

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-261V

Filed: October 25, 2011

Unpublished

WILLIAM BRUCE TOMPKINS,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

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Zatuchni; Sanders; Death of
petitioner during pendency of a
properly filed Petition due to non-
vaccine-related cause; Standing to
continue a Petition

Stephen I. Leshner, Stephen I. Leshner, P.C., Phoenix, AZ, for Petitioner.

Lisa Watts, U.S. Department of Justice, Washington, D.C., for Respondent.

RULING ON RESPONDENT'S MOTION TO DISMISS AND PETITIONER'S MOTION TO SUBSTITUTE PARTY PETITIONER¹

On April 28, 2010, William Tompkins filed this Petition under the Vaccine Act,² alleging he suffered a vaccine-related injury. Thereafter, respondent was ordered to file her Rule 4(c) Report and a responsive expert report. Scheduling Order, filed Jun. 3, 2010. On August 2, 2010, respondent filed a status report informing the court that the parties were discussing a potential litigative risk settlement. Respondent's filing deadline for the Rule 4(c) Report and responsive expert report were suspended to allow these discussions. Scheduling Order, filed Aug. 3, 2010. Shortly thereafter, the parties reached a tentative agreement to settle this case. 15-Week Stipulation Order, filed Oct. 21, 2010.³ However, during the parties' exchange of the settlement

¹ The undersigned intends to post this decision on the website for the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). **As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing.** Further, consistent with the statutory requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.

² This 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. (West 1991 & Supp. 2002) (hereinafter "Program," "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C. §§ 300aa of the Act.

³ Of note, no finding or admission of entitlement to compensation was made herein.

agreement, William died tragically due to injuries sustained in a car accident prior to the finalization and filing of the agreement.

Subsequently, petitioner's counsel moved to substitute William's father, Jeffrey Tompkins ("Jeffrey"), as representative of William's estate as petitioner. Thereafter, respondent moved to dismiss the Petition due to William's death from non-vaccine-related causes and the fact that, in respondent's view, William's estate does not qualify as a proper petitioner in this scenario. The question to be answered is whether Jeffrey Tompkins, as personal representative of his son's estate, has standing to pursue this Petition in light of his son's death due to non-vaccine-related causes.

After considering the parties' respective arguments, the undersigned finds that based on the plain language of 42 U.S.C. § 300aa-11(b)(1)(A) (2006), as interpreted by the Court of Appeals for the Federal Circuit in Zatuchni v. Sec'y of the Dept. of Health & Human Servs., 516 F.3d 1312 (Fed. Cir. 2008), and thereafter applied by my colleague in Sanders v. Sec'y of the Dept. of Health & Human Servs., No. 99-430V, 2009 WL 1759452 (Fed. Cl. Spec. Mstr. May 27, 2009), the Petition filed properly by William Bruce Tompkins prior to his unfortunate death maintains that status despite William's passing due to a conceded non-vaccine related cause. As William Bruce Tompkins qualified as a proper petitioner when he filed the Petition, his father may be substituted into the case representing William's estate to continue the Petition. Therefore, Respondent's Motion to Dismiss is **denied** and petitioner's Motion to Substitute Jeffrey, as representative of the Estate, is **granted**.

I. STATEMENT OF FACTS

The essential facts are not in dispute. William Bruce Tompkins enlisted with the United States Marines and assumed Active Duty Status in San Diego, California on July 21, 2008. Pet. at 1; P Ex. 1. He received MMR, hepatitis A and B, pneumococcal, and meningococcal vaccinations on July 23, 2008. Pet. at 1; P Ex. 1. Following the initial vaccinations, William developed an upper respiratory infection. Pet. at 2. On August 22, 2008, William received another set of vaccinations, including hepatitis A and B boosters, IPV, tetanus-diphtheria, and yellow fever. Pet. at 2; P Ex. 1. Thereafter, petitioner's upper respiratory infection continued, along with the development of parasthesias,⁴ muscle shaking and weakness. Pet. at 2; P Ex. 2.

