

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-20 V

Filed: May 17, 2010

Not for Publication

[REDACTED]

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Petitioner,

*

Damages decision based on proffer

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v.

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SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

*

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*

Respondent.

*

Carol L. Gallagher, Somers Point, NJ, for petitioner.

Glenn A. MacLeod, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING DAMAGES¹

On May 12, 2010, respondent filed a Proffer on Award of Compensation. On May 12, 2010, petitioner filed a notice accepting respondent's Proffer. Based on the record as a whole, the special master finds that petitioner is entitled to the award as stated in the Proffer. Pursuant to the terms stated in the attached Proffer, the court awards petitioner:

a lump sum payment of **\$737,686.84**, representing life care expenses for Year

¹ Because this decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

One (\$225,129.62), lost earnings (\$186,117.03), pain and suffering (\$230,384.25), and past unreimbursable expenses (\$96,055.94), in the form of a check payable to [REDACTED], petitioner; and

an amount sufficient to purchase an annuity contract, subject to the conditions described in the attached proffer, that will provide payments for the life care items contained in the life care plan, as illustrated by the chart at Tab A attached hereto, paid to the life insurance company from which the annuity will be purchased.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

Dated: May 17, 2010

/s/ Laura D. Millman

Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.

OFFICE OF SPECIAL MASTERS

_____,
Petitioner,

v.

SECRETARY OF
HEALTH AND HUMAN SERVICES,

Respondent.

No. 07-20V
Special Master Millman

RESPONDENT'S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

The respondent engaged life care planner Laura Fox, MSN, RN, CLCP, and petitioner engaged life care planner Roberta Hurley, BS Ed., to work together to provide an estimation of [REDACTED] future vaccine injury-related needs. All items of compensation identified in the life care plan are supported by the evidence, and are illustrated by the chart entitled **Items of Compensation for [REDACTED]**, attached hereto as Tab A.¹ Respondent proffers that [REDACTED] should be awarded all items of compensation set forth in the life care plan and illustrated by the chart attached at Tab A. Petitioner agrees.

¹The chart at Tab A illustrates the annual benefits provided by the life care plan. The annual benefit years run from the date of judgment up to the first anniversary of the date of judgment, and every year thereafter up to the anniversary of the date of judgment.

B. Lost Earnings

The parties agree that based upon the evidence of record, petitioner has suffered a loss of earnings related to her vaccine injury and that it is unlikely that she will be gainfully employed in the future. Therefore, respondent proffers that [REDACTED] should be awarded \$186,117.03 in lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A). Petitioner agrees.

C. Pain and Suffering

Respondent proffers that [REDACTED] should be awarded \$230,384.25 in actual and projected pain and suffering. This amount reflects that the award for projected pain and suffering has been reduced to net present value. See 42 U.S.C. § 300aa-15(a)(4). Petitioner agrees.

D. Past Unreimbursable Expenses

Evidence supplied by petitioner documents her expenditure of past unreimbursable expenses related to her vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$96,055.94. Petitioner agrees.

E. Medicaid Lien

Petitioner represents that there are no Medicaid liens outstanding against her.

II. Form of the Award

The parties recommend that the compensation provided to [REDACTED] should be made through a combination of a lump sum payment and future annuity payments as described below, and request that the special master's decision and the Court's judgment award the following:

A. A lump sum payment of \$737,686.84, representing life care expenses for Year One (\$225,129.62), lost earnings (\$186,117.03), pain and suffering (\$230,384.25), and past unreimbursable expenses (\$96,055.94), in the form of a check payable to [REDACTED], petitioner;

B. An amount sufficient to purchase an annuity contract, subject to the conditions described below, that will provide payments for the life care items contained in the life care plan, as illustrated by the chart at Tab A attached hereto, paid to the life insurance company² from which the annuity will be purchased. Compensation for Year Two (beginning on the first anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to petitioner, [REDACTED], only so long as [REDACTED] is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to petitioner in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Tab A describe only the total yearly sum to be paid to petitioner and do not require that the payment be made in one annual installment.

² The Life Insurance Company must have a minimum of \$250,000,000 capital and surplus, exclusive of any mandatory security valuation reserve. The Life Insurance Company must have one of the following ratings from two of the following rating organizations:

- a. A.M. Best Company: A++, A+, A+g, A+p, A+r, or A+s;
- b. Moody's Investor Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;
- c. Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or AAA;
- d. Fitch Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA.

1. Growth Rate

Respondent proffers that a four percent (4%) growth rate should be applied to all non-medical life care items, and a five percent (5%) growth rate should be applied to all medical life care items. Thus, the benefits illustrated in the chart at Tab A that are to be paid through annuity payments should grow as follows: four percent (4%) compounded annually from the date of judgment for non-medical items, and five percent (5%) compounded annually from the date of judgment for medical items. Petitioner agrees.

2. Life-contingent annuity

Petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as she, [REDACTED], is alive at the time that a particular payment is due. Petitioner agrees to make arrangements to ensure that written notice is provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of [REDACTED] death.

3. Guardianship

Petitioner is a competent adult. Evidence of guardianship is not required in this case.

