I granted that request, setting a date of September 18, 2006, for these records to be filed. Order, dated August 28, 2006. On September 16, 2006, petitioner's counsel filed a report, informing the court that petitioner died on September 9, 2006, and requesting that any further action on this case be stayed until a decision was issued in another case pending before the Court of Federal Claims. Although petitioner's status report incorrectly identified the pending case, subsequent discussions clarified that the case was *Zatuchni v. Sec'y, HHS*, No. 94-58V.

At a November 7, 2006 status conference, petitioner's counsel informed the court that petitioner's death on September 9, 2006, was unrelated to his alleged vaccine injury. As the decision in *Zatuchni v. Sec'y, HHS*, 73 Fed. Cl. 451 (Fed. Cl. 2006) ["*Zatuchni III*"] was released on October 31, 2006, I ordered counsel to file briefs on the issue of whether petitioner's claim for a vaccine injury survived his death from unrelated causes. Petitioner failed to file either a brief or a motion for enlargement by the deadline. In a recorded status conference on January 10, 2007, petitioner's counsel apologized for missing the deadline. I set new deadlines for the filing of briefs on the issue of the survival of petitioner's claim. Counsel for both sides filed the briefs

---

[7] This order was issued in *Capizzano I*, No. 00-759V, and other "Hepatitis B rheumatoid arthritis cases." Petitioner's case was not specifically identified in the caption of the order, and the docket sheet for this petitioner's case does not reflect filing of this order. However, it is apparent from the record that counsel for both parties and the assigned special master treated this case as part of the omnibus proceeding dealing with hepatitis B and RA.

[8] *Anderson v. Sec'y, HHS*, No. 99-380V, was treated by the court as a master file for all the hepatitis B cases alleging RA as the injury.

as ordered.[9]

Petitioner's counsel also filed petitioner's death certificate (Pet. Ex. 59) on November 9, 2006; a copy of petitioner's will (Pet. Ex. 61) and a motion to amend the caption of this case, substituting petitioner's wife in her capacity as the executor of petitioner's estate, on January 17, 2007; and a status report on February 14, 2007, indicating that no letters of administration appointing Mrs. Sanders as executor would be filed in this case. On March 6, 2007, I issued a published order, denying the motion to recaption the case until some evidence was produced demonstrating that Mrs. Sanders was, in fact, the legally-appointed administrator or executor of Mr. Sanders' estate. Petitioner's Exhibit 62, containing "Letters of Office" appointing Elizabeth A. Sanders as the independent executor of Mr. Sanders' estate, was filed on March 28, 2007. On March 29, 2007, I granted the renewed request to recaption this case, filed on March 28, 2007, substituting Mrs. Sanders, as independent executor of the estate of petitioner, Ronnie D. Sanders, Sr., as the petitioner.

Based on respondent's appeal to the Federal Circuit off the Court of Federal Claims decision in *Zatuchni III*, this case was informally stayed, pending resolution of that appeal. While awaiting the Federal Circuit's decision, I ordered the parties to file expert reports. Subsequently, petitioner filed the report of Dr. Joseph Bellanti on April 8, 2008,[10] and respondent filed the report of Dr. Lawrence Kagan on July 17, 2008.

At a September 5, 2008 status conference, the parties discussed the impact of the Federal Circuit's opinion in *Zatuchni v. Sec'y, HHS,* 516 F.3d 1312 (Fed. Cir. 2008) ["*Zatuchni IV*"], affirming Judge Wheeler's decision in *Zatuchni III*. I ordered the parties to brief the issues presented. Respondent filed a [89] memorandum, renewing respondent's motion to dismiss, on October 6, 2008, and petitioner filed a [90] response on November 3, 2008. The issues presented in respondent's motion to dismiss are now ripe for consideration.[11]

---

[9] Petitioner's counsel apparently decided to forego filing the optional reply brief, as none was received by the due date.

[10] On October 3, 2007, I issued an order for petitioner to file a medical expert report by no later than February 4, 2008. I granted a motion for enlargement of time to file the medical expert report, but petitioner failed to meet the revised deadline. On March 7, 2008, petitioner filed both a motion for leave to file out of time and the medical expert report. As the deadline to file was March 4, 2008, I struck both filings and instructed petitioner that if she wished to refile, she should do so in conformity with Vaccine Rule 19. *See* Order, dated March 7, 2008. On April 8, 2008, petitioner again filed Dr. Bellanti's medical expert report prior to being granted the concurrently filed motion for enlargement of time. The motion for enlargement of time was granted, and, although this was the second time petitioner incorrectly tried to file the medical expert report, it was filed by leave of court. *See* Order, dated April 11, 2008.

[11] Although either petitioner or petitioner's counsel was responsible for nearly all the other delays in processing this ten year old case, the court bears responsibility for the delay in resolving this motion to dismiss, from the joinder of the issues on November 3, 2008, through the date of this order. The issues in this case were finally joined at a time when I was involved in drafting my decision on the test case for the

II. Issues Presented.

The issue that is presented in this case can be simply stated, but is not so easily resolved. The issue is whether a properly filed petition[12] for compensation for a vaccine-related injury may be maintained by the estate of a vaccinee who died from causes unrelated to a vaccine, while a decision on the vaccinee's entitlement to compensation was pending. Stated another way, did Congress intend that a claim for a vaccine-related injury would survive the death of a vaccinee from causes unrelated to a vaccine? Because the Vaccine Act is silent regarding the survival of a properly filed vaccine injury claim and the *Zatuchni IV* decision is implicitly grounded on the survival of a similar, properly filed injury petition, I conclude that Mr. Sanders' claim survived his death and may be pursued by his estate.

