



The VCF held a conference call with law firms on February 15, 2019, to discuss the Special Master's determination of funding insufficiency. This document summarizes the Special Master's remarks during the call.

On February 15, 2019, the VCF published its [Seventh Annual Status Report and Third Annual Reassessment of Policies and Procedures](#), which is the periodic reassessment of VCF policies and procedures that is required by the statute. At the same time, the VCF posted a [message](#) from the Special Master to the 9/11 community, and a [Frequently Asked Questions](#) document.

As background, on October 3, 2018, the VCF published in the Federal Register a Notice of Inquiry as part of the Special Master's statutory obligation to periodically reassess the VCF's policies and procedures for two purposes: to make sure that: (1) we prioritize claims for individuals who suffer from the most debilitating physical conditions, and; (2) we do not exceed the \$7.375 billion in funds appropriated to the VCF.

The publication was prompted by an August 2018 projections analysis that suggested the possibility that, following current policies and procedures, the VCF might exceed its available funding prior to the VCF's claim filing deadline on December 18, 2020. The VCF is grateful to those who took the time to consider the questions and submit thoughtful responses.

The publication of the Notice of Inquiry resulted in a deluge of new claims – with more claims received in the four months since October, 2018 (over 8,100) than the VCF usually gets in a full year. In January alone, we got six times the usual monthly claim filing volume – over 4,000 claims. Many of these claimants had registered years earlier, but recently submitted their completed claims, and we believe that they were spurred to do so in response to the publication of the Notice of Inquiry and the media reports about the VCF's funding situation.

This was largely consistent with the trends that we had been seeing, and which prompted the Special Master to issue the Notice of Inquiry in the first place, but it was extremely unexpected in scope.

For further perspective, in the first five years of the Fund, through December 31, 2016, roughly 19,000 compensation forms were filed. In the two years after that, through December 2018, almost 20,000 additional compensation forms were filed, with an additional 4,800 compensation forms filed in January of this year alone. That's a jump from roughly 300 new claims per month to more than 800 new claims per month, an increase of more than 167%.

Last year, we projected that we would have just over 11,000 additional claims and amendments by the VCF's claim filing deadline three years later, i.e., in December 2020. Since that time, in just over one year, we've already exceeded that number, with nearly two more years to go.

These numbers also reflect:

- A 235% increase in deceased claim filings since reauthorization in December 2015,
- A marked increase in cancer claims, and claims for other serious conditions. As a point of reference, in 2015 the Congressional Budget Office ("CBO") estimated that we would get between 2,500 and 10,000 cancer claims (and they were looking at a time horizon to 2025). We have already found over 8,000 cancer claimants eligible, and already awarded compensation to more than 6,000 of these claimants.
- Prior to the 2015 reauthorization, nearly 22% of claims decided were for cancer. By the end of 2018, that number had risen to over 32%.
- In addition, we have also seen a marked increase in claims from the survivor population; At the time of reauthorization, not quite 14% of all VCF claims had been filed by survivors. It is now nearly 35%.



While the VCF has rendered determinations on more than 21,000 claims as January 31, 2019 (some more than once due to an amendment or an appeal), over 19,000 original claims and amendments remain to be decided, and claims continue to be filed. The problem is one of basic math – as of February 15, 2019, we have awarded nearly \$5 billion on over 21,000 claims. We have about \$2 billion left, with just over 19,000 claims and amendments still needing a decision, and two years of claim filing left to go. We need a reserve for administrative costs, for the most severe claims, and for unanticipated and unforeseeable future increases in claims volumes. That math doesn't work.

In light of these statistics and the projections analysis set forth in greater detail in the Annual Report, and pursuant to our statutory mandate, the Special Master has formally determined that the VCF's appropriated funding amount is insufficient to pay all pending claims, as well as all claims anticipated but not yet filed, at the same levels as we have under current policies. Accordingly, as the law requires, the Special Master is modifying VCF policies and procedures so as to ensure that the VCF does not expend funds beyond its appropriated limit of \$7.375 billion. To that end, the VCF must make significant reductions in awards.

In choosing how to go about this difficult task, we attempted to balance the VCF's two statutory directives – not exceeding the available appropriation, and prioritizing the claims for claimants with the most debilitating conditions – against three main policy considerations: (1) ensuring that all claimants filing before the statutory deadline, December 18, 2020, will receive some compensation for their suffering (subject to applicable statutory offsets); (2) holding a reasonable amount of money in contingent reserve to insure against further unanticipated increases in claim filings, and to be able to make increased awards in appropriate cases where claimants are suffering from extraordinarily severe conditions; and (3) minimizing operational and administrative implementation challenges to avoid a delay or outright halt in claim determinations.

