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The September 11th Victim Compensation Fund (VCF): Background and Potential Reauthorization

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SUMMARY

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The September 11th Victim Compensation Fund (VCF): Background and Potential Reauthorization

The September 11th Victim Compensation Fund (VCF) provides cash benefits to certain persons whose health may have been affected by exposure to debris or toxic substances in the aftermath of the September 11, 2001, terrorist attacks on the Pentagon and the World Trade Center, and the terrorist-related aircraft crash at Shanksville, PA. Congress created the original VCF shortly after the 2001 terrorist attacks to provide compensation to persons injured and to the families of persons killed in the attacks and their immediate aftermath. In 2011, Congress reopened the VCF to provide benefits to persons who responded to the terrorist attack sites, were involved in the cleanup of these sites, or lived in lower Manhattan during the attacks. The VCF was reauthorized in 2015, and it is scheduled to sunset on December 18, 2020.

The VCF has awarded more than $5 billion since its reopening and is in danger of exceeding its current appropriation of $7.375 billion before its sunset date and thus being unable to pay full benefits. In February 2019, the Special Master of the VCF announced that all future VCF awards would be reduced to prevent the VCF from running out of appropriated funds. The Special Master cites increases in death claims, cancer claims, and claims from non-responders as drivers of the increase in VCF benefit costs.

Reauthorization bills, H.R. 1327 and S. 546, have been introduced, with H.R. 1327 being ordered reported out of the Judiciary Committee on June 12, 2019. Both bills would reauthorize the VCF without changing any eligibility categories and appropriate “such sums as may be necessary” for each fiscal year through FY2090. On July 12, 2019, H.R. 1327 was passed by the House of Representatives with amendments that changed the bill’s name, changed the provisions for adjusting the maximum amount of income considered for determining noneconomic loss, added up to two Deputy Special Masters to the program’s administration, and made the bill’s spending exempt from PAYGO requirements.

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The current September 11th Victim Compensation Fund (VCF) provides cash benefits to certain persons whose health may have been affected by the aftermath of the September 11, 2001, terrorist attacks on the Pentagon and the World Trade Center, and the terrorist-related aircraft crash at Shanksville, PA. The current iteration of the VCF may be unable to pay full benefits to eligible persons and is scheduled to sunset on December 18, 2020. Current VCF data are provided in this report's **Appendix**.

History of the VCF

On September 22, 2001, the Air Transportation Safety and System Stabilization Act (ATSSA; P.L. 107-42) was enacted into law.[1] Quickly passed by Congress in the wake of the September 11, 2001, terrorist attacks, this legislation provided various forms of relief to the American airline industry and affirmed Congress's commitment to improving airline safety. Title IV of the ATSSA also established the VCF to compensate persons injured or the representatives of persons killed in the attacks or their immediate aftermath.

The VCF originally closed in 2003 and was reopened in 2011 and expanded to provide compensation to responders to the September 11, 2001, terrorist attacks and others, such as certain New York City residents, who may have suffered health effects in the aftermath of the attacks. The VCF was reauthorized in 2015 and, if not reauthorized in the 116th Congress, will sunset on December 18, 2020.

Original VCF

The original VCF, as created by Title IV of the ATSSA, provided cash benefits to the following groups of persons who suffered physical injury or death as a result of the terrorist attacks of September 11, 2001:

- persons who were present at the World Trade Center, Pentagon, or aircraft crash site in Shanksville, PA, at the time of or in the immediate aftermath of the aircraft crashes at those sites on September 11, 2001;[2] and
- passengers and crew of any aircraft that crashed on September 11, 2001, as a result of terrorist activity.

The amount of benefits available to each claimant was determined by a Special Master appointed by the Attorney General.[3] The amount of benefits payable to each claimant was based on each person's economic losses (such as loss of future earnings) and noneconomic losses (such as pain and suffering). The VCF statute specifically prohibited the payment of punitive damages. Benefits were reduced by certain collateral source payments, such as life insurance benefits, available to the claimant. There was no cap on the amount of benefits that any one person could receive or on total benefits paid.

By filing a VCF claim, a person waived his or her right to file a civil action or be a party to such an action in any federal or state court for damages related to the September 11, 2001, terrorist-

[1] The Air Transportation Safety and System Stabilization Act (ATSSA) is codified at 49 U.S.C. §40101 note.

[2] The term "immediate aftermath" was defined in the original Victim Compensation Fund (VCF) regulations at 28 C.F.R. §104.2(b) [2002] to include the period of time from a crash until 12 hours after a crash for all persons except rescue workers and 96 hours after a crash for rescue workers.

[3] Attorney General John Ashcroft appointed Kenneth Feinberg as Special Master of the VCF on November 26, 2001.

related aircraft crashes.[4] This provision established the VCF as an alternate and expedited route to compensation for victims while providing some protection against lawsuits for damages that may have been brought by victims against the air carriers; airframe manufacturers; the Port Authority of New York and New Jersey, who owned the World Trade Center; or any other entity.

Congress provided funding for the VCF through an appropriation of "such sums as may be necessary" for benefit payment and administration. The Special Master of the VCF was required to promulgate regulations to govern the program within 90 days of the law's enactment, and all claims had to be filed within two years of the regulations' promulgation, at which time the VCF would close.[5] The original VCF received 7,403 claims and made awards totaling $7.049 billion to 5,560 claimants.[6]

Reopened VCF

The original VCF was closed to new claims in December 2003. However, concerns about injuries and illnesses incurred by persons involved in emergency response, recovery, and debris removal operations at the September 11th aircraft crash sites led Congress to reopen the VCF with the enactment of Title II of the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act; P.L. 111-347). The reopened VCF extended eligibility for cash benefits to persons who suffered physical injuries or illnesses as a result of rescue, recovery, or debris removal work at or near the September 11th aircraft crash sites during the period from September 11, 2001, to May 30, 2002, as well as certain persons who lived, worked, or were near the World Trade Center on September 11, 2001.

