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DEPARTMENT OF JUSTICE

28 CFR Part 104

[Docket No. CIV 151]

RIN 1105-AB49;

James Zadroga 9/11 Victim Compensation Fund Reauthorization Act

AGENCY: Department of Justice.

ACTION: Final Rule.

SUMMARY: This rule finalizes the Interim Final Rule published on June 15, 2016, which implemented recently-enacted statutory changes governing the September 11th Victim Compensation Fund of 2001 (the “Fund”). After consideration of all of the public comments filed in response to the Interim Final Rule, the Special Master has concluded that no substantive changes to the Interim Final Rule are needed. Accordingly, this Final Rule adopts as final the provisions of the Interim Final Rule, with only two minor technical corrections.

DATES: This final rule takes effect on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jordana H. Feldman, September 11th Victim Compensation Fund, Civil Division, U.S. Department of Justice, 290 Broadway, Suite 1300, New York, NY 10007, telephone 855-885-1555 (TTY 855-885-1558).

SUPPLEMENTARY INFORMATION:

On December 18, 2015, President Obama signed into law the James Zadroga 9/11 Victim Compensation Fund Reauthorization Act (the “Reauthorized Zadroga Act”), Public Law No. 114-113, Div. O, Title IV. The Act extends the September 11th Victim Compensation Fund of

2001 (the “Fund”) which provides compensation to any individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001, or the rescue and recovery efforts during the immediate aftermath of such crashes or the debris removal efforts that took place in the immediate aftermath of those crashes.

On June 15, 2016, Special Master Sheila L. Birnbaum published an Interim Final Rule to revise the existing regulations to implement changes required by the Reauthorized Zadroga Act. (81 FR 38936). Since the issuance of the Interim Final Rule, Sheila Birnbaum has stepped down as Special Master and the Attorney General has appointed Rupa Bhattacharyya in her place, effective July 21, 2016.

The Interim Final Rule took effect on the date of publication (June 15, 2016), but provided a 30-day period for interested persons to submit public comments. Special Master Bhattacharyya is issuing this Final Rule, which addresses the issues that have been raised. For the reasons described below, after consideration of all of the public comments, the Special Master has concluded that no substantive changes to the Interim Final Rule are needed. Accordingly, this Final Rule adopts the provisions of the Interim Final Rule without change, except for two minor technical corrections.

Background

The June 15, 2016, Interim Final Rule (81 FR 38936) provided a brief history of the September 11th Victim Compensation Fund of 2001, the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act), and the regulations issued by the Special Masters pursuant to those statutes.

On December 18, 2015, President Obama signed into law Public Law 114-113, providing for the reauthorization of the Zadroga Act. The Reauthorized Zadroga Act extends the time period during which eligible claimants may submit claims, increases the Fund’s total funding available to pay claims, creates different categories of claims, directs the Special Master to issue full compensation to eligible claimants, and instructs the Special Master to implement certain changes to the policies and procedures used to evaluate and process claims.

The Interim Final Rule addressed those changes mandated by the statute. The Interim Final Rule was published in the Federal Register (81 FR 38936) and became effective on June 15, 2016, and was followed by a 30-day public comment period. The Department received 31 comments since the publication of the Interim Final Rule. The Special Master’s office has reviewed and evaluated each of these comments in preparing this Final Rule. Significant comments received in response to the Interim Final Rule are discussed below. After careful review and consideration, and for the reasons described below, the Special Master has concluded that no substantive changes to the Interim Final Rule are warranted.

Accordingly, this Final Rule adopts the provisions of the Interim Final Rule without change, except for two technical corrections, as follows. These are not substantive changes and merely correct minor drafting errors in the wording of the Interim Final Rule as published.

(1) In section 104.21, Presumptively covered conditions, this Final Rule corrects an unintended wording error in the second sentence of paragraph (a), by restoring the missing word “or,” in this sentence.

(2) In section 104.62, Time limit for filing claims, in paragraph (b), this Final Rule restores the missing cross-reference to paragraph “(a)” of the section.

Summary of Comments on the Interim Final Rule and the Special Master’s Response

Categories of Claims

Many comments focused on the statutory definition of Group A claims and the decision by Congress to define the two categories of claims by reference to the date the Special Master “postmarks and transmits” a final award determination to the claimant. Several commenters argued that the “cut-off” date for inclusion in Group A should have been the date the claim was submitted or filed by the claimant, rather than the date the final award amount was determined by the Special Master. The commenters asserted that claims that had been submitted to the Fund on or before December 17, 2015, but did not have a loss determined by that time, should be considered Group A claims and subject to the standards in effect at the time of their submission.

The Reauthorized Zadroga Act makes clear that the critical date is the date that the final award determination was postmarked and transmitted, not the date the claim was submitted. Therefore, under the plain language of the statute, claims that were pending but not determined as of December 17, 2015 cannot be considered Group A claims. Because Congress expressly set forth this definition in the statute, this definition cannot be changed by the Special Master.

