

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS  
No. 99-430V  
Filed: March 6, 2007  
To be Published**

*****		
RONNIE D. SANDERS, SR.,	*	
	*	
Petitioner,	*	
	*	
v.	*	Death of Petitioner;
	*	Appointment of Executor;
	*	Motion to Substitute
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	
*****		

**ORDER<sup>1</sup>**

**Vowell**, Special Master:

On July 2, 1999, petitioner Ronnie D. Sanders [“petitioner” or “Mr. Sanders”] timely filed a petition for compensation under the National Childhood Vaccine Injury Act, [“Vaccine Act” or “Program”], 42 U.S.C. § 300aa-10 *et. seq.*<sup>2</sup> The petition alleged that hepatitis B vaccinations Mr. Sanders received on or about January 27 and February 24, 1994, caused an unspecified adverse reaction. Petition [“Pet.”] at 1. None of the statutorily required supporting documentation accompanied the petition.<sup>3</sup> For over two

---

<sup>1</sup> Because I have designated this order to be published, petitioner has 14 days to request redaction of any material “that includes medical files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b); 42 U.S.C. § 300aa12(d)(4)(B). Otherwise, the entire decision will be publicly available. *Id.*

<sup>2</sup> Hereinafter, for ease of citation, all “§” references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2000 ed.).

<sup>3</sup> Section 300aa–11(c) of the Vaccine Act requires the petition to be accompanied by certain documentary evidence, including records pertaining to the vaccination and subsequent treatment. See *also*, Vaccine Rule 2(e), RCFC, Appendix B.

years, the petitioner failed to file any medical records or his affidavit.<sup>4</sup> The special master assigned to this case ordered him to file a single medical record in support of his claim by March 8, 2002, or his case would be dismissed for failure to prosecute. See Order, dated August 29, 2001. Petitioner filed numerous medical records and other documents in response to this order, but by March 21, 2002, petitioner had not filed proof of immunization or an affidavit. See Respondent's Status Report, dated March 21, 2002, and Petitioner's Exhibits ["Pet. Ex."] 1-7. Petitioner later identified his adverse reaction as rheumatoid arthritis ["RA"]. See Status Report, dated August 5, 2005.<sup>5</sup>

On December 5, 2002, this case was reassigned to Chief Special Master Golkiewicz. At the request of petitioner's counsel, this case was grouped with a number of other cases also alleging that the hepatitis B vaccine caused RA. Five "test cases" for this theory were tried in an omnibus proceeding on June 11-12, 2003, in which petitioner's counsel participated and over which Chief Special Master Golkiewicz presided. He ruled in *Capizzano v. Sec'y, HHS* ["*Capizzano I*"], No. 00-759V, 2004 WL 1399178 (Fed. Cl. Spec. Mstr., 2004), that hepatitis B vaccine could cause RA.<sup>6</sup>

After the omnibus hearing, Chief Special Master Golkiewicz ordered petitioner to file a status report indicating how he intended to proceed, in light of the decision in *Althen v. Sec'y, HHS*, No. 00-170V (Fed. Cl. 2003).<sup>7</sup> See Order, dated October 3, 2003.<sup>8</sup> Petitioner complied. A more specific order issued on February 1, 2005 directed petitioner to describe with particularity how his case compared to the facts of the

---

<sup>4</sup> At petitioner's request, the proceedings in this case were suspended for 180 days of this period. See Order, dated March 13, 2000.

<sup>5</sup> Petitioner had apparently orally identified this case as involving RA prior to the omnibus causation hearing in *Capizzano I*, but none of the status reports filed prior to August 5, 2005 explicitly stated so.

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

<sup>7</sup> The order was issued in the case of *Andersen v. Sec'y, HHS*, No. 99-380V, which was treated by the court as a master file for all the hepatitis B cases alleging RA as the injury.

<sup>8</sup> This order was actually issued in *Capizzano* and other "Hepatitis B rheumatoid arthritis cases." Petitioner's case was not specifically identified in the caption of the order and the docket sheet for this petitioner's case does not reflect filing of this order. However, it is apparent from the record that counsel for both sides and the assigned special master treated this case as part of the omnibus proceeding dealing with hepatitis B and RA.

*Capizzano I* decision, and warned that the opinion of a qualified expert was required to substantiate the claim for compensation.

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

Petitioner filed a status report on August 16, 2006, indicating that he had been ill, and also filed a motion on August 17, 2006, requesting additional time to file the outstanding medical records. I granted that request, setting a date of September 18, 2006 for these records to be filed. Order, dated August 28, 2006. On September 16, 2006, petitioner's counsel filed a report requesting a status conference and informing the court that petitioner had died on September 9, 2006. Counsel also requested that any further action on this case be stayed until a decision in a case pending before the Court of Federal Claims was issued.<sup>9</sup> The requested status conference was held on September 26, 2006. I granted a request for delay in filing medical records between this status conference and another status conference on November 7, 2006.