The first formulation of the issue presented focuses on the statutory language of the Vaccine Act, requiring an interpretation of § 300aa-11(b)(1)(A) concerning who may file a petition.[13] The second formulation focuses on Congressional intent, implicating issues of statutory construction and the federal common law regarding survival of personal injury actions within the context of the Vaccine Act's limited waiver of sovereign immunity.

III. Law Applicable to Mr. Sanders' Claim.

---

first theory in the Omnibus Autism Proceeding. That lengthy decision was issued on February 12, 2009. *Snyder v. Sec'y, HHS*, No. 01-162, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). As described in the opinion, the evidentiary record in that case was voluminous, the issues were extraordinarily complex, and the case had the potential to affect a substantial percentage of the nearly 5,000 cases in the OAP. *Snyder*, 2009 WL 332044 at *8. Thus, the majority of my time was devoted to the *Snyder* decision. Unfortunately, the work on the OAP case materially delayed this decision.

[12] Mr. Sanders did not comply with § 300aa-11(c)(1) at the time of filing his petition on July 2, 1999. More than two years after the petition was filed, he still had not filed medical records or an affidavit. He eventually filed proof of his immunization on April 7, 2005. *See* Pet. Ex. 48. He did not identify the precise injury claimed until August 5, 2005. The expert report linking his RA to his vaccine was not filed until long after his death. However, our case law suggests that these failures do not affect the "properly filed" determination. *See, e.g*, *Hamrick v. Sec'y, HHS*, No. 99-683V, 2007 U.S. Claims LEXIS 415 (Fed. Cl. Spec. Mstr. Jan. 9, 2008) (lack of medical records does not affect jurisdiction to entertain a petition) and *Stewart v. Sec'y, HHS*, No. 02-819V, 2002 U.S. Claims LEXIS 363 (Fed. Cl. Spec. Mstr. Dec. 30, 2002) (failure to file medical records contemporaneously with petition does not require automatic dismissal of the petition).

[13] Section 300aa-11(b)(1)(A) provides:

> Except as provided in subparagraph (B), any person who has sustained a vaccine-related injury, the legal representative of such person if such person is a minor or is disabled, or the legal representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table may, if the person meets the requirements of subsection (c)(1) of this section, file a petition for compensation under the Program.

A. The *Zatuchni* Decisions.

The two most recent decisions of the U.S. Court of Federal Claims and the Federal Circuit on the issue of representative capacity implicitly address the issue presented here. The *Zatuchni* decisions involved the petition of E. Barbara Snyder, who filed a Vaccine Act petition on her own behalf in January, 1994. After requesting and receiving stays over a 10 year period, an evidentiary hearing was held, and the special master determined that she was not entitled to compensation. *Snyder v. Sec'y, HHS*, 2005 U.S. Claims LEXIS 141 (Fed. Cl. Spec. Mstr., May 6, 2005).

Between the evidentiary hearing and the special master's decision, Ms. Snyder died. The fact of her death was apparently unknown to her former attorney, who filed a motion for review of the decision denying compensation.[14] While that motion was pending before the Court of Federal Claims, Ms. Snyder's attorney notified the court that Ms. Snyder had died on April 28, 2005, eight days before the special master's entitlement decision was issued.

Citing to RCFC 25,[15] Judge Wheeler granted a motion to substitute the court-appointed executor of Ms. Snyder's estate. *Snyder v. Sec'y, HHS*, Memorandum and Order, 69 Fed. Cl. 390 (2006). Rule 25 permits substitution after the death of a party when a "claim is not thereby extinguished...". In applying RCFC 25, Judge Wheeler assumed, without explicitly deciding, that Ms. Snyder's death did not extinguish her injury claim. 69 Fed. Cl. at 391-92.

After substitution, Judge Wheeler reversed the special master's decision denying

---

[14] The attorney-client relationship generally does not survive the death of the client. An attorney may continue to represent the interests of a deceased client only if authorized to do so by the personal representative of the client. 7 Am. Jur. 2d *Attorneys at Law* § 171 (1980). *See also* 7A C.J.S. *Attorney & Client* § 274 (2007). In the *Snyder* Memorandum and Order, 69 Fed. Cl. 390, Judge Wheeler noted that counsel for a deceased petitioner may continue to act on the former client's behalf, pending the appointment of an executor. The specific issue of whether a petition for review filed by an attorney on behalf of a deceased client could be considered properly filed was apparently never raised by the parties in the case.

