

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS**

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SALLY SIGAL, as Special Administrator \*  
and Legal Representative of the Estate of \*  
ELI SIGAL, \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH \*  
AND HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

No. 07-489V  
Special Master Christian J. Moran

Filed: May 23, 2008

Motion to dismiss; Estate may not  
seek compensation for a vaccine-  
related injury; Zatuchni

*Russell E. Nordstrom, Esq., Nordstrom, Steele, Nicolette and Blythe, Tustin, CA, for petitioner;  
Althea Walker Davis, United States Dep't of Justice, Washington, DC, for respondent.*

**DECISION\***

Sally Sigal, as special administrator and legal representative of the estate of Eli Sigal, seeks compensation for neurological injuries that she alleges were caused by the flu vaccine. Ms. Sigal does not claim that the flu vaccine caused Mr. Sigal's death.

Respondent filed a motion to dismiss this case. Respondent argues that Ms. Sigal does not qualify as a petitioner eligible to seek compensation pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq. (2006).

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\* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, the person submitting the information has 14 days to identify and to move to delete such information before the document's disclosure. If the special master agrees that the identified material fits within the categories listed above, the special master shall redact such material from public access. 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

As explained below, Ms. Sigal does not satisfy any of the definitions of “petitioner” in the Act. Consequently, respondent’s motion to dismiss is GRANTED.

## **I. Facts and Procedural History**

Because the pending motion raises a purely legal question, the facts can be summarized relatively easily. The parties do not dispute any of the allegations in Ms. Sigal’s petition.

Mr. Sigal was born in 1947. Ms. Sigal and he were married in 1989. They lived together until Mr. Sigal died. Pet. at 2.<sup>1</sup>

On October 11, 2002, Mr. Sigal received the flu vaccine. He experienced neurological problems after the flu vaccination. Eventually, Mr. Sigal was diagnosed with Guillain-Barre syndrome.

On October 13, 2004, Mr. Sigal and Ms. Sigal filed a petition for compensation. This case was assigned docket number 04-1542V. Attorney Nordstrom represented the petitioners. Respondent filed a motion to dismiss this case because the flu vaccine was not a covered vaccine. The parties filed a joint stipulation of dismissal and the case ended.

On April 12, 2005, the Secretary of Health and Human Services issued regulations, announcing that the flu vaccine was a covered vaccine. 70 Fed. Reg. 19,092 (April 12, 2005). People who believed that the flu vaccine caused them an injury could seek compensation through this program.

On July 21, 2005, Mr. Sigal was involved in an automobile accident. He died of burns caused by this accident. Pet. at 2.<sup>2</sup>

On August 23, 2006, a petition was filed seeking alleging that the flu vaccine caused Mr. Sigal to suffer neurological problems. The petition listed “Mr. Sigal” as the petitioner. The petition was actually submitted to the Clerk’s Office by Mr. Nordstrom. (The petition in the currently pending case asserts that Mr. Nordstrom did not know that Mr. Sigal had died approximately 13 months before this petition was filed. Pet. at 3.) The Clerk’s Office assigned docket number 06-600V to this case.

While case number 06-600V was pending, medical records relating to Mr. Sigal were filed. The continued development of this case led to the discovery that Mr. Sigal had died in July

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<sup>1</sup> The petition contains neither page number nor paragraph numbers. It would be helpful for counsel to include both in future petitions. Citations are to pages in the petition.

<sup>2</sup> The petition on page 3 contains a typographical error in that it states the car accident occurred in 2002. The correct year is 2005, as stated on page 2 of the petition.

2005. After Mr. Sigal’s death was discovered, respondent filed a motion to dismiss the petition in case number 06-600V. The (undersigned) special master issued a decision, granting the motion to dismiss. Judgment entered on July 5, 2007.

On July 2, 2007, Ms. Sigal filed the pending petition.<sup>3</sup> Ms. Sigal seeks compensation for “pain and suffering and other damages suffered by [Mr.] Sigal.” Pet. at 1-2. Ms. Sigal does not seek compensation for Mr. Sigal’s death.