The VCF was initially reopened for new claims through October 3, 2016. Total benefits and administrative costs paid by the reopened VCF were limited to $2.775 billion, unlike in the original VCF, which had no cap on total funding for benefits, allowing the Special Master to award benefits without considering the benefits' total cost. Under the reopened VCF, attorneys' fees were limited to 10% of the VCF award.[7]

VCF Reauthorization

The reopened VCF was scheduled to stop taking claims on October 3, 2016. The VCF was reauthorized on December 18, 2015, with the enactment of Title IV of Division O of the Consolidated Appropriations Act, 2016 (Zadroga Reauthorization Act of 2015; P.L. 114-113). Under this reauthorization, claims approved before the reauthorization date are considered Group A claims. Group A claims are subject to the same rules as claims under the reopened VCF and are subject to the $2.775 billion cap on total benefit payments. All other claims filed before the final VCF deadline of December 18, 2020, are considered Group B claims subject to additional rules and funding caps established by the reauthorization legislation. Thus, all current claims are Group B claims.

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[4] This provision was amended later in 2001 by Section 201 of the Aviation and Transportation Security Act (P.L. 107-71) to permit civil actions against persons who were knowing participants in any conspiracy to hijack any aircraft or commit any terrorist act.

[5] Interim final regulations for VCF1 were promulgated on December 21, 2001 (Department of Justice, "September 11th Victim Compensation Fund of 2001; Interim Final Rule," 66 *Federal Register* 66282, December 21, 2001), resulting in a sunset date for the VCF of December 22, 2003.

[6] Kenneth R. Feinberg, *Final Report of the Special Master for the September 11th Victim Compensation Fund 2001*, Department of Justice, 2004, p. 109.

[7] There was no cap on attorneys' fees in the original VCF legislation.

Overview of the VCF Under Current Law

VCF Eligibility

To be eligible for VCF benefits, a person must have

- died as a passenger or crew member on one of the aircraft hijacked on September 11, 2001;
- died as a direct result of the terrorist-related aircraft crashes or rescue, recovery, or debris removal in the *immediate aftermath* of the September 11, 2001, terrorist attacks; or
- been present at a *September 11th crash site* in the immediate aftermath of the September 11, 2001, terrorist attacks and suffered *physical harm* as a direct result of the crashes or the rescue, recovery, and debris removal efforts.

Immediate Aftermath

For the purposes of VCF eligibility, the immediate aftermath of the September 11th terrorist attacks is the time period from September 11, 2001, to May 30, 2002.

September 11th Crash Sites

For the purposes of VCF eligibility, the September 11th crash sites include

- the World Trade Center, Pentagon, or Shanksville, PA, crash sites;
- the buildings or portions of buildings that were destroyed as a result of the September 11th terrorist attacks;
- the area in Manhattan that is south of the line that runs along Canal Street from the Hudson River to the intersection of Canal Street and East Broadway, north on East Broadway to Clinton Street, and east on Clinton Street to the East River; and
- any area related to debris removal, such as the debris-removal barges and Fresh Kills in Staten Island, New York.

Physical Harm

To be eligible for the VCF, individuals who did not die as passengers or crew members of one of the hijacked aircraft, or as a direct result of the September 11th terrorist attacks (including rescue, recovery, and debris removal), must have suffered physical harm as a result of the attacks. For the purposes of VCF eligibility, physical harm is demonstrated by the presence of a *World Trade Center (WTC)-related physical health condition* as defined for the purposes of the World Trade Center Health Program (WTCHP).[8]

[8] The World Trade Center Health Program (WTCHP) provides medical monitoring and treatment to responders to the sites of the September 11, 2001, terrorist attacks and certain New York City residents living near the World Trade Center. The WTCHP is administered by the Centers for Disease Control and Prevention (CDC), National Institute for Occupational Safety and Health (NIOSH). For additional information on the WTCHP, see the program website at https://www.cdc.gov/wtc/.

WTC-Related Physical Health Condition

A WTC-related physical health condition is a physical health condition covered by the WTCHP. These conditions are those provided in statute at Sections 3312(a) and 3322(b) of the Public Health Service Act (PHSA)[9] and those added through rulemaking by the WTCHP administrator.[10] Per Section 3312(a) of the PHSA, to be covered by the WTCHP and thus compensable under the VCF, a condition must be on the list of covered WTCHP-covered conditions and it must be determined that exposure in the aftermath of the September 11, 2001, terrorist attacks "is substantially likely to be a significant factor in aggravating, contributing to, or causing the illness or health condition."[11] In most cases, the VCF requires that a person's condition be certified by the WTCHP for that condition to be compensable.[12]

The WTCHP provides guidance on how to evaluate if a person's condition meets the standard to be linked to exposure in the aftermath of the September 11, 2001, terrorist attacks.[13] This evaluation is based on a combination of the amount of time a person was physically present at a site and the specific activities—such as search and rescue, sleeping in a home in Lower Manhattan, or just passing through a site—in which the person engaged. For example, a person who was engaged in search and rescue activities at the World Trade Center site between September 11 and September 14, 2001, must have been present for at least 4 hours for the WTCHP to certify his or her condition and thus compensable by the VCF, whereas a person whose only activity was passing through Lower Manhattan during the same period, and who was not caught in the actual dust cloud resulting from the buildings' collapse, would have to have been in the area for at least 20 hours to be eligible for compensation.[14] The WTCHP evaluates conditions that do not meet the minimum exposure criteria on a case-by-case basis using "professional judgement" and "any relevant medical and/or scientific information."[15]

WTCHP-covered mental health conditions may not be used to establish VCF eligibility, as the VCF does not include any provisions for benefit payments for mental health conditions.