[15] RCFC 25(a)(1) provides:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and shall be served as provided in RCFC 5. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

As the Federal Circuit noted in *Zatuchni IV*, this rule of procedure does not confer any substantive rights. *Zatuchni IV*, 516 F.3d at 1326. Thus, the rule does not address whether the death of a petitioner extinguishes a Vaccine Act injury claim.

entitlement to compensation and remanded the case back to the special master to determine if Ms. Snyder's death was vaccine-related, and to determine damages. *Zatuchni v. Sec'y, HHS*, 69 Fed. Cl. 612, 624 (2006) ["*Zatuchni I*"]. On remand, the special master concluded that Ms. Snyder's death was vaccine-related, but that her estate was entitled to only the statutory death benefit, holding that the Act precluded compensation for both a vaccine-related injury and a vaccine-related death. *Zatuchni v. Sec'y, HHS*, 2006 U.S. Claims LEXIS 127, at *10-11 (Fed. Cl. Spec. Mstr. May 10, 2006) ["*Zatuchni II*"].[16]

Another motion for review was filed, which challenged the special master's determination that Ms. Snyder's estate was entitled only to the death benefit and not to damages from the vaccine injury before her death. Judge Wheeler reversed the special master's legal conclusion that the Vaccine Act precluded Ms. Snyder's estate from obtaining compensation for both her pre-death vaccine injury and her vaccine-related death. *Zatuchni III*, 73 Fed. Cl. at 451-52.

Respondent appealed Judge Wheeler's decision to the Federal Circuit. In a panel split as to the basis for the decision, but united as to the result, the Federal Circuit held that the Vaccine Act permitted Ms. Snyder's estate to recover damages for both her vaccine injury and her death. *Zatuchni IV*, 516 F.3d 1312. The majority decision focused primarily on interpreting § 300aa-15(a) regarding the types of compensation available, discussing § 300aa-11(b)(1)(A) only in the context of the government's arguments on the survival of injury claims.

The majority opinion expressly left open a question similar, but not identical, to the question presented in this case: "We need not decide whether § 300aa-11(b)(1)(A) would permit the estate of a person who suffered vaccine-related injuries but died of a non-vaccine-related cause to file a petition for vaccine-related injury compensation...".[17]

---

[16] In *Zatuchni II*, Special Master Hastings determined that Ms. Snyder's vaccine injury would have entitled her to nearly $555,000 in compensation for unreimbursed expenses, lost wages, and pain and suffering. Congress limited compensation for a vaccine related death to $250,000. In interpreting the statutory language pertaining to awards of damages, Special Master Hastings acknowledged the inequity in awarding only the death benefit, but concluded that the Vaccine Act did not authorize compensating both the pre-death injury and the death itself. It was this limitation on compensation that was reversed by Judge Wheeler, whose decision was affirmed by the Federal Circuit.

[17] That the court left this issue open could signal a very expansive reading of § 300aa-11(b)(1)(A). The language of that provision limits petitioners in injury cases to the person injured (in most cases, the vaccinee) or a legal representative, if the injured person is a minor or disabled. The statutory language appears to be plain on its face and would thus bar an estate from filing an injury claim. However, the statute does not address the capacity (or "standing") of an estate to continue an injury action, the situation presented both in *Zatuchni* and in this case. In limiting the classes of qualified filers, the statute necessarily restricts the nature of some claims. Because the statute limits the petitioners in injury cases to the person injured (or the legal representative of minors or those disabled), the statute bars loss of consortium or companionship claims. *See, e.g.,Schafer v. American Cyanamid Co.*, 20 F.3d 1 (1st Cir. 1994) (because the Vaccine Act did not permit daughter and husband of vaccine-injured person to file a

Zatuchni IV, 516 F.3d at 1320-21.

In his concurring and dissenting opinion in *Zatuchni IV*, Judge Dyk squarely addressed the issue of whether a claim for a vaccine-related injury survives the death of the petitioner. Applying "federal common law" to the Vaccine Act's silence regarding survivorship, Judge Dyk concluded that a vaccine injury claim survives the death of the injured party. 516 F.3d at 1328-31. Judge Dyk dissented from the panel's methodology in approaching statutory construction, but concurred in the result. As his dissent made clear, he believed that the Vaccine Act was silent as to survival of personal injury claims, and that all injury claims survive the death of the injured person. Clearly, Judge Dyk would permit Mr. Sanders' estate to pursue the issue of entitlement to compensation.

However the *Zatuchni* decision at the Court of Federal Claims and the majority decision at the Federal Circuit affirming Judge Wheeler did not expressly resolve the core issue in this case: whether a petition for compensation survives the death of a vaccinee when that death is from causes unrelated to a vaccine. Several decisions of the Court of Federal Claims and of other special masters have addressed this core issue, but the decisions cannot be completely reconciled with either one another or *Zatuchni IV.*

B. Decisions Defining Proper Petitioners and Claims.

1. Issues and Precedents.

The facts of this case place it in the interstices between most of the decisions of the Court of Federal Claims interpreting the language of the Vaccine Act that defines petitioners and determines what types of damages are available to various classes of petitioners. The decisions most closely corresponding to the facts of this case are the decisions of two special masters, Special Master Millman in *Flannery v. Sec'y, HHS*, No.99-963V, 2005 U.S. Claims LEXIS 74 (Fed. Cl. Spec. Mstr. Mar. 14, 2003), and Special Master Abell in *Campbell v. Sec'y, HHS*, No. 01-688V, 2004 U.S. Claims LEXIS115 (Fed. Cl. Spec. Mstr. Apr. 22, 2004), both of which are discussed below. As Special Master Millman noted in her decision in *Flannery*, the prior decisions of the Court of Federal Claims judges and special masters on similar facts are not easily reconciled with one another. *Flannery*, 2005 U.S. Claims LEXIS 74 at *23-25.

