

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-423V

Filed: October 22, 2012

KENNETH COSGROVE, by his mother,	*	UNPUBLISHED
ALICIA ACKEN COSGROVE,	*	
	*	Joint Stipulation on Damages;
Petitioner,	*	MMR, Hepatitis B, <u>Hemophilus</u>
	*	<u>Influenza</u> Type b; Varicella
v.	*	Vaccines; Encephalitis; Seizure
	*	Disorder
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

Michael G. McLaren, Memphis, TN, for petitioner.

Justine Elizabeth Daigneault, Washington, DC, for respondent.

DECISION¹

On July 1, 2010, Alicia Acken Cosgrove (petitioner), filed a petition for compensation on behalf of her son Kenneth (Kenny), alleging that he suffered certain injuries as a result of receiving a vaccination. Petitioner alleges that Kenny suffered from neurologic injuries, an encephalitis, and a seizure disorder as a result of receiving the Measles-Mumps-Rubella, hepatitis B, Hemophilus influenza type b, and varicella vaccinations on August 27, 2007, and that he experienced the residual effects of his injuries for more than six months. She sought an award on Kenny's behalf under the National Vaccine Injury Compensation Program, National Vaccine Injury Compensation

¹ Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this ruling on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b).

Program² (the Act or the Program). 42 U.S.C. §§ 300aa-1 to -34 (2006).

On October 22, 2012, counsel for both parties filed a stipulation, stating that a decision should be entered awarding compensation.

Respondent denies that Kenny suffered any injury as a result of the vaccinations he received on August 27, 2007, and denies that his current condition and alleged residual effects are the result of a vaccine-related injury. Nevertheless, the parties agree to the joint stipulation, attached hereto as Appendix A. The undersigned finds the stipulation reasonable and adopts it as the decision of the Court in awarding damages, on the terms set forth therein.

The parties stipulated that petitioner shall receive the following compensation: A lump sum of \$ 25,000.00 in the form of a check payable to petitioner as guardian/conservator of Kenny's estate. This amount represents compensation for all damages that would be available under 42 U.S.C. §300aa-15(a). Stipulation ¶ 8.

The undersigned approves the requested amount for petitioner's compensation. Accordingly, an award should be made consistent with the stipulation.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court **SHALL ENTER JUDGMENT** in accordance with the terms of the parties' stipulation.³

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Chief Special Master

² The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-1 to -34 (2006) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

³ Pursuant to Vaccine Rule 11(a), entry of judgment is expedited by the parties' joint filing of notice renouncing the right to seek review.

5. Petitioner represents that there has been no prior award or settlement of a civil action for damages on behalf of Kenneth as a result of his condition.

6. Respondent denies that that the MMR, Hep B, Hib, or Varicella immunizations caused Kenneth's neurologic injuries, encephalitis, seizure disorder, or any other injury, or his current condition.

7. Maintaining their above-stated positions, the parties nevertheless now agree that the issues between them shall be settled and that a decision should be entered awarding the compensation described in paragraph 8 of this Stipulation.

8. As soon as practicable after an entry of judgment reflecting a decision consistent with the terms of this Stipulation, and after petitioner has filed an election to receive compensation pursuant to 42 U.S.C. § 300aa-21(a)(1), the Secretary of Health and Human Services will issue a lump sum payment of \$25,000.00 in the form of a check payable to petitioner as guardian/conservator of Kenneth's estate. This amount represents compensation for all damages that would be available under 42 U.S.C. § 300aa-15(a).

9. As soon as practicable after the entry of judgment on entitlement in this case, and after petitioner has filed both a proper and timely election to receive compensation pursuant to 42 U.S.C. § 300aa-21(a)(1), and an application, the parties will submit to further proceedings before the special master to award reasonable attorneys' fees and costs incurred in proceeding upon this petition.

10. Petitioner and her attorney represent that compensation to be provided pursuant to this Stipulation is not for any items or services for which the Program is not primarily liable under 42 U.S.C. § 300aa-15(g), to the extent that payment has been made or can reasonably be

expected to be made under any State compensation programs, insurance policies, Federal or State health benefits programs (other than Title XIX of the Social Security Act (42 U.S.C. § 1396 et seq.)), or by entities that provide health services on a pre-paid basis.