Cancer as a WTC-Related Physical Health Condition

The WTCHP statute does not include any type of cancer in the list of WTC-related health conditions. However, the statute does require the WTCHP administrator to periodically review the available scientific evidence to determine if any type of cancer should be covered by the WTCHP and, by extension, the VCF. In response to a petition to add conditions to the list of WTC-related health conditions, the WTCHP administrator is required, within 90 days, to either request a recommendation on action from the WTC Scientific/Technical Advisory Committee (STAC) or make a determination on adding the health condition. If the WTCHP administrator

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[9] 42 U.S.C. §§300mm-22(a) and 300mm-32(b).

[10] The complete list of conditions covered by the WTCHP is provided in regulation at 42 C.F.R. §88.15 and on the WTCHP website at https://www.cdc.gov/wtc/conditions.html.

[11] 42 U.S.C. §300mm-22(a).

[12] In certain limited circumstances, a physician not affiliated with the WTCHP may certify that a person's condition is covered by the WTCHP and thus compensable by the VCF.

[13] World Trade Center Health Program, *Policy and Procedures for Certification of Physician Determinations for Aerodigestive and Cancer Health Conditions*, February 20, 2015, https://www.cdc.gov/wtc/pdfs/policies/WTCHPPPCertPhysDetFINAL20Feb2015-508.pdf. (Hereinafter WTCPH, *Policy and Procedures for Certification of Physician Determinations*.)

[14] WTCPH, *Policy and Procedures for Certification of Physician Determinations*, pp. 4-5.

[15] WTCPH, *Policy and Procedures for Certification of Physician Determinations*, p. 4.

requests a recommendation from the STAC, that recommendation must be made within 90 days of its receipt and the WTCHP administrator must act on that request within an additional 90 days.[16]

On September 7, 2011, Representatives Carolyn B. Maloney, Jerrold Nadler, Peter King, Charles B. Rangel, Nydia M. Velazquez, Michael G. Grimm, and Yvette Clarke and Senators Charles E. Schumer and Kirsten E. Gillibrand filed a petition, in the form of a letter to the WTCHP administrator, requesting that the administrator "conduct an immediate review of new medical evidence showing increased cancer rates among firefighters who served at ground zero" and that the administrator "consider adding coverage for cancer under the Zadroga Act."[17] In response to this petition, the WTC administrator requested that the STAC "review the available information on cancer outcomes associated with the exposures resulting from the September 11, 2001, terrorist attacks, and provide advice on whether to add cancer, or a certain type of cancer, to the List specified in the Zadroga Act."[18]

On September 12, 2012, based on the STAC's recommendations, the WTCHP administrator added more than 60 types of cancer, covering nearly every body system and including any cancers in persons less than 20 years of age and any rare cancers,[19] to the list of WTC-related health conditions, thus making these conditions compensable under the VCF.[20]

In a review of the decision to add cancers to the list of WTC-related health conditions, the Government Accountability Office (GAO) found that the WTCHP administrator used a hazards-based approach to evaluate cancers.[21] This approach evaluated whether exposures in the aftermath of the September 11, 2001, terrorist attacks were associated with types of cancer but did not evaluate the probability of developing cancer based on a given exposure. A GAO-convened scientific panel indicated that the hazards-based approach the WTCHP administrator used was reasonable given data constraints and the fact that there is a certification process to determine if a cancer or other condition on the list of WTC-related health conditions meets the statutory requirement of being "substantially likely to be a significant factor in aggravating, contributing to, or causing the illness or health condition."[22] The panel also indicated that this approach could have benefited from an independent peer review process. The WTCHP administrator stated that peer review was not possible given the statutory time constraints to act on the petition and the STAC's recommendation.

[16] 42 U.S.C. §§300mm-22(a)(6)(B) and (C). Each of these deadlines was increased from 60 days to 90 days by the Zadroga Reauthorization Act of 2015.

[17] Letter from Reps. Carolyn B. Maloney, Jerrold Nadler, and Peter King, et al. to John Howard, Director, National Institute for Occupational Safety and Health, September 7, 2011.

[18] Letter from John Howard, Director, National Institute for Occupational Safety and Health, to Elizabeth Ward, Chair, WTC Health Program Scientific/Technical Advisory Committee, October 5, 2011.

[19] For the purposes of the WTCHP and VCF, a rare cancer is a cancer that occurs in less than 15 cases per 100,000 persons per year in the United States. This includes, among other cancers, cancers of the brain, male breast, and gallbladder. A complete list of covered rare cancers is provided on the WTCHP website at https://www.cdc.gov/wtc/conditions.html.

[20] Department of Health and Human Services, "World Trade Center Health Program: Addition of Certain Types of Cancer to the List of WTC-Related Health Conditions," 77 *Federal Register* 56158, September 12, 2012.

[21] U.S. Government Accountability Office, *World Trade Center Health Program: Approach Used to Add Cancers to List of Covered Conditions was Reasonable but Could be Improved*, GAO-14-606, July 2014.

[22] 42 U.S.C. §§300mm-22(a).

