OFFICE OF SPECIAL MASTERS

No. 94-58V
(Filed: May 10, 2006)
To be published[1]

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DORY ZATUCHNI, Executrix of the Estate of E. Barbara Snyder, Deceased, Petitioner, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	Vaccine Act Entitlement; Causation-in-Fact "Substantial Factor;" Sovereign Immunity Doctrine; Vaccine Act Damages; Whether Award of Death Benefit Precludes "Life Compensation" under § 300aa-15(a)(1), (3), and (4).
* *	

Ronald Homer, Boston, Massachusetts, appeared for petitioner.

Linda Renzi, U.S. Department of Justice, Washington, D.C., appeared for respondent.

DECISION ON REMAND[2]

HASTINGS, *Special Master*.

This is an action in which the petitioner, Dory Zatuchni, executrix of the estate of E. Barbara Snyder, seeks an award for that estate under the National Vaccine Injury Compensation Program

[1]Because I have designated this document to be published, this document will be made available to the public unless petitioner files, within fourteen days, an objection to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." See 42 U.S.C. § 300aa-12(d)(4)(B): Vaccine Rule 18(b).

[2]This Decision on Remand is issued pursuant to Rule 28A of the Vaccine Rules of this Court.

(hereinafter "the Program--see 42 U.S.C. § 300aa-10 *et seq.*[3]) on account of the lengthy illness and subsequent death of Ms. Snyder. For the reasons set forth below, I conclude that the estate is entitled to such an award, in the amount of $250,000.

I

THE APPLICABLE STATUTORY SCHEME AND CASE LAW

Under the National Vaccine Injury Compensation Program (hereinafter the "Program"), compensation awards are made to individuals who have suffered injuries after receiving vaccines. In general, to gain an award, a petitioner must make a number of factual demonstrations, including showings that an individual received a vaccination covered by the statute; received it in the United States; suffered either a serious long-lasting injury or death; and has received no previous award or settlement on account of the injury or death. Finally--and the key question in most cases under the Program--the petitioner must also establish a *causal link* between the vaccination and the injury or death. In some cases, the petitioner may simply demonstrate the occurrence of what has been called a "Table Injury." That is, it may be shown that the vaccine recipient suffered an injury of the type enumerated in the "Vaccine Injury Table" corresponding to the vaccination in question, within an applicable time period also specified in the Table. If so, the Table Injury is presumed to have been caused by the vaccination, and the petitioner is automatically entitled to compensation, unless it is shown affirmatively that the injury was caused by some factor other than the vaccination. § 300aa-13(a)(1)(A); § 300aa-11(c)(1)(C)(i); § 300aa-14(a); § 300aa-13(a)(1)(B).

In other cases, however, the vaccine recipient may have suffered an injury *not* of the type covered in the Vaccine Injury Table. In such instances, an alternative means exists of demonstrating entitlement to a Program award. That is, the petitioner may gain an award by showing that the recipient's injury or death was "caused-in-fact" by the vaccination in question. § 300aa-13(a)(1)(A); § 300aa-11(c)(1)(C)(ii). In such a situation, of course, the presumptions available under the Vaccine Injury Table are inoperative. The burden is on the petitioner to introduce evidence demonstrating that, in fact, the vaccination caused the injury or death in question. *Althen v. Secretary of HHS*, 418 F. 3d 1274, 1278 (Fed. Cir. 2005)*; Hines v. Secretary of HHS*, 940 F. 2d 1518, 1525 (Fed. Cir. 1991). The showing of "causation-in-fact" must satisfy the "preponderance of the evidence" standard, the same standard ordinarily used in tort litigation. § 300aa-13(a)(1)(A); see also *Hines*, 940 F. 2d at 1525; *Althen*, 418 F. 3d at 1278. Under that standard, the petitioner must show that it is "more probable than not" that the vaccination was the cause of the injury. *Althen*, 418 F. 3d at 1279. The petitioner need not show that the vaccination was the sole cause or even the predominant cause of the injury or condition, but must demonstrate that the vaccination was at least a "substantial factor" in causing the condition, and was a "but for" cause. *Shyface v. Secretary of HHS*, 165 F. 3d

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[3]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2000 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (2000 ed.). I will also sometimes refer to the statute that defines the Program as the "Vaccine Act."

1344, 1352 (Fed. Cir. 1999). Thus, the petitioner must supply "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury;" the logical sequence must be supported by "reputable medical or scientific explanation, *i.e.*, by evidence in the form of scientific studies or expert medical testimony." *Althen*, 418 F. 3d at 1278; *Grant v. Secretary of HHS*, 956 F. 2d 1144, 1148 (Fed. Cir. 1992).

The *Althen* court also provided additional discussion of the "causation-in-fact" standard, as follows:

> Concisely stated, Althen's burden is to show by preponderant evidence that the vaccine brought about her injury by providing: (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury. If Althen satisfies this burden, she is "entitled to recover unless the [government] shows also by a preponderance of evidence, that the injury was in fact caused by factors unrelated to the vaccine."

Althen, 418 F. 3d at 1278 (citations omitted). The court noted that a petitioner need not necessarily supply evidence from *medical literature* supporting the petitioner's causation contention, so long as the petitioner supplies the *medical opinion* of a qualified expert. The court stressed that a finding of causation may be based largely upon "circumstantial evidence," which the court found to be consistent with the "system created by Congress, in which close calls regarding causation are resolved in favor of injured claimants." 418 F. 3d at 1280.[4]

II

BACKGROUND FACTS, PROCEDURAL HISTORY, AND STATEMENT OF ISSUES TO BE DECIDED

As will be detailed in the "procedural history" section of this Decision on Remand (pp. 4-5), this case has previously been the subject of two published opinions, which set forth the facts and procedural history in greater detail. Accordingly, as to those elements of the facts and procedural history that have been previously detailed, I will set forth here only a thumbnail sketch.

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[4]Most recently, the Federal Circuit addressed the causation-in-fact standard once again in *Capizzano v. Secretary of HHS*, 440 F. 3d 1317 (Fed. Cir. 2006). That opinion cautioned Program factfinders against narrowly construing the second element of the *Althen* test, confirming that circumstantial evidence and medical opinion, sometimes in the form of notations of treating physicians in the vaccinee's medical records, may in a particular case be sufficient to satisfy that second element of the *Althen* test.

A. Facts

The now-deceased person who is the subject of this case, E. Barbara Snyder, was born in 1946. Her medical history prior to February of 1992 was not remarkable. On February 10, 1992, at age 45, petitioner received an "MMR"--*i.e.*, measles, mumps, rubella--vaccination. About two weeks later, she experienced the onset of pain in multiple joints. And soon thereafter she experienced additional symptoms, which would later be diagnosed as symptoms of a condition known as the fibromyalgia syndrome (hereinafter "FMS").

During the following years, Ms. Snyder continued to report joint pain, muscle pain, and a number of other symptoms of FMS. Her general condition deteriorated substantially, to the point where she ambulated only with a walker, used a motorized scooter when leaving her residence, and required a nurse's aid to help her with certain aspects of daily living.

On April 28, 2005, Ms. Snyder was found dead in her apartment, apparently of natural causes. No autopsy was performed. The official cause of death was determined by Dr. Dan Teano, who had been Ms. Snyder's treating physician for her last eight years of life. Dr. Teano wrote on the death certificate that the "immediate cause" of Ms. Snyder's death was "Cardio-Respiratory Arrest," which was "due to Chronic-Bronchitis [and] Chronic Obstructive Pulmonary Disease." (Ex. 45.) He also listed, as "Other Significant Conditions Contributing to Cause of Death," several conditions, including "Post Rubella Vaccination Syndrome" and "Fibromyalgia." (*Id.*)

B. Procedural history

Ms. Snyder filed her Program petition on January 31, 1994. Initially, settlement negotiations ensued with respect to potential compensation for Ms. Snyder's chronic *joint pain*, but stalled over the issue of whether she should be compensated for her *other* symptoms which were part of her FMS condition. For approximately ten years, Ms. Snyder requested a stay of proceedings, while she sought an expert opinion to bolster her causation-in-fact contention. In 2004, she requested an end to the stay and a ruling on her claim. After conducting an evidentiary hearing, I denied her claim. *Snyder v. HHS*, 2005 WL 1230787 (Fed. Cl. Spec. Mstr. May 6, 2005). At the time I issued my Decision denying her claim, neither her counsel nor I were aware that Ms. Snyder had died a few days beforehand.

Ms. Snyder's counsel sought review of my decision, and the present petitioner, Ms. Zatuchni, was established as the substitute petitioner in the case, as executrix of Ms. Snyder's estate. Judge Wheeler of this court, upon review, determined that the legal standard which I had utilized in denying Ms. Snyder's claim was erroneous under the subsequently-issued Federal Circuit precedent of *Althen*, discussed above. The judge then redetermined the causation-in-fact issue himself, finding that the conditions of joint pain and FMS, which Ms. Snyder endured between her 1992 vaccination

and her death, were, in fact, caused by the rubella component of her 1992 MMR vaccination.[5] *Zatuchni v. Secretary of HHS*, 69 Fed. Cl. 612 (2006).

The judge then remanded the case to me, to determine (1) whether Ms. Snyder's *death* was vaccine-caused, and (2) the extent of any compensation due to her estate.

C. Issues to be decided on remand

In this case, as explained above, Ms. Snyder endured a lengthy illness, and then died. The initial factual question to be decided in this case, thus, is whether that *illness* was "caused-in-fact" by her vaccination. Judge Wheeler has already resolved that question in the affirmative. The questions remaining for me on remand, therefore, are as follows. First, I must resolve the factual issue of whether Ms. Snyder's *death* was likely vaccine-related. I will address that question next, in part III of this Decision on Remand. Thereafter, I will address certain issues, both legal and factual, concerning the *extent of compensation* available to Ms. Snyder's estate.

In part IV of this Decision, I will address the factual issue of the *amount* of compensation that *would be* appropriate pursuant to parts (1), (3), and (4) of § 300aa-15(a), *if* the estate were to be held entitled to those categories of compensation. Finally, I must address the difficult *legal* issue of whether Ms. Snyder's estate is eligible for compensation under parts (1), (3), and (4) of § 300aa-15(a), in *addition* to the $250,000 death benefit of § 300aa-15(a)(2). In part V of this Decision, I discuss certain principles of *statutory construction* that are relevant to the resolution of that legal issue. Then, in part VI, I will resolve that legal issue itself.

III

ISSUE OF CAUSE OF DEATH

Based on the evidence of record, I find that it is "more probable than not" that Ms. Snyder's joint pain and FMS conditions were "substantial factors" contributing to her death. I find that "but for" those conditions, Ms. Snyder would not have died when she did. Therefore, since Judge Wheeler has already found as fact that Ms. Snyder's joint pain and FMS conditions were vaccine-caused, I conclude that under the above-cited legal precedent (see cases discussed at pp. 2-3 above, especially *Shyface*), Ms. Snyder's *death* was vaccine-caused, and her estate is, therefore, entitled to the $250,000 death benefit of § 300aa-15(a)(2).

