

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-426V

Filed: October 4, 2012

Not for publication

DAVID A. BROWN, *

*

Petitioner, *

*

*

v. *

Damages decision based on proffer

*

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

*

*

Respondent. *

*

*

Lisa A. Roquemore, Irvine, CA, for petitioner.

Lara A. Englund, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING DAMAGES¹

On October 3, 2012, respondent filed a Proffer on Award of Compensation. On October 4, 2012, petitioner's counsel communicated to the undersigned's law clerk that petitioner accepts respondent's Proffer. Based on the record as a whole, the undersigned 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. A lump sum payment of **\$1,644,061.99**, representing compensation for life care

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.

expenses expected to be incurred during the first year after judgment (\$196,669.69), lost earnings (\$1,053,718.63), pain and suffering (\$224,805.32), and past unreimbursable expenses (\$168,868.35). The award shall be in the form of a check payable to petitioner, David A. Brown; and

- b. An amount sufficient to purchase an annuity contract described in paragraph II.B. of the attached Proffer and subject to the conditions described in the Proffer. The award shall be 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: October 4, 2012

/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.

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

DAVID A. BROWN,)	
)	
Petitioner,)	
)	
v.)	No. 09-426V
)	Special Master Laura Millman
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

RESPONDENT'S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

The respondent engaged life care planner Jacqueline Morris, RN, BSN, CRRN, CNLCP, to provide an estimation of David A. Brown’s future vaccine-injury related needs.¹ For the purposes of this proffer, the term “vaccine related” is as described in the special master’s Ruling on Entitlement issued September 30, 2011. All items of compensation identified in the life care plan, filed on October 4, 2012, as Respondent’s Exhibit N, are supported by the evidence,, and are illustrated by the chart entitled Appendix A: Items of Compensation for David A. Brown, attached hereto as Tab A.² Respondent proffers that David A. Brown should be awarded all

¹ The parties have no objection to the proffered award of damages. Assuming the special master issues a damages decision in conformity with this proffer, the parties waive their right to seek review of such damages decision, recognizing that respondent reserves her right, pursuant to 42 U.S.C. § 300aa-12(f), to seek review of the September 30, 2011, decision finding petitioner entitled to an award under the Vaccine Act. This right accrues following entry of judgment.

² The 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.

items of compensation set forth in the life care plan and illustrated by the chart attached at Tab A. Petitioner agrees.

B. Lost Future Earnings

The parties agree that based upon the evidence of record, David A. Brown has suffered a past loss of earnings and will not be gainfully employed in the future. Therefore, respondent proffers that David A. Brown should be awarded lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A). Respondent proffers that the appropriate award for David A. Brown's lost earnings is \$1,053,718.63. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that David A. Brown should be awarded \$224,805.32 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 David A. Brown's expenditure of past unreimbursable expenses related to his vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$168,868.35. Petitioner agrees.

E. Medicaid Lien

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

II. Form of the Award

The parties recommend that the compensation provided to David A. Brown should be made through a combination of lump sum payments 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 **\$1,644,061.99**, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$196,669.69), lost earnings (\$1,053,718.63), pain and suffering (\$224,805.32), and past unreimbursable expenses (\$168,868.35), in the form of a check payable to petitioner, David A. Brown.

B. An amount sufficient to purchase an annuity contract,³ 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 company⁴ from which the annuity will be purchased.⁵ 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, David A. Brown, only so long as David A. Brown is alive at the time a particular payment is due.

³ In respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

⁴ 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.

⁵ Petitioner authorizes the disclosure of certain documents filed by the petitioner in this case consistent with the Privacy Act and the routine uses described in the National Vaccine Injury Compensation Program System of Records, No. 09-15-0056.

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.

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 he, David A. Brown, is alive at the time that a particular payment is due. Written notice shall be provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of David A. Brown's 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, David A. Brown: **\$1,644,061.99**
- B. An amount sufficient to purchase the annuity contract described above in section II. B.

Respectfully submitted,

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Dated: October 3, 2012

Appendix A: Items of Compensation for David Brown

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Years 3-5	Compensation Year 6	Compensation Year 7	Compensation Year 8	Compensation Years 9-10	Compensation Year 11
				2012	2013	2014-2016	2017	2018	2019	2020-2021	2022
Custom AFO	4%	*									
Right Arm/Hand Orthotic	4%	*									
Lift	4%	*									
Lift Slings	4%	*									
Comm Assistive Device	4%	*		915.00			915.00				915.00
Anti-embolism Stockings	4%			58.00	58.00	58.00	58.00	58.00	58.00	58.00	58.00
Shower Chair & Commode	4%	*									
Grab Bars	4%			53.97							
Hand Held Shower	4%			48.00	24.00	24.00	24.00	24.00	24.00	24.00	24.00
Urinal	4%			8.00	8.00	8.00	8.00	8.00	8.00	8.00	8.00
Rails	4%	*									
WC Van Transport	4%		M	4,830.00	4,830.00	4,830.00	4,830.00	4,830.00	4,830.00	4,830.00	4,830.00
Home Mods	0%			18,500.00							
Lost Future Earnings				1,053,718.63							
Pain and Suffering				224,805.32							
Past Unreimbursable Expenses				168,868.35							
Annual Totals				1,644,061.99	145,308.29	129,290.29	130,285.96	129,290.29	130,984.29	129,290.29	130,412.61

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 (\$196,669.69), lost earnings (\$1,053,718.63), pain and suffering (\$224,805.32), and past unreimbursable expenses (\$168,868.35): \$1,644,061.99.