One year later, the WTCHP administrator added prostate cancer to the list of WTC-related health conditions.[23] The WTCHP administrator has also established minimum latency periods for certain types of cancer[24] and maximum onset periods for certain types of aerodigestive disorders.[25]

VCF Operations

The Civil Division of the Department of Justice administers the VCF. The VCF Special Master, currently Rupa Bhattacharyya decides VCF eligibility and benefits. A claimant dissatisfied with the Special Master's decision on his or her claim may file an appeal and request a hearing before a VCF hearing officer appointed by the VCF. There is no further right of appeal or judicial review of VCF decisions. A claimant may amend his or her claim after a decision has been made if the claimant has new material relevant to the claim.

Registration and Claim Deadlines

All claims for VCF benefits must be filed by December 18, 2020, five years after the VCF reauthorization act's enactment. Before filing a claim, a potential claimant must have registered with the VCF by one of the following applicable deadlines:

- by October 3, 2013, if the claimant knew, or reasonably should have known, that he or she suffered a physical harm or died as a result of the September 11th attacks or rescue, recovery, or debris removal efforts, and that he or she was eligible for the VCF, on or before October 3, 2011;
- within two years of the date the claimant knew, or reasonably should have known, that he or she has a WTC-related physical health condition or died as a result of the September 11th attacks and is eligible for the VCF.

If a claimant has a condition that is later added to the list of conditions covered by the WTCHP, then the two-year period begins on the later of the dates when a government entity, such as the WTCHP or a state workers' compensation agency, determines that the condition is related to the September 11th attacks, or when a claimant's condition is added to the list of conditions covered by the WTCHP.[26]

VCF Benefits

Benefits under the original VCF were not subject to any caps on individual or total payments. When the VCF was reopened, total benefits were subject to a cap of $2.775 billion; however,

[23] Department of Health and Human Services, "World Trade Center Health Program: Addition of Prostate Cancer to the List of WTC-Related Health Conditions," 78 *Federal Register* 57514, September 19, 2013.

[24] World Trade Center Health Program, *Minimum Latency & Types and Categories of Cancer*, Revised, November 5, 2014, https://www.cdc.gov/wtc/pdfs/policies/wtchpminlatcancer2014-11-07-508.pdf. For example, the minimum latency period for mesothelioma is 11 years from exposure and the minimum latency period for most solid cancers is four years from exposure.

[25] World Trade Center Health Program, *Time Intervals for New Onset Aerodigestive Disorders*, Revised, February 18, 2015, https://www.cdc.gov/wtc/pdfs/WTCHP_Time_Intervals_New_Onset_AeroDig_Disorders.pdf. For example, to be compensable certain obstructive airway diseases, such as asthma and chronic cough syndrome, must occur within five years of exposure.

[26] A table of deadlines for each type of medical condition is provided on the VCF website at https://www.vcf.gov/pdf/RegisterChart.pdf.

there were no specific caps on individual benefits. VCF benefits for Group B are subject to caps on noneconomic losses and total benefits.

Benefits under the VCF for Group B claims are determined by the Special Master based on the claimant's economic and noneconomic losses. For noneconomic losses, there is a cap of $250,000 for claims based on cancer and $90,000 for all other claims. However, for cases in which a person's death was caused by a WTC-related health condition, the VCF regulations provide that the presumed award for noneconomic loss is $250,000 plus an additional $100,000 for the person's spouse and each dependent.[27] When calculating economic losses, the Special Master is only permitted to consider the first $200,000 in annual income when determining losses to past earnings and future earning capacity, which limits the amount of economic losses that can be paid. There is a total cap of $4.6 billion for VCF Group B awards. As in past iterations of the VCF, benefits are reduced by certain collateral source payments available to claimants, such as life insurance benefits, workers' compensation payments, and government benefits related to the person's injury or death, such as Social Security Disability Insurance (SSDI) and the Public Safety Officers' Benefits Program (PSOB).

VCF Financing

The costs of VCF benefits and administration are not subject to annual appropriations. Rather, costs for Group A benefits and administration were financed by the $2.775 billion in appropriations provided by the Zadroga Act. Costs for Group B benefits and administration are financed by the one-time appropriation of $4.6 billion provided in the Zadroga Reauthorization Act of 2015. Thus, the total funding available for the VCF since its reopening is $7.375 billion. Funding was made exempt from budget sequestration by the Zadroga Reauthorization Act of 2015.[28]

Special Master's Reduction of Future Awards

Total funding for VCF benefits and administrative costs is capped by the $7.375 billion in appropriations that have been provided in the Zadroga Act and Zadroga Reauthorization Act of 2015, with a total cap of $4.6 billion for VCF Group B awards. The VCF statute requires the Special Master to annually reassess VCF policies and procedures to determine if these policies and procedures satisfy the statutory requirements that claimants with the most debilitating physical conditions have their claims prioritized and that total expenditures for awards and administrative costs associated with Group B claims do not exceed the $4.6 billion in available funding.[29]

Special Master's Assessment

Notice of Inquiry

In October 2018, the Special Master published a Notice of Inquiry in the *Federal Register* seeking public comments on possible policy changes that the Special Master could consider to

[27] 28 C.F.R. §104.44.

[28] 2 U.S.C. §905(g)(1)(B). The exemption applies to any sequestration order on or after the date of enactment of the Zadroga Reauthorization Act of 2015 (December 18, 2015).