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[5]It is ironic that after such an unusually lengthy pendency of this Vaccine Act proceeding, Ms. Snyder's condition was ultimately found to be vaccine-caused, only after her death. It is quite sad that Ms. Snyder herself will not experience the fruits of her ultimate triumph concerning this causation issue. However, as noted above, it was simply at Ms. Snyder's *own request* that proceedings were stayed for so long, in this very unusual Vaccine Act case.

I base this factual finding upon (1) the death certificate and (2) the oral testimony of Dr. Teano. First, as noted above, the *official determination* of the cause of Ms. Snyder's death was made by Dr. Teano, who had been Ms. Snyder's treating physician for her last eight years of her life. Dr. Teano wrote on the death certificate that the "immediate cause" of Ms. Snyder's death was "Cardio-Respiratory Arrest," which was "due to Chronic Bronchitis [and] Chronic Obstructive Pulmonary Disease." (Ex. 45.) He also listed, as "Other Significant Conditions Contributing to Cause of Death," several conditions, including "Post Rubella Vaccine Syndrome" and "Fibromyalgia." (*Id.*)

This death certificate, in my view, constitutes an *extremely powerful* piece of evidence in petitioner's favor concerning this issue. Dr. Teano was contacted in his capacity as Ms. Snyder's treating physician, and was asked to determine a cause of death for official government purposes. This request had nothing to do with this ongoing Vaccine Act litigation. And Dr. Teano, on his own, plainly listed both "Post Rubella Vaccination Syndrome" and "Fibromyalgia" as "Significant Conditions Contributing to Cause of Death." It is hard to imagine what could constitute a more inherently powerful piece of evidence, concerning the issue of the cause of a person's death, than the *official government determination* concerning the cause of that death.

Secondly, I also found persuasive the *oral testimony* of Dr. Teano. He explained that the first notation on the death certificate, that the "immediate cause" of Ms. Snyder's death was "Cardio-Respiratory Arrest," meant merely that her heart stopped beating. He noted that, as further indicated on the death certificate, his conclusion was that the cardiorespiratory arrest was likely caused by the chronic conditions affecting Ms. Snyder's cardiopulmonary capacity--*i.e.*, chronic bronchitis and Chronic Obstructive Pulmonary Disease (COPD). Dr. Teano acknowledged that the *primary* cause of these two conditions was Ms. Snyder's smoking. But he explained that as a result of her joint pain and FMS, Ms. Snyder had been effectively unable to exercise for more than 13 years, and this factor had likely also further weakened her cardiopulmonary capacity. (Tr. 19-22.[6]) He opined that, by causing the lack of exercise, the joint pain and FMS had substantially contributed to Ms. Snyder's death (Tr. 23), and that she would not have died when she did if she had not had those conditions (Tr. 62).

I found this explanation of Dr. Teano to be straightforward and persuasive. It seems quite unsurprising that 13 years without exercise would weaken a person's cardiopulmonary capacity, and thereby make one more susceptible to death by pulmonary disease.

I have carefully considered the written opinions submitted by respondent's two experts, but I do not find them persuasive. In his report, filed as Ex. J, Dr. Alan Brenner, a rheumatologist, simply does not address Dr. Teano's theory that the FMS and joint pain contributed to Ms. Snyder's death by keeping her from exercising for so long. Dr. Brenner may be correct in his assertion that most FMS patients are not made "housebound" by that condition, but it appears likely, based upon

[6]"Tr." references in this Decision on Remand are to the transcript of Dr. Teano's testimony, presented on March 3, 2006.

the record of this case, that Ms. Snyder herself was, in fact, prevented from exercising by her FMS condition, and that this lack of exercise likely contributed to her demise.

In respondent's other expert report, Ex. H, Dr. Bharat Awsare, a pulmonologist, agrees with Dr. Teano's conclusion that Ms. Snyder was suffering from COPD, but disagrees with Dr. Teano's opinion that the COPD was severe enough to cause Ms. Snyder's death. This point is a difficult one, since Dr. Awsare has excellent credentials as a pulmonologist. But I find Dr. Teano's opinion to be more persuasive on this point, since Dr. Teano had the benefit of actually treating Ms. Snyder for eight years, while Dr. Awsare was relying only upon the medical records of her treatment. I also note that Dr. Awsare, like Dr. Brenner, simply does not directly address Dr. Teano's theory that the joint pain and FMS contributed to Ms. Snyder's death by preventing her from exercising.

It is also worth noting that neither Dr. Brenner nor Dr. Awsare offer an opinion as to what *did* cause Ms. Snyder's death.[7]

It is important to stress that petitioner does not contend, and I do not find, that Ms. Snyder's vaccine-related condition was the *primary* cause of her death. It seems quite likely, rather, that, as Dr. Teano acknowledged, *smoking* was the *primary* cause of Ms. Snyder's COPD, and, thus, her death. It is petitioner's burden, however, only to show that the vaccine-related condition was a "substantial factor" contributing to the death, and a "but for" cause. See *Shyface*. Petitioner has carried that burden.

I also note that this factual question is not free from doubt. As respondent points out, it seems surprising that no autopsy was performed; that, before stating his conclusion on the death certificate, Dr. Teano did not examine Ms. Snyder's body; and that Dr. Teano received relatively little information from the coroner who did examine the body (apparently, Dr. Teano was told only that Ms. Snyder had been found dead and that there were no obvious indications of death by other than natural causes). Obviously, we could feel more sure about the cause of death if an autopsy had been done, or other additional information about the death was available. However, that is just the way that the determination of death was made in Ms. Snyder's case. The fact is that while his state of information was imperfect, Dr. Teano was simply in the *best position of anyone* to determine the cause of Ms. Snyder's death.

Finally, it is noteworthy that in the recent *Capizzano* opinion, the U.S. Court of Appeals for the Federal Circuit stressed that "medical records and medical opinion testimony are favored in vaccine cases, *as treating physicians are likely to be in the best position to determine* whether 'a logical sequence of cause and effect shows that the vaccination was the reason for the injury.'" 440 F. 3d at 1326 (emphasis added). Similarly, in this very case, Judge Wheeler has found persuasive

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[7]Of course, respondent is correct in pointing out that it is *not* respondent's burden to demonstrate that some other factor caused Ms. Snyder's death. It is *petitioner's* burden to demonstrate that the vaccine-related injury was a substantial factor in the death, and a "but for" cause. I find that petitioner has carried this burden.

the opinions of treating physicians stated in the medical records. 69 Fed. Cl. at 624. These teachings support my conclusion on this issue, which relies upon the opinion of Ms. Snyder's final treating physician, Dr. Teano.

In short, for all reasons set forth above, I find that it is "more probable than not" that Ms. Snyder's joint pain and FMS conditions were "substantial factors" contributing to her death. I find that "but for" those conditions, Ms. Snyder would not have died when she did. Therefore, since Judge Wheeler has already found as fact that Ms. Snyder's joint pain and FMS conditions were vaccine-caused, I conclude that under the above-cited legal precedent (see cases discussed at pp. 2-3 above, especially *Shyface*), Ms. Snyder's death was vaccine-caused, and her estate is, therefore, entitled to the $250,000 "death benefit" of § 300aa-15(a)(2).

IV

RESOLUTION OF "INJURY COMPENSATION" ISSUES

As is made clear elsewhere in this Decision on Remand, it is unclear *as a matter of law* whether the estate is entitled to *any* funds pursuant to § 300aa-15(a)(1), (3), and (4), in addition to the $250,000 "death benefit" of § 300aa-15(a)(2). As will be seen in Section VI of this Decision, I have ultimately resolved that legal question in the negative. However, because that constitutes a close legal question, I find it appropriate that I determine what *would be* an appropriate amount of compensation pursuant to § 300aa-15(a)(1), (3), and (4), *if* compensation were to be deemed appropriate pursuant to those subsections. In that way, in the event that it ultimately is determined, on appeal of this Decision, that compensation under those subsections *is* appropriate, then the issue of the appropriate *amount* of such compensation would already be resolved.

Accordingly, in the following paragraphs, I will determine the amount of compensation that *would be* appropriate under parts (1), (3), and (4) of § 300aa-15(a), assuming that, as a matter of law, compensation under those subsections is found to be appropriate.

A. "Actual unreimbursable expenses" (§ 300aa-15(a)(1))

The parties have agreed that the proper award under § 300aa-15(a)(1) would be an award of $16,000 to the estate, *plus* an additional amount of $158,880.49, representing an amount to satisfy an outstanding Medicaid lien, such amount to be made payable to:

Delaware Health and Social Services
Attention: June Hales
P.O. Box 906
New Castle, Delaware 19720.[8]

[8]See "Respondent's Response" filed on March 31, 2006, p. 2.

B. "Pain and suffering" (§ 300aa-15(a)(4))

Based upon the record as a whole, I conclude that the appropriate amount under this category, for Ms. Snyder's severe mental and physical "pain and suffering" during the 13-year period between her injury and her death, would be the full $250,000.

C. "Lost earnings" (§ 300aa-15(a)(3))

Section 300aa-15(a)(3)(A) provides compensation for lost earning capacity, in the case of a person who sustained a vaccine-related injury after attaining the age of 18. The parties here disagree concerning the issue of what would be an appropriate award under this category of compensation.

Petitioner seeks an award in this category for amounts that Ms. Snyder would have earned, absent her vaccine-related injury, during the period between her injury in 1992 and her death in 2005. Petitioner's claim concerning the issue was stated in her Ex. 60, filed on March 6, 2006. Petitioner also relies upon the information set forth at Exhibits 15, 59, and 62. Respondent addressed this issue in respondent's brief filed on March 31, 2006 (pp. 2-7), and petitioner replied at pp. 17-23 of her brief filed on April 14, 2006.

Petitioner bases her claim on this point on the fact that just before her vaccination in question, Ms. Snyder was earning $330.80 per week for full-time employment as an office manager. Petitioner assumes that, absent her vaccine-related injury, Ms. Snyder would have continued to work full-time thereafter, through April of 2005. Petitioner also assumes that Ms. Snyder's wages would have increased, from that $330.80-per-week figure, at the rate of the wage growth of the average U.S. worker during that time period (see rates provided at Ex. 60, Tab A). Petitioner's initial total claim for "lost earnings," for the 1992-2005 time period, was $285,813. (See Ex. 60.)

Respondent raised two principal objections to petitioner's claim. First, respondent noted that under the applicable statutory provision, adjustments must be made for income taxes and employment taxes, and for the Social Security Disability Income (SSDI) payments that petitioner received because she was unable to work. Petitioner, in her reply, agreed that such adjustments must be made.