The Special Master feels strongly that she would not be fulfilling her responsibility if she did not adopt policies such that every individual suffering from a physical health condition as a result of the events of September 11th received at least some measure of compensation from the Fund that was created to help them. We could not abide a plan that would leave some claimants uncompensated or that would fail to make any allowance for the claimants who suffer the most.

What's more, in making this decision, we were acutely aware of the fact that we had previously announced that reductions aimed at addressing any insufficiency of funds would be applied only to claims filed after the date of announcement, thus sparing any pending claim, and we are aware that many of you have acted over the last few months in reliance on that announcement. But, regrettably, the stark reality of the data has rendered that intention unworkable under every possible option explored. While we sincerely believed when the Notice of Inquiry was published that we could make changes only with respect to new claims filed after the effective date of any announcement of changes due to funding insufficiency, the deluge of claims filed since October 3, 2018, and the data and projections we are looking at now no longer bear that out.

After thoroughly evaluating every potential available option, the Special Master agreed with the majority of the commenters who responded to the Notice of Inquiry and concluded that the fairest way to implement the required reduction of awards is to do so across the board, applying a percentage reduction to all awards. Accordingly, all pending claims, regardless of when they were filed, will be subject to the new policies put in place to address the insufficiency of funds. We *will* make some accommodation, however, for claimants whose claims were already pending as of February 1, 2019, as follows:

Effective for any award on which the VCF makes a determination on or after February 25, 2019:

- If the claim or amendment was already submitted for compensation review on or before



February 1, 2019, the calculated award will be reduced by 50 percent.

- If the claim or amendment is submitted for compensation review on or after February 2, 2019, the calculated award will be reduced by 70 percent.

By law, we cannot reduce the offsets applied to the award and so the offsets will be taken in full.

Because we treat expedites as priority claims, any claims approved for expedited status will be subject to the 50 percent reduction. We continue to appreciate the discretion and judgment that are applied when making requests for expedited processing and we will continue to strictly apply the expedite criteria so that only those claims for which expedition is truly necessary are allowed to jump the line.

There are very limited exceptions to losses that will not be subject to reductions. First, on wrongful death claims, the \$250,000 non-economic loss for the eligible death and the \$100,000 on account of a spouse and any dependents will not be reduced, pursuant to the language in the regulations. Second, burial expenses will not be reduced. And third, medical expenses will not be reduced due to insufficient funding.

Every award letter dated on or after February 25, 2019, will clearly indicate whether or not the award has been subject to a reduction. There will be some awards in the pipeline that will get a letter after February 25, 2019, to which the reductions will not be applied as we are trying not to delay awards by sending claims back for review when they are already near the end of the process.

Where the reductions are applied, we will not communicate the value of the awards before the reduction was taken, but the components of the reduced award as well as the inputs that go into calculating the award – eligible conditions, earnings basis, percentage of disability, start date of loss – will be included in the award letter's detailed addendum as normal.

We are painfully aware of the inequity of the situation. If there had been a different option available, we would have taken it. But we must go forward under the law as written.

The reductions made due to insufficient funding will require some attendant changes to VCF procedures, although we are making every effort to minimize these changes and to prevent any slowdown in award determinations as a result of implementation. We are continuing to devise implementation plans and will announce any process changes that affect claim filing or processing as soon as possible. We will keep the 9/11 community apprised of all developments.

One process that clearly will be impacted is the appeals process. Claimants will continue to have the right to appeal their compensation decisions so long as they do so within the required 30 days of receiving their award letter, consistent with our regulations. Eligibility appeals and appeals from compensation determinations involving economic loss will continue without change. For economic loss appeals, the detailed award letter addendum will include, as it currently does, the inputs used to calculate economic loss, including the earnings basis, the percentage of disability, and the start of loss date. Therefore, we believe that the information necessary to pursue an appeal and seek recalculation of the reduced award remains available to the claimant and the appeal can be heard in the ordinary course.

For compensation appeals involving non-economic loss, the VCF is adopting a two-tiered structure in an effort to preserve the expenditure of resources for appeals for claimants with the most debilitating conditions. Thus, for non-economic loss appeals, the VCF will schedule appeal hearings only for claimants with the most severe conditions – e.g., cancer, interstitial lung diseases, sarcoidosis – so that the VCF can assess whether the limited funding held in contingent reserve for the most severe cases should be used to increase a reduced award. For claimants with less severe conditions, the VCF will defer any requested appeal hearing until after December 18, 2020, but will pay the reduced value award in the interim.