---

claim for their loss of companionship or consortium, their civil suit against vaccine manufacturers was not barred by the Act, despite Mrs. Shafer's acceptance of a damage award under the Act for her own injuries). *See also Abbott v. Sec'y, HHS*, No. 90-1637V, 1992 U.S. Cl. Ct. LEXIS 473, at *12-13. (Fed. Cl. Spec. Mstr. Oct. 5, 1992), *rev'd on other grounds*, 27 Fed. Cl. 792 (1993) (mother's settlement of a state court suit for her son's death, which state law characterized as a loss of consortium claim, did not bar a subsequent Vaccine Act death claim). The more likely characterization of the court's statement that it "need not decide" this issue is that the court was addressing Judge Dyk's dissenting opinion that all injury claims survive the death of the vaccine-injured person. *See* 516 F.3d at 1321, n. 10.

Additionally, these prior decisions do not constitute binding precedent for the resolution of this case. Decisions issued by special masters and judges of the Court of Federal Claims constitute persuasive, but not binding, authority. *Hanlon v. Sec'y, HHS*, 40 Fed. Cl. 625, 630 (1998). The analysis of these persuasive, but not binding, decisions, interpreting portions of the Act relevant to the instant case, is further complicated by the impact of *Zatuchni IV*, which is binding precedent. *Guillory v. Sec'y, HHS*, 59 Fed. Cl. 121, 124 (2003), *aff'd*, 104 Fed. Appx. 712 (Fed. Cir. 2004).[18]

In *Zatuchni IV*, the Federal Circuit rejected the interpretation, previously accepted by most judges and the special masters of the Court of Federal Claims, that Vaccine Act petitioners could not receive both the death benefit and compensation for pre-death injuries. Thus, *Zatuchni IV* renders suspect the statutory analysis found in many of the cases which have addressed the standing and survival issues raised in the instant case, because those cases either constituted or followed the pre-*Zatuchni IV* rulings on compensation limits. The following cases interpreting § 300aa-11(b)(1)(A) provide some insight into the issues presented in the instant motion to dismiss.

1. Death of a Minor Vaccinee Prior to Filing a Petition.

In *Buxkemper v. Sec'y, HHS*, 32 Fed. Cl. 213 (1994), Judge Horn reviewed the award of compensation for a vaccine injury to Jayson Buxkemper, based on a Vaccine Act petition brought by his parents after his death. The specific allegations made in the petition were not delineated in the opinion, but petitioners presented evidence pertaining to both a vaccine-related injury and a vaccine-related death. The special master concluded that, although Jayson's death was not vaccine-related, he did suffer a Vaccine Table injury, a residual seizure disorder.[19] The special master awarded compensation for Jayson's pain and suffering prior to his death. Judge Horn held that, once the special master determined Jayson's cause of death was unrelated to his vaccination, Jayson's parents were not proper petitioners and were thus ineligible, after his death, to file a petition for compensation for a vaccine injury that preceded it, but did not cause it.[20] 32 Fed. Cl. at 216.

---

[18] Petitioner's November 3, 2008 reply memorandum on the applicability of *Zatuchni IV* to this case incorrectly states (on the third page of this unpaginated document) that Judge Wheeler's decision in *Zatuchni III* constitutes "binding precedent" in this case. It does not, but *Zatuchni IV* does.

[19] A "Table" injury is an injury listed on the Vaccine Injury Table, 42 C.F.R. § 100.3, corresponding to the vaccine received within the time frame specified. The original Vaccine Injury Table included a residual seizure disorder as a Table injury for pertussis-containing vaccines.

[20] If Jayson's parents were not proper petitioners on the injury claim because Jayson died before the injury claim was filed, Judge Horn need not have determined whether Jayson actually suffered a vaccine injury. If § 300aa-11(b)(1)(A) is read literally, only living vaccine-injured persons may file claims, either personally, if they are adults not under a legal disability, or, if a minor or disabled, through a legal representative. However, based on errors in the methodology used by the special master to find a Table injury, Judge Horn may have elected to reach the merits of the claim in order to avoid perpetuation of

In her analysis of the statutory provision at issue in *Buxkemper*, Judge Horn concluded that the language used in § 300aa-11(b)(1)(A) meant that Congress intended to limit compensation to specific categories of individuals. She held that the § 300aa-11(b)(1)(A) language defining petitioners limited the classes of proper petitioners under the Act to living vaccinees who suffered a vaccine injury (or to a vaccinee's legal representatives if the vaccinee is a minor or disabled) and to legal representatives of the estates of those who suffered a vaccine-related death. 32 Fed. Cl. at 225. Under Judge Horn's analysis of the issue, once the special master determined that Jayson's death was not vaccine-related, his parents were not proper petitioners as to the injury claim, and their injury petition had to be dismissed because these "petitioners are not eligible to receive compensation under the Vaccine Act." 32 Fed. Cl. 225. In effect, she ruled that Jayson's parents lacked standing to pursue the vaccine injury claim because they filed their petition after Jayson's death.