Second, respondent argues that it would be inappropriate to predict what Ms. Snyder's wages would have been over the 13-year period in question based *only* upon the weekly wage that she was earning at the time of the vaccination in question. Respondent notes that, according to the Social Security Administration printout contained at Ex. 59, for most of the several years prior to 1992, petitioner had apparently *not* worked full-time during those years. Respondent argues that I should base the "lost earnings" award on petitioner's *average* annual earnings during the *five-year period* prior to 1992, which would produce a far smaller award than would petitioner's calculation.

This is a close question. Respondent is correct that, based upon the petitioner's earnings over the years as reported to the Social Security Administration (SSA), apparently Ms. Snyder was not employed full-time during many of the years preceding her injury in question. Accordingly, it is not unreasonable for respondent to argue that I should base a "lost earnings" calculation on her apparent average earnings over a *several-year period*. However, after careful consideration, several factors cause me, instead, to adopt petitioner's approach concerning this issue. First, unfortunately, we do not have Ms. Snyder available to explain whether the SSA records are accurate, and explain to us whether, absent her injury, she would likely have continued to work full-time at the job she held at the time of the injury. Second, since Ms. Snyder was apparently a single woman who depended on her own labor to support herself, it seems dubious to conclude that, if she were not injured, she would have worked only part-time throughout the 1992-2005 period, thereby forcing herself to live on what would amount to poverty-level income. Third, while due to Ms. Snyder's death we have limited information about what her work history might have been absent the injury, we do know one fact--that at the time of the injury she was working full-time and making $330.80 per week. In these circumstances, it seems appropriate to rely heavily upon this fact that we do know. Fourth, the legislative history tells us that the Program was intended to provide "generous" compensation to vaccine-injured persons.[9] Putting these reasons together, I conclude that it is appropriate to base the "lost earnings" calculation in this case upon Ms. Snyder's actual earnings at the time of her injury--*i.e.*, the figure of $330.80 per week that petitioner suggests.

Finally, there is one additional minor dispute between the parties, concerning the appropriate "growth rate" to utilize to predict what Ms. Snyder's wage growth would have been from 1992 through 2005. Petitioner proposes that I utilize the growth rate supplied in the Social Security Administration's (SSA) "Average Wage Index" data. (Ex. 60, Tab A.) Respondent, on the other hand, argues for deriving a growth rate from the Bureau of Labor Statistics' (BLS) "Average Weekly Earnings" data. (Brief 3-31-06, p. 5.) Respondent, however, did *not* provide me with a copy of any BLS report or data, comparable to the SSA document attached by petitioner at Ex. 60, Tab A. Therefore, since petitioner has at least provided some evidentiary basis for her claimed rate, I will utilize the growth rate suggested by petitioner.

Accordingly, for the reasons set forth above, I will utilize the wages starting point and the growth rate proposed by petitioner, then make the tax and SSDI adjustments proposed by respondent. The resulting calculation is an award for "lost earnings" of $129,443.41.[10]

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[9]See H.R. Rept. No. 99-908, 99th Cong., 2d Sess. at 3 (reprinted at 1986 U.S.C.C.A.N. at 6344). In this regard, I note that the sovereign immunity principle of "strict construction" has no application to the type of factual/discretionary determination that I am making here. The principle applies only to legal issues of *statutory interpretation*.

[10]This calculation was provided in respondent's brief filed on 3-31-06, p. 5, and petitioner did not dispute that calculation.

V

STATUTORY CONSTRUCTION PRINCIPLES

Before I move to my analysis of the particular legal issue to be decided here, I note that respondent has argued that in reaching an interpretation of the statutory provisions in question, I am bound by the "sovereign immunity" principles of statutory construction, which would mean that I should "strictly" and "narrowly" construe the statute. On the other hand, there also exists a principle of statutory construction that states that a "remedial" statute is generally to be construed in a "liberal" fashion, so as to give broad effect to the "remedial" purpose behind the statute. Accordingly, in this section of this Decision on Remand, I will examine each of these principles of statutory construction.

A. The "sovereign immunity doctrine"

The starting point of the "sovereign immunity" doctrine, a judge-made doctrine which dates from the early days of our country, is that the federal government, as this nation's "sovereign," may not be sued without its consent. *See*, *e.g., United States v. Horn*, 29 F. 3d 754, 761 (1st Cir. 1994); *M.A. Mortenson Co. v. United States*, 996 F. 2d 1177, 1180 (Fed. Cir. 1993). From that initial principle, the federal courts have derived certain principles of *statutory construction* that have been applied in interpreting legislation which is said to have *waived* that immunity with respect to a particular type of suit against the United States. One principle is that a statutory waiver of sovereign immunity must be "definitely and unequivocally expressed." *See*, *e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Horn*, 29 F. 3d at 762. The second principle is that the statutory language setting forth such a waiver is to be "construed strictly" or "construed narrowly" in favor of the government. *Nordic Village*, 503 U.S. at 34; *Ardestani v. I.N.S.*, 502 U.S. 135, 137 (1991); *Horn*, 29 F. 3d at 762.

In this case, of course, as the respondent does not dispute, the overall statute establishing the Program, to which I will sometimes refer as the "Vaccine Act" (see 42 U.S.C. § 300aa-1 through 34), unquestionably *does* waive the government's immunity from suit, in order to permit monetary awards to persons whose circumstances fall within that Act's requirements. The sovereign immunity principles of statutory construction set forth above, however, are still of great significance here, because in this case I am required to determine the meaning of *one particular provision* of the Vaccine Act. Respondent argues that because this particular provision is *part* of the Vaccine Act, which *as a whole* constitutes a waiver of sovereign immunity, in reaching an interpretation I must "narrowly and strictly" construe the statutory language.

After reviewing a great number of the cases that have discussed these principles of statutory construction, to which I will sometimes refer collectively as the "sovereign immunity doctrine," I note that over the years the federal courts, including the Supreme Court, appear to have waxed and waned in their level of devotion to the doctrine. In fact, there have been opinions, especially in the middle of the last century, in which the courts have indicated that the doctrine was falling into "disfavor." *See*, *e.g.*, *National City Bank of New York v. Republic of China*, 348 U.S. 356, 359-60

(1955); *Kiefer and Kiefer v. Reconstruction Finance Corp*, 306 U.S. 381, 390-91 (1939); Wright, Miller, and Cooper, *Federal Practice and Procedure*, Vol. 14 (West 1998), § 3654, pp. 317-18, and cases cited therein. Several Supreme Court opinions, indeed, suggested that waivers of sovereign immunity in some circumstances could be construed "liberally" rather than "strictly." *See, e.g.*, *United States v. Yellow Cab Co.*, 340 U.S. 543, 555 (1951); *F.H.A. v. Burr*, 309 U.S. 242, 245 (1940); *United States v. Shaw*, 309 U.S. 495, 501 (1940). In other cases, that same Court stated that "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *Block v. Neal*, 460 U.S. 289, 298 (1983); *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949); *Yellow Cab,* 340 U.S. at 554. That Court has also indicated that in construing a statute that waives sovereign immunity, a court must be careful not to "assume the authority to narrow the waiver that Congress intended." *Bowen v. City of New York*, 476 U.S. 476, 479 (1986); *United States v. Kubrick*, 444 U.S. 111, 118 (1979). It has added that, in such statutory construction situations, a federal court should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).[11]

More recently, however, the Supreme Court has vigorously *reaffirmed and reemphasized* the principles of requiring "unequivocal" expression of an immunity waiver, and of "strictly and narrowly construing" such waivers. *See*, *e.g.*, Wright, Miller, and Cooper, *supra*, § 3654, pp. 318-19, 327, 333-38; John Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 780 (1995). Specifically, certain Supreme Court decisions of the 1990's resoundingly endorsed those principles. *Nordic Village*, 503 U.S. at 33; *Ardestani*, 502 U.S. at 137; *United States v. Idaho*, 508 U.S. 1, 6-9 (1993); *Lane v. Pena*, 518 U.S. 187, 192 (1996); *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 615, 619, 626 n.16, 627 (1992); *United States v. Williams*, 514 U.S. 527, 531 (1995). As to the statements regarding "liberal" construction and the like set forth in the cases cited in the previous paragraph, the recent Supreme Court opinions have cautioned that those statements were confined to two particular types of cases, and should *not* be applied beyond those cases. That is, the Court explained that in the context of the "sweeping language" of the Federal Tort Claims Act allowing suits against the United States, as well as those statutes which allow certain federally-created agencies to "sue or be sued" as if they were non-governmental entities, the Court had elected to narrowly construe *exceptions* to those broad waivers of sovereign immunity, and, thus, in effect, to broadly construe the waivers themselves. *Nordic Village*, 503 U.S. at 34. But the Court emphasized that these specific exceptions do *not* mean that waivers of sovereign immunity in *other*

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[11]The lower courts have also at times suggested something other than "strict construction" of statutes waiving sovereign immunity. *See, e.g., May Dept. Stores Co. v. Smith*, 572 F. 2d 1275, 1276-77 (8th Cir. 1978) ("courts have been liberal in finding that [sovereign] immunity has been waived"); *Bank of Hemet v. United States*, 643 F. 2d 661, 665 (9th Cir. 1981) ("[t]he time is long past when the bar of sovereign immunity should be preserved through strained and hypertechnical interpretations of relevant acts of Congress"); *In re Town & Country Home Nursing Services, Inc.*, 963 F. 2d 1146, 1151 (9th Cir. 1991) ("[i]t is well established that when the federal government waives its immunity, the scope of the waiver is construed to achieve its remedial purpose").

types of statutes are to be "liberally construed;" instead, the "traditional principle," that statutes "must be construed strictly in favor of the sovereign," remains the general rule. *Id.*

Moreover, the 1990's Supreme Court decisions cited above did more than merely reaffirm the sovereign immunity doctrine in the face of prior indications that the doctrine might have been falling into "disfavor;" those decisions seem clearly to have actually *strengthened and reinforced* the doctrine, making it more rigorous than ever before. As one commentator has put it, those recent decisions have given the sovereign immunity doctrine "some extra teeth." *Nagle*, 1995 Wis. L. Rev. at 796. For example, those decisions have specified that the fact and extent of the waiver must be unequivocally indicated in the language of the statutory text itself. *Nordic Village*, 503 U.S. at 37; *United States v. Idaho*, 508 U.S. at 6; *Lane v. Pena*, 518 U.S. at 192. In other words, if the waiver is not apparent in the statutory text itself, the Court will not utilize the legislative history to interpret the text. *Nordic Village*, 503 U.S. at 37; *Lane v. Pena*, 518 U.S. at 192. Further, in one case where the text itself did not contain an unequivocal waiver, the Court declined to find a waiver even though such an interpretation admittedly would have fostered the general purpose behind the statute. *Ardestani*, 502 U.S. at 138. The commentators, as well as at least one Supreme Court justice, have referred to these pronouncements as creating a "clear statement rule" with regard to sovereign immunity waivers. *United States v. Williams*, 514 U.S. at 541 (J. Scalia, concurring); Wright, Miller, and Cooper, *supra*, § 3654, p. 333; Nagle, *supra*, 1995 Wis. L. Rev. at 774. Some commentators have even dubbed it a "super strong clear statement rule." See W. Eskridge and P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992).[12] At the least, these recent decisions have firmly re-entrenched the rule that statutory waivers of sovereign immunity must be "unequivocally expressed," and that the statutory language of such waivers must be "strictly and narrowly construed" in favor of the government.