William's illness progressed to the point that he was unable to feed himself or walk without assistance. Pet. at 2. He was ordered to report to the Primary Care Clinic on August 28, 2008, Pet. at 2, and was transferred to the Naval Medical Center; there, he was diagnosed with Guillain-Barré Syndrome ("GBS"),⁵ and hospitalized from August 28 to September 5, 2008. Pet. at 2; Ex. 3. Following his hospitalization, William spent a month in a rehabilitation hospital. Pet. at 2; Ex. 3. At a follow-up visit with the Naval Medical Center Neurology Department, it was found that petitioner suffered from a condition that "prevented him from performing the

⁴ "A spontaneous, abnormal, usually nonpainful sensation (e.g., burning, pricking); may be due to lesions of both the central and peripheral nervous systems." *STEDMAN'S MEDICAL DICTIONARY* 1425 (28th ed. 2006).

⁵ "An acute, immune-mediated disorder of peripheral nerves, spinal roots, and cranial nerves, commonly presenting as a rapidly progressive, areflexive, relatively symmetric ascending weakness . . . with variable sensory and autonomic dysfunction." *STEDMAN'S MEDICAL DICTIONARY* 1899 (28th ed. 2006).

duties in his rank” Pet. at 2; Ex. 4. On November 21, 2008, petitioner filed a report with the Vaccine Adverse Event Reporting System documenting his symptoms. Pet. at 4; Ex. 11. Due to his condition, petitioner was subsequently released from Active Duty on February 27, 2009, and transferred to the Temporary Disability Retired List on February 28, 2009. Pet. at 3; Ex. 6; Ex. 7.

William filed this Petition for compensation on April 28, 2010, claiming that both the primary vaccinations on July 23, 2008, and secondary vaccinations on August 22, 2008, were the cause of his GBS. See Pet. at 3. As stated previously, respondent filed a Status Report on August 2, 2010, indicating that the parties were discussing litigative risk settlement. R Status Rep., Aug. 2, 2010. The parties reached a tentative agreement on October 21, 2010, at which point the undersigned issued a 15 Week Order. See 15 Week Order, filed October 21, 2011.⁶

A Stipulation of Settlement was sent to petitioner on January 25, 2011. R Status Rep., Jan. 25, 2011. Petitioner and petitioner’s counsel signed the stipulation on January 27, 2011. See P Mot. to Sub. Tragically, that same day, petitioner was severely injured in an automobile accident and died of his injuries on January 31, 2011. P Mot. to Sub; Ex. A. It is conceded that William’s death was due to a cause that was not vaccine-related. P Mot. to Sub.; P Ex A; P Resp. at 1-2. Petitioner’s father, Jeffrey Tompkins, filed a Motion to Substitute himself as personal representative of petitioner’s estate on April 14, 2011. P Mot. to Sub. Respondent then filed a Motion to Dismiss on May 16, 2011. R Mot. to Dismiss.

II. RESPONDENT’S MOTION TO DISMISS

Respondent argues herein that William’s father does not have standing before this Court and therefore the claim should be dismissed. See R Mot. to Dismiss at 2. Respondent’s argument begins with § 300aa-11(b)(1)(A) of the Vaccine Act, which states that “any person who 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 such person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table...” may file a Petition under the Program. R Mot. to Dismiss at 2. As William’s father or the estate is not one of the three types of petitioners explicitly described in the statute,⁷ respondent claims that Petitioner’s estate is precluded from proceeding with the claim. R Mot. to Dismiss at 2.

Respondent relies on a vaccine case involving similar issues decided by a special master and attempts to distinguish this case from the decisions in Zatuchni and Sanders, which resolved similar issues in petitioners’ favor. R Mot. To Dismiss at 3-5 (citing Campbell v. Sec’y of Health & Human Servs., No. 01-688V, 2004 WL 1047393, at *1 (Fed. Cl. Spec. Mstr. Apr. 22, 2004); Zatuchni, 516 F.3d 1312; Sanders, 2009 WL 1759452). The special master in Campbell found that a husband could not continue his wife’s Petition for a vaccine-related injury after she died of a cause unrelated to the vaccine. This decision was issued prior to the Federal Circuit’s

⁶ In this Program, the “15 Week Order” evolved over the years with agreement of the parties to memorialize the “meeting of the minds” of counsel and to give respondent’s counsel sufficient time to obtain the requisite approval of appropriate supervisory officials within government.