At the November 7, 2006 status conference, petitioner's counsel informed the court that petitioner's death on September 9, 2006 was unrelated to his alleged vaccine injury. As the decision in *Zatuchni III* had been issued on October 31, 2006, I ordered petitioner's counsel to brief the issue of whether petitioner's claim for a vaccine injury survived his death from unrelated causes, and directed that the brief be filed by December 22, 2006. Order, dated November 13, 2006.

Petitioner's counsel failed to file either the brief or a motion for enlargement. I therefore held a recorded status conference on January 10, 2007, during which petitioner's counsel apologized for missing the deadline and again represented that petitioner's death was from cancer, a cause unrelated to the alleged vaccine injury. I set new deadlines for the filing of briefs on the issue of the survival of petitioner's claim. Counsel for both sides have filed the briefs as ordered.<sup>10</sup>

Petitioner's counsel also filed petitioner's death certificate (Pet. Ex. 59) on

---

<sup>9</sup> Although petitioner's status report incorrectly identified the pending case, subsequent discussions clarified that the case was *Zatuchni v. Sec'y, HHS*, [*Zatuchni III*].

<sup>10</sup> Petitioner's counsel apparently decided to forego filing the optional reply brief, as none was received by the due date.

November 9, 2006; a copy of petitioner's will (Pet. Ex. 61) on January 17, 2007; a motion to amend the caption of this case by substituting petitioner's wife in her capacity as the executor of petitioner's estate, filed on January 17, 2007; and a status report filed on February 14, 2007, indicating that no letters of administration appointing Mrs. Sanders as executor would be filed in this case.

At this juncture, the petition for compensation has never been amended to reflect petitioner's actual injury, no affidavit has been filed, and no medical record or report filed causally connects either petitioner's medical condition or his death<sup>11</sup> to the 1994 hepatitis B vaccinations.

This case presents several issues for the court. The initial issue is the motion to substitute Mrs. Sanders as petitioner in the capacity of executor of Mr. Sanders' estate. The motion to substitute raises an additional issue: Has Mrs. Sanders been properly appointed to represent her deceased husband's estate? The more fundamental question of whether the estate may maintain the action Mr. Sanders began in 1999—whether Mr. Sanders' claim of a vaccine-related injury survives his death from causes unrelated to the vaccine—will be deferred until the issue of substitution is resolved.

Addressing the issue of Mrs. Sanders' representative capacity first, I have before me the death certificate (Pet. Ex. 59) and Mr. Sanders' will (Pet. Ex. 61). The death certificate is adequate to establish the fact that the petitioner in this case died on September 9, 2006 and the will indicates that Mr. Sanders' desired to have his wife, Elizabeth Sanders, serve as executor of his estate. In the event she is unable to serve, he nominated his two sons as co-executors. Pet. Ex. 61, p. 2. What is lacking is any evidence that a court of competent jurisdiction has appointed Mrs. Sanders as the executor. In my Order of January 17, 2007, I directed petitioner's counsel to file documents related to the administration of petitioner's estate by no later than February 9, 2007. Instead of filing letters testamentary, letters of administration, or other documents reflecting Mrs. Sanders' appointment as executor, petitioner's counsel filed a status report indicating:

Counsel has spoken at length with Petitioner's trusts & estate attorney and has been informed of the following. First, all properties under Mr. Sanders' will (his estate) were held in joint tenancy with Mrs. Sanders. As a result, at his death, the property transferred immediately to Mrs. Sanders without necessitating the will be formally submitted to probate. Under Illinois law, Mr. Sanders has no additional estate and no further action by Mrs. Sanders is required to administer Mr. Sanders' assets – which are now Mrs. Sanders' assets. No further documents, e.g. letters of

---

<sup>11</sup> Mr. Sanders died of metastasized lung cancer. Pet. Ex. 59. Petitioner's counsel has conceded that this cancer has no relationship to RA. Recorded status conference, January 10, 2007.

administration, will issue in this case, and consequently, Petitioner will have nothing further to submit.

Petitioner's Status Report, dated February 14, 2007.

It appears from the above statement that, under the law of the state where Mr. Sanders resided at the time of his death (Illinois), probate of his will was unnecessary to transfer ownership of property he jointly owned with his wife. However, Mr. Sanders' interest in the Vaccine Act petition he filed in 1999 cannot be considered a joint asset; it was filed in his name alone for his alleged injuries.<sup>12</sup> By the terms of his will, Mrs. Sanders inherits the entirety of Mr. Sanders' estate. Assuming, *arguendo*, that the claim for compensation survives his death, any compensation awarded would be transferred to Mr. Sanders' estate and be inherited by Mrs. Sanders absent any outside claims on the estate.

Being the heir, however, is an issue separate from that of appointment as the executor. His will does not appoint her as executor of his estate; his will expresses his desire that she be so appointed. State courts, normally probate courts, appoint executors. While they usually follow the desires expressed in the decedent's will, they are not required to do so. An individual may be capable of inheriting an estate, but through physical or mental infirmity or lack of desire, may be unable to serve as executor. While motions to recaption cases are routinely granted when the original petition was filed on behalf of a minor and the petitioner has reached the age of majority, this case presents a different issue.