[29] Section 405(d)(2)(C)(ii) of the ATSSA (49 U.S.C. §40101 note).

ensure there is sufficient funding to administer and pay future VCF claims without exceeding the $4.6 billion cap on Group B expenditures.[30] The Special Master received 28 comments in response to this Notice of Inquiry, of which 16 were relevant to the request for information on possible VCF policy and procedure changes.[31]

Table 1. Projected VCF Program Costs

(from VCF's reopening on October 3, 2011, through end of program authority—Group A and Group B claims)

	2019 Report		2018 Report		2017 Report	
	Historical Data Model	Historical Data and Trend Model	Historical Data Model	Historical Data and Trend Model	Historical Data Model	Historical Data and Trend Model
	in millions of dollars					
Projected Award Costs[a]	$10,064[b]	$11,660[b]	$7,032	NA	$4,056	$7,083
Projected Administrative Costs	$251	$251	$264	NA	$226	$226
Total Projected Costs	**$10,315[b]**	**$11,911[b]**	**$7,295**	**NA**	**$4,282**	**$7,309**

Sources: September 11th Victim Compensation Fund, *Seventh Annual Status Report and Third Annual Reassessment of Policies and Procedures*, February 2019, p. 41, https://www.vcf.gov/pdf/VCFStatusReportFeb2019.pdf; and earlier versions from 2017 and 2018.

Notes: The historical data model is based on historical program data and the historical data and trend model uses historical data augmented by recent trends in program participation. The 2018 report did not use the historical data and trend model for projections.

a. Includes initial and revised awards.

b. Exceeds total available funding of $7.375 billion.

Projections of Future VCF Expenditures

In February 2019, the Special Master published her most recent annual assessment of VCF policies and procedures.[32] This report includes two sets of projections of future VCF benefit and administrative costs. One projection is based on historical program data and another projection is based on these historical data, augmented by data on recent program trends. These two models were also used in the 2017 assessment, whereas the 2018 assessment only projected costs based on historical program data.

As shown in **Table 1**, the Special Master projects under both models that total VCF program costs by the end of the program will far exceed the $7.375 billion in available funding. This is the first

[30] Department of Justice, "September 11th Victim Compensation Fund: Compensation of Claims," 83 *Federal Register* 49946, October 3, 2018.

[31] A summary of these public comments and the Special Master's responses to these comments is provided as Appendix A of the Special Master's *Seventh Annual Status Report and Third Annual Assessment of Policies and Procedures*, available online at https://www.vcf.gov/pdf/VCFStatusReportFeb2019.pdf.

[32] September 11th Victim Compensation Fund, *Seventh Annual Status Report and Third Annual Reassessment of Policies and Procedures*, February 15, 2019, https://www.vcf.gov/pdf/VCFStatusReportFeb2019.pdf.

time the Special Master projects that program funding will be insufficient to pay all VCF benefits and administrative expenses.

On June 21, 2019, during testimony before the House Committee on the Judiciary, the Special Master pointed to increases in death claims, cancer claims, and claims from non-responders have played a role in driving projected benefit costs above the amount of available funding Congress provided.[33] The Special Master did not, however, break down how much of the cost increases can be attributed to each of these three factors.

Death Claims

As of May 31, 2019, the Special Master has determined that 1,057 death claims are eligible for the reopened VCF. Of these, award decisions based on economic and noneconomic loss have been made in 856 cases.[34] As a comparison, the original VCF paid awards in 2,880 cases of death.[35] Because there is a regulatory presumption of noneconomic loss of $250,000 for the decedent and an additional $100,000 for the spouse and any dependents, noneconomic loss awards in death cases have the potential to be larger than those in injury cases.

Since the VCF's reauthorization in 2015, the number of eligible and awarded death cases has increased significantly. For claims paid prior to reauthorization (Group A claims), awards were paid in 17 death cases.[36] Thus, in less than four years since reauthorization, there has been a nearly 5,000% increase in death awards. Of the 839 death awards paid since reauthorization, 517 were awarded in the period between April 30, 2018, and April 30, 2019, with an additional 43 claims paid in May 2019. Through the end of May 2019, there has been an average of more than 35 new eligibility decisions and more than 48 new awards in death claims per month.[37]

Although the Special Master does not discuss the causes of the increases in death claims, the nature of many of the compensable medical conditions, especially certain types of cancer with low survival rates, means that many persons eligible for compensation from the VCF will likely die as a result of their WTC-related health conditions, thus possibly making their families eligible for death compensation.[38]

Cancer Claims

Cancers were first added to the VCF as compensable conditions in September 2012. Since then, there have been 8,734 cases with at least one form of cancer determined to be eligible for the VCF. As of the end of April 2019, eligible claims with at least one type of cancer made up 37% of all eligible VCF claims.

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[33] Testimony of Special Master Rupa Bhattacharyya, in U.S. Congress, House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *The Need to Reauthorize the September 11th Victim Compensation Fund*, 116th Cong., 1st sess., June 21, 2019.

[34] September 11th Victim Compensation Fund, *VCF Program Statistics*, (as of May 31, 2019), June 5, 2019, https://www.vcf.gov/pdf/VCFMonthlyReportMay2019.pdf.

[35] Kenneth R. Feinberg, *Final Report of the Special Master for the September 11th Victim Compensation Fund 2001*, Department of Justice, 2004, p. 23.

[36] September 11th Victim Compensation Fund, *Fifth Annual Status Report and Annual Reassessment of Policies and Procedures*, March 13, 2017, p. 8, https://www.vcf.gov/pdf/VCFStatusReportMar2017.pdf.

[37] Congressional Research Service (CRS) analysis of VCF program data from various data reports available online at https://www.vcf.gov/programstatsarchive.html.