2. Death of a Minor Vaccinee After the Filing of a Petition on Her Behalf.

Andrews v. Sec'y, HHS, 33 Fed. Cl. 767 (1995), decided only nine months after *Buxkemper*,[21] involved slightly different facts. The parents of Kristen Andrews filed a petition on her behalf alleging a Table injury and respondent recommended compensation. Before the amount of compensation could be determined, Kristen died, apparently of causes unrelated to the vaccine.[22] The special master concluded that § 300aa-11(b)(1) did not extinguish a properly filed claim, in spite of respondent's contention that this section also defined who could receive compensation, as well as limiting who could file a petition.

In considering the petition for review of the special master's decision in *Andrews*, Judge Tidwell came to a result different from that in *Buxkemper*, based, at least in part, on his interpretation of the same statutory language. Judge Tidwell construed the legislative history of the Vaccine Act to permit an award of damages for a vaccine-related injury, in spite of the death of the vaccinee while the petition was pending. Judge Tidwell concurred with the special master, noting that, although the language of § 300aa-11(b)(1)(A) limited:

the class of persons who may *file* a petition under the Act, on its face it

---

those errors in future cases.

[21] Curiously, Judge Tidwell's decision did not mention *Buxkemper*. Although decisions issued by special masters and judges of the Court of Federal Claims constitute persuasive, but not binding, authority in unrelated Vaccine Act cases *(see Hanlon*, 40 Fed. Cl. at 630), it is odd that a decision which so recently construed some of the same statutory provisions was not even mentioned, let alone discussed.

[22] The special master required petitioners to file an affidavit of a medical expert relating the cause of death to Kristen's vaccine-related condition. Petitioners were unable to find an expert to so opine. 33 Fed. Cl. at 768.

> does not limit the class of persons who may receive compensation on behalf of an injured person for a properly filed petition. As used in the Act, 'file' is a verb. The act of "filing" was complete when Kristen's petition was deposited at the court in accordance with the requirements of section 300aa-11. In this case, it is undisputed that the petition was properly *filed* by Kristen's legal representatives prior to her death.

33 Fed. Cl. at 769 (emphasis original, citations omitted). Judge Tidwell concluded that, although there was no provision in § 300aa-11(b)(1)(A) "for the estate of a vaccine injured person to file a petition for compensation...the section does not extinguish a properly filed claim if the vaccine injured person subsequently dies." 33 Fed. Cl. at 769.

Judge Tidwell also addressed the purposes behind the Vaccine Act, concluding therefrom that Congress intended survival of the vaccine injury cause of action created by the Act. Although under common law, personal injury actions did not survive the death of either party, Judge Tidwell noted that, by the time the Vaccine Act was enacted, many states permitted a personal injury cause of action to be filed or continued by a plaintiff's estate. He concluded that, as the Vaccine Act "was designed to replace the state law civil tort system with a simple, fair and expeditious means for compensating vaccine injured persons," Congress must have intended that the cause of action for a vaccine injury would survive the death of the vaccinee. 33 Fed. Cl. at 771-72.

3. Reconsidering *Buxkemper* and *Andrews:* No Fourth Class of Petitioners.

In *Cohn v. Sec'y, HHS*, 44 Fed. Cl. 658 (1999), Judge Christine Miller carefully analyzed both *Buxkemper* and *Andrews*. The petitioners in *Cohn* filed a petition on behalf of their deceased daughter, Nina, seeking compensation for both her vaccine-related injuries and her death. The special master denied the death claim because the petitioners could not demonstrate that Nina's death was vaccine-related.[23] The special master also denied the injury claim based on lack of jurisdiction, "because no provision under section 300aa-11(b)(1)(A) allows an estate of a vaccine-injured person to file a petition for compensation after the person has died." *Cohn,* 44 Fed. Cl. at 658-59, citing to the special master's slip opinion at 4. Judge Miller noted that petitioners were apparently contending that the list of proper petitioners found in § 300aa-11(b)(1)(A) was not exhaustive, and, in addition to the three enumerated classes of petitioners, a fourth class of proper petitioners was constituted by "the legal representatives of estates of persons who were injured but did not die, as the result of the administration of a vaccine, but who died before the petition was filed." *Cohn*, 44 Fed. Cl. at 659. Concluding that the statute prohibited the filing of a claim for injury subsequent to the death of the vaccinee, Judge Miller upheld the special master's dismissal of the petition,

[23] In their motion for review, the petitioners conceded that the death was not vaccine related. *Cohn*, 44 Fed. Cl. at 658, n.2

ruling that "[p]etitioners who file an injury claim on behalf of an estate do not qualify for compensation under a plain reading of the Vaccine Act." *Cohn*, 44 Fed. Cl. at 661.

In dicta, Judge Miller commented that "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." Thus, although Judge Miller distinguished the *Cohn* claim from that of the petitioners in *Andrews* on the basis of the vaccinee's status at the time the petition was filed, it appeared that she disagreed with Judge Tidwell's conclusion that Congress intended for the survival of injury claims.

4. Death of a Minor Vaccinee While Injury Claim Was Pending.

Two months after Judge Miller's decision in *Cohn*, Judge Turner issued a decision, *Lawson v. Sec'y, HHS*, 45 Fed. Cl. 236 (1999), that failed to mention any of the three earlier cases interpreting § 300aa-11(b)(1)(A). Judge Turner apparently adopted Judge Tidwell's reasoning but did not mention the *Andrews* decision.