Appeal determinations made on or after February 25, 2019, for appeals filed on awards issued prior to February 25, 2019, will not be subject to percentage reductions, regardless of when the hearing is held. If changes are made to an award following an appeal on these claims, they will be made using the original, unreduced values and calculations.

There are two reminders being made in any abundance of caution:

- First, the VCF advises every claimant who receives an award letter that he or she is required to advise the VCF of any changes to their collateral offsets after the award determination is communicated. It is extremely important that these collateral offset update forms continue to be filed on all claims. Failure to file a timely collateral offset update form may require us to rescind money already paid, as explained in the VCF's collateral offset update policy, and will delay any correction of a reduced award that might be required by law should legislation that is currently pending in Congress pass.
- Second, the statutory 10% of the award that is allowable for attorneys' fees must be assessed from the reduced award value that is paid by the VCF. Attorneys cannot assume that the awards will be corrected or increased at some point in the future and withhold some higher amount in anticipation of 10% of some larger, speculative, future award.

Additional Policy Changes

In addition to adopting the reductions due to insufficient funding to compensate all pending and projected claims, the VCF is also making several policy changes that the Special Master has determined constitute better, sounder policy. These changes are not made due to the determination of funding insufficiency, but are done in continuation of the VCF's long tradition of refining and clarifying our existing policies to make sure that the VCF is operating consistent with our guiding principles, i.e., in a manner that is fair to claimants, consistent with law, and accountable to the taxpayers. These policy changes are effective as of February 15, 2019 and include the following:

- **Recalibrating Non-Economic Loss Awards:** In consultation with the medical professionals at NIOSH and in the World Trade Center Health Program's Clinical Centers of Excellence, we are adjusting certain non-economic loss values to more accurately correspond to the medical reality, which is that very few non-cancer conditions are, by diagnosis alone, so severe that they should automatically qualify for the highest-available non-economic loss award of \$90,000. Thus, effective immediately, only interstitial lung disease (including asbestosis and pulmonary fibrosis), emphysema, and sarcoidosis will be treated as presumptively severe and awarded the highest level non-economic loss award without further documentation of severity. Similarly, the baseline non-economic loss award values for basal cell and squamous cell skin cancers are being lowered to \$90,000, consistent with the medical view that these conditions have relatively less severe effects on the activities of daily living, with higher awards reserved for those claimants who demonstrate that their condition is severe such that an increase in the award value is warranted (e.g., for recurrence, multiple procedures, or disfigurement resulting from treatment). We are also lowering the minimum non-economic loss value for the least severe conditions – Laryngitis, Nasopharyngitis, Pharyngitis, Rhinitis, Rhinosinusitis, and Sinusitis – to \$10,000. All other conditions will be awarded \$20,000 in non-economic loss, with very limited exceptions where there is demonstrated ongoing severity and significant detrimental effects on a claimant's quality of life.
- **Adjusting the Default Future Residual Earnings Assumption:** The default residual earnings assumption of \$23,818, which was set in 2012, is used to calculate a deduction from lost earnings awards when a claimant has been determined to be disabled for certain types of work from his or her 9/11-related eligible physical health conditions, but is not disabled from working



completely. Given the passage of time, we are adjusting the default residual earnings assumption to more closely mirror current value. Effective immediately, the VCF will adopt \$31,200 as the future annual residual earnings assumption – this is equal to New York City’s 2018 annual minimum wage rate for businesses with 11 or more employees.

- **Contingent Collateral Offsets:** It has been the VCF’s policy to calculate a future collateral offset only where payment of such benefit was not contingent on some future event. For example, because Social Security survivor benefits are contingent on a victim’s surviving spouse remaining unmarried, they would not be offset for the full period of loss, if at all. Effective immediately, offsets will be taken in full to the end of work life expectancy or other appropriate date, regardless of contingency. If and when a contingency comes to pass that terminates an offset benefit, if it occurs before December 18, 2020, the claimant may amend the claim.
- **Increased Medical Expenses Threshold:** The minimum threshold for reimbursement of out-of-pocket medical expenses is increased from \$2,000 to \$5,000. As is currently true, exceptions to this policy may be made in appropriate circumstances.

Please direct any questions about the reductions due to insufficient funding or other additional policy changes to the VCF law firm liaisons via the regular communication channels. We will compile a master list and provide answers to everyone as quickly as possible.

Thank you.