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 David Brown

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Years 12-13	Compensation Year 14	Compensation Year 15	Compensation Years 16-Life
				2023-2024	2025	2026	2027-Life
Medicare Part B Premium	5%		M	1,198.80	1,198.80	1,198.80	1,198.80
Medicare Part B Deductible	5%	*					
Standard Premium & RxPremium	5%		M	1,272.00	1,272.00	1,272.00	1,272.00
Anthem Medicare MOP	5%			3,400.00	3,400.00	3,400.00	3,400.00
Anthem Medicare Deductible	5%			300.00	300.00	300.00	300.00
Anthem Medicare Rx Deductible	5%			316.00	316.00	316.00	316.00
Primary Care Physician	5%	*					
Neurologist Evaluation	5%	*					
Neurologist for Baclofen Pump	5%	*					
Baclofen Pump Refill Kit	5%	*					
Baclofen Dose	5%	*					
Physical Medicine	5%	*					
Neuro-ophthalmology	5%	*					
Orthopedic	5%	*					
Psychiatry Consult & Follow up	5%	*					
Post-acute Rehab	4%	*					
PT Eval	4%	*					
PT	4%	*					
OT Eval	4%	*					
OT	4%	*					
ST Eval	4%	*					
ST	4%	*					
Seating Eval for Manual WC	4%			63.69	63.69	63.69	63.69
Seating Eval for Power WC	4%	*					
Neuropsych Eval	4%	*					
Counseling: Individual	4%	*					
Counseling: Family	4%	*					
MRI of Brain & Prof Fee	5%	*					
CT Cervical Spine	5%	*					
CT Lumbar Spine & Prof Fee	5%	*					
X-rays Pelvis	5%	*					
X-ray Right Shoulder	5%	*					

Appendix A: Items of Compensation for David Brown

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Years 12-13	Compensation Year 14	Compensation Year 15	Compensation Years 16-Life
				2023-2024	2025	2026	2027-Life
CBC	5%	*					
CMP	5%	*					
Baclofen	5%	*					
Trazadone	5%	*		24.00	24.00	24.00	24.00
Lexapro	5%	*		60.00	60.00	60.00	60.00
Tylenol	4%			20.80	20.80	20.80	20.80
ER Facility Fee	5%	*					
ER Physician Fee	5%	*					
Hosp Physician Fee	5%	*					
Hospitalization Facility Fee	5%	*					
Fee	5%	*					
Intrathecal Baclofen Trial Fac. Fee	5%	*					
Baclofen Pump Implant Phys. Fee	5%	*					
Baclofen Pump Implant Fac. Fee	5%	*					
Anesthesia	5%	*					
Baclofen Pump Repl Phys. Fee	5%	*					
Baclofen Pump Repl Fac. Fee	5%	*					
Anesthesia	5%	*					
Strabismus Surgery Pro-op CT	5%	*					
Strabismus Surgery	5%	*					
Residential Care	4%		M	109,500.00	109,500.00	109,500.00	109,500.00
Attendant Care	4%		M	6,180.00	3,090.00	3,090.00	3,090.00
RN Case Mngt	4%			1,366.00	1,366.00	1,366.00	1,366.00
Custom Manual WC	4%					1,694.00	338.80
Manual WC Maint	4%			169.00	169.00	169.00	169.00
Power WC	4%	*					
Power WC Maint	4%	*					
WC Cushion	4%	*					
WC Cushion Cover	4%			44.00	44.00	44.00	44.00
Front Wheeled Walker	4%	*		11.40	11.40	11.40	11.40
Gait Belt	4%			4.73	4.73	4.73	4.73
Suitcase Ramp	4%			12.67	12.67	12.67	12.67

Appendix A: Items of Compensation for David Brown

ITEMS OF COMPENSATION	G.R.	*	M	Compensation	Compensation	Compensation	Compensation
				Years 12-13	Year 14	Year 15	Years 16-Life
				2023-2024	2025	2026	2027-Life
Custom AFO	4%	*					
Right Arm/Hand Orthotic	4%	*					
Lift	4%	*					
Lift Slings	4%	*					
Comm Assistive Device	4%	*		183.00	183.00	183.00	183.00
Anti-embolism Stockings	4%			58.00	58.00	58.00	58.00
Shower Chair & Commode	4%	*					
Grab Bars	4%						
Hand Held Shower	4%			24.00	24.00	24.00	24.00
Urinal	4%			8.00	8.00	8.00	8.00
Rails	4%	*					
WC Van Transport	4%		M	4,830.00	4,830.00	4,830.00	4,830.00
Home Mods	0%						
Lost Future Earnings							
Pain and Suffering							
Past Unreimbursable Expenses							
Annual Totals				129,046.09	125,956.09	127,650.09	126,294.89

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 (\$196,669.69), lost earnings (\$1,053,718.63), pain and suffering (\$224,805.32), and past unreimbursable expenses (\$168,868.35): \$1,644,061.99.
 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.