⁷ According to the Act, a legal representative may file a Petition only in a case where the vaccinee died of a vaccine-related injury. § 300aa-11(b)(1)(A).

ruling in Zatuchni. In Zatuchni, the Court of Federal claims held that the estate of a deceased vaccinee could continue the Petition when the vaccinee died of a vaccine-related cause during the pendency of the petition. Zatuchni v. Sec’y of the Dept. of Health & Human Servs., 73 Fed. Cl. 451 (Fed. Cl. 2006). Zatuchni was affirmed by the Federal Circuit. Zatuchni, 516 F.3d 1312. In Sanders, which was decided after the Circuit’s decision in Zatuchni, my colleague allowed the estate of a deceased vaccinee to proceed on the Petition when the vaccinee died of non-vaccine-related causes during the pendency of the petition, as is the case here.

Respondent recognizes that Zatuchni as interpreted in Sanders supports a finding for petitioner in this case. R Mot. to Dismiss at 4, n. 3. Sanders will be discussed more fully below, but in summary it found that Zatuchni “determined that vaccine injury claims survive the death of the injured person” where the petitioner died of a vaccine-related injury pending the determination of a valid vaccine-injury claim. Zatuchni, 2009 WL 1759452, at *12. Reasoning from that finding and relying upon Judge Tidwell’s similar reasoning and finding in Andrews v. Sec’y of Health & Human Servs., 33 Fed. Cl. 767 (Fed. Cl. 1995), which was issued pre-Zatuchni, Special Master Vowell found that “once a Petition is properly filed, the Petition remains properly filed, regardless of the status of the vaccine.” Id. That is to say, once a Petition is properly filed for an injury claim, that Petition does not lose its proper filing status upon the death of the vaccinee, whether or not that death is vaccine-related. Respondent correctly notes that this special master is not bound by the decision in Sanders. Mot. to Dismiss at 4 (citing Hanlon v. Sec’y of Health & Human Servs., 40 Fed. Cl. 625, 630 (Fed. Cl. 1998)).⁸ However, respondent presented no persuasive argument undercutting the reasoning applied in either Andrews or Sanders. It is this reasoning that persuades the undersigned to follow the outcomes in those cases.

Ultimately, respondent argues that Zatuchni held narrowly that “the legal representative of the estate of an individual who had a pending Vaccine Act claim, and **whose death resulted from her vaccine-related injury**, was entitled to recover both the death benefit and compensation for pain and suffering, lost wages, and unreimbursable expenses.” R Mot. to Dismiss at 5-6 (emphasis in original), citing Zatuchni, 516, F. 3d at 1312, 1318-19. Respondent contends that Zatuchni declined to address the issues presented in this case, “whether the estate of an individual can seek compensation for a vaccine-related injury when the decedent died of unrelated causes.” Id. at 7. In respondent’s view, the only way this Petition could survive is if William died due to his vaccination-related injuries, which did not occur. Id. at 7. As will be discussed below, the undersigned believes respondent gives Zatuchni an unwarranted narrow reading.

III. PETITIONER’S RESPONSE

In contrast, petitioner argues that William was a proper petitioner when the Petition was filed and therefore Jeffrey may continue the Petition as long as he was properly substituted into the case. P Resp. at 1-2. Petitioner relies upon the Court of Federal Claims Rule 25, which states that “[i]f a party dies and the claim is not extinguished, the court may order substitution of

⁸ Additionally, Respondent relies on ¶ 14 of the Stipulation of Settlement, which states that “[i]f petitioner should die prior to entry of judgment, this agreement shall be voidable upon proper notice to the Court” See P Statement of Damages, Ex. B at 7. However, the parties’ present motions do not concern upholding the tentative agreement entered into by the parties.

the proper party.” RCFC Rule 25(a)(1).⁹ Petitioner argues that the original Petition, timely filed and strong enough to warrant settlement, may continue. Further, petitioner notes that the proposed settlement included the interest of William’s “heirs, executors, administrators, successors or assigns,” showing respondent’s intention to bind a future personal representative. Attempting to deny the agreement at this point seems, to petitioner, “puzzling and unjust.” P Resp. at 2.

Petitioner cites to Andrews v. Sec’y of Health & Human Servs., 33 Fed. Cl. 767 (1995), arguing this case held that § 300aa-11(b)(1)(A) “defines the people who may file claims -- not the people who may receive compensation.” Like Campbell, which is cited for support by respondent, Andrews was decided prior to the Federal Circuit’s decision in Zatuchni. The court in Andrews relied upon the “plain meaning of the Act” in “conjunction with its [legislative] history” to find that petitioner’s claim was not extinguished; it found respondent’s view, similar to that held by respondent herein, to be “neither fair, expeditious, generous *or* efficient.” Andrews, 33 Fed. Cl. at 771.