1. *The "sovereign immunity" statutory construction principles generally apply to interpretations of the Vaccine Act*

In light of the above discussion, the question becomes, then, whether the "sovereign immunity doctrine"--*i.e.*, the statutory construction principles set forth above--apply to legal interpretations of the *Vaccine Act*. Because the Vaccine Act authorizes suits and monetary awards against a fund administered by an agency of the United States (see § 300aa-15(i)(2)), it would seem likely that the sovereign immunity doctrine would be generally applicable to that Act. Petitioner has argued that the Vaccine Act does not constitute a waiver of sovereign immunity at all, because the awards come from a special government-controlled trust fund, instead of the "general treasury." (Br. 3-3-06, p. 11, fn. 9; Br. 3-17-06, p. 5, fn. 2.) This argument seems dubious for a number of reasons, but it *clearly* fails for one particular reason. That is, the United States Court of Appeals for the Federal Circuit has, in fact, on at least three occasions, cited the sovereign immunity doctrine as applicable to its interpretation of Vaccine Act provisions. See *Brice v. Secretary of HHS*, 240 F. 3d

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[12]Indeed, a dissenting opinion in one Supreme Court case complained that these 1990's decisions adopted a "radically new and unforgiving approach to waivers of sovereign immunity." *Lane v. Pena*, 518 U.S. at 210 (J. Stevens, dissenting).

1367, 1370 (Fed. Cir. 2001); *Martin v. Secretary of HHS*, 62 F. 3d 1403, 1405 (Fed. Cir. 1995); *Schumacher v. Secretary of HHS*, 2 F. 3d 1128, 1135 fn. 12 (Fed. Cir. 1993). Because the legal holdings of the Federal Circuit are binding upon this court, it is, therefore, simply settled law in this court that the sovereign immunity principles of statutory construction *do* apply to interpretations of the Vaccine Act.

2. The "sovereign immunity" statutory construction principles are applicable to interpretations of the particular statutory subsection applicable here

There is another potential argument to be considered in this regard, although such argument was not raised by the petitioner in this case. That is, in *McGowan v. Secretary of HHS*, 31 Fed. Cl. 734 (1994), the court applied the doctrine of sovereign immunity in interpreting one portion of the Vaccine Act, stating that the provision in question constituted a "jurisdictional requirement." (*Id.* at 740.) But, noting that the Vaccine Act is "remedial" in nature, the court added language that might be interpreted as implying that once it is determined that a claimant meets the statute's "jurisdictional requirements," there is no need for "strict construction" of those *additional* Vaccine Act statutory provisions that are *non-jurisdictional*. (*Id.*) This suggests the possibility that when dealing with the Vaccine Act, or any other statute that waives the federal government's immunity from suit, it may be appropriate to apply the sovereign immunity principle of "strict construction" *not* to interpretations of *all* parts of such a statute, but only to interpretations of *jurisdictional requirements* of the statute, or to the interpretation of those portions of a statute that set *initial conditions for eligibility* for payment from the government. Does the case law support this suggestion in *McGowan*, that the rule of "strict construction" should be applied only when interpreting a statute's "jurisdictional" requirements, or a statute's "initial eligibility" requirements[13] --as opposed to other statutory sections that, for example, specify *how much* of a payment that an eligible claimant may receive from the government?

I have carefully considered this possibility, but I cannot find any other case law for such a proposition, beyond *McGowan* itself. I simply have found no opinion, of the Supreme Court, the Federal Circuit, or any other court, that explicitly makes the distinction suggested in *McGowan*. To the contrary, I note that in some of the 1990's Supreme Court decisions, it is stated that when a statute contains a waiver of sovereign immunity, that waiver must be strictly construed, in favor of the government, "in terms of its scope." *Lane v. Pena*, 518 U.S. at 192; *Dept. of the Army v. Blue Fox*, 525 U.S. 255, 261 (1999). *See also U.S. v. Williams*, 514 U.S. at 541 ("clear statement" rule

[13]I note that while the judge in *McGowan* referred to the provision that she was interpreting as a "jurisdictional" requirement, it is arguable that such provision was not "jurisdictional," but merely one element that a petitioner must satisfy in order to qualify for a Vaccine Act award. *See, e.g.*, *Spruill v. Merit Systems Protection Board*, 978 F. 2d 679 (Fed. Cir. 1992), (lamenting the blurring, in many court decisions, of the distinction between elements of a claim and jurisdictional elements); *Arbaugh v. Y & H Corp.,* ___ U.S. ___, 126 S. Ct. 1235, 1242, 1245 (2006) ("[w]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character").

with regard to waivers of sovereign immunity "applies even to determination of the scope of explicit waivers") (Scalia, J., concurring). These statements, mandating that a waiver is to be strictly construed as to the "scope" of the waiver, seem to indicate that even when a statute clearly does waive the government's immunity to a *general* type of suit, when legal issues arise as to whether a certain category of claimants does or does not fall within the terms of that waiver, or when legal issues arise that would affect the *amount* of the government's exposure to claims under such a statute, then the statute must be "strictly construed" as to such issues.

Further, my analysis of other Vaccine Act decisions has uncovered no support for the *McGowan* suggestion. To be sure, in each of the three *Federal Circuit* opinions that have applied the sovereign immunity doctrine to Vaccine Act provisions, the provision in question could, indeed, be said to concern a "jurisdictional" requirement of the Vaccine Act. See *Martin*, 62 F. 3d 1404 (holding that the Court of Federal Claims had no "jurisdiction" to award fees and costs in the case); *Schumacher*, 2 F. 3d at 1135 n. 12 (interpreting the "gatekeeping" provision of § 300aa-11(a)(5)(B)); *Brice*, 240 F. 3d at 1368 (interpreting one of the Vaccine Act's statute of limitations provisions, § 300aa-16(a)(2)). And it is true that in *Martin*, the Federal Circuit stated that "the alleged *jurisdictional* grant must be narrowly construed." 62 F. 3d 1405 (emphasis added). However, in *Schumacher* and *Brice* there is no suggestion that the "strict construction" rule is to be applied only to "jurisdictional" requirements, or to some other limited subset of Vaccine Act provisions.

Moving beyond the Federal Circuit decisions, to the opinions of judges and special masters of the Court of Federal Claims, I note that the sovereign immunity principle of "strict construction" has been applied to issues of interpretation of the Vaccine Act in dozens of opinions of *judges* of this Court, and in even more opinions of *special masters*. In none of those many opinions, however, other than *McGowan*, has it been suggested that the "strict construction" principle applies only to "jurisdictional" issues, or to some other subset of statutory interpretation issues under the Vaccine Act. To the contrary, in many cases the strict construction principle has been applied in interpreting parts of the Vaccine Act that clearly are not "jurisdictional" in nature, and do not set forth conditions for eligibility. For example, in *Lemire v. Secretary of HHS*, 60 Fed. Cl. 75, 80 (2004), a judge of this court applied the "strict construction" rule in deciding the procedural issue of what constitutes a "decision" in a Vaccine Act case. In *Patton v. Secretary of HHS*, 28 Fed. Cl. 532, 535 (1993), a judge applied the principle to the issue of whether a special master has authority to amend a decision after judgment. In several other cases, judges of this court have applied the principle in interpreting the Vaccine Act's provision for attorneys' fees and costs. *Brice v. Secretary of HHS*, 55 Fed. Cl. 366, 369, 372 (2003); *Grice v. Secretary of HHS*, 36 Fed. Cl. 114, 120 (1996); *Mass v. Secretary of HHS*, 31 Fed. Cl. 523, 528 (1994); *Ashe-Cline v. Secretary of HHS*, 30 Fed. Cl. 40, 45, 54 (1993); *Jessup v. Secretary of HHS*, 26 Cl. Ct. 350, 352 (1992).

Moreover, in several cases, judges of this court have applied the "strict construction" principle in cases in which the petitioner clearly *was* generally entitled to Program compensation, in interpreting various parts of § 300aa-15(a), which defines the *scope of Program compensation* available to whose petitioners who have *already* been determined to be *entitled* to compensation. Thus, in *Hulsey v. Secretary of HHS*, 19 Cl. Ct. 331, 334 (1991), a judge applied the "strict

construction" rule in determining whether a particular type of claimed future expense fit within the enumerated categories of § 300aa-15(a)(1)(A)(iii)(II). In *Holihan v. Secretary of HHS*, 45 Fed. Cl. 201, 207 (1999), a judge applied the principle in interpreting the "lost earnings" provision of § 300aa-15(a)(3)(B). In *Mikulich v. Secretary of HHS*, 18 Cl. Ct. 253, 259 fn. 6 (1989), and *Brown v. Secretary of HHS*, 18 Cl. Ct. 834, 841 (1989), the two judges each applied the "strict construction" principle in interpreting the "$30,000 damages cap" provision of § 300aa-15(b). In *Edgar v. Secretary of HHS*, 29 Fed. Cl. 339, 344 (1993), a judge applied the principle in determining whether a petitioner was entitled to post-judgment interest as part of Program compensation. And in *Sheehan v. Secretary of HHS*, 19 Cl. Ct. 320 (1990), a judge applied the "strict construction" doctrine in deciding the *exact same legal question* at issue here--*i.e.*, whether the estate of a vaccinee who has suffered a *vaccine-related death* may receive, in *addition* to the $250,000 "death award" of § 300aa-15(a)(2), further compensation pertaining to the period between injury and death.

Turning to the decisions of *special masters* that have applied the "strict construction" rule to issues of Vaccine Act interpretation, most of those decisions have dealt with issues that could be deemed "jurisdictional"--*i.e.*, interpretational issues concerning the Vaccine Act's statute of limitations provisions, or the "gatekeeping provisions" of § 300aa-11(a). However, a few special master decisions, like those judges' opinions discussed above, have applied that principle in interpreting parts of the Vaccine Act that clearly are not "jurisdictional" in nature, and do not set forth conditions for eligibility. For example, in *Lawson v. Secretary of HHS*, 1999 WL 603693 (Fed. Cl. Spec. Mstr. May 28, 1999), a special master applied the "strict construction" principle in interpreting the meaning of the term "sequela" in § 300aa-14 of the Vaccine Act. And in three other decisions, special masters applied the "strict construction" principle in cases in which the petitioner clearly *was* generally entitled to Program compensation, in interpreting various parts of § 300aa-15, which defines the *scope of Program compensation*. In both *Holihan v. Secretary of HHS*, 1999 WL 63954 (Fed. Cl. Spec. Mstr. Jan. 19, 1999), *rev'd on other point* 45 Fed. Cl. 201 (1999), and *Childers v. Secretary of HHS*, 1999 WL 218893 (Fed. Cl. Spec. Mstr. March 26, 1999), the undersigned special master applied the principle in interpreting the "lost earnings" provision of § 300aa-15(a)(3)(B). And in *Brown v. Secretary of HHS*, 2005 WL 2659073 (Fed. Cl. Spec. Mstr. Sept. 21, 2005), a special master applied the principle in interpreting the term "net present value" in § 300aa-15(f)(4)(A).

