

fiscal year will equal the amount of the death benefit available under the PSOB Program in the same fiscal year (without regard to any reduction in PSOB Program death benefits due to a limitation in appropriations). The amount of the PSOB Program death benefit, which is subject to change, is currently approximately \$262,100. Survivors who already collected, or are eligible to collect, death benefits under the PSOB Program are not eligible to receive Smallpox Vaccine Injury Compensation Program death benefits under the standard calculation. Survivors receiving a death benefit under the standard calculation from this program will receive the difference between any disability benefit paid under the PSOB Program and the death benefit available under the standard calculation if the PSOB Program disability benefit was underpaid due to a limitation in appropriations.

Death benefits under the standard calculation will be reduced by the amount of lost employment income benefits that were paid under this program either to the deceased individual during his or her lifetime, or to his or her estate after death. For example, if a smallpox vaccine recipient received \$40,000 from the program during his lifetime in benefits for lost employment income and later died, his survivors would be entitled to receive a total of approximately \$222,100 in this fiscal year (the approximate \$262,100 death benefit, minus the \$40,000 in benefits for lost employment income paid to the injured person during his lifetime).

#### Death Benefits Under the Alternative Calculation, Described in § 102.82(d)

Payments made under the "alternative calculation" of death benefits are based on the deceased person's employment income at the time he or she sustained the covered injury. Under this calculation, 75% of the deceased person's employment income (determined in the same manner as employment income for purposes of lost employment income benefits) at the time he or she sustained the covered injury resulting in death will be paid annually until the youngest of the dependents reaches the age of 18. However, the maximum annual amount that may be paid to dependents (in total) under the alternative calculation is \$50,000. No lifetime caps apply to death benefits under this alternative calculation.

Death benefits under this alternative calculation are available only to surviving dependents who are younger than the age of 18. In order for such

surviving dependents to receive payments under the alternative calculation as opposed to the standard calculation, the legal guardian of all the dependents younger than the age of 18 must choose to receive a proportionate share of the benefits under this calculation on their behalf, as described in § 102.82(d)(1). In the event that multiple dependents have different legal guardians, each legal guardian is responsible for choosing the calculation of death benefits on behalf of the dependents of whom he or she is the legal guardian. For this reason, the legal guardian of several individuals who qualify both as surviving dependents younger than the age of 18 and as surviving eligible children cannot select a death benefit under the standard calculation for some of those dependents and a death benefit under the alternative calculation for other dependents. For those survivors who are eligible for a death benefit under both calculations, the particular circumstances (e.g., the age of the survivors, the employment income of the deceased person at the time of the covered injury) will determine which method of calculation will provide the greatest financial benefit.

If dependent survivors choose to receive death benefits under the alternative calculation, no death benefits will be paid to those dependents under the standard calculation. However, such payments would not preclude other eligible survivors of equal priority from receiving a proportionate death benefit under the standard calculation. For example, if a deceased smallpox recipient or vaccinia contact is survived by two dependents younger than the age of 18 from a prior marriage and by a spouse who is not the legal guardian of the dependents, the legal guardian of the two dependents could choose to receive a 50% share of the death benefit for the dependent children under the alternative calculation and the surviving spouse would still be able to receive his or her 50% share of the death benefit under the standard calculation. As another example, if a deceased smallpox recipient is survived by two minor, dependent children, one whose living parent is the deceased person's surviving spouse and another whose living parent is the deceased person's former spouse, the surviving spouse could receive a 50% share of the death benefit under the standard calculation and each of the dependent children would be eligible for a proportionate share (25%) of the death benefit available under the standard calculation

or the alternative calculation, as determined by the children's respective legal guardians. Although the Program will generally apportion death benefits among multiple eligible survivors, it will not do so on behalf of dependents receiving death benefits under the alternative calculation if the dependents share the same legal guardian (because such payments would be made to the legal guardian on behalf of all of the dependents for whom he or she is the legal guardian). The legal guardian would be expected to apportion the award appropriately.

Death benefits paid to survivors under this alternative calculation are secondary to all payments made, or expected to be made in the future, by any third party payor for: (i) Compensation for the deceased person's loss of employment income on behalf of the dependents receiving death benefits under the alternative calculation, or their legal guardian(s); (ii) disability, retirement, or death benefits in relation to the deceased person on behalf of the dependents receiving death benefits under the alternative calculation, or their legal guardian(s); and (iii) life insurance benefits on behalf of the dependents receiving death benefits under the alternative calculation. Such secondary benefits are described in § 102.83(d)(3)(A). Reductions will not be made if such benefits were paid to other persons (for example, if a retirement benefit was paid to the surviving spouse who is not the dependents' legal guardian, no deduction would be made to the dependents' death benefit to account for the benefit the spouse received). In calculating such reductions, the Secretary will have discretion to apportion over multiple years any lump-sum third-party payments. The Secretary has a right to recover benefits paid under this program from third-party payors that have an obligation to pay for or provide such benefits.

As with other determinations made under this regulation, any determination concerning the calculation and payment of death benefits is not subject to any judicial review.

#### Filing a Request Package (§ 102.40–§ 102.41)

A Smallpox Vaccine Injury Compensation Request Form (hereinafter "Request Form") available from the program and all the eligibility and benefits documentation comprise the Smallpox Vaccine Injury Compensation Request Package (hereinafter "Request Package"). In order for a requester to have his or her request reviewed by the program, the