Some commenters asserted that the statutory definition is unfair or contrary to laws and principles that ensure that certain rights and benefits are not changed or compromised without notice. These comments focused on the unfairness of evaluating a claim submitted prior to reauthorization under the standards set forth in subsequently enacted legislation. In this regard, however, the Special Master is constrained by the law as Congress enacted it, and cannot disregard the clear language of the statute.

One commenter suggested a change that would violate other applicable law. This commenter proposed that the Special Master backdate loss determination letters to December 17, 2015, for all claims or amendments that were pending at the time of reauthorization. Such an

action would be in violation of the law and of generally accepted accounting principles.

Therefore, the Special Master cannot accept that suggestion.

Valuation of Claims

\$200,000 Annual Gross Income Cap

Several commenters argued about the fairness of the statutory \$200,000 cap on annual gross income. One commenter was concerned about the broad scope of the definition of “annual gross income” in computing economic loss. The Reauthorized Zadroga Act explicitly provides that the term “gross income” is defined as set forth in Section 61 of the Internal Revenue Code. Section 405(b)(7)(B), (C). There, the definition of “gross income” is broadly defined to include “all income from whatever source derived,” including (but not limited to) compensation for services, including fees, commissions, fringe benefits, and other similar items, pensions, annuities, interest, and other sources of income. Sections 104.43 and 104.45 of the Interim Final Rule, the provisions that address the determination of economic loss for decedents and for injured claimants who suffered an eligible physical harm respectively, were revised to account for the \$200,000 annual gross income cap as required by the Reauthorized Zadroga Act. Because Congress explicitly provided this definition and annual income cap requirement in the statute, these requirements cannot be changed by the Special Master.

One commenter noted that the cap may have unintended consequences for a claimant who is disabled at a young age and therefore has a long remaining work life. Another commenter suggested that the Special Master should mitigate the effect of the \$200,000 annual gross income cap by adjusting certain components of the loss calculation methodology, such as extending work life, reducing the tax offset, or lowering the residual earnings deduction, in claims where the cap is implicated. The Special Master cannot make adjustments to the loss

calculation methodology for the purpose of eliminating the effect of the annual gross income cap, as doing so would violate Congressional intent. The Special Master, however, intends to exercise her discretion to apply the cap in ways that are favorable to claimants, while consistent with the language and intent of the statute. For example, the VCF will apply the tax adjustment to earnings before computing the annual cap, rather than after computing the cap. By applying this adjustment before the annual cap is computed, the amount of gross income is reduced and thus the award reduction resulting from the application of the cap is reduced. This is consistent with the overall purpose of the loss computation which is to determine the amount of earnings – after all deductions – that is lost to the claimant as a result of the September 11th attacks. The Special Master will provide additional information concerning the Fund’s valuation methodologies on the Fund’s website in order to give claimants greater insight into, and confidence in, its decision-making process.

Other comments questioned how the \$200,000 annual gross income cap ended up in the statute. One commenter stated that a citizens group that advocated for the extension of the Zadroga Act in 2015 made no mention of such a cap. Another commenter asked whether the Fund advised Congress to designate the cap. The Fund took no such action. The Special Master cannot respond to questions about the process by which Congress develops legislation.

Noneconomic Loss Caps

The Reauthorized Zadroga Act imposes caps on the amount of noneconomic loss that may be awarded for a claim that results from any type of cancer at \$250,000 and for a claim that does not result from any type of cancer at \$90,000. The Interim Final Rule, sections 104.45 and 104.46, clarified that, in computing the total noneconomic loss, the Special Master has discretion to consider the effect of multiple cancer conditions or multiple cancer and non-cancer conditions,

and that, in computing the amount of noneconomic loss for economic loss claims, the Special Master has discretion to consider the extent of disability and the fact that different eligible conditions may contribute to the disability. Several commenters commended the Special Master for interpreting the statutory noneconomic loss caps as not imposing an aggregate cap on noneconomic loss, noting that this interpretation is consistent with both the letter and spirit of the statute. One commenter stated that the Special Master's interpretation appropriately addresses the realities of the first responders who are diagnosed with multiple forms of cancer and non-cancer conditions and is therefore important in ensuring that claimants receive full compensation as contemplated by the Reauthorized Zadroga Act. This commenter also noted that the Interim Final Rule properly interpreted the statute as not affecting the noneconomic loss amounts for claims filed on behalf of decedents.

Timing of Filing Claims

The Zadroga Act defines the timing requirements for filing a claim as the date no later than two years after the claimant “knew (or reasonably should have known) ... that the individual suffered a physical harm at a 9/11 crash site as a result of the terrorist-related aircraft crashes of September 11, 2001, or as a result of debris removal,” and “knew (or should have known)...that the individual was eligible to file a claim” with the Fund. Section 405(c)(3)(A). The Reauthorized Zadroga Act does not change this requirement.