None of the Vaccine Rules address the issue of substitution. If the Rules of the Court of Federal Claims ["RCFC"] applied to this case, Rule 25 might indicate that the motion to substitute was not timely filed as it was filed more than 90 days after the court was notified of petitioner's death.<sup>13</sup> However, Vaccine Rule 1 provides that the RCFC "apply only to the extent referenced in the Vaccine Rules." See *Stevens v. Sec'y, HHS*, 31 Fed. Cl. 12, 21 (Fed. Cl. 1994) (Vaccine Rules, not Court of Federal Claims rules or Fed. R. Civ. P., govern filing of Vaccine Act petitions). See also, *Snyder v. Sec'y, HHS*, 69 Fed. Cl. 390 (Memorandum and Order, January 24, 2006) (noting that counsel for a deceased petitioner may continue to act on that party's behalf pending appointment of an executor).

---

<sup>12</sup> § 300aa-11(b)(1)(A) provides that the following persons may file petitions for compensation: "[A]ny person who has sustained a vaccine-related injury, the legal representative of such person if such person is a minor or is disabled, or the legal representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table... ."

<sup>13</sup> RCFC 25(a)(1) requires service of a statement of the fact of the death and the 90 day period begins running at that point. Petitioner's counsel notified the court and opposing counsel of petitioner's death in his September 16, 2006 status report.

In this case, while counsel has continued to act on behalf of Mr. Sanders, he has also informed the court that no administrator has been or will be appointed. Generally speaking, an attorney-client relationship does not survive the death of the client. 7 American Jurisprudence 2d Attorneys at Law § 171 (1980) *cited with approval in Washington v. Caseyville Health Care Association*, 159 Ill.App.3d 743, 512 N.E.2d 1080, 111 Ill. Dec. 539 (1987) and *In re Marriage of Fredricksen*, 159 Ill. App. 3d 743, 512 N.E.2d 1080, 111 Ill. Dec. 539 (1987). An attorney may continue represent the interests of a deceased client only if authorized to do so by the personal representative of the client. *Id.* See also, *7A Corpus Juris Secundum, Attorney & Client § 274 (2007)*. *But see, Snyder*, 69 Fed. Cl. at 392 (indicating that under RCFC 25, counsel for a deceased petitioner may be considered that petitioner's "representative").

Under Illinois law, the powers of a person named as an executor are limited, extending only to matters pertaining to funerals, burials, and the preservation of the estate. Illinois Probate Act of 1975, § 755 ILCS 5/6-14. Section 755 ILCS 5/6-3(a) of that Act requires a person with knowledge who knows he or she is named as executor of the will to have the will admitted to probate within 30 days of the death or to declare his refusal to act as executor. If no petition to admit the will to probate is filed, the court may do so *sua sponte*, unless it appears that probating the will is unnecessary. § 755 ILCS 5/6-3(b)

Special masters are neither bound by their own decisions nor by cases from the Court of Federal Claims except in the same case on remand, therefore the decision in *Snyder* does not bind me in this matter. See *Guillory v. U.S.*, 59 Fed. Cl. 121, 124 (2003). Setting that fact aside, Judge Wheeler's decision in *Snyder*, 69 Fed. Cl. at 392, indicating that a deceased petitioner's former attorney could continue to represent her interests on appeal, was based on facts distinguishable from those in this case. Ms. Snyder died after her causation hearing, but the court and her attorney were not aware of her death until after the special master's decision denying her petition was on review at the Court of Federal Claims. Ms. Snyder had named an executor in her will, but the person so named declined to serve. The Delaware court system was in the process of appointing an executor while the motion for review of the special master's causation decision was pending. Judge Wheeler granted the motion to substitute pursuant to RCFC 25 only after petitioner's counsel filed a copy of a document granting Ms. Zatuchni the authority to represent Ms. Snyder's estate. Here, I not only do not have such a document, counsel has informed me that no such authority will be sought.

Absent Mrs. Sanders' appointment by a court of competent jurisdiction to administer whatever interest Mr. Sanders' estate may have in his petition for compensation, I cannot grant the motion to recaption this case. Reviewing the status report of February 14, 2007, I am uncertain whether counsel fully understood the issue raised by Mrs. Sanders' decision not to seek appointment as her deceased husband's executor. While the status report does contain the language "No further documents, e.g. letters of administration, will issue in this case, and consequently, Petitioner will have nothing further to submit," I am not certain that counsel or Mrs. Sanders are fully

cognizant of the consequences of this inaction.

Accordingly, **the motion to recaption is DENIED. Petitioner's counsel may refile the motion, accompanied by evidence indicating that a court of competent jurisdiction has appointed an executor for Mr. Sanders' estate, by March 30, 2007. A failure to comply will result in the dismissal of the petition.**

**IT IS SO ORDERED.**

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