III. Summary of Recommended Payments Following Judgment

- | | | |
|----|---|----------------------|
| A. | Lump Sum paid to petitioner: | \$ 737,686.84 |
| B. | An amount sufficient to purchase the annuity contract described above in section II. B. | |

Respectfully submitted,

TONY WEST
Assistant Attorney General

TIMOTHY P. GARREN
Director
Torts Branch, Civil Division

MARK W. ROGERS
Deputy Director
Torts Branch, Civil Division

CATHARINE E. REEVES
Assistant Director
Torts Branch, Civil Division

/s/ **GLENN A. MACLEOD**
GLENN A. MACLEOD
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Dated: May 12, 2010

TAB A

Appendix A: Items of Compensation for

[illegible]

ITEMS OF COMPENSATION	G.R	*	M	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Year 6	Compensation Year 7	Compensation Year 8
				2010	2011	2012	2013	2014	2015	2016	2017
Home Mods	0%			110,000.00							
Lost Earnings				186,117.03							
Pain and Suffering				230,384.25							
Past Unreimbursable Expenses				96,055.94							
Annual Totals				737,686.84	51,470.84	51,679.84	52,551.82	51,679.84	60,820.84	52,760.82	66,720.84

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.

Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner for Yr 1 life care expenses (\$225,129.62), lost earnings (\$186,117.03), pain and suffering (\$230,384.25), and past unreimbursable expenses (\$96,055.94): \$737,686.84.

Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.

Annual amounts shall increase at the rates indicated above in column G.R., compounded annually from the date of judgment.

Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

Items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.

Appendix A: Items of Compensation for

[illegible]

ITEMS OF COMPENSATION	G.R	*	M	Compensation Year 9	Compensation Year 10	Compensation Year 11	Compensation Year 12	Compensation Year 13	Compensation Year 14	Compensation Year 15	Compensation Year 16
				2018	2019	2020	2021	2022	2023	2024	2025
Home Mods	0%										
Lost Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Annual Totals				51,979.84	52,851.82	103,148.64	51,770.84	52,036.02	50,746.04	50,955.04	59,509.02

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.

Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner for Yr 1 life care expenses (\$225,129.62), lost earnings (\$186,117.03), pain and suffering (\$230,384.25), and past unreimbursable expenses (\$96,055.94): \$737,686.84.

Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.

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Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

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Appendix A: Items of Compensation for [REDACTED]

ITEMS OF COMPENSATION	G.R	*	M	Compensation Year 17	Compensation Year 18	Compensation Year 19	Compensation Year 20	Compensation Year 21	Compensation Years 22-Life
				2026	2027	2028	2029	2030	2031-Life
Medicare Premium	5%		M						
Medigap	5%		M	1,920.00	1,920.00	1,920.00	1,920.00	1,920.00	1,920.00
Doctor Visit & Co-pays	5%								
Medicare Part D	5%	*	M	643.20	643.20	643.20	643.20	643.20	643.20
Medicare Part D Deductible	5%	*		310.00	310.00	310.00	310.00	310.00	310.00
Colace	5%			299.88	299.88	299.88	299.88	299.88	299.88
Senekot	5%			97.96	97.96	97.96	97.96	97.96	97.96
Stimulation Bike	4%				14,950.00	1,495.00	1,495.00	1,495.00	1,495.00
Electrodes for Bike	4%			553.00	553.00	553.00	553.00	553.00	553.00
Bike Repairs	4%			300.00	300.00	300.00	300.00	300.00	300.00
Prone Stander	4%	*							
Electric Wheelchair (includes Maintenance)	4%			1,536.40	1,536.40	1,536.40	1,536.40	1,536.40	1,536.40
Manual Wheelchair	4%	*							
Manual Wheelchair Maintenance	4%			100.00	100.00	100.00	100.00	100.00	100.00
Shower Chair	4%					755.98	251.99	251.99	251.99
Hopsital Bed & Mattress	4%	*							
Hoyer 6 Point Hydraulic Lift	4%	*							
Reacher	4%			34.00	34.00	34.00	34.00	34.00	34.00
Transfer Board	4%			209.00		209.00	104.50	104.50	104.50
Adapted Gardening Table	4%					325.00	108.33	108.33	108.33
Catheters, Leg Bags, Insertion Tray, Bags & Gloves	4%	*							
Van	4%							23,120.00	2,312.00
Van Mods	4%							18,004.00	1,800.40
Transp. to Home for Driver Training	0%								
Moss Rehab Driving Lessons	0%								
Case Mngt	0%								
Home Health Care: Weekdays	4%		M	32,760.00	32,760.00	32,760.00	32,760.00	32,760.00	32,760.00
Home Health Care: Weekends	4%		M	13,728.00	13,728.00	13,728.00	13,728.00	13,728.00	13,728.00

Appendix A: Items of Compensation for [REDACTED]

ITEMS OF COMPENSATION	G.R	*	M	Compensation Year 17	Compensation Year 18	Compensation Year 19	Compensation Year 20	Compensation Year 21	Compensation Years 22-Life
				2026	2027	2028	2029	2030	2031-Life
Home Mods	0%								
Lost Earnings									
Pain and Suffering									
Past Unreimbursable Expenses									
Annual Totals				52,491.44	67,232.44	55,067.42	54,242.26	95,366.26	58,354.66

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.

Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner for Yr 1 life care expenses (\$225,129.62), lost earnings (\$186,117.03), pain and suffering (\$230,384.25), and past unreimbursable expenses (\$96,055.94): \$737,686.84.

Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.

Annual amounts shall increase at the rates indicated above in column G.R., compounded annually from the date of judgment.

Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

Items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.