For further support, petitioner relies on both Zatuchni and Sanders, arguing that in the aggregate, these cases indicate that Jeffrey Tompkins may continue a Petition for pre-death vaccine-related injuries if the original petitioner filed a valid Petition. P Resp. at 5. Petitioner notes that the Federal Circuit stated the death of petitioner ““does not alter the fact that certain expenses were incurred, wages lost, or pain and suffering endured in the interim, and these damages are no less related to or caused by a vaccine-related injury.”” P Resp. at 4 (quoting Zatuchni, 516 F.3d at 1318).

IV. PRIOR CASE LAW

A brief review of some of the past relevant case law in this Program may be helpful to the reader.

a. Zatuchni

Zatuchni is the only relevant Federal Circuit case to address a similar issue under the Vaccine Act. Zatuchni v. Sec’y of Health & Human Servs., 516 F.3d 1312 (Fed. Cir. 2008). In Zatuchni, Ms. Snyder filed suit, claiming vaccine-related injuries. Snyder v. Sec’y of Health & Human Servs., No. 94-58V, 2005 WL 1230787 at *1, *4 (Fed. Cl. Spec. Mstr. May 6, 2005). However, several days before the special master issued a decision denying compensation, petitioner passed away. Snyder v. Sec’y of Health & Human Servs., 69 Fed. Cl. 390, 390 (2006). Ms. Snyder’s personal representative, Ms. Zatuchni, was substituted as petitioner in the case and appealed the special master’s denial of compensation. Id. at 392; see Zatuchni v. Sec’y of Health & Human Servs., 69 Fed. Cl. 612 (2006). The Court of Federal Claims reversed the denial of compensation and remanded the case to the special master. The special master subsequently determined that Ms. Snyder’s death was vaccine-related, but only awarded the

⁹ This was the mechanism used in Zatuchni to substitute Ms. Snyder’s estate as petitioner. Snyder v. Sec’y of the Dept. of Health & Human Servs., 69 Fed. Cl. 390 (Fed. Cl. 2006)(appointing Dory Zatuchni, as legal representative of Ms. Snyder’s estate, petitioner, having found the requirements of CFC Rule 25 satisfied), aff’d, 516 F.3d 1312, 1323 (noting there was no procedural difficulty of substituting the estate when petitioner died of vaccine-related injuries).

death-benefit portion of compensation. Zatuchni v. Sec’y of Health & Human Servs., No. 94-58V, 2006 WL 1499982 (Fed. Cl. Spec. Mstr. May 10, 2006).¹⁰ The special master’s decision regarding compensation was appealed.

On appeal, the Court of Federal Claims reversed the special master’s finding of limited compensation, and the Federal Circuit later affirmed that reversal, holding that the legal representative is not prevented from requesting both injury compensation and death-benefit compensation in the situation before them. Zatuchni, 516 F.3d at 1321; Zatuchni, 73 Fed. Cl. 451 (Fed. Cl. 2006). In affirming, the Federal Circuit explained that if the Petition was properly filed by the person who suffered the vaccine injury and that petitioner subsequently died of a vaccine-related cause while the case is pending, that Petition survives and may continue to be pursued by the legal representative of the estate of the deceased petitioner. Zatuchni, 516 F.3d at 1321. As it was not an issue in the case, the court declined to “decide whether § 300aa-11(b)(1)(A) would permit the estate of a person who suffered vaccine-related injuries but died of a non-vaccine-related cause to **file** a Petition for vaccine-related injury compensation.” Zatuchni, 516 F.3d at 1320-21 (emphasis added).¹¹

The undersigned notes that in the case *sub judice*, William properly filed the Petition for his injuries and the question is whether the estate may continue to pursue compensation following a non-vaccine-related death; this is not an issue of the estate attempting to file a new Petition. The issue herein was addressed squarely by my colleague in Sanders. Sanders v. Sec’y of Health & Human Servs., No. 99-430V, 2009 WL 1759452 (Fed. Cl. Spec. Mstr. May 27, 2009).¹²

b. Sanders

Mr. Sanders filed a Petition for compensation claiming that his Hepatitis B vaccinations resulted in the development of rheumatoid arthritis. Sanders, 2009 WL 1759452, at *1. Mr.

