

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-2820V

Filed: October 26, 2011

HARRY TEMBENIS and GINA TEMBENIS,)	
administrators of the estate of)	
ELIAS TEMBENIS, deceased)	
)	
Petitioners,)	Damages; vaccine-related injury;
)	<u>Zatuchni</u> , Diphtheria-Tetanus-
v.)	acellular-Pertussis (DTaP);
)	whether parents of deceased
SECRETARY OF)	child may recover for his lost
HEALTH AND HUMAN SERVICES,)	earning capacity; sufficient
)	severity; reasonable anticipation
)	
Respondent.)	
)	

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, M.A. for Petitioners.
Ryan D. Pyles, United States Department of Justice, Washington, D.C. for Respondent.

RULING ON COMPENSATION FOR LOST EARNINGS OF ELIAS TEMBENIS¹

LORD, Special Master.

I. INTRODUCTION AND SUMMARY

On December 16, 2003, Petitioner Harry Tembenis filed this case on behalf of his son, Elias Tembenis, under the National Childhood Vaccine Injury Act (“Vaccine Act” or “Act”).² At that time, Mr. Tembenis, as the sole Petitioner, filed a “Short-Form Autism Petition for Vaccine Compensation,” and joined the Omnibus Autism Proceeding (“OAP”). On August 27, 2008, Mr. Tembenis filed a notice to proceed separately from the OAP. He also filed an amended petition alleging that a Diphtheria-Tetanus-

¹ In accordance with Vaccine Rule 18(b), petitioner has 14 days to file a proper motion seeking redaction of medical or other information that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Redactions ordered by the special master, if any, will appear in the decision as posted on the United States Court of Federal Claims’ website.

² The National Vaccine Injury Compensation Program (“Vaccine Program”) comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (2010). Hereinafter, individual section references will be to 42 U.S.C. § 300aa of the Vaccine Act.

acellular-Pertussis (“DTaP”) vaccination administered on December 26, 2000, caused Elias to develop a seizure disorder that eventually led to his death on November 17, 2007.³ On November 13, 2008, the caption was amended to name Harry and Gina Tembenis, administrators of Elias’s estate, as Petitioners. An entitlement hearing was convened on October 23, 2009.

On November 29, 2010, I issued a decision that Petitioners were entitled to compensation. On January 3, 2011, I ordered the parties to file a joint status report within 30 days detailing the parties’ efforts to resolve the damages portion of the case. On May 2, 2011, the parties filed a joint status report in which they stated that “there are irreconcilable differences with regard to damages.” Joint Status Rep. 1, ECF No. 61. Specifically, the parties were unable to agree on an appropriate amount of compensation for lost wages. Id. I ordered briefing on the issue of whether the Act provides compensation for lost earnings of a vaccinee who died in childhood, before receiving an award. Briefing was completed on August 25, 2011, and the matter is now ripe for decision.

The issue presented is purely legal: whether compensation for a deceased, minor vaccinee is provided by section 300aa-15(a)(3)(B):

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

42 U.S.C. § 300aa-15(a)(3)(B).

The Secretary maintains that compensation is not permitted for future lost earnings when a minor vaccinee dies before receiving an award, because it cannot be “anticipated” that such an individual would be likely to suffer impaired earnings at age 18. Resp’t Br. at 3. Accordingly, only losses incurred before a vaccinee’s decease are allowed, even if the cause of death is vaccination. Id. The Secretary maintains that awarding lost earnings to a deceased vaccinee would duplicate the \$250,000 statutory

³ Elias was admitted to the emergency room with a fever and a cough on November 16, 2007. Pet’r Ex. 16 at 2. While there, he suffered a seizure and went into status epilepticus, followed by bradycardiac arrest. Id. at 14. On November 17, 2007, due to the absence of any neurologic functioning and overwhelming organ failure, it was decided to withdraw aggressive life support. Id. at 36. Elias was pronounced dead six minutes later. Id. The immediate cause of death was multisystem organ failure, which was a consequence of cardiac arrest, which was a consequence of Elias’s seizure disorder. Pet’r Ex. 15 at 393.

award for death in section 15(a)(2). Resp't Br. at 6. The Secretary recognizes that the Federal Circuit in Zatuchni v. Sec'y of Dep't of Health & Human Servs., 516 F.3d 1312 (Fed. Cir. 2008), held that the compensation provided in sections 15(a)(1), (3) and (4) is not duplicative of the death award in section 15(a)(2), but argues that the vaccinee's representative in Zatuchni did not seek, and was not awarded, compensation for "future" lost wages. Id. at 9.