[38] A claim that has already been awarded benefits may be amended at any time if the circumstances of medical condition, economic, or noneconomic loss change and additional compensation may be awarded. This can include filing an amended claim after a previously paid claimant dies from a compensable condition.

As shown in **Table 2**, the most significant growth in cancer claims occurred shortly after cancers were added to the list of WTC-eligible health conditions and also in the most recent year. Between September 30, 2014, and December 31, 2015, the number of eligible claims with cancer as the only compensable condition (cases that would not otherwise be eligible for the VCF if not for the addition of cancer) increased 194% from 472 claims to 1,387 claims. This increase is understandable and expected given that this was early in the period during which cancer claims were first eligible for compensation. However, the recent increase in eligible cancer-only claims as a percentage of all eligible claims is one of the factors that drove the projected program costs, which were just below total available funds in the 2018 assessment, over the funding cap in the 2019 assessment. In 2018, the number of eligible cancer-only claims increased 58%. At the end of 2018, eligible cancer-only claims made up 18% of all eligible claims.

Table 2. Eligible Cancer-Only Claims and Total Claims

Report Date	Total Eligible Claims	Eligible Cancer-Only Claims	Eligible Cancer-Only Claims as % of Total Eligible Claims	% Change in Eligible Cancer-Only Claims from Previous Report
September 30, 2014	8,517	472	5.54%	NA
December 31, 2015	13,437	1,387	10.32%	193.86%
December 31, 2016	15,851	1,897	11.97%	36.77%
December 31, 2017	18,024	2,485	13.79%	31.00%
December 31, 2018	22,323	3,929	17.60%	58.11%

Source: Congressional Research Service (CRS) analysis of VCF program data from various annual status reports available online at https://www.vcf.gov/programstatsarchive.html.

The increase in eligible cancer claims is notable for three reasons. First, no types of cancer were compensable when the VCF was originally reopened in 2010 and no cancers were included in the list of WTC-related health conditions created by Congress in the Zadroga Act. Cancers were added to the list of covered conditions by the WTCHP administrator in two determinations made in 2012 and 2013. These determinations resulted in more than 60 types of cancer covering nearly every body system being compensable under the VCF.

Neither the VCF nor WTCHP statutes include any specific provisions requiring any follow-up or continuous review of scientific evidence to determine if, in the nearly seven years since these determinations were made, there is any additional evidence to support or refute including these types of cancers in the list of WTC-related health conditions compensable under the VCF. The GAO cited limitations on data available in 2012 as a reason that its scientific panel found the WTCHP administrator's use of a hazards-based rather than probability model to add cancers to the list of WTC-related health conditions reasonable.[39] Given the increases in the number of persons receiving services from the WTCHP and developing cancer in the years since the 2012 and 2013 cancer determinations, there may be additional data to warrant reevaluating the list of covered cancers or evaluating the likelihood of developing cancer after different types of exposures in the aftermath of the September 11, 2001, terrorist attacks.

In addition, the VCF covers a wide range of persons from firefighters and police officers who were the first responders to the attacks, to construction and other workers who were involved in

[39] U.S. Government Accountability Office, *World Trade Center Health Program: Approach Used to Add Cancers to List of Covered Conditions was Reasonable but Could be Improved*, GAO-14-606, July 2014.

debris removal, and to adults and children who were in lower Manhattan at the time of the attacks, all of whom may have had different types and durations of exposure to toxic substances in the aftermath of the attacks. Although the determination that a person's health condition was linked to his or her exposure in the aftermath of the September 11, 2001, terrorist attacks is based on a combination of duration and nature of exposure, the list of covered conditions, including all cancers except childhood cancer, applies equally to all persons with no accounting for individual exposure experience.

Second, the VCF is a program of presumptive eligibility. Thus, when determining eligibility for the VCF, controlling factors such as genetics, age, behaviors such as tobacco use, or exposure to other toxins are not considered and the Special Master does not make a determination as to the probability that a person's exposure in the aftermath of the September 11, 2001, terrorist attacks caused his or her cancer. Rather, the only requirement that a cancer or other health condition be linked to a person's exposure in the aftermath of the attacks is the WTCHP's determination that such exposure "is substantially likely to be a significant factor in aggravating, contributing to, or causing the illness or health condition."[40] In addition, the WTCHP administrator did not consider the likelihood or probability that any given cancer would occur based on the hazards experienced in the aftermath of the September 11, 2001, attacks when cancers were added to list of WTC-related health conditions.

This approach is different than the probability of causation model used for some cancer claims under Part B of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), in which the probability that a person's cancer was caused by occupational exposure to ionizing radiation must be 50% or greater to receive compensation.[41] The VCF's presumptive eligibility model is also in contrast to the probability of causation model recommended by the National Research Council Board on Radiation Effects Research[42] to be used to determine eligibility for benefits under the Radiation Exposure Compensation Act (RECA) for persons who lived near the Nevada Test Site during atmospheric atomic weapons testing.[43] However, the presumptive eligibility model is used for other federal compensation programs, including disability compensation for veterans exposed to radiation and Agent Orange.

Third, cancer claims have the potential to result in higher benefits than non-cancer claims. The cap on noneconomic loss awards for cancer claims is $250,000 versus $90,000 for non-cancer claims.

Non-responder Claims

Since it was reauthorized in 2015, the VCF has paid awards to an increasing number of non-responders. For claims paid prior to reauthorization (Group A claims), awards to non-responders—including those who participated in cleaning or maintenance work near one of the crash sites or persons who lived in, worked in, attended school in, or were visiting lower

[40] 42 U.S.C. §300mm-22(a).