¹⁰ To be clear, the case *sub judice* differs from Zatuchni in that petitioner in the case at hand, William, died during the pendency of the Petition due to **non-vaccine-related causes**, whereas it was found that Ms. Snyder, the petitioner in Zatuchni, died during the pendency of the Petition due to **vaccine-related causes**.

¹¹ Judge Dyk wrote a separate opinion in Zatuchni, concurring in the result but dissenting to the majority’s reasoning. This opinion addressed more generally whether claims under the Vaccine Act survived following death of a petitioner. Zatuchni, 516 F.3d at 1324 (Dyk, J., dissenting). This portion of the decision agrees with the majority that the Act does not preclude survival of claims; however, it diverges regarding its reliance on federal common law and adoption of the approach used by a majority of states regarding survival of personal injury claims. Judge Dyk further found survival of a claim under the Act to be “consistent with the objectives of the Vaccine Act with respect to both compensation of injured individuals and protection of vaccine manufacturers.” Id. at 1330.

¹² While not directly on point, the undersigned had occasion to consider the relevant sections of the Act in Griglock v. Sec’y of the Dept. of Health & Human Servs., 2011 WL 839728 (Fed. Cl. Spec. Mstr. Feb. 11, 2011), aff’d 99 Fed. Cl. 373 (Fed. Cl. Aug. 3, 2011). In Griglock, the estate of a woman who sustained a vaccine-related injury and vaccine-related death filed the Petition. However, the Petition was filed outside of the Act’s statute of limitations for vaccine-injury claims; however, the Petition was filed within the Act’s statute of limitations for vaccine-related death claims. Unlike Zatuchni, wherein the injury and death claim were both within the statutes of limitations, the undersigned found the Griglock petitioner’s untimely filing of the injury claim barred damages for the vaccine-related injury despite recovering damages for the vaccine-related death. While finding that Zatuchni would allow the estate to recover compensation for both injury and death, Griglock was distinguished from Zatuchni and the case *sub judice* in that the result was governed by the Act’s statute of limitations.

Sanders' case was grouped with several similar cases into an omnibus-type proceeding to determine causation. See Capizzano v. Sec'y of Health & Human Servs., No. 00-759V, 2004 WL 1399178 (Fed. Cl. Spec. Mstr. June 8, 2004)(explaining ruling that hepatitis B vaccine can cause rheumatoid arthritis). While his case was stayed pending the five "test" cases, Mr. Sanders died of a non-vaccine related cause. Sanders, 2009 WL 1759452, at *2. Mr. Sanders' wife moved to be substituted as petitioner and respondent moved to dismiss the case, arguing that Ms. Sanders was not a proper petitioner and therefore lacked standing to continue the claim. Id. at *2-3. The special master, relying on Andrews and Zatuchni, held that once the Petition was properly filed, the Petition remains proper regardless of the status of the vaccinee; respondent's motion to dismiss was denied. Id. at *12. Sanders ultimately concluded with the parties' stipulation on an award of compensation. Sanders, No. 99-430, slip op., Decision on Joint Stipulation, filed November 18, 2009. No appeal of the special master's determination was pursued and the parties filed a Joint Notice of Decision Not to Seek Review on November 19, 2009.

- c. Figuroa v. Sec'y of Health & Human Servs., No. 10-750V, 2011 WL 2784586 (Fed. Cl. Spec. Mstr. June 22, 2011)

In contradistinction to Zatuchni and Sanders, Figuroa is a case to distinguish from petitioner's case. Mr. Figuroa received the flu vaccine and was later diagnosed with Guillain-Barré Syndrome. Figuroa v. Sec'y of Health & Human Servs., No. 10-750V, 2011 WL 2784586, at *1 (Fed. Cl. Spec. Mstr. June 22, 2011). Mr. Figuroa died of pancreatic cancer **before** he filed a Petition in the Program. Id. Mr. Figuroa's wife, as administratrix of his estate, filed a Petition for his vaccine-related injury and respondent moved to dismiss the case. Id. Special Master Moran, citing Zatuchni and Sanders, explained that the present case was distinguishable from prior cases as the wife was not a proper petitioner under § 300aa-11(b)(1)(A) at the time of filing. Id. at *2. Therefore, Mrs. Figuroa could not proceed and the motion to dismiss was granted. Id. at *3-4; but see Zatuchni, 516 F.3d at 1324-1331 (Dyk, J., dissenting)(Survival of claims under the Vaccine Act are "properly governed by federal common law, and [thus] claims for vaccine-related injur[ies] accruing prior to death survive the death of a claimant.").