(1) As in Zatuchni, the plain and natural meaning of section 15(a)(3)(B) contradicts the Secretary's arguments. The provision states that if a vaccinee's injury is severe enough that it could be anticipated to cause a person at age 18 to suffer lost wages, compensation should be awarded. See Edgar v. Sec'y of Dep't of Health & Human Servs., 989 F.2d 473 (Fed. Cir.1993), (holding that compensation for loss of earnings may not be diminished in the event of the vaccinee's premature death). There is no requirement, express or implied, that a vaccinee must actually survive to age 18, or be found likely to survive, to obtain compensation.

(2) The Secretary's interpretation does not give effect to the plain meaning of the words Congress used and the context in which they appear. The language concerning "anticipation" must be read in conjunction with the language concerning the "severity of the injury" suffered and the lost earning "capacity." Instead, the Secretary isolates the phrase "impaired earning capacity at age 18," to conclude that a child who does not survive to age 18 should receive no compensation for lost earnings. This distorts the provision by omitting key concepts. The statute on its face requires that in the case of a minor vaccinee the severity of the injury must be considered at the time of the award to anticipate loss of earning capacity. The language does not imply that survival to the age of 18 must be anticipated.

The Secretary's interpretation also distorts the plain meaning by adding to the words a concept that Congress did not include – the necessity for actual lost earnings. The Secretary argues, "Because Elias' death at age seven years effectively forecloses the possibility of him ever having suffered an actual loss of earning capacity, petitioners are not entitled to receive an award for his lost earnings under the statute." Resp't Br. at 5 (emphasis in original). When Congress meant to restrict the compensation available under section 15(a) to amounts actually incurred, it said so explicitly. See §§ 300aa-15(a)(1)(A) and (B) (compensating for "actual unreimbursable expenses"). One must assume, therefore, that omission of the word "actual" from the text of section 15(a)(3)(B) was deliberate.

(3) The Secretary argues further that in no case, whether under section 15(a)(3)(A) (adult vaccinees) or (B) (minor vaccinees), may future lost earnings be awarded to survivors on behalf of a deceased individual. Such compensation would be duplicative of the award for death in section 15(a)(2). Resp't Br. at 7-8.

Zatuchni expressly states, however, that each of the elements of compensation set forth in section 15(a) is available to the successor of a deceased vaccinee.

[I]f a petition is properly filed by a person who suffered a vaccine-related injury, but that person dies of vaccine-related causes while her claim is pending, § 300aa-11(b)(1)(A) does not prevent – directly or by implication – the legal representative of the estate of such a person from requesting each of the categories of compensation listed in § 300aa-15(a) after they have been properly substituted for the deceased petitioner.

Zatuchni, 516 F.3d at 1321 (emphasis added). Although this is dictum, no persuasive argument has been presented by the Secretary to overturn the Circuit’s stated conclusion in Zatuchni.

Accordingly, where, as in this case, a child suffers a severe seizure disorder as a result of vaccination, it certainly can be anticipated that the child’s earning capacity will be impaired at age 18. If the child succumbs to his vaccine-related injury, his successors may obtain compensation for his loss of future earnings pursuant to section 15(a)(3)(B) of the Act.

II. DISCUSSION

A. Zatuchni Makes Available All Elements of Compensation To Successors of a Deceased Petitioner.

In Zatuchni, a petitioner who alleged a vaccine injury at the age of 45 died before her case was concluded. 516 F.3d at 1314. The question was whether the petitioner’s estate could “receive the compensation for medical expenses, lost wages, and pain and suffering provided for under 42 U.S.C. § 300aa-15(a)(1), (3), and (4), in addition to the \$250,000 death benefit provided for under § 300aa-15(a)(2).” Id. at 1315. The Federal Circuit held that the enumerated elements of compensation were available to the estate of the deceased vaccinee. Id. at 1319. “Most important,” in the Circuit’s analysis, were the text and structure of section 15(a), which lists the death award “alongside” the provisions compensating for lost wages, pain and suffering. Id. at 1318. The Court found no evidence in the text of section 15(a) that the death award “is the only compensation that may be paid in a ‘death case[.]’” Rather, the language Congress used was “inclusive.” Id.

Rejecting the Secretary’s restrictive interpretation of section 15(a), the Circuit stated that the vaccinee’s death did “not alter the fact that certain expenses were incurred, wages lost, or pain and suffering endured in the interim, and these damages are no less related to or caused by a vaccine-related injury . . . simply because the vaccine-injured person in question is no longer living.” 516 F.3d at 1319-20. Awarding compensation in addition to the amount for death is not inconsistent with section 15(a), the Circuit held. “To the contrary, this is the reading of § 300aa-15(a) that most naturally flows from its text and structure.” Id. at 1319.