All of these Vaccine Act opinions of judges and special masters, therefore, seem to be inconsistent with the suggestion in *McGowan* that the "strict construction" principle need not be applied in interpreting "non-jurisdictional" provisions of the Vaccine Act.

In short, I have carefully considered the above-described suggestion in *McGowan*, that the principle of "strict construction" need only be applied to interpretations of the Vaccine Act's "jurisdictional" requirements, or to some other limited subset of Vaccine Act provisions. However, after analysis of all of the Vaccine Act and non-Vaccine Act precedent cited above, I simply do not find support for that suggestion. I note that the stated rationale for the entire "sovereign immunity doctrine" is to guard against improper dissipation of federal funds, *i.e.*, to ensure that the courts award judgments against the United States only in the circumstances, and in the amounts, in which

such awards were clearly intended by Congress. My conclusion based on the case law, then, is that the doctrine is to be applied to the interpretation of *any* Vaccine Act provision that could have an impact on the amount of funds to be awarded from the federal Vaccine trust fund--*i.e.*, to both issues involving whether a person is *entitled* to a Vaccine Act award, and to issues involving the *scope* or *extent* of an award to a person who *is* entitled to one. The legal issue involved in this case, then, would appear to be one to which the doctrine *does* apply.

B. The principle of "liberal" construction of "remedial" legislation

Another principle of statutory construction, however, must also be considered. That is, a number of federal courts have stated that "remedial" or "welfare" legislation should be given a "broad construction" or a "liberal interpretation" in order to further the "remedial," "beneficent," or "humanitarian" purposes behind the statute. *See*, *e.g.*, *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 562 (1987); *Jefferson County Pharmaceutical Ass'n. v. Abbott Laboratories*, 460 U.S. 150, 159 (1983); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *United States v. Zacks*, 375 U.S. 59, 67 (1963); *Urie v. Thompson*, 337 U.S. 163, 180 (1949); *Cosmopolitan Shipping Co. v. McCallister*, 337 U.S. 783, 788 (1949); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Connecticut Light & Power Co. v. Secretary of the U.S. Dept. of Labor*, 85 F.3d 89, 94 (2d Cir. 1996); *Bechtel Construction Co. v. Sec. of Labor*, 50 F. 3d 926, 932 (11th Cir. 1995); *Caro-Galvan v. Curtis Richardson*, 993 F.2d 1500, 1505 (11th Cir. 1993); *DeMutiis v. United States*, 48 Fed. Cl. 81, 86 (Fed. Cl. 2000).[14] Thus, the question arises whether the Vaccine Act should be viewed as legislation that is "remedial" in nature, and therefore should be "liberally" construed so as to give a wider application to the remedial purposes behind the statute.[15] The cases that I have identified as mentioning this "remedial legislation" rule do not provide any precise definition of what legislation should be considered to be "remedial" in nature. However, the cases all seem to refer to statutes that are designed to benefit or protect classes of persons who have been harmed or disadvantaged in some fashion. In that light, it seems reasonable to conclude that the Vaccine Act, which is designed to benefit persons injured by vaccinations, does constitute a "remedial" statute. *See, e.g., McGowan v. Secretary of HHS*, 31 Fed. Cl. 734, 740 (1994). Does it follow, therefore, that the provisions of that Act are to be "liberally" or "broadly" interpreted? I conclude that it does not. Rather, my analysis of the case law is that with respect to statutes which are *both* "remedial" in nature *and* waive the federal government's immunity from suit, it is the sovereign immunity doctrine which "trumps" the competing principle of statutory construction, so that *strict and narrow construction* remains the controlling principle with respect to such statutes.

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[14]One recent appellate decision, however, criticized the principle of "liberal construction of remedial legislation" as "meaningless," on the theory that *all* legislation is intended to "remedy" some wrong. *Holland v. Williams Mountain Coal Co.*, 256 F. 3d 819, 823 (D.C. Cir. 2001).

[15]The petitioner in this case has not cited these cases, nor has petitioner cited the principle of "liberal construction of remedial statutes." Nevertheless, I have found it appropriate to consider on my own this potentially-applicable theory of statutory construction.

The most straightforward reason for this conclusion, with respect to the Vaccine Act, is simply that binding precedent mandates it. That is, as noted above, the Federal Circuit has clearly stated that the doctrine of sovereign immunity *does* apply in interpreting Vaccine Act provisions. *Martin v. Secretary of HHS*, 62 F. 3d at 1405; *Schumacher v. Secretary of HHS*, 2 F. 3d at 1135, fn. 12; *Brice v. Secretary of HHS*, 240 F. 3d at 1370. That court, whose pronouncements concerning legal issues are binding upon this court, has *not* indicated that the operation of the sovereign immunity doctrine is negated or mitigated because the Vaccine Act is remedial in nature. Accordingly, the precedent of *Martin*, *Schumacher*, and *Brice* would seem to leave me no choice but to apply the sovereign immunity principle of "strict and narrow construction" to the Vaccine Act provision here in question, without regard to the fact that the Act may be "remedial" in nature.

In addition, I note that the same result flows from an analysis of the non-Program case law, especially the recent Supreme Court precedent. First, I note that in all of the cases cited above at p. 17 concerning "remedial legislation," as in all of the Supreme Court opinions and nearly all of the other federal cases that I have found that also describe the same rule of "liberal construction," the statute that was being interpreted pertained to relief against *private entities*, rather than against the federal government.[16] So those cases provide no authority for the proposition that it is correct to use the "remedial legislation" principle to liberally construe a statute that authorizes relief against the *United States*.

More importantly, the recent Supreme Court precedent seems to point strongly to the conclusion that the "remedial legislation" principle has *no* application to statutes affording relief against the *government*. For example, in *Lane v. Pena*, that court was interpreting the Rehabilitation Act of 1973, an act protecting the handicapped, which certainly does seem to be an example of "remedial legislation." 518 U.S. at 188. Yet the Court applied the sovereign immunity "strict construction" rule, and mentioned nothing about the remedial nature of the statute being a reason to mitigate the application of that rule. *Id.* at 192. Another example is *Library of Congress v. Shaw*, 478 U.S. 310 (1986), in which the Supreme Court interpreted a provision of the Civil Rights Act of 1964, which allows victims of racial discrimination to obtain redress, and, thus, also seems to fit the description of "remedial legislation." *Id.* at 311. Again, the Court applied the "strict construction" principle as part of the sovereign immunity doctrine. *Id.* at 317.[17] Thus, the Supreme Court, at least

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[16]It may be noted that in some of the "remedial legislation" cases cited above, the United States or an agency thereof is listed as a party. However, in none of those cases was the "remedial legislation" doctrine utilized in interpreting a statute that afforded relief *against the government*. For example, in *United States v. Zacks*, it was found that the statute in question was *not* "remedial" in nature. 375 U.S. at 68. And in the cases in which the Secretary of Labor was a party to the litigation, that Secretary participated only in the posture of assisting a worker in obtaining relief *against a private employer*.

[17]See also *United States v. Horn*, *supra*, in which the court explained that where the sovereign immunity doctrine conflicted with the doctrine of the "supervisory powers" of federal courts, the sovereign immunity doctrine, being a "mandatory and absolute" doctrine, would take precedence. 29 F. 3d at 764-767. But see also *DeMutiis v. United States, supra*, in which a judge of this court

in its recent decisions, seems clearly to have taken the view that when a statute waives the federal government's immunity from suit, such a statute, *even when "remedial" in nature*, must be strictly construed in the government's favor.

To be sure, I have identified two appellate court decisions in which it is asserted that a "remedial" statute affording relief against the United States should be interpreted "liberally." See *In re Town and Country Home Nursing Services, Inc.*, 963 F. 2d 1146, 1151 (9th Cir. 1991); *Thurston v. United States*, 179 F. 2d 514, 515 (9th Cir. 1950). In addition, the court in *McMahon v. United States*, 186 F. 2d 227, 229 (3rd Cir. 1950), *aff'd* 342 U.S. 25 (1951), suggested that in the case of a statute that is *both* "remedial" *and* constitutes a waiver of sovereign immunity, the two competing statutory construction principles would in effect cancel each other out, so that the court would construe the statutory language "without throwing any weights on either side of the scale." 186 F. 2d at 229.[18] I conclude, however, that these three appellate court decisions were simply overruled by the recent Supreme Court decisions in *Lane v. Pena* and *Library of Congress v. Shaw*, cited above, which establish a contrary rule.

In short, the recent Supreme Court precedent seems to mandate the same rule apparently imposed on Vaccine Act cases by the Federal Circuit in the cases of *Martin*, *Schumacher, and Brice*. That is, even though the Vaccine Act may be "remedial" in nature, its provisions still must be "strictly construed" in keeping with the doctrine of sovereign immunity.

C. Summary of statutory construction principles to be applied here

For the reasons set forth above, I have concluded that the sovereign immunity statutory construction principles *are* properly applicable to the statutory interpretation question at issue here. This means that I must "constru[e] ambiguities in favor of immunity." *Lane v. Pena*, 518 U.S. at 192; *United States v. Williams*, 514 U.S. at 531; see also *Robb v. United States*, 80 F. 3d 884, 887 (4th Cir. 1996) ("all ambiguities are resolved in the favor of the sovereign"); *Levernier Construction v. United States*, 947 F. 2d 497, 503 (Fed. Cir. 1991) (the statutory provision is to be given the "most restrictive" interpretation). It means that if more than one "plausible" reading of the statutory provision exists (*Nordic Village*, 503 U.S. at 36-37), or there are two possible interpretations of "equal likelihood" (*Department of Energy v. Ohio*, 503 U.S. at 626 fn.16), then I must choose the interpretation that produces the more limited award. See also *Marathon Oil Co. V. United States*, 374 F. 3d 1123, 1127 (Fed. Cir. 2004) ("[i]f a statute is susceptible to a plausible reading under

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applied the "liberal construction of remedial legislation" principle in interpreting a federal compensation program, without mention of the sovereign immunity doctrine. 48 Fed. Cl. at 86.