V. ANALYSIS

While there is not a great deal of jurisprudence in this area, and the Federal Circuit has not had occasion to address the exact issue presented here, the current interpretations of § 11 on this issue are coalescing around finding that a properly filed Petition may be continued by a substituted party whether or not that substituted party would have been a proper petitioner under § 11 at the time the Petition was filed.

Beginning with the plain language of the statute, § 300aa-11(b)(1)(A) describes who may **file** a Petition under the program. In this case, William qualified as one of the three types of petitioners who may file for compensation; he alleged that he suffered a vaccine-related injury. See Pet. The only question is whether Jeffrey, representing William's estate, can continue his son's existing claim.

As recognized by respondent, the Sanders' decision addressed the exact question presented in this case while finding in petitioner's favor. R Mot. to Dismiss at 4, n. 3. In doing

so, my colleague comprehensively addressed decisions by special masters and the Court of Federal Claims resolving the various factual and legal issues under §11(b)(1)(A) prior to the Circuit's decision in Zatuchni, and the subsequent impact of Zatuchni on these issues. In Sanders, the special master found that “[w]hile Zatuchni did not address survival of an injury claim under the precise circumstances presented by Mr. Sanders’ death, it implicitly answered the general question of Congressional intent in the face of this statute’s silence.” Sanders, 2009 WL 1759452, at *11. Furthermore, although § 300aa-11(b)(1)(A) does not expressly allow for the substitution of petitioners, it also does not prohibit it. Id. Thus, the special master relied on the Federal Circuit’s reading of the statute in Zatuchni, which allows for survival of certain petitions when the estate is substituted for a vaccinee who alleges a vaccine-related injury but dies of while the Petition is pending. Id.; Zatuchni, 516 F.3d at 1321. As the facts in the present case are so similar to those in Sanders, the undersigned finds no reason to arrive at a different conclusion. Critical to Sanders and to the case at hand, Zatuchni resolved the survival issue, stating that §300aa-11(b)(1)(A) “[r]emedied the illogical consequence of a validly filed vaccine-injury claim being extinguished by an equally valid vaccine death claim. In doing so, the court necessarily determined that vaccine injury claims survive the death of the injured person.” Sanders, 2009 WL 1759452 at *12.

While recognizing that Zatuchni involved a properly filed injury case and a vaccine-related death and Sanders and the case at hand involve a non-vaccine-related death, my colleague reasoned that “this distinction does not make a difference in the survival of an injury claim.” Id. My colleagues reasoning and thus the conclusion cannot be improved upon. “Once a Petition is properly fled, the Petition remains properly filed, regardless of the status of the vaccine.” Id.

Likewise, based upon Zatuchni and my colleague’s thorough, and in my view correct, interpretation and application of its reasoning, I conclude along with the Andrews’ and Sanders’ courts that a properly filed Petition remains properly filed regardless of any change in the status of the petitioner-vaccinee.

As stated earlier, the undersigned finds respondent’s interpretation of Zatuchni too narrow. Respondent recognizes the holding in Zatuchni that a petitioner’s estate may maintain an action when the petitioner-vaccinee dies from a vaccine-related injury during the pendency of a properly filed Petition and collect both death benefits and appropriate injury benefits; however, respondent states that “[t]he majority explicitly stated that they ‘need not decide whether §300aa-11(b)(1)(A) would permit the estate of a person who suffered vaccine-related injuries but died of a non-vaccine-related cause **to file** a Petition for vaccine-related compensation” Mot. to Dismiss at 6 (emphasis added)(citing Zatuchni, 516 F.3d at 1320-21). What respondent imprecisely states is that the Circuit “specifically declined to address the issue presented here.” Id. at 7. The Circuit’s majority opinion actually declined to address whether a claim **could be filed** by the estate when the petitioner-vaccinee died of a non-vaccine-related cause. Zatuchni, 516 F.3d at 1320-21. Thus, respondent incorrectly crafts the issue here as “whether the estate of an individual **can seek** compensation for a vaccine-related injury when the decedent died of unrelated causes.” Id. (emphasis added).¹³ The Federal Circuit in Zatuchni declined to decide