[41] Part B of EEOICPA, codified at 42 U.S.C. §§7384l – 7384w-1, provides cash and medical benefits to certain former workers in the development of atomic weapons with specific types of cancer. Workers who are not part of the EEOICPA Special Exposure Cohort are eligible for EEOICPA benefits if it is determined that their cancers were "at least as likely as not" (probability of causation of 50% or greater) to be related to their employment.

[42] National Research Council, Board on Radiation Effects Research, *Assessment of the Scientific Information for the Radiation Exposure Screening and Education Program* (Washington, DC: The National Academies Press, 2005).

[43] For additional information on RECA, see CRS Report R43956, *The Radiation Exposure Compensation Act (RECA): Compensation Related to Exposure to Radiation from Atomic Weapons Testing and Uranium Mining*, by Scott D. Szymendera.

Manhattan between September 11, 2001, and May 30, 2002—made up 14% of total initial compensation awards.[44] As of the end of 2018, the percentage of total awards made to non-responders had risen to 19% of total initial awards.[45]

Although the Special Master cites the increase in non-responder claims as one of the causes of the increase in VCF benefit costs and the recent projection that program costs will exceed available funding, limitations in the data reported by the VCF make analyzing this potential cost driver difficult. In her congressional testimony, the Special Master states "At the time of Reauthorization in December 2015, not quite 14% of all VCF awards were paid to non-responders. Today, just about 38% of claims filed are from this population."[46] However, this is not a direct comparison, as the Special Master is comparing data on awards with data on claims filed, regardless of whether those claims result in awards without any additional information on the percentage of claims filed that may result in awards. In addition, the data reported by the VCF in its annual status reports are, according to the VCF, self-reported data. Finally, in each year's data on claimant categories, there are a number of cases listed as "no response." Of the 20,981 initial awards reported in the VCF's most recent status report, for example, 370 cases, or 2% of total awards, are listed in the "no response" category.[47]

Reductions of Future Awards

Because award costs under both models are projected to exceed the $7.375 billion in available funding, in February 2019, the Special Master announced the following reductions in the amounts of all future VCF awards for all cases pending as of February 25, 2019:

- For all cases filed on or before February 1, 2019; the calculated award is to be reduced by 50%;
- For all cases that qualify for expedited processing because the claimant has a terminal illness or significant financial hardship, the calculated award is to be reduced by 50%; and
- For all cases filed after February 1, 2019, the calculated award is to be reduced by 70%.[48]

In all cases, the full amount of any offsets for collateral source payments are to continue to be taken.

The award reductions are not to apply to appeals decisions initially issued before February 25, 2019. However, there will be scheduling adjustments for future appeals. For appeals of noneconomic loss decisions, the VCF is to schedule appeals hearings only for cases involving the most severe conditions, such as cancer, interstitial lung disease, and sarcoidosis. For all other noneconomic loss and economic-loss cases, the VCF is not to schedule appeals hearings until

[44] September 11th Victim Compensation Fund, *Fifth Annual Status Report and Annual Reassessment of Policies and Procedures*, March 13, 2017, p. 9, https://www.vcf.gov/pdf/VCFStatusReportMar2017.pdf.

[45] September 11th Victim Compensation Fund, *Seventh Annual Status Report and Third Annual Reassessment of Policies and Procedures*, February 15, 2019, p. 16, https://www.vcf.gov/pdf/VCFStatusReportFeb2019.pdf.

[46] Testimony of Special Master Rupa Bhattacharyya, in U.S. Congress, House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, *The Need to Reauthorize the September 11th Victim Compensation Fund*, 116th Cong., 1st sess., June 21, 2019.

[47] September 11th Victim Compensation Fund, *Seventh Annual Status Report and Third Annual Reassessment of Policies and Procedures*, February 15, 2019, p. 16, https://www.vcf.gov/pdf/VCFStatusReportFeb2019.pdf.

[48] September 11th Victim Compensation Fund, *Determination of Funding Insufficiency: Questions and Answers*, February 2019, https://www.vcf.gov/pdf/VCFFIQandA.pdf.

after December 18, 2020. These schedule changes are designed to ensure that there is sufficient funding to pay increased noneconomic loss determinations made on appeal for the most severe conditions.

Potential VCF Reauthorization in the 116th Congress

The VCF is scheduled to sunset on December 18, 2020. The 116th Congress faces the question of whether to reauthorize the program or let it expire. On June 12, 2019, the House Committee on the Judiciary ordered that H.R. 1327, the Never Forget the Heroes: Permanent Authorization of the September 11th Victim Compensation Fund Act, be reported. Identical legislation, S. 546, is pending committee action in the Senate.

This reauthorization legislation includes the following major components:

- authorization for the VCF through FY2090, with a deadline of October 1, 2089, to file claims;[49]
- removal of the cap on VCF funding;
- appropriations of "such sums as may be necessary" for the VCF for each fiscal year through FY2090;
- payment of the difference between the full award and the actual amount received for all persons who received reduced awards due to the Special Master's actions;
- authority for the Special Master to exceed the limit on noneconomic loss if it is determined that a person's pain and suffering is of such severity as to make the award "insufficiently compensatory"; and
- a cost of living adjustment, to be made every five years, to the maximum amount of annual income permitted to be considered by the Special Master when determining economic loss (currently $200,000).