Jennifer Lawson's parents brought a Vaccine Act petition on her behalf, alleging a vaccine injury. While the petition was pending, Jennifer died, and the petition was amended to include a claim based on her death as a sequela of the vaccine injury originally alleged. Without addressing entitlement to compensation on the original injury claim, the special master concluded that Jennifer's death was not a sequela of the vaccine. Commenting that petitioners could receive compensation for Jennifer's pre-death injuries if they could demonstrate a Table injury or actual causation, Judge Turner remanded the case to the special master to consider the injury aspect of her claim, and if vaccine causation of the injury could be established, to consider anew "whether Jennifer's death was vaccine related." *Lawson*, 45 Fed. Cl. at 237-38.

Lawson's lack of legal citations and limited development of the issues precludes much reliance on its holding. It appears that Judge Turner assumed that Jennifer's injury claim survived her death, perhaps based on *Andrews*. It also appears that the special master assumed that it did not, perhaps based on both *Buxkemper* and Judge Miller's dicta in *Cohn* about survival of personal injury actions. On remand, the special master determined that Jennifer did not suffer a vaccine injury and, thus, the issues raised concerning survival of a vaccine injury claim after the death of the vaccinee were left unresolved.[24]

[24] The special master's decision on remand in *Lawso*n was not published. However, the special master who decided *Lawson* explained the subsequent history of Jennifer Lawson's case in *Clifford v. Sec'y, HHS*, No. 01-424V, 2002 U.S. Claims LEXIS 209 (Fed. Cl. Spec. Mstr. Jul. 30, 2002), because the petitioner in *Clifford* relied upon Judge Turner's decision in *Lawson.*

5. Death of an Adult Vaccinee While the Injury Claim Was Pending.

Two more recent cases, *Campbell* and *Flannery*, present facts virtually indistinguishable from those of this case. In *Campbell*, Special Master Abell dismissed the vaccine injury claim of Lavilla Campbell, based on her death from unrelated causes, after first permitting her husband, the executor of Mrs. Campbell's estate, to be substituted as petitioner in her stead. In *Flannery*, Special Master Millman dismissed the vaccine injury petition, originally filed by Riley Elton on her own behalf, after Ms. Elton's death from unrelated causes. Ms. Flannery, Ms. Elton's sister, was appointed administratrix of Ms. Elton's estate and substituted as the petitioner.

Both special masters reached identical decisions, but approached the analysis of the issues presented from slightly different perspectives. Special Master Abell first relied on the plain text of the Act to conclude that Mr. Campbell, as the executor of his wife's estate, was not a qualified petitioner. Second, he looked to legislative intent. Reasoning that because the Vaccine Act constituted a limited waiver of sovereign immunity, its provisions must be narrowly construed. As the Act contains no survival clause, he concluded that Congress did not intend the survival of Mrs. Campbell's vaccine injury claim, rejecting arguments that Court of Federal Claims rules permitting the substitution of a party "in order to avoid injustice"[25] would permit a contrary result. Finally, he rejected an argument that the U.S. Supreme Court decision in *Carlson v. Green*, 446 U.S. 14, 23-24 (1980), which established the survivability of claims of deprivation of civil rights, established a uniform federal rule of the survivability of all claims against the federal sovereign. Pointing to the language used by Justice Powell regarding the effect of applying state laws of survivorship to claims of infringement of civil rights, Special Master Abell concluded that, as suing the sovereign is not a civil right, *Carlson v. Green* was not applicable.

Special Master Abell also distinguished his own decision in *Andrews*, based on the fact that in *Andrews*, the petitioners were the parents, who properly filed the petition before their daughter's death. Her death did not require a change in petitioners, unlike the required substitution of the executor of her estate for the petitioner in *Campbell*.

In *Flannery*, Special Master Millman began her analysis with the doctrine of sovereign immunity and the requirement to strictly construe statutes permitting monetary damages against the United States. Her extensive discussion of the Vaccine Act cases distinguishing the damages available in death cases from those of injury claims is no longer relevant because *Zatuchni IV* permitted recovery for both causes of action. She considered the Court of Federal Claims decisions in both *Andrews* and *Lawson*, but rejected the stated reasoning in *Andrews*, and the implied reasoning in *Lawson*, that the Vaccine Act permitted an injury claim to survive the death of the vaccinee, relying heavily on federal court decisions interpreting the survivability of

[25] RCFC 17(a).

claims for personal injury under federal law. Special Master Millman concluded that the absence of any survivability provision in the Vaccine Act indicated Congressional intent to limit vaccine injury claims to living vaccinees. She concluded that neither the policies behind the Vaccine Act nor the Act's own provisions permitted compensating the estate of a vaccinee for vaccine-related injuries.