¹³ That question, whether the estate can **file** a claim for injury compensation **after** the non-vaccine-related death of the vaccinee has been addressed. See, e.g., Buxkemper v. Sec’y of the Dept. of Health & Human Servs., 32 Fed. Cl. 213 (Fed. Cl. 1994); Sigal v. Sec’y of the Dept. of Health & Human Servs., No. 07-489V, (Fed. Cl. Spec. Mstr. May 23, 2008); Cohn v. Sec’y of the Dept. of Health & Human Servs., No. 90-2611V, (Fed. Cl. Spec. Mstr. May 24, 1999), aff’d, 44 Fed Cl. 658 (Fed. Cl. 1999).

whether the estate could file a Petition, while the dissent would allow such an action. Zatuchni, 516 F.3d at 1318-19, 1324-31. However, that is not the issue in this case.

The issue presented here is whether a properly filed Petition for compensation survives the death of a petitioner-vaccinee when the death is not vaccine-related? It is not a question of whether the estate can seek compensation, originally filing the Petition. It is a question of whether the properly filed Petition may be continued by the estate. Zatuchni answered that question for a vaccine-related death, but not a non-vaccine-related death. In Zatuchni, the Federal Circuit focused on the proper filing of a Petition, allowing both claims, compensation related to the injury and the death, to continue. See Zatuchni, 516 F.3d at 1320-21; c.f. Kennedy v. Sec’y of Health & Human Servs., No. 90-1009V, 2011 WL 1235393, at *1, *1 (Fed. Cl. Mar. 17, 2011)(stating that “[t]he Vaccine Act ... contains no requirements as to who may *prosecute* a case on behalf of a petitioner ... after the case is properly filed” regarding the appointment of “next friend” for an incompetent vaccinee)(emphasis in original), appeal docketed, No. 11-5106 (Fed. Cir. Jun. 28, 2011). There is nothing in Zatuchni’s legal reasoning that indicates that the nature of the death – vaccine related or not – is critical to determining the survivability of the claim. Instead it is the initial appropriateness of the filing of the claim that is critical. Andrews prior to Zatuchni, and Sanders interpreting Zatuchni, found that the claim survived a non-vaccine-related death. I concur.

Furthermore, respondent argued in Zatuchni that vaccine-related injury claims do not survive the death of a vaccine-injured person based upon §11(b)(1)(A). Zatuchni, 516 F.3d at 1320. The Circuit explicitly rejected this argument finding that either the estate filing in the first instance or a properly substituted representative or estate continuing the claim can pursue both the death and injury claim. While Zatuchni involved a vaccine-related death, there is no logical reason to distinguish survivability of the claim for a properly filed Petition based upon a subsequent change in vaccinee status due to vaccine-related death versus non-vaccine-related death. That was the finding made by Special Master Vowell in Sanders, and that is the finding made here. The amount of damages may be impacted, but not the right to damages.

The implicit reasoning found in the Federal Circuit’s decision in Zatuchni combined with the reasoning in Sanders supports a finding that the estate may be substituted in to continue the vaccinee’s claim for vaccine-related injury compensation, despite William’s non-vaccine-related death during the pendency of the Petition.

VI. CONCLUSION

As William was a proper petitioner when the claim was originally filed, Jeffery may proceed with the Petition as representative of his son’s estate. Respondent’s Motion to Dismiss is denied. However, respondent is correct that the stipulated settlement is no longer viable. The parties shall confer and hopefully agree upon the appropriate damages in this case. Accordingly:

- **Respondent’s Motion to Dismiss is denied.**
- **Petitioner’s Motion to Substitute Jeffrey Tompkins, as representative of the Estate of William Bruce Tompkins, is granted.** The caption of this case shall hereafter be:

 JEFFREY TOMPKINS, as personal representative *
 of the estate of WILLIAM BRUCE TOMPKINS, *
 deceased, *
 *
 Petitioner, *
 *
 v. *
 *
 SECRETARY OF THE DEPARTMENT *
 OF HEALTH AND HUMAN SERVICES, *
 *
 Respondent. *

- **The parties shall confer and file within thirty (30) days, by no later than November 28, 2011, a joint status report proposing a manner and schedule for proceeding.**

Any questions regarding this Order shall be directed to my law clerk, Danielle Strait, at (202) 357-6343.

IT IS SO ORDERED.

s/ Gary J. Golkiewicz
 Gary J. Golkiewicz
 Special Master