[18]Note that the Supreme Court in *McMahon*, while affirming the appellate court's *result*, merely interpreted the statutory language in the government's favor, without explaining whether it approved of the court of appeals' comment as to the *statutory construction rules*. 342 U.S. at 26.

which sovereign immunity is not waived, the statute fails to establish an unambiguous waiver and sovereign immunity therefore remains intact").[19]

VI

ISSUE OF WHETHER THE ESTATE IS ENTITLED TO "INJURY COMPENSATION" IN ADDITION TO THE "DEATH BENEFIT"

As noted above, the final legal issue to be decided on this remand is whether Ms. Snyder's estate is entitled, in addition to the $250,000 "death benefit" of § 300aa-15(a)(2), to further compensation under § 300aa-15(a)(1), (3), and (4), pertaining to the period between Ms. Snyder's injury and her death.

A. The statute and the parties' positions

Section 300aa-15 defines the *scope of compensation* available in Program cases, once a vaccinee has already been found to be *entitled* to a Program award. The two principal subsections of § 300aa-15 are subsections (a) and (b); subsection (a) sets forth the compensation available for Program cases involving vaccinations administered *after* October 1, 1988, while subsection (b) sets forth the compensation available in cases involving vaccinations given *prior* to that date. This case involves a vaccination administered in 1992, and thus it is a so-called "post-Act" case, governed by subsection (a).

Subsection (a), the subsection applicable here, begins with general language stating that "Compensation [for post-Act cases] * * * shall include the following * * *." Four numbered parts of subsection (a) follow, each of which provides a separate type of compensation.[20] Part (1) provides compensation for "actual unreimbursable expenses" which resulted, or are likely to result, from "the vaccine-related injury," and were incurred for purposes of medical care, rehabilitation, etc. Part (2)

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[19]As a final point concerning the sovereign immunity doctrine, I note that the case law concerning the doctrine seems to me to be often confusing and inconsistent. For example, as noted above, over the years the devotion of the courts to the doctrine seems to have "waxed and waned." Further, there have been a number of opinions in which courts have interpreted provisions of statutes that appear to waive the federal government's immunity, yet those opinions either do not mention the doctrine, or do not appear to actually apply it. Moreover, I note that at least two Supreme Court cases in this decade seem to apply the doctrine with less rigor than did the 1990's cases, or possibly indicate that the Court may be moving toward the procedure suggested in *McGowan*, *i.e.*, applying the doctrine only to certain provisions of immunity-waiving statutes. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *Scarborough v. Principi*, 541 U.S. 401, 419-421 (2004). These recent decisions, however, do not *explicitly say* that the Supreme Court is moving away from the 1990's teachings concerning the doctrine, so that, in my view, I am bound to continue to apply those 1990's teachings.

[20]The entire text of §300aa-15(a) is set forth as an appendix to this decision.

states, in full, as follows: "In the event of a vaccine-related death, an award of $250,000 for the estate of the deceased." Part (3) provides certain compensation for "lost earnings" in the case of any person who has sustained "a vaccine-related injury." And finally, part (4) provides certain compensation for "pain and suffering" resulting from "the vaccine-related injury."

Judge Wheeler has found as fact that Barbara Snyder's FMS was vaccine-caused, and I have found as fact that her FMS was a substantial factor causing her death. Therefore, as noted above, both parties to this case agree that pursuant to part (2) of § 300aa-15(a), Ms. Snyder's estate is entitled to $250,000 on account of her death.[21]

The parties differ, however, in interpreting the *other* parts of this statutory compensation scheme. The petitioner seems to rely chiefly on the fact that the opening language of subsection (a) provides that "compensation * * * for a vaccine-related *injury or death* * * * shall include the following" (emphasis added). Petitioner notes that nothing in the statute explicitly states that when a vaccinee's estate receives the $250,000 "death benefit" under part (2), the estate may not *also* receive compensation under parts (1), (3), and (4) for any damages incurred between the time of vaccination and the death. Petitioner argues that therefore, when a vaccinee suffers a *vaccine-related injury*, incurs substantial damages that would be compensable under parts (1), (3), and (4), then dies a *vaccine-related death*, the estate is entitled to damages under *all four parts* of subsection (a).

Specifically, petitioner argues that under Judge Wheeler's factual findings, Ms. Snyder certainly suffered a "vaccine-related injury," which injury undoubtedly caused her "unreimbursed expenses," a "loss of earnings," and "pain and suffering" during the 13 years between the onset of her injury and her death. Therefore, petitioner argues, Ms. Snyder's estate should be entitled to compensation under parts (1), (3), and (4) of subsection (a). Petitioner further argues that under my factual finding on remand, set forth above, Ms. Snyder *also* suffered a "vaccine-related death," so that her estate therefore is *also* entitled to the $250,000 "death benefit" under part (2) of subsection (a).

In other words, petitioner argues that in the relatively rare Program case in which a vaccinee suffers a "vaccine-related injury," lives thereafter for a substantial period of time, and then suffers a "vaccine-related death," there is nothing in the statute that prohibits that vaccinee's estate from receiving *both* the $250,000 "death benefit" of part (2) of § 300aa-15(a), and also the damage elements available for a "vaccine-related injury" pursuant to parts (1), (3), and (4) of § 300aa-15(a).

Respondent, on the other hand, takes a different view. In respondent's briefs filed on remand concerning this issue, respondent devoted much discussion to an argument, based upon § 300aa-11(b)(1)(A), that the current petitioner, Ms. Zatuchni, would have no "standing" as a petitioner in this case, *if* she could not prove that Ms. Snyder's *death* was vaccine-caused. That argument,

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[21]Of course, respondent has never "agreed" with the *factual findings* noted above. Respondent agrees only that, as a matter of law, *if* those factual findings are assumed to be correct, then Ms. Snyder's estate is entitled to $250,000.

however, is now moot, since I have found as fact that Ms. Snyder's FMS *was* a significant factor contributing to her death. Respondent has argued alternatively, however, that as a matter of law, even assuming that Ms. Snyder's death was vaccine-related, her estate would be entitled to the "death benefit" of part (2) of § 300aa-15(a), but would *not* be entitled to any *additional* compensation pursuant to parts (1), (3), and (4) of § 300aa-15(a). In this regard, respondent's primary argument seems to be that part (2) of § 300aa-15(a) is the only subpart that mentions any award for an "estate" of a deceased vaccine recipient. Respondent argues that because parts (1), (3), and (4) of § 300aa-15(a) make no mention of any award to an "estate" of a deceased person who had suffered a "vaccine-related injury," any award pursuant to those three subparts must be restricted to *living* vaccine recipients who suffered a vaccine-related injury.

Respondent also relies heavily on several published decisions in which judges or special masters of this court have indicated the legal conclusion that when an estate of a deceased vaccine-recipient is awarded the $250,000 "death benefit" of § 300aa-15(a)(2), such estate is barred from obtaining any additional compensation pursuant to parts (1), (3), or (4) of § 300aa-15(a). See *Sheehan v. HHS*, 19 Cl. Ct. 320 (1990); *Buxkemper v. HHS*, 32 Fed. Cl. 213 (1994); *Vijil v. HHS*, 1993 WL 177077 (Fed. Cl. Spec. Mstr. May 7, 1993); *Clifford v. HHS*, 2002 WL 1906520 (Fed. Cl. Spec. Mstr. July 30, 2002).

B. Discussion

After careful analysis, I conclude that both parties have presented interpretations of the statute on this point that are reasonable and plausible. Both interpretations have strengths. The statute is simply unclear, ambiguous, and leaves room for doubt on this point. Therefore, pursuant to the "sovereign immunity doctrine," I am required to adopt the more "narrow" and "strict" interpretation--*i.e.*, the respondent's interpretation.

1. Strengths of petitioner's interpretation

Petitioner's argument is, indeed, straightforward and appealing. Petitioner is certainly correct that nothing in the statute *explicitly* states that when a vaccinee's estate receives a $250,000 "death benefit" under part (2) of § 300aa-15(a), the estate may not *also* receive compensation under parts (1), (3), and (4) for any damages incurred between the time of vaccination and death. Since Ms. Snyder did, under the factual findings here, suffer *both* a "vaccine-related injury" and later a "vaccine-related death," petitioner argues, why should her estate *not* receive *both* the compensation provided for a "vaccine-related injury" *and* the compensation provided for a "vaccine-related death"? This argument is particularly appealing in the context of this case, in which it has been determined that Ms. Snyder lived with a severe vaccine-related injury *for more than 13 years* prior to her vaccine-related death. This case is different from the typical Program case in which a "death benefit" has been awarded; in most of those cases, little or no time elapsed between the onset of the vaccine-related symptoms and the vaccinee's death.

In addition, petitioner's case finds at least some support in one published opinion. In *Lawson v. Secretary of HHS*, 45 Fed. Cl. 236 (1999), Judge Turner of this court faced a situation in which a minor vaccinee had died after a long illness; the judge remanded the case for factual determinations concerning whether the illness and the death were vaccine-related. In so doing, the judge stated that if the illness and death were both determined to be vaccine-related, then the vaccinee's parents could obtain compensation for the vaccinee's "pain and suffering" and "lost earnings," and also "an additional $250,000" for the statutory death benefit. *Id*. at 237. This *Lawson* opinion is of somewhat limited precedential value here, because it concerns a "pre-Act case"--*i.e.*, a case involving a vaccine administered *prior* to October 1, 1988--in which compensation is determined under *part (b)* of § 300aa-15, rather than part (a). Part (b), unlike part (a), does *not* have separate subparts, each of which concern only a "vaccine-related injury" or a "vaccine-related death." Rather, part (b) is organized quite differently, consisting of a single sentence which determines compensation for "a vaccine-related injury or death." Nevertheless, the *Lawson* decision provides at least *some* support for petitioner's argument here, since it seems to disagree with the conclusion stated in *Sheehan*, *Buxkemper*, *Vijil*, and *Clifford*, that the overall structure of the Vaccine Act indicates that the $250,000 "death benefit" must be the *only* compensation in the case of a vaccine-related death.

2. Strengths of respondent's interpretation

As noted above, respondent relies on four decisions of judges and special masters. In each of the *Sheehan*, *Vijil*, and *Clifford* cases, it was determined that the vaccinee had died a vaccine-related death, so that the deceased's estate was entitled to the $250,000 "death benefit" of § 300-15(a)(2); in each case, the estate also sought *additional* compensation amounts for "unreimbursed expenses," lost earnings," and/or "pain and suffering." In each case, the judge or special master concluded, as a matter of law, that the estate was ineligible for any compensation beyond the $250,000 death benefit. See *Sheehan* (ruling of Judge Tidwell); *Vijil* (Special Master Hastings); *Clifford* (Special Master Millman).

The *Sheehan* opinion, to be sure, is of less support to respondent's interpretation than *Vijil* and *Clifford*, because *Sheehan*, like the *Lawson* case discussed on this page above, was a "pre-Act case," in which compensation is determined under part (b) of § 300aa-15, rather than part (a). Nevertheless, *Sheehan* is still of some support to respondent's interpretation, since it indicates agreement with the view stated in *Vijil*, *Clifford*, and *Buxkemper* that the *overall structure* of the Vaccine Act indicates that the $250,000 "death benefit" must be the only compensation in the case of a vaccine-related death.[22]

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[22]See also *Andrews v. Secretary of HHS*, 33 Fed. Cl. 767 (1995). That case, again, did not involve a vaccine-related death, but the judge did note, in *dicta*, that

> the court agrees with the *Vijil* decision that the estate of a person who suffers a vaccine related death is limited to an award of $250,000 under 15(a)(2).