Respondent filed a motion to dismiss arguing that Ms. Sigal is not a proper petitioner as defined in 42 U.S.C. § 300aa–11(b)(1)(A). Briefing on this motion was stayed until the Court of Appeals for the Federal Circuit issued its decision in Zatuchni v. Sec’y of Health & Human Servs. Order, filed October 5, 2007. The Federal Circuit issued the decision in Zatuchni on February 12, 2008, and this case resumed. Briefing was completed. The motion is ready for adjudication.

## II. Analysis

The analysis begins with a review of the plain language of the statute. Flowers v. Sec’y of Health & Human Servs., 49 F.3d 1558, 1560 (Fed. Cir. 1995). Here, the pertinent portion of Title 42 of the United States Code states:

### **§ 300aa-11. Petitions for compensation**

\* \* \*

#### **(b) Petitioners**

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

This section sets forth three categories of people who “may . . . file a petition.” These are (1) a person who sustained a vaccine-related injury, (2) the legal representative of a minor or disabled person who sustained a vaccine-related injury, and (3) the legal representative of a

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<sup>3</sup> Respondent correctly observes that between the date Ms. Sigal filed the petition in the present case (July 2, 2007) and the date judgment was entered in case numbered 06-600V (July 5, 2007), there were two petitions based upon the same vaccination. Respondent, however, has not argued that the present petition should be dismissed because it was filed in violation of 42 U.S.C. § 300aa–11(b), which permits the filing of only one petition for each administration of a vaccine. Resp’t Mot. to Dismiss, filed Oct. 1, 2007, at 3 n.2.

Because the case is dismissed for another reason, it is not necessary to consider whether Ms. Sigal has also failed to comply with 42 U.S.C. § 300aa–11(b).

person who died as a result of the administration of a covered vaccine. See Buxhemper v. Sec’y of Health & Human Servs., 32 Fed. Cl. 213, 225 (1994) (reversing award of pain and suffering associated with a vaccine-related injury to the estate of a child who died of a cause not related to a vaccine).

Ms. Sigal does not fit within any of the three categories. She is not the person who suffered a vaccine-related injury. Therefore, she does not meet the first category. The second category is for people who suffered a vaccine-related injury but who cannot file a petition for themselves due to disability or age. The pending case does not fit this situation because Mr. Sigal is prevented from filing his own petition due to his death, not a disability. The third category addresses “legal representatives” of people who have died “as the result of the administration of a vaccine.” The pending case does not fit this situation because Mr. Sigal did not die as a result of the administration of a vaccine. He died because of a car accident.

Ms. Sigal does not argue that she fits any of the categories of section 11(b)(1)(A). Instead, she argues that policy and equitable considerations should permit the estate of a person who died due to causes not related to a vaccination to seek compensation for vaccine-related injuries, such as pain and suffering, the decedent endured while alive. Ms. Sigal particularly emphasizes the concurring opinion in Zatuchni v. Sec’y of Health & Human Servs., 516 F.3d 1312 (Fed. Cir. 2008). Pet’r Resp., filed April 21, 2008.

In effect, Ms. Sigal is requesting that a fourth category be created, a category for legal representatives of a decedent who suffered a vaccine-caused injury but died of a non-vaccine related cause. This request is beyond the authority of a special master.

Expanding the categories of people who may file a petition would constitute a broadening of the jurisdiction set forth by Congress. But, jurisdiction of the vaccine program is construed narrowly. Martin v. Sec’y of Health & Human Servs., 62 F.3d 1403, 1405 (Fed. Cir. 1995); Schumacher v. Sec’y of Health & Human Servs., 2 F.3d 1128, 1135 n.12 (Fed. Cir. 1993) (stating “a waiver of sovereign immunity must be ‘unequivocally expressed’ and not merely implied by a court”); Kay v. Sec’y of Health & Human Servs., 80 Fed. Cl. 601, 605 (2008), appeal docketed, No. 08-5068 (Fed. Cir. April 21, 2008). Consequently, Ms. Sigal’s implicit request that the statute be interpreted to allow someone who does not meet the literal terms of section 11(b)(1)(A) must be rejected.