Section 15(a)(3)(B) was not specifically addressed in Zatuchni, since the vaccinee in that case suffered her alleged injury in adulthood. The reasoning of

Zatuchni applies, however, in the case of a child vaccinee, no less than an adult. The Circuit has indicated that all the forms of compensation set forth in § 15(a) are available in the case of a deceased petitioner, and the statute specifically provides in section 15(a)(3)(B) for compensation to minor children. See Zatuchni, 516 F.3d at 1322 (stating “that recovery under § 300aa-15(a)(1) through (4) is permitted” following the death of the vaccinee). On its face, the statute does not discriminate between stricken vaccinees who die as children and those who perish in adulthood. For the reasons discussed below, I find no persuasive reason to imply the intent to draw such a distinction.

Nor, in light of Zatuchni, do I find an occasion to engage in a comprehensive analysis of whether Congress intended to include survivorship among the rights afforded petitioners under the statute. The majority’s analysis in Zatuchni proceeded under the plain terms of the Act and its structure, without reference to federal or state law. See Zatuchni, 516 F.3d at 1321 n.10 (eschewing any attempt “to ‘harmonize’ the Act with state law,” in favor of “follow[ing] the unambiguous language of the Act”). As the Circuit reasoned, the provisions compensating for death are “alongside” those affording other forms of compensation, not separate and distinct from them. Id. at 1320. To construe the statute in accordance with Zatuchni, the same approach used by the Federal Circuit should be adopted. This gives effect to the natural meaning of the words Congress used in the context of section 15(a) as a whole, and comports with the structure and intent of the Act.⁴

Zatuchni also counsels against adoption of the Secretary’s policy arguments. In particular, the Secretary asserts that Congress’s concern about the sufficiency of funds for the Vaccine Program should restrict the recovery by an individual who died as a result of vaccination. Resp’t Br. at 5-6. Zatuchni held to the contrary, based on the express legislative history indicating that Congress intended that the Act’s provisions be administered with “‘generosity[.]’” See Zatuchni, 516 F.3d at 1316 (citing and quoting legislative history).

B. Section 15(a)(3)(B) Supports Awarding Compensation.

1. The Statute Provides Compensation For Present Loss of Future, Anticipated Earning Capacity.

The Secretary questions whether Zatuchni applies here because Petitioners seek compensation for future, as opposed to actual, incurred loss. Since Elias died as a

⁴ Similarly, the question of sovereign immunity, see Resp’t Br. at 10-11, does not arise where, as here, congressional intent to waive it is clear. See Zatuchni, 516 F.3d at 1323 (doctrine of sovereign immunity does not “require us to ignore what we see as the plain reading of 42 U.S.C. § 300aa-15(a)”); “Clear evidence of legislative intent prevails over other principles of statutory construction[.]” Stotts v. Sec’y of Dep’t of Health & Human Servs., 23 Cl. Ct. 352, 364 (1991) (citing and quoting Neptune Mutual Ass’n., Ltd. of Bermuda v. United States, 862 F.2d 1546, 1549 (Fed. Cir. 1988)).

result of his vaccine injury before he was awarded compensation, the Secretary maintains that the element of compensation for lost earnings is unavailable because Elias cannot possibly suffer lost earnings in the future.

The Secretary misconstrues the nature of the loss, which is present loss of the capacity to earn in the future. Elias had a certain capacity to earn in adulthood before he was injured by vaccination; after vaccination, that capacity was impaired. The intent of section 15(a)(3)(B) on its face is not to compensate for actual lost earning capacity, but for the future, “anticipated” loss of the capacity to earn. This intent is embodied in the language Congress used, which requires that a special master determine if the “vaccine-related injury is of sufficient severity to permit reasonable anticipation that [the petitioner] is likely to suffer impaired earning capacity at age 18 and beyond” § 300aa-15(a)(3)(B).