One commenter suggested that the Special Master interpret the “knowledge” component to mean personal knowledge that the claimant's eligible physical condition was related to his/her 9/11-related exposure based on the date the claimant received a diagnosis from the WTC Health Program of an eligible physical harm. The commenter argued that it is not reasonable to assume that a clean-up worker, resident, or other “survivor” knew or reasonably should have known that

his/her physical condition was related to his/her 9/11-related exposure until that time, given repeated assurances from public officials regarding the safety of the air quality around the WTC site, the lack of resources available to that community for medical screening and treatment until 2007, and the media's focus on the health-related impact on 9/11 responders.

While these comments do not require changes in the regulations, they raise issues that merit consideration by the Special Master in evaluating the issue of "timeliness." The Special Master will provide additional information concerning this issue on the Fund's website in order to give claimants greater insight into the decision-making process.

Fees and Expenses

Two comments were submitted regarding revisions or clarifications to the provisions on the amounts that a representative of a claimant may charge in connection with a claim to the Fund. One commenter suggested that the Special Master clarify that Section 104.81 be revised to make clear that the limitation on attorneys' fees applies to charges "to a claimant" and that expenses not charged to a claimant need not be approved by the Special Master. The Special Master believes that the existing language is sufficiently clear and that no change is needed.

Another commenter suggested the addition of a provision to address how costs associated with the transfer of claimant files should be allocated if a claimant terminates counsel and retains new counsel. The commenter suggested that any costs for such a transfer should be borne solely by "incoming" counsel. The Special Master does not believe that this is an issue to be addressed in the regulations and therefore no changes to the Final Rule are made with respect to this issue.

Other Comments

The Special Master received a number of additional comments that, while not requiring changes to the regulations, raise important issues for the administration of the Fund. Former

Special Master Birnbaum indicated from the reopening of the Fund in 2011 that her goal was to design, implement, and administer a program that is transparent and fair. Special Master Bhattacharyya is similarly committed to those goals in the administration of the Fund for the next five years.

Comments stressed the importance of transparency so that claimants can understand the reasons for how their claims are handled. Some commenters suggested that certain claims were submitted months or years before the reauthorization and did not receive a loss calculation or other correspondence from the Fund requesting missing information or clarification of previously submitted information, and as a result, those claims will be unfairly subject to Group B statutory standards. These commenters did not identify specific claims and therefore the Special Master could not investigate the reasons why this may have happened or whether the loss amount in those claims would yield a different value under Group B standards. As a general matter, many claims that did not receive a loss calculation letter at the time of reauthorization had incomplete compensation forms, had an eligibility issue that precluded compensation review, were missing required supporting documents that were not submitted with the claim, or presented unique circumstances related to compensation that require additional research or third-party verification. Other claims may have submitted all of the paperwork necessary to process the claim but unfortunately were not fully evaluated and determined when Congress enacted the new legislation. The Fund has prioritized and granted expedited review for claimants suffering from a terminal illness or extreme financial hardship and undertook great efforts to review claims in the order in which they were submitted. The Fund continues its commitment to reviewing claims when they are fully submitted in a first in, first out order.

The Special Master appreciates these comments. While these comments do not require changes in the regulations, they suggest ways that the Fund can better achieve its mission. The Special Master is attuned to these issues and will take them into account as she works to ensure that the Fund serves the 9/11 community as the Zadroga Act intended.

Other commenters suggested changes that are outside the scope of this program. For example, two commenters called for the expansion of the New York State World Trade Center (WTC) Disability Law, which allows certain first responders to receive a disability pension due to injuries sustained as a result of 9/11 exposure, to include first responders who voluntarily left their employment or are not otherwise covered. Such an action would have to be addressed by the state legislature.

One commenter objected to the definition of the “9/11 crash site” on the grounds that the northern boundary line does not encompass the full New York City exposure zone and is inconsistent with the boundary used in the WTC Health Program, but properly recognized that it would require an act of Congress to revise the boundary.

Regulatory Certifications

Administrative Procedure Act

This Final Rule is being made effective on the date of publication in the Federal Register. The Special Master, pursuant to 5 U.S.C. 553(d)(3), finds that there is good cause to forgo a 30-day delayed effective date for this Final Rule. The Final Rule makes no change to the provisions of the Interim Final Rule (except for two minor technical corrections fixing unintended errors). The preamble of this Final Rule responds to the public comments and explains why no substantive changes to the Interim Final Rule are needed. In the interests of transparency, the Special Master has deferred the issuance of payments on pending claims until after the

publication of this Final Rule, which serves to make clear the final standards applicable to the adjudication of claims under the Fund. Thus, a 30-day delay in the effective date of this Final Rule would also have had the effect of further delaying the issuance of payments on claims under the revised provisions of Part 104, which would be undesirable and contrary to sound public policy.