Ms. Sigal’s citation to the policy concerns expressed in Zatuchni is not persuasive for two reasons. First, the majority opinion explicitly limited its holding. It stated that the court’s decision “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.” Zatuchni, 516 F.3d at 1320-21. This statement, by itself, means that Zatuchni is not dispositive because Ms. Sigal’s case present the exact question that was not answered by the majority opinion in Zatuchni.

Second, the issue of sovereign immunity in Zatuchni arose in a slightly different factual context. In Zatuchni, Barbara Snyder filed, in 1994, a petition seeking compensation for a vaccine-related injury. While the case was pending in 2005, Ms. Snyder died. Dory Zatuchni became the legal representative of the estate of Ms. Snyder. Eventually, it was found that Ms. Snyder suffered an injury because of the vaccine and Ms. Snyder died of the administration of the vaccine. The question before the Federal Circuit was whether Ms. Zatuchni, as the legal representative of Ms. Snyder's estate, could recover compensation for Ms. Snyder's injuries and compensation for Ms. Snyder's death. Zatuchni, 516 F.3d at 1314-15.

The situation presented in Ms. Sigal's pending case does not raise the same question about the meaning of section 11(b)(1)(A). When Ms. Snyder filed her petition in 1994, she satisfied the first category of this paragraph because she sought compensation for a vaccine-related injury. After Ms. Snyder died in 2005, her estate fulfilled the criteria of the third category because the estate also sought compensation for a death caused by the administration of a vaccine. Consequently, the jurisdictional criteria of section 11(b)(1)(A) was met.<sup>4</sup> The question in Zatuchni was the amount of relief to which that person was entitled.

In contrast, here, Ms. Sigal fails to meet any of the categories of section 11(b)(1)(A) at any time during the litigation. Ms. Sigal's case, therefore, is also distinguishable from other cases in which representatives of estates attempted to substitute themselves for their decedents who were claiming a vaccine-related injury. See, e.g., Campbell v. Sec'y of Health & Human Servs., Fed. Cl. 01-688V, 2004 WL 1047393 (Spec. Mstr. April 22, 2004); Cohn v. Sec'y of Health & Human Servs., 44 Fed. Cl. 658 (1999); Andrews v. Sec'y of Health & Human Servs., 33 Fed. Cl. 767 (1995). In Campbell, and Cohn the original petitioner satisfied section 11(b)(1)(A) by claiming compensation for an injury which he or she suffered. In Andrews, the original petitioners were parents of a disabled person and, thus, fulfilled the second category of this paragraph. Beyond observing that Campbell, Cohn, and Andrews arose in a different factual context from Ms. Sigal, it is not necessary to evaluate whether this trio of decisions, which do not constitute precedent binding on the undersigned, are consistent with the Federal Circuit's binding decision in Zatuchni.

In sum, Ms. Sigal is not a proper petitioner because she cannot comply with section 11(b)(1)(A). When a person seeking compensation from the government does not comply with the exact terms of the statute, the court may not grant relief. See Inter-Coastal Xpress, Inc. v. United States, 296 F.3d 1357, 1373 (Fed. Cir. 2002).

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<sup>4</sup> The Federal Circuit rejected a contention that section 11(b)(2) prohibited a merger of the theories. Zatuchni, 516 F.3d at 1323.

**III. Conclusion**

Ms. Sigal is not a proper petitioner. Therefore, this court lacks jurisdiction to entertain her claim. Respondent's Motion to Dismiss is hereby GRANTED. The Clerk's Office is ordered to enter judgment in accord with this opinion.

IT IS SO ORDERED.

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Christian J. Moran  
Special Master