The phrase “reasonable anticipation” relates as much to severity of the vaccine-related injury as to loss of earnings. Thus, the special master is to determine whether the nature and severity of the minor child’s injury is such that impairment of earning capacity in adulthood could reasonably be anticipated. This meaning emerges clearly from the language used in the statute, which must be applied as written. See Zatushni, 516 F.3d at 1321 n.10 (noting the court’s obligation to “follow the unambiguous language of the Act”).⁵

Section 15(a)(3)(B) directs the special master to consider the age of 18 and beyond as the time period for which future lost earnings should be calculated. The provision construed as a whole does not explicitly or implicitly direct a special master to determine whether the child actually will reach the age of 18, or suffer actual loss of earnings. “It is plainly evident that § 300aa-15(a)(3)(B) [which] provides the special master with the authority to award compensation for **impaired earning capacity** measured by lost **earnings**, simply codifies the manner in which they must be calculated, and specifies only that they are to be *calculated* from the **age of 18** if the individual suffered a vaccine-related injury before that time.”) Stotts v. Sec’y of Dep’t of Health & Human Servs., 23 Cl. Ct. 352 at 365 (1991) (emphasis in original).

That the child in Stotts was alive at the time the award was made does not vitiate the significance of the passage quoted above. But see Resp’t Br. at 9-10 (attempting to distinguish Stotts). Stotts does not indicate that a child must actually survive until the

⁵ The court in Stotts reached the same result using similar reasoning. Stotts noted that the compensation is for loss of the “capacity” to earn, not for actual lost earnings. The loss of capacity to earn occurs at the time of the injury; thus the award must be made in anticipation of the loss of earning that will result (based on severity of the injury) over the child’s anticipated work life, calculated from the age of 18, regardless of what the child’s actual life experience may turn out to be. “Under the plain language of § 300aa-15(a)(3)(B), one could sensibly argue that the vaccine-related injury being compensated is *loss of earning capacity*, not *loss of actual earnings*.” 23 Cl. Ct. at 366 n.13 (emphasis in original).

age of 18 to qualify for compensation. Historically, many children in the Vaccine Program have received compensation for lost earnings without a finding that the victim actually would survive to age 18, and without the Secretary even contending that actual survival to that age was an issue.⁶ The happenstance of a vaccinee's death from his vaccine-related injury is merely that – an event without legal significance insofar as application of the statutory provision on lost wages is concerned. Contra Sarver, No. 07-307V, slip op. at 10 n.5 (Fed. Cl. Spec. Mstr. Nov. 16, 2009) (“What is required is that the special master reasonably anticipate, when making his (or her) decision about damages, that the person is likely to be alive at age 18 and beyond.”)

Similarly, the principle that a special master should consider all the information available at the time an award is made does not indicate that a deceased child is entitled to no compensation for future lost wages. See McAllister v. Sec'y of Dep't of Health & Human Servs., 70 F.3d 1240, 1243 (Fed. Cir. 1995) (cited in Sarver, slip op. at 10) (“[C]ompensation in a Vaccine Act case is ordinarily calculated as of the time of the special master's decision that leads to the final judgment in the case.”). McAllister means simply that a special master, at the time an award is made, must take into account all the available information concerning the effect of the severity of the vaccinee's injury on his capacity to earn after the age of 18. McAllister does not mean that a child who has died before the age of 18 therefore is entitled to no compensation. If McAllister offers any guidance regarding the issue presented here, it is that a child who dies as the result of vaccination, based on the severity of his vaccine-related injury, is entitled to 100% compensation for future lost wages, not 0%. See Rivera v. Sec'y of Dep't of Health & Human Servs., 1992 WL 198853, at *5 (Ct. Cl. Spec. Mstr. July 31, 1992) (to take into account diminished life expectancy in awarding annuity “would take unfair advantage of the severity of [vaccinee's] injuries.”).⁷

2. The Secretary's Interpretation Is Not Plausible.

As set forth by the Secretary in her brief, “Respondent reads section 15(a)(3)(B) . . . as requiring that compensation for a minor's lost wages be based upon the “reasonable anticipation” that the claimant “is likely to suffer impaired earning capacity at age 18 and beyond.”” Resp't Br. at 4. The Secretary contends that the special