Paperwork Reduction Act of 1995

This Final Rule implements Public Law 114-113 which reauthorizes the September 11th Victim Compensation Fund of 2001. In order to be able to evaluate claims and provide compensation, the Fund must collect information from an individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001 or the debris removal efforts that took place in the immediate aftermath of those crashes. Accordingly, in connection with the approval of the Interim Final Rule, the Department of Justice, Civil Division, submitted an information collection request to the Office of Management and Budget for review and clearance in accordance with the emergency review procedures of the Paperwork Reduction Act of 1995. This request sought reinstatement of the prior information collection authorized under Public Law 111-347. The Department also published a Notice in the Federal Register soliciting public comment on the information collection associated with this rulemaking. 81 FR 20674 (April 8, 2016). The Office of Management and Budget approved the information collection on June 13, 2016. The information collection will be effective until June 30, 2019.

Regulatory Flexibility Act

These regulations set forth procedures by which the Federal government will award compensation benefits to eligible victims of the September 11, 2001, terrorist attacks. Under 5

U.S.C. 601(6), the term “small entity” does not include the Federal government, the party charged with incurring the costs attendant to the implementation and administration of the Victim Compensation Fund. This rule provides compensation to individuals, not to entities.

Further, because a general notice of proposed rulemaking was not required for the Interim Final rule, and in accordance with the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)), a Regulatory Flexibility Act analysis was not required.

Executive Orders 12866 and 13563— Regulatory Review

This Final Rule has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review” section 1(b), Principles of Regulation and in accordance with Executive Order 13563 “Improving Regulation and Regulatory Review” section 1(b) General Principles of Regulation. The Office of Management and Budget had determined that the Interim Final Rule was an “economically significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly the Interim Final Rule had been reviewed by the Office of Management and Budget. This Final Rule, however, adopts as final the regulatory provisions promulgated by the Interim Final Rule, with no substantive change. Accordingly, the Department has determined that this Final Rule is not a significant regulatory action under Executive Order 12866, and this rule has not been reviewed by the Office of Management and Budget.

Executive Order 13132—Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the

preparation of a Federalism Assessment. This rule is substantively identical to the Interim Final Rule published on June 15, 2016, and the Department of Justice worked cooperatively with state and local officials in the affected communities, and notified national associations representing elected officials, in the preparation of the Interim Final Rule.

Executive Order 12988—Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Congressional Review Act

This rule adopts as final the provisions of the Interim Final Rule published on June 15, 2016 (81 FR 38936). Upon consideration of the public comments submitted in response to the Interim Final Rule, the Special Master has determined that no substantive changes need to be

made in the regulations in 28 CFR part 104, which took effect on June 15, 2016. This rule makes no amendments to the existing regulations in 28 CFR part 104, except for two technical changes correcting minor drafting errors.

The Special Master has determined that this Final Rule does not fall within the definition of a “rule” under the Congressional Review Act, 5 U.S.C. 804(3)(C), because it is a rule of agency practice or procedure that does not substantially affect the rights or obligations of non-agency parties. Accordingly, the requirement to submit a report pursuant to 5 U.S.C. 801 is not applicable.

List of Subjects in 28 CFR Part 104

Disaster assistance, Disability benefits, Terrorism.

Accordingly, for the reasons set forth in the preamble, the interim rule amending 28 CFR part 104, which was published at 81 FR 38936, on June 15, 2016, is adopted as final with the following changes:

PART 104—SEPTEMBER 11TH VICTIM COMPENSATION FUND

1. The authority citation for Part 104 continues to read as follows:

Authority: Title I V of Pub. L. 107–42, 115 Stat. 230, 49 U.S.C. 40101 note; Title II of Pub. L. 111–347, 124 Stat. 3623; Div. O, Title IV of Pub. L. 114-113, 129 Stat. 2242.

2. In §104.21, the last sentence of paragraph (a) is revised to read as follows:

§ 104.21 Presumptively covered conditions.

(a). * * * Group B claims shall be eligible for compensation only if the Special Master determines based on the evidence presented that a claimant who seeks compensation for physical harm has at least one WTC-Related Physical Health Condition, or, with respect

to a deceased individual, the cause of such individual's death is determined at least in part to be attributable to a WTC-Related Physical Health Condition.

* * * * *

3. In § 104.62, paragraph (b) is revised to read as follows:

§ 104.62 Time limit on filing claims.

* * * * *

(b) *Determination by Special Master.* The Special Master or the Special Master's designee should determine the timeliness of all claims under paragraph (a) of this section.

Dated: August 29, 2016.

Rupa Bhattacharyya,
Special Master

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