

was alive, the death does not have to be related to the covered injury for these benefits to be paid.

Once the Secretary has determined that he has all the information necessary to compute lost employment income, the calculation will be made as follows, as set out in § 102.81:

(1) If the eligible individual lost five days or fewer of employment income, then there will be no benefits for lost employment income.

(2) If the eligible individual lost six to nine days of employment income, then the Secretary will subtract five days from the number of lost work days; if the eligible individual lost 10 or more days of employment income, then every lost work day will be counted.

(3) The Secretary will multiply the injured individual's daily gross employment income (including income from self-employment) at the time of the covered injury by the number of lost work days (as computed above). This figure will be adjusted to account for inflation, as appropriate.

(4) The Secretary will compute 75% of the lost employment income if the injured individual had one or more dependents (at the time of the covered injury) or 66 2/3% of the lost employment income if there were no dependents (at the time of the covered injury). This calculation will serve as the basis for the lost employment income benefit.

(5) The amount of payment will be reduced by any benefit that the requester is entitled to receive from a third-party payor (e.g., a workers' compensation program). However, the Secretary may make a payment of lost employment income and later pursue such a payment from a third-party payor with an obligation to pay for or provide the benefit (e.g., the Secretary can pay a benefit for lost employment income to a requester with a claim pending in a State workers' compensation program, and then has a right to recover such a payment from the State if its program determines that such a benefit is due the requester).

(6) The payments made will be subject to an annual cap of \$50,000. The benefits paid in lost employment income will be subject to a lifetime cap, as discussed above, unless the Secretary determines that a requester has a covered injury considered to be a total and permanent disability under section 216(i) of the Social Security Act.

No State law workers' compensation lien may be maintained on any benefit for lost employment income paid under this program.

**Death Benefits—Summary and Calculation** (§ 102.11, § 102.33, and § 102.82)

Certain survivors of smallpox vaccine recipients or vaccinia contacts who died as a direct result of a covered injury or its health complications may be eligible for death benefits, as set out in § 102.11 (eligible survivors and their priority to receive death benefits), § 102.33 (general description of death benefits) and § 102.82 (calculation of death benefits).

The SEPPA provides that death benefits under this program may be available under two different calculations. The "standard calculation" is a lump-sum payment to eligible survivors and is described in § 102.82(c). In general, this method is based on the death benefit available under the PSOB Program. The "alternative calculation" is only available to surviving dependents who are younger than the age of 18, as described in § 102.82(d). This method is based upon the deceased person's employment income at the time of the covered injury.

**Eligible Survivors and Priorities for Receiving Death Benefits**

With limited exceptions, the Smallpox Vaccine Injury Compensation Program follows the requirements of the PSOB Program with respect to the categories of eligible survivors (known in the PSOB Program as beneficiaries) and the order of priority for payments of death benefits to them. The order of priority for survivors to receive death benefits under the program is subject to changes made in the future under the PSOB Program concerning eligible survivors and their priority to receive death benefits.

Currently, the categories of eligible survivors under the PSOB Program are as follows: (1) Surviving spouses; (2) surviving eligible children; (3) individuals designated by the deceased person as the beneficiaries under the deceased person's most recently executed life insurance policy; and (4) surviving parents. Such survivors, as defined under the PSOB Program, are also eligible survivors under this program. Currently, a surviving child is considered eligible under the PSOB Program if he or she is an individual who is a natural, illegitimate, adopted, or posthumous child, or stepchild, of the deceased person, and is 18 years of age or younger, or between 19 and 23 years of age and a full-time student, or is over 18 years of age and incapable of self-support because of physical or mental disability.

The SEPPA included two additional categories of survivors under this program who are not eligible survivors under the PSOB Program: (5) Legal guardians of deceased minors without surviving parents; and (6) surviving dependents who are younger than the age of 18 (some of whom may also fall within the category of surviving eligible children). As discussed below, special criteria apply to the final category of eligible survivors.

Under current practices, in the event that the deceased eligible individual is survived by a spouse and eligible children, the spouse will receive 50% of the death benefit and the children will divide the remaining 50% equally. If there are no surviving eligible children, then the spouse receives the entire benefit; if there is no surviving spouse, then the children divide the benefit in equal shares. In the event that the deceased injured individual has no surviving spouse or children, the individual designated by the deceased individual as the beneficiary under his or her most recently executed life insurance policy will receive the death benefit. If there is no life insurance policy or no surviving designated beneficiary under such a policy, the parents will divide the death benefit in equal shares. If none of these categories of survivors exists, the legal guardian of a deceased minor (who was a smallpox vaccine recipient or vaccinia contact) with no living parent will receive the death benefit, if applicable. As explained in § 102.11(b)(5), surviving dependents younger than the age of 18 will have the same priority as surviving eligible children.

Only the legal guardians of persons qualifying both as surviving eligible children under the PSOB Program and as dependents younger than the age of 18 can choose between a proportional death benefit under the standard and the alternative methods of payment. Survivors eligible under the PSOB Program's categories of survivors (e.g., spouses, parents, certain insurance designees, and surviving eligible children) who do not qualify as dependent minors are only covered under the standard calculation. Dependents who are minors and who do not qualify under another category of eligible survivors (for example, eligible surviving children of the deceased) are only covered by the alternative method of payment.

**Death Benefits Under the Standard Calculation, Described in § 102.82(c)**

Under the "standard calculation," the amount of the death benefit that can be paid under the program in a particular