33 Fed. Cl. at 770.

The fourth opinion upon which respondent relies, *Buxkemper*, also offers limited support, but still at least some support, to the respondent's interpretation. In *Buxkemper*, the factual finding was that the vaccinee's *death* was *not* vaccine-caused, so that the decision is not directly on point here. But Judge Horn did note that she had reviewed the ruling in *Vijil*, and endorsed its general thrust. 32 Fed. Cl. at 224. The judge quoted, and particularly endorsed, a portion of the *Vijil* opinion in which it was concluded that, for purposes of determining compensation in Vaccine Act cases, Congress intended to make a basic distinction between "vaccine-related injury" cases and "vaccine-related death" cases. *Id*. at 224-225. Further, the judge, after examining the statutory compensation scheme, concluded that Congress intended only two general categories of compensation, for two types of petitioners--*i.e.*,

> *either* compensation for individuals who *continue to suffer* from a vaccine injury and will have to deal with the costs of that injury for the remainder of his/her life, *or* death benefits, of up to $250,000.00, to the estates of those who have died as a result of a vaccine-related injury.

32 Fed. Cl. at 225 (emphasis added). Thus, the *Buxkemper* decision, while not directly on point, does appear to offer at least some support for respondent's interpretation of the statutory provisions relevant to this case.

The opinions cited above, upon which respondent relies, utilized two basic lines of analysis in concluding that the estate of a vaccinee who receives the $250,000 "death benefit" may not also receive *additional* compensation pursuant to parts (1), (3), and (4) of § 300aa-15. I will discuss those two lines of analysis separately below.

a. Statutory usage of the term "vaccine-related injury" vs. the term "vaccine-related death"

The special masters in *Vijil* and *Clifford*, and to a partial extent the judges in *Sheehan* and *Buxkemper*, looked to the language of parts (1), (3), and (4) of § 300aa-l5(a). The opinions note that the language of parts (1), (3), and (4) refers only to the case of a "vaccine-related injury," and does not mention a "vaccine-related death." The opinions concluded that this failure to mention a "vaccine-related death" is significant when the language of parts (1), (3), and (4) is evaluated in light of language used *elsewhere* in the statute.

In this regard, the opinions relied on the fact that throughout the statutory sections governing the Program, Congress quite frequently used the phrase "a vaccine-related injury or death," or very similar language; at a few other places, in contrast, reference was made only to a "vaccine-related injury" or to a "vaccine related-death." The fact that Congress so often used the phrase "vaccine-related injury *or* death" is of some significance by itself.[23] That is, logically, one could argue (as

[23]For example, the phrase "vaccine-related injury or death," or substantially similar wording, appears in § 11(a) (1); § 11(a) (2) (A) ; § 11(a) (3); § 11(a) (4) ; § 11(a) (5) (A) ; § 11(a) (5) (B) ;

petitioner here seems to do) that the use of the "or death" language in each place in the statute was redundant, since a person who has been killed by something has certainly been "injured" by it, in one sense of the word "injury." Yet Congress' election to use "injury or death" in most places, but only "injury" or only "death" in a few specific provisions, suggests that Congress viewed "vaccine-related injury" and "vaccine-related death" cases as *quite distinct* for analytical purposes.

This inference is buttressed by the fact that in those few instances where Congress referred *only* to a "vaccine-related injury" or *only* to a "vaccine-related death," a clear intent to treat the two situations *differently* is apparent. For example, § 300aa-16, the "Limitations" section of the statute, provides, in subsection (a) (1), a uniform cut-off date for all "pre-Act cases" (*i.e.*, those cases where the vaccination occurred prior to October 1, 1988, the effective date of the Vaccine Program), applicable to *both* a "vaccine-related injury or death." But then the very next two statutory provisions, § 300aa-16(a) (2) and § 300aa-l6(a) (3), applicable to "post-Act" cases, make a clear distinction between "vaccine-related injury" cases (§ 300aa-16(a)(2)) and cases in which "a death occurred" (§ 300aa-16(a) (3)).

Thus, based upon this *overall* pattern of statutory usage of the terms "vaccine-related injury" and "vaccine-related death" *throughout* the Vaccine Act, the opinions upon which respondent relies drew an inference. They drew the inference that when Congress intended a provision to apply to situations where the recipient was *either* alive or dead, the phrase "vaccine-related injury or death" was used; when Congress intended application only to living persons, the term "vaccine-related injury" was used; and when Congress intended application only to deceased persons, the term "vaccine-related death" was used. The opinions then applied that conclusion in interpreting parts (1), (3), and (4) of § 300aa-15(a). They concluded that in parts (1), (3), and (4) of § 300aa-l5(a), the use of the term "vaccine-related injury" was specifically intended to *limit* compensation to those cases in which the vaccine recipient is *not deceased*.

b. The legislative history

The judge and special masters in *Sheehan*, *Vijil*, and *Clifford* also relied, to varying extents, upon certain *legislative history*. First, two excerpts from the committee report accompanying the bill that resulted in enactment of the Program in 1986 were found to be relevant. One excerpt, part of a listing of the categories of available compensation, stated as follows:

> (2) *Death Benefits*. Allowable death benefits for a vaccine-related death are set at a level of $250,000.

(H.R. Rept. No. 99-908, 99th Cong., 2d Sess., p. 21, reprinted at 1986 U.S.C.C.A.N., p. 6362.) The other was part of a discussion of the "pain and suffering" compensation category, which noted that an award in that category can range *up to* $250,000, at the special master's discretion; it contrasted

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§ 11(a) (6) ; § 11(a) (7) ; § 11(a) (8) ; § 11(a) (9) ; § 11(c) (1) ; § 11(c) (1) (E) ; § 15(a) ; § 15(b) ; § 15(e) (2) ; § 15(f) (2); § 15(i); § 15(j); § 16(a) (1); § 16(c); § 17(a); § 21(c) (1); and a number of other places in the statute.

that discretionary award with "the fixed death benefit" of § 300aa-15(a) (2). (*Id.*) These excerpts, thus, support respondent's position here, insofar as they do not contain any hint that any amount other than the $250,000 is available in a death case. They are not dispositive, however, because they both refer to a "death benefit." Therefore, they could conceivably be viewed as not inconsistent with petitioner's theory that § 300aa-l5(a) (2) provides a defined $250,000 "death benefit," but does not preclude *additional* compensation under § 300aa-15(a)(l), (3), and (4) for damages incurred prior to death.

Of slightly more weight, according to the *Vijil* and *Clifford* opinions, is an excerpt from a document published with a committee report accompanying legislation that modified the Program in 1987. This document was prepared by the Congressional Budget Office, giving an estimate of the potential expenditure under the Program. It stated that "[c]ompensation in the case of a vaccine-related death is set in law at $250,000." (H.R. Rept. No. 100-391(I), 100th Cong., 1st Sess., p. 695, reprinted at 1987 U.S.C.C.A.N. p. 2313-2661.) This statement, of course, goes further than do the above-cited excerpts from the 1986 committee report. That is, it states not merely that the "death benefit" is $250,000, but flatly that the "compensation" with respect to a death is $250,000--implying that the $250,000 is the *entire compensation* available. On the other hand, because it was not technically part of the report *of* the House committee, but rather part of a report by a functionary *to* the committee, this excerpt, too, is of somewhat limited value in determining the Congressional intent.

Finally, in *Vijil* and *Clifford*, the special masters relied upon an additional category of legislative history. This category consists of a series of early Congressional vaccine injury compensation bills which were not themselves enacted, but plainly provided the general structure of the legislation that eventually was enacted into law. First, two bills were introduced in the 98th Congress (the Congress prior to the one that ultimately enacted the Program in 1986). See Senate Bill No. 2117, introduced on November 17, 1983, by Senator Hawkins (printed in the Congressional Record at pp. 33796-33803) and House Bill No. 5810, introduced by Representative Waxman on June 7, 1984. Section 2116(a) of S. 2117 and Section 2106(a) of H.R. 5810 were the direct counterparts of § 300aa-15(a) of the current statute, and each provided as follows:

> Sec. 2116 [2106]. (a) The compensation to be awarded under the Program to eligible persons shall include the following:
>
> (1) Actual unreimbursed expenses and projected expenses of medical care, rehabilitation, developmental evaluation, special education, vocational training and placement, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment and necessary facilities to enable the compensated person to achieve his or her maximum feasible potential and enjoyment of life;
>
> (2) *In the event of a death, compensation of not less than $300,000, nor more than $700,000* for the parents of the victim (or other appropriate family

member as determined by the court), *plus such expenses as may have been incurred under paragraph (1) prior to death*[.]

(Cong. Rec. p. 33800, emphasis added.) Neither S. 2117 nor H.R. 5810 was enacted by the 98th Congress. However, in the 99th Congress, Senator Hawkins introduced, on April 2, 1985, Senate Bill No. 827, containing exactly the same language, with respect to death compensation, quoted above from S. 2117 and H.R. 5810. Representative Waxman, on the other hand, introduced, on July 17, 1986, House Bill No. 5184, which was generally similar to the three bills mentioned above, but contained *different* language as to the compensation in a "death case." H.R. 5184, that is, contained the exact same language that was eventually enacted, and that is codified today as § 300aa-l5(a)(2).

Ultimately, neither S. 827 nor H.R. 5184 was enacted in its original form. But the portion of S. 827 relating to vaccine injury compensation (including, of course, the language quoted above) died in a Senate committee; on the other hand, the bulk of H.R. 5184, after being reintroduced by Representative Waxman as House Bill No. 5546 on September 28, 1986, *was* eventually enacted into law, *including* the provision now codified as § 300aa-15(a)(2).

Thus, the three earlier bills noted above, including S. 827 introduced before the 99th Congress, provided clearly that in the case of a death, the family would receive an amount between $300,000 and $700,000, *plus compensation for any unreimbursed expenses occurring prior to death.* But the subsequent legislation eventually enacted, while retaining the general format of the earlier bills, not only reduced the general death benefit from the discretionary $300,000 -to- $700,000 level to the fixed $250,000 amount, but also *left out entirely* the additional clause that would have provided precisely the type of *supplemental* compensation that petitioner seeks here.