IV. Analysis.

Were I analyzing the issues presented in this case prior to the decision in *Zatuchni IV*, resolution of the issues would have been much easier. Two of my colleagues, relying on statutory language, using recognized principles of statutory interpretation and an analysis of Congressional intent, concluded, on virtually identical facts, that the death of a vaccine-injured petitioner extinguished the petition for compensation. Their opinions were buttressed by *Buxkemper* and *Cohn*. The contrary decision in *Andrews* was distinguished in *Campbell* by the same special master who awarded compensation in *Andrews*, based on the need to substitute a new party in *Campbell*. However, all of these cases were decided before *Zatuchni IV.*

Although *Zatuchni IV* (including Judge Dyk's dissenting and concurring opinion) does not directly reach the issue presented in this case, that opinion signals a different interpretation of the Vaccine Act's silence regarding survival of a vaccine injury cause of action. The instant motion appears to be the first case to require an interpretation of § 300aa-11(b)(1)(A) of the Act after *Zatuchni IV*, and I must write, not on the slate my colleagues used, but one altered by *Zatuchni IV*'s more expansive interpretation of the Vaccine Act's compensation provisions and its ruling that at least some injury claims survive the injured person's death.

A. Statutory Language.

The Supreme Court has repeatedly stated that, in interpreting a statute, a court must begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose. *See, e.g.*, *Engine Mfrs. Ass'n. v. S. Coast Air Quality Mgmt. Dist*., 541 U.S. 246, 253 (2004). Thus, I begin the analysis of the issues presented with the plain language of the Vaccine Act.

The Act authorizes compensation for "vaccine-related injury or death." § 300aa-10. In filing his petition, Mr. Sanders claimed a vaccine-related injury, and, for purposes of analyzing the issue presented, I will assume, *arguendo*, that the later-identified injury, RA, was vaccine-related and that all the requirements of subsection 11(c)(1) are met.[26]

[26] Subsection (c)(1) is entitled "Petition content." It lists a number of requirements, including an affidavit and supporting documentation demonstrating the receipt of a vaccine listed in the Vaccine Injury Table within the U.S. (or an exception to this requirement), and evidence indicating that the vaccinee

The Act limits those who may file a petition for compensation for a vaccine-related injury or death to three categories of individuals: (1) any person who has sustained a vaccine-related injury; (2) the legal representative of a vaccine-injured person who is a minor or is disabled; and (3) the legal representative of any person who died as the result of the administration of a vaccine. This subsection further requires that the injured or deceased person must meet the requirements of subsection (c)(1) of this section in order to file a petition for compensation under the Program.[27]

As Judge Miller noted in *Cohn*, the earlier Court of Federal Claims cases have consistently interpreted § 300aa-11(b)(1)(A) "as providing for three qualifying classes of petitioners: (1) living persons who have sustained a vaccine-related injury; (2) those who are the legal representatives of living persons who have sustained a vaccine-related injury; and (3) those who are the legal representatives of estates of persons who died as the result of the administration of a vaccine." *Cohn*, 44 Fed. Cl. at 659 (emphasis added). In listing three qualifying classes of persons, Judge Miller also delineated, as does the statute, two distinct causes of action: (1) vaccine-related injury and (2) vaccine-related death.

The "living vaccinee" requirement is not expressly stated in the statute, but is one read there by implication, because the filer for an injury claim is listed as the vaccine-injured person. The only statutory exception to this requirement is when the vaccine injured person is not legally competent to file suit himself, *i.e.*, one who is a minor or "disabled."[28] However, the statute does not specifically require that the vaccine-injured person must be living at the time the merits of the petition are determined. Some elements of compensation, such as future expenses under § 300aa-15(a), would not be applicable to the case of a vaccinee who died before entitlement to compensation was established or before the amount of damages could be determined, but neither §§ 300aa-15(a) nor 11(b)(1)(A) requires that the vaccine-injured person must be living at the time the damage award is made.

It is clear that Mr. Sanders was a proper petitioner at the time he filed his

---

sustained a condition listed on the Vaccine Injury Table or an injury or death caused by the vaccine.

[27] In referring to subsection (c)(1) in subsection (b)(1)(A), Congress used language that was both curious and inartful. Read literally, the last three lines of (b)(1)(A) require a determination that subsection (c)(1)'s requirements for compensation be met in order to be a qualified filer. Section 12(a) makes meeting 11(c)(1)'s requirements the basis for awarding compensation. Nevertheless, petitions have been deemed properly filed, even when not accompanied by all of § 11(c)(1)'s list of requirements. *See* n. 12, *supra.*

[28] The term "disabled" is not otherwise defined in the Vaccine Act, but based on the definition of "legal representative" found in § 300aa-33(2), the term "disabled" refers to one under a legal disability. "Legal representative" is defined as "a parent or an individual who qualifies as a legal guardian under state law." *Id*. Thus, the disability referred to would not encompass a physical disability that did not affect mental capacity to handle one's own affairs.

petition. Equally clearly, had his estate filed a claim for injury on his behalf, Mr. Sanders' estate would not have been a proper petitioner, because an estate is not listed as a person who may file a claim. *See Sigal v. Sec'y, HHS*, No. 07-489V, 2008 U.S. Claims LEXIS 177 (Fed. Cl. Spec. Mstr. May 23, 2008). Notwithstanding the language in *Zatuchni IV*, 516 F.3d at 1320-21, suggesting that this may be an open question, I draw this conclusion from the plain language of the statute: a legal representative is not listed as a proper filer on behalf of a vaccine-injured, legally competent adult. In contrast, in death claims, the statute lists a legal representative as an authorized petitioner.