⁶ See, e.g., Holihan v. Sec'y of Dept of Health & Human Servs., 45 Fed. Cl. 201 (1999); Watkins v. Sec'y of Dep't of Health & Human Servs., 1999 WL 199057 (Fed. Cl. Spec. Mstr. Mar. 12, 1999); Brewer v. Sec'y of Dep't of Health & Human Servs., 1996 WL 147722 (Fed. Cl. Spec. Mstr. Mar. 18, 1996); Fouk v. Sec'y of Dep't of Health & Human Servs., 1993 WL 189960 (Fed. Cl. Spec. Mstr. May 17, 1993); Kircher v. Sec'y of Dep't of Health & Human Servs., 1992 WL 78537 (Ct. Cl. Spec. Mstr. Mar. 23, 1992); Wasson v. Sec'y of Dep't of Health & Human Servs., 1991 WL 20077 (Ct. Cl. Spec. Mstr. Jan. 10, 1991); Latorre v. Sec'y of Dep't of Health & Human Servs., 1990 WL 290313 (Ct.Cl. Spec. Mstr. June 15, 1990); Clark v. Sec'y of Dep't of Health & Human Servs., 19 Ct. Cl. 113 (1989); Reddish v. Sec'y of Dep't of Health & Human Servs., 18 Ct. Cl. 366 (1989); Beck v. Sec'y of Dep't of Health & Human Servs., 1989 WL 250082 (Ct. Cl. Spec. Mstr. Aug. 17, 1989).

⁷ This discussion assumes that the victim's death, as in this case, was vaccine-related. If the victim's death were unrelated to vaccination, the amount of compensation would reflect the severity of the vaccine-related injury.

master must anticipate loss of the capacity to earn when the victim of a vaccine injury actually reaches age 18 – meaning that the vaccinee must be found likely to reach the age of 18 in order to qualify for any compensation of future lost earnings.

The statute provides compensation to a child whose “vaccine-related injury is of sufficient severity to permit reasonable anticipation” of diminished capacity to earn in adulthood. § 300aa-15(a)(3)(B). Granted that section 15(a)(3)(B) lacks stylistic grace (being one sentence comprised of 11 lines of text), its meaning is nevertheless clear. It incorporates, in the following order, the concepts of “earning capacity,” “vaccine-related injury,” “sufficient severity,” and “reasonable anticipation” of a loss of “earning capacity at age 18 and beyond[.]” Id. If these concepts are put together in the order promulgated by Congress, the sentence cannot be read in the way the Secretary has construed it: to permit compensation only for actual lost earnings at and beyond age 18. Instead, it must be read to provide compensation for anticipated future loss during adulthood, based on the severity of a child’s present vaccine injury.

Only by isolating certain phrases and removing them from their context can it be asserted that Congress in section 15(a)(3)(B) was “‘looking ahead’ to an actual loss of earnings,” as opposed to a “hypothetical” loss in the future. Resp’t Br. at 4 (emphasis in original). As the Circuit noted in Edgar, the actual loss of earning capacity at age 18 is not a prerequisite to compensation. Section 15(a)(3)(B) simply is intended to “prescribe[] a factor to be applied in calculating the total compensation for lost earnings, i.e., it must be presumed that an injured child will not begin working until age 18.” Edgar, 989 F.2d at 477.

While not “on all fours,” because the victim in Edgar was alive at the time of the award, the Circuit’s reasoning is pertinent here. The Circuit held that the present value of an annuity awarded to an injured vaccinee could not take into account the possibility of the victim’s death before reaching age 18, or before receiving an income stream equal to the amount of projected lost earnings. 989 F.2d at 475-77. The Circuit stated that the Secretary could not substitute “an amount reflecting the cost of an annuity with contingencies [for the annuitant’s death]” but was required to furnish “an annuity that does not have those contingencies.” Id. at 477. The Circuit ruled, “nothing in section 2115 (a)(3)(B) permits the compensation award to be contingent upon the child reaching age 18. In addition, nothing in section 2115(a)(3)(B) authorizes the amount of compensation to be contingent upon the actual, post-injury life of the injured child.” Id.⁸

In sum, the plain language of section 15(a)(3)(B), in addition to the decisions in Zatuchni and Edgar, forecloses the interpretation advocated by the Secretary. See Zatuchni, 516 F.3d at 1315 (noting that “argument cannot overcome the clear intent expressed by the structure and language of the statutory scheme at issue”).

⁸ The Federal Circuit referred to Section 2115(a)(3)(B) of the Public Health Service Act, codified at 42 U.S.C. § 300aa-15(a)(3)(B) (2006).

III. CONCLUSION

Respondent agrees that Elias sustained a vaccine injury before age 18, and that his earning capacity would have been impaired had he lived to that age. Resp't Br. at 4. Given these factual concessions, and the conclusion reached herein with respect to the availability of lost earnings to the successors of a child who died due to a vaccine injury, damages should be awarded to Petitioners for the lost wages that could have been anticipated had Elias survived to adulthood and beyond, based on the severity of his injury following vaccination. The appropriate amount of such damages will be determined in future proceedings or by agreement between the parties.

IT IS SO ORDERED.

s/Dee Lord
Dee Lord
Special Master