Of course, as I stated in *Vijil*, I do recognize that one must be cautious in making inferences about Congressional intent based upon a single difference between a non-enacted bill and an enacted one, when there were other differences between the two bills as well. But in the circumstances here, I conclude that the *presence* of the above-quoted specific provision in S. 2117, H. R. 5810, and especially S. 827 (which was introduced in the 99th Congress), followed by its *absence* in the similarly-organized legislation that was eventually enacted, does add considerable weight to the view that Congress *considered* adding the language "plus compensation for any unreimbursed expenses occurring prior to death," but, for whatever reason, decided not to do so. In other words, this circumstance adds support to the view that Congress intended $250,000 to be the *entire* compensation available in the case of a deceased vaccine recipient.

c. Summary of the analysis on which respondent relies

In short, the special masters in *Vijil* and *Clifford*, and to some extent the judges in *Sheehan* and *Buxkemper*, based their analyses upon, first, the use of the term "vaccine-related injury" in parts (1), (3), and (4) of § 300aa-15(a)(1), and second, the legislative history. Each of those four opinions indicate the conclusion that the estate of a deceased vaccinee is limited to the $250,000 "death benefit," and may *not* receive any additional compensation. Respondent relies upon this reasoning

in this case. And I find that this statutory interpretation set forth in those opinions, while certainly not free from doubt, is at least a *reasonable* and *plausible* interpretation of the statute.

3. Conclusion

As can be seen by the above discussion, *both* parties to this case have presented interpretations of the statutory provisions in question that have a basis in logic. Both parties' interpretations are reasonable and plausible. The statute is simply unclear, ambiguous, and leaves room for doubt on this point. Therefore, pursuant to the "sovereign immunity doctrine," in the face of two different plausible interpretations, I am required to adopt the more "narrow" and "strict" interpretation--*i.e.*, the interpretation that would produce the more limited waiver of the federal government's immunity from suit. That, of course, means that I must choose the interpretation proposed by respondent. I must conclude, as a matter of law, that when a vaccinee has suffered a vaccine-caused death, the compensation for the vaccinee's estate is limited to the $250,000 "death benefit" of § 300aa-15(a)(2); the estate may not receive any additional compensation pursuant to the provisions of § 300aa-15(a)(1), (3), and (4).

In reaching this conclusion, I find it appropriate to add several additional points. First, I acknowledge that, as petitioner argues, in the particular circumstances of this case, it seems intuitively unfair to deny Ms. Snyder's estate any compensation for the 13-year period between Ms. Snyder's injury and her death. As noted above, this case is different from the typical Program case in which a "death benefit" has been awarded; in most of those cases, little or no time elapsed between the onset of the vaccine-related symptoms and the vaccinee's death. Here, in contrast, Ms. Snyder endured 13 years of suffering.

However, in *Sheehan* and *Clifford* there were also fairly lengthy periods--10 months and 14 months, respectively--between the injury and death, and yet in each case the judge or special master concluded that the statute limited the award to the $250,000 death benefit. *Sheehan*, 19 Cl. Ct. at 322; *Clifford*, 2002 WL 1906520 at *1. Perhaps Congress simply did not anticipate the very unusual situation in this case, in which a vaccinee would be found to have suffered a vaccine-related injury and then to have died as a result of that injury more than 13 years later. But, for whatever reason, Congress simply seems to have established a *general rule* under which the estate of a deceased vaccinee can receive no more than $250,000 under any circumstances. I am powerless to set aside that general rule for this particular case, no matter how unfortunate the specific facts of this case may be.

Second, I also note that I reach my decision on this case even though I am well aware of the statement in the legislative history indicating that Vaccine Act awards are to be made with "generosity." (H.R. Rept. No. 99-908, 99th Cong., 2d Sess. at 3 (reprinted at 1986 U.S.C.C.A.N. at 6344).) Certainly, it seems clear that the *general spirit* behind enactment of the Act was one of generosity to persons who have suffered very unfortunate injuries. Therefore, I candidly acknowledge that my own initial intuitive inclination was to *resist* the idea that the sovereign immunity doctrine should apply to questions of statutory interpretation in Vaccine Act cases,

requiring use of the most narrow interpretation as to close questions. It seems counter-intuitive to apply this doctrine to a statute with such a generous, remedial purpose. Moreover, I personally find some of the dissenting opinions, in the 1990's Supreme Court cases cited above, to be persuasive in arguing *against* the recent trend to rigorously apply the sovereign immunity doctrine. However, those dissenting opinions are, of course, *dissents*; I am bound to follow, instead, the *majority* opinions in those cases, which mandate strict enforcement of the doctrine, even in cases where the statutory scheme involves a remedial program.

Third, I note that, at first glance, the outcome of this issue might seem strange in another sense. That is, had Ms. Snyder lived, she would presumably have been entitled to keep for herself most of the compensation set forth at part IV of this Decision on Remand, a total of about $395,000.[24] Instead, after she suffered a severe *additional* consequence of the vaccination, her death, Ms. Snyder's *estate* will receive a *lesser* amount, $250,000. This result might seem peculiar, at first glance. However, it was apparently the decision of Congress that while a *living* injured vaccinee might receive *more* than $250,000, including, for example, a large "lost earnings" amount sufficient to support that person for the rest of his or her life, Congress simply concluded that the figure of $250,000 was an appropriate *total* amount for the *estate* of a deceased vaccinee.[25] This was simply a policy judgment that Congress made, which I have no power to alter.

In addition, one might also find it strange if one concluded, from the discussion above, that if Ms. Snyder's *death* had *not* been found to be vaccine-related, then her estate would have received the $395,000 figure, so that the fact that her death was found to be vaccine-related has seemingly *reduced* her estate's award from the larger figure to the $250,000 figure. That, however, would be a mistaken assumption. Rather, if Ms. Snyder's *death* had *not* been found to be vaccine-related, then as a matter of law her estate might well have received *no compensation at all*, even in light of her 13 years of vaccine-related illness. That is, a series of rulings by judges and special masters of this court have held that if the vaccinee dies prior to judgment in a Vaccine Act proceeding, and the *death* is found *not* to be vaccine-related, then the estate is not eligible to receive any compensation at all, even though the vaccinee may have lived with a vaccine-related injury for some period prior

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[24]This total of $395,000, consists of the $16,000 for "unreimbursable expenses," $129,000 for "lost earnings," and $250,000 for "pain and suffering." The additional $158,000 for the Medicaid lien, would, in any event, have been payable to the state Medicaid program, and would not have been available to Ms. Snyder.

[25]See, *e.g.*, the observation of Judge Horn in *Buxkemper* that Congress intended only two general categories of compensation, for two types of petitioners--*i.e.*,

> *either* compensation for individuals who *continue to suffer* from a vaccine injury and will have to deal with the costs of that injury for the remainder of his/her life, *or* death benefits, of up to $250,000.00, to the estates of those who have died as a result of a vaccine-related injury.

32 Fed. Cl. at 225 (emphasis added).

to death. See *Cohn v. HHS*, 44 Fed. Cl. 658 (1999); *Buxkemper v. HHS*, 32 Fed. Cl. 213, 225 (1994); *Flannery v. HHS*, 2003 WL 1699396 (Fed. Cl. Spec. Master. Mar. 14, 2003); *Estate of Campbell v. HHS*, 2004 WL 1047393 (Fed. Cl. Spec. Mstr. Apr. 22, 2004). These rulings relied upon § 300aa-11(b)(1)(A), which defines who may *file* a Vaccine Act petition. The decisions note that under § 300aa-11(b)(1)(A), only the following three categories of persons may "file a [Vaccine Act] petition"--

> [1] any person who has sustained a vaccine-related injury, [2] the legal representative of such person if such person is a minor or is disabled, or [3] the legal representative of any person who died as the result of the administration of a vaccine.

§300aa-11(b)(1)(A). The rulings conclude that in the case of a deceased vaccinee who died of a non-vaccine cause, the estate of the vaccinee cannot be a proper Vaccine Act "petitioner," with standing to prosecute a Vaccine Act petition, because the estate cannot fit within one of those three categories. *Flannery* and *Campbell*, indeed, both involved cases in which, as here, an adult vaccinee filed a petition on her own behalf; in each case, the vaccinee then died of a non-vaccine cause before a decision in the case was filed.[26] In each of those cases, the special master concluded that, as a matter of law, the administrator of the deceased's estate could *not* become a proper substitute "petitioner" and seek an award for the vaccinee's claimed pre-death damages.

To be sure, a reasonable argument could be made in this case that since Ms. Snyder was alive when she *filed* the petition, the petition was properly *filed* pursuant to § 300aa-11(b)(1)(A), and that § 300aa-11(b)(1)(A) therefore would *not* prohibit the substitution of an executor to *maintain* (not file) the claim. *See Andrews v. Secretary of HHS*, 33 Fed. Cl. 767 (1995), affirming 1995 WL 262294 (Fed. Cl. Spec. Mstr. Apr. 20, 1995). Thus, again, there is more than one plausible interpretation of the statute concerning this legal issue as well. But *Flannery* and *Campbell*, I believe, do present an interpretation of the statute that is at least *plausible*, so that, under the sovereign immunity rule of "strict construction," that interpretation would have to be adopted as the proper interpretation of § 300aa-11(b)(1)(A). Therefore, given the heavy hand of the sovereign immunity doctrine, it seems that absent a finding of a vaccine-related death, Ms. Snyder's estate likely would not have qualified for *any* Vaccine Act compensation.

In short, for the reasons stated above, based upon the ambiguous statutory language and the "strict construction" principle, I find that I have no choice but to conclude as a matter of law that Ms. Snyder's estate is entitled to the $250,000 death benefit under § 300aa-15(a)(2), but *not* to any additional compensation pursuant to § 300aa-15(a)(1), (3), and (4).

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[26]In each of the *Cohn* and *Buxkemper* cases, in contrast, the vaccinee had died of a non-vaccine cause *prior* to the filing of the petition.

VII

CONCLUSION

Accordingly, my Decision on Remand in this case is that the current petitioner, Ms. Zatuchni, is entitled to a Program award in the amount of $250,000, on behalf of the estate of Ms. Snyder.

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George L. Hastings, Jr.
Special Master

STATUTORY APPENDIX

§ 300aa-15. Compensation

(a) General rule.

Compensation awarded under the Program to a petitioner under section 300aa-11 of this title for a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, shall include the following:

(1)(a) Actual unreimbursable expenses incurred from the date of the judgment awarding such expenses and reasonable projected unreimbursable expenses which--

(i) result from the vaccine-related injury for which the petitioner seeks compensation,

(ii) have been or will be incurred by or on behalf of the person who suffered such injury, and

(iii)(I) have been or will be for diagnosis and medical or other remedial care determined to be reasonably necessary, or

(II) have been or will be for rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary.

(B) Subject to section 300aa-16(a)(2) of this title, actual unreimbursable expenses incurred before the date of the judgment awarding such expenses which--

(i) resulted from the vaccine-related injury for which the petitioner seeks compensation,

(ii) were incurred by or on behalf of the person who suffered such injury, and

(iii) were for diagnosis, medical or other remedial care, rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary.

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

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

(B) In the case of any person who has sustained a vaccine-related injury before attaining the age of 18 and who earning capacity is or has been impaired by reason of such person's vaccine-related injury for which compensation is to be awarded and who 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.