Whether Mr. Sanders' death from non-vaccine-related causes extinguishes his cause of action is not clear from the language of the statute. Thus, I must consider whether the statute imposes a "standing" requirement for maintaining a petition and whether the Act permits survival of a cause of action under the circumstances presented in Mr. Sanders' case. For guidance on both of these questions, I turn to *Zatuchni IV.*

B. Statutory Interpretation, "Standing" and Survival.

The Vaccine Act does not contain any provisions regarding who may maintain a properly filed petition. It does not expressly allow for the substitution of petitioners, but neither does it prohibit such substitution. It does not directly address the issue of "standing" to maintain a properly filed petition after the death of the vaccine-injured person. Thus, the question of whether Mr. Sanders' executor may maintain his personal injury claim must, of necessity, focus on what Congress intended with regard to survival of vaccine injury claims. *Cohn*, *Campbell*, and *Flannery* contain language suggesting or finding that Congress did not intend for survival.

However, *Zatuchni IV* came to a different conclusion regarding Congressional intent for at least some vaccine injury claims. The Federal Circuit stated that § 300aa-11(b)(1)(A):

> plainly does not dictate that a properly filed petition by the estate of a person who suffered both vaccine-related injures and a vaccine-related death (and thus had standing to file under § 300aa-11(b)(1)(A)) may not contain a request for any and all the types of compensation listed in §300aa-15(a). Similarly, as in this case, if a petition is properly filed by a person who suffered a vaccine-related injury, but that person dies of vaccine-related causes while her claim is pending, § 300aa-11(b)(1)(A) does not prevent - - directly or by implication - - the legal representative of the estate of such person from requesting each of the categories of compensation listed in § 300aa-15(a) after they have been properly substituted for the deceased petitioner.

516 F.3d at 1321. Obviously, the court found that Ms. Snyder's claim for a vaccine-

related injury survived her death. While *Zatuchni IV* did not address survival of an injury claim under the precise circumstances presented by Mr. Sanders' death, it implicitly answered the general question of Congressional intent in the face of this statute's silence.

Zatuchni IV thus addressed both standing to maintain a properly filed petition and whether an estate may be compensated for a vaccine-related injury. The factor that distinguishes *Zatuchni IV* from the instant case is that Ms. Snyder's death was vaccine-related and Mr. Sanders' death was not. Does this distinction make a difference in either standing to maintain a claim or the survival of the claim itself?

At least one argument can be made that it does, because the statute permits executors to file claims for vaccine-related deaths, making an executor an "authorized filer." Ms. Snyder's injury claim could have been amended to include the death claim,[29] for which the administrator of her estate was a proper filer. In contrast, Mr. Sanders' executor has conceded that no death claim can be made because his death was not vaccine-related.

I conclude that this distinction does not make a difference in the survival of an injury claim. *Zatuchni IV* remedied the illogical consequence of a validly filed vaccine-injury claim being extinguished by an equally valid vaccine death claim. In so doing, the court necessarily determined that vaccine injury claims survive the death of the injured person.[30] Relying on *Zatuchni IV* and on Judge Tidwell's decision in *Andrews* regarding standing of an estate to maintain a claim that was properly filed, I also must conclude that once a petition is properly filed, the petition remains properly filed, regardless of the status of the vaccinee. Therefore, I conclude that Mr. Sanders' injury claim survived his death and his properly appointed executor may maintain it.

V. Conclusion.

Respondent's motion to dismiss **is DENIED**.

This case is now more than nine years old. There are substantial risk factors for

---

[29] Amendment, rather than a new petition, would be required because § 300aa-11(b)(2) prohibits filing more than one petition for a single administration of a vaccine.

[30] If vaccine injury claims survive the death of the injured person, one could argue that such claims survive even if the petition is not filed before the vaccinee's death. However, in limiting the classes of individuals who may file injury petitions, the statute appears to bar an estate from filing an injury claim. This result may be inequitable, but as the majority decision in *Zatuchni IV* noted, the Vaccine Act involves several trade-offs and limitations. If the family of vaccine-injured child incurred significant, unreimbursed expenses prior to the child's death, but delayed in filing the petition for compensation until after the child's death, it does not appear from the statutory language that the estate would be a proper filer, and, thus, the family's expenses would not be compensable under the Act, but might be compensable in a civil suit on behalf of the child's estate against a manufacturer or administrator under those circumstances.

both petitioner and respondent in proceeding to a causation hearing. With Mr. Sanders' death, the estate will have difficulty in establishing the facts upon which Dr. Bellanti relies for his expert opinion on causation. However, in a number of cases, including *Capizzano I*, special masters and the judges of the Court of Federal Claims have found that hepatitis B vaccine can cause RA, thus establishing the first of the three causation factors, set forth in *Althen v. Sec'y, HHS*, 418 F.3d 1274 (Fed. Cir. 2005), required to prove causation in off-Table claims. I express no opinion at present whether the other two factors can be established to demonstrate that Mr. Sanders' condition was caused by his vaccines, but I strongly encourage the parties to consider a litigative risk settlement in this case.

The parties are ordered to confer and to contact my chambers **by no later than MONDAY, JUNE 8, 2009** to schedule a status conference to discuss further proceedings in this case. If the parties are unwilling to initiate settlement discussions, they shall confer with their experts and advise the court of possible dates for an entitlement hearing **to be conducted within the 60 days following this order**.

IT IS SO ORDERED.

s/ Denise K. Vowell
Denise K. Vowell
Special Master