The reauthorization legislation would not make any changes to the basic eligibility for VCF awards. The legislation also would not specifically address the three drivers of increased VCF costs that the Special Master identified in her 2019 congressional testimony: (1) increases in death claims, (2) cancer claims, and (3) claims from non-responders. However, because this legislation would provide full funding for the VCF not subject to annual appropriations, any increases in program costs would not result in the VCF having insufficient funding to pay all benefits. The Congressional Budget Office has estimated that this legislation, if enacted, would result in $6.785 billion in direct spending on benefits and administration between FY2019 and FY2024 and $10.180 billion in spending between FY2019 and FY2029.[50]

House Passage of Reauthorization Legislation

On July 12, 2019, the House of Representatives passed H.R. 1327 with the following amendments:

[49] This would bring the VCF in line with the WTCHP, which is currently authorized through FY2090.

[50] Congressional Budget Office, H.R. 1327, Never Forget the Heroes: Permanent Authorization of the September 11th Victim Compensation Fund Act: As Ordered Reported by the House Committee on the Judiciary on June 12, 2019, Cost Estimate, July 11, 2019, at https://www.cbo.gov/publication/55435.

- the bill's title was changed to the "Never Forget the Heroes: James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of the September 11th Victim Compensation Fund Act";
- the appropriations of "such sums as may be necessary" for the VCF for each fiscal year through FY2090 is changed to include each fiscal year through FY2092, and the deadline for filing claims is changed from October 1, 2089, to October 1, 2090;
- the authority for the Special Master to exceed the limit on noneconomic loss is changed from requiring a determination that a person's pain and suffering is of such severity as to make the award "insufficiently compensatory" to a determination that the claim "presents special circumstances";
- the original bill's requirement that the Special Master apply a cost-of-living adjustment to the maximum amount of annual income permitted to be considered when determining economic loss (currently $200,000) every five years was replaced with a provision requiring the Special Master to "periodically" adjust the limit "to account for inflation";
- a provision was added permitting the Attorney General to appoint up to two Deputy Special Masters and providing that the Special Master and the deputies serve at the pleasure of the Attorney General; and
- a provision was added specifying that the legislation's budgetary effects shall not be entered on the statutory or Senate PAYGO scorecards, thus making the legislation exempt from PAYGO requirements that new legislative spending not increase the deficit.[51]

[51] For additional information on the PAYGO process and rules, see CRS Report R41157, *The Statutory Pay-As-You-Go Act of 2010: Summary and Legislative History*, and CRS Report RL31943, *Budget Enforcement Procedures: The Senate Pay-As-You-Go (PAYGO) Rule*.

Appendix. September 11th Victim Compensation Fund Awards and Amounts

Table A-1. September 11th Victim Compensation Fund (VCF) Awards

(from VCF's reopening on October 3, 2011, through December 31, 2018—Group A and Group B claims)

Compensation Awarded	Number	Amount
Initial Awards	20,981	$4,291,381,834.60
Revised Awards[a]	5,603	$509,124,835.90
Total Awards	*26,584*	*$4,800,506,670.50*

Source: September 11th Victim Compensation Fund, *Seventh Annual Status Report and Third Annual Reassessment of Policies and Procedures,* February 15, 2019, p. 15, at https://www.vcf.gov/pdf/VCFStatusReportFeb2019.pdf.

Notes: Award amounts are after offsets for benefits from collateral sources such as life insurance.

a. Revised Awards include compensation awarded after an amendment or appeal of an initial decision.

Table A-2. September 11th Victim Compensation Fund (VCF) Award Amounts

(from VCF's reopening on October 3, 2011, through December 31, 2018—Group A and Group B claims)

Compensation Awards	Personal Injury Claims	Death Claims
Total Awards	*$4,408,575,405.21*	*$391,931,265.29*
Highest Award Amount	$4,133,466.00	$3,687,255.65
Lowest Award Amount[a]	$458.13	$4,124.70
Mean Award Amount	$227,375.08	$682,807.08

Source: September 11th Victim Compensation Fund, *Seventh Annual Status Report and Third Annual Reassessment of Policies and Procedures,* February 15, 2019, p. 15, at https://www.vcf.gov/pdf/VCFStatusReportFeb2019.pdf.

Notes: Award amounts are after offsets for benefits from collateral sources such as life insurance.

a. Does not include awards of $0.00 due to total reduction of award due to offsets or because the claimant was already fully compensated by an earlier VCF award.

Table A-3. September 11th Victim Compensation Fund (VCF) Compensation Paid by Category

(from VCF's reopening on October 3, 2011, through December 31, 2018—Group A and Group B claims)

Claimant Category	Claims Paid	Amount
Responder—New York	16,525	$3,849,021,080.56
Responder—Pentagon	30	$8,970,012.20
Responder—Shanksville	7	$1,441,017.56
Non-Responder—New York (cleaning or maintenance)	693	$80,939,483.54
Non-Responder—New York (other)	2,671	$634,886,384.95
Resident in New York Crash Site[a]	471	$102,953,949.11
Attended School/Childcare/Adult Care in New York Crash Site	35	$10,754,643.81
Other Person Present in New York Crash Site	164	$40,725,194.90
Non-responder—Pentagon	15	$3,623,901.41
No Response	370	$67,191,002.46

Source: September 11th Victim Compensation Fund, *Seventh Annual Status Report and Third Annual Reassessment of Policies and Procedures,* February 2019, p. 16, https://www.vcf.gov/pdf/VCFStatusReportFeb2019.pdf.

Notes: Only includes cases in which compensation has been paid by the VCF to the claimant. Does not include cases pending review or appeal. Compensation amounts are after offsets for benefits from collateral sources such as life insurance.

a. The New York Crash Site is defined as the area in Manhattan that is south of the line that runs along Canal Street from the Hudson River to the intersection of Canal Street and East Broadway, north on East Broadway to Clinton Street, and east on Clinton Street to the East River.

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