11. Payments made pursuant to paragraph 8 and any amounts awarded pursuant to paragraph 9 of this Stipulation will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

12. The parties and their attorneys further agree and stipulate that, except for any award for attorneys' fees, litigation costs, and past unreimbursable expenses, the money provided pursuant to this Stipulation will be used solely for the benefit of Kenneth as contemplated by a strict construction of 42 U.S.C. §§ 300aa-15(a) and (d), and subject to the conditions of 42 U.S.C. §§ 300aa-15(g) and (h).

13. Petitioner represents that she presently is, or within 90 days of the date of judgment will become, duly authorized to serve as guardian/conservator of Kenneth's estate under the laws of the State of Wisconsin. No payments pursuant to this Stipulation shall be made until petitioner provides the Secretary with documentation establishing her appointment as guardian/conservator of Kenneth's estate. If petitioner is not authorized by a court of competent jurisdiction to serve as guardian/conservator of the estate of Kenneth Cosgrove at the time a payment pursuant to this Stipulation is to be made, any such payment shall be paid to the party or parties appointed by a court of competent jurisdiction to serve as guardian/conservator of the estate of Kenneth Cosgrove upon submission of written documentation of such appointment to the Secretary.

14. In return for the payments described in paragraphs 8 and 9, petitioner, in her individual capacity and as legal representative of Kenneth, on behalf of herself, Kenneth, and his heirs, executors, administrators, successors or assigns, does forever irrevocably and unconditionally release, acquit and discharge the United States and the Secretary of Health and Human Services from any and all actions or causes of action (including agreements, judgments, claims, damages, loss of services, expenses and all demands of whatever kind or nature) that have been brought, could have been brought, or could be timely brought in the Court of Federal Claims, under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq., on account of, or in any way growing out of, any and all known or unknown, suspected or unsuspected personal injuries to or death of Kenneth resulting from, or alleged to have resulted from, the MMR, Hep B, Hib, or Varicella vaccinations administered on August 27, 2007, as alleged by petitioner in a petition for vaccine compensation filed on or about July 1, 2010, in the United States Court of Federal Claims as petition No. 10-423V.

15. If Kenneth should die prior to entry of judgment, this agreement shall be voidable upon proper notice to the Court on behalf of either or both of the parties.

16. If the special master fails to issue a decision in complete conformity with the terms of this Stipulation or if the Court of Federal Claims fails to enter judgment in conformity with a decision that is in complete conformity with the terms of this Stipulation, then the parties' settlement and this Stipulation shall be voidable at the sole discretion of either party.

17. This Stipulation expresses a full and complete negotiated settlement of liability and damages claimed under the National Childhood Vaccine Injury Act of 1986, as amended, except as otherwise noted in paragraph 9 above. There is absolutely no agreement on the part of the

parties hereto to make any payment or to do any act or thing other than is herein expressly stated and clearly agreed to. The parties further agree and understand that the award described in this Stipulation may reflect a compromise of the parties' respective positions as to liability and/or amount of damages, and further, that a change in the nature of the injury or condition or in the items of compensation sought, is not grounds to modify or revise this agreement.

18. This Stipulation shall not be construed as an admission by the United States or the Secretary of Health and Human Services that the MMR, Hep B, Hib, or Varicella vaccines caused Kenneth's neurologic injuries, encephalitis, seizure disorder, or any other injury or his current condition.

19. All rights and obligations of petitioner hereunder shall apply equally to petitioner's heirs, executors, administrators, successors, and/or assigns as legal representatives of Kenneth Cosgrove.

END OF STIPULATION

/

/

/

/

/

/

/

/

/

/

Respectfully submitted,

PETITIONER:



ALICIA ACKEN COSGROVE

ATTORNEY OF RECORD FOR
PETITIONER:



MICHAEL G. McLAREN, ESQ.
Black McLaren Jones Ryland & Griffec, P.C.
530 Oak Court Drive, Suite 360
Memphis, TN 38117
(901) 762-0535

AUTHORIZED REPRESENTATIVE
OF THE ATTORNEY GENERAL:



VINCENT J. MATANOSKI
Acting Deputy Director
Torts Branch
Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, DC 20044-0146

AUTHORIZED REPRESENTATIVE
OF THE SECRETARY OF HEALTH
AND HUMAN SERVICES:



GEOFFREY EVANS, M.D.
Director, Division of
Vaccine Injury Compensation
Healthcare Systems Bureau
U.S. Department of Health
and Human Services
5600 Fishers Lane
Parklawn Building, Mail Stop 11C-26
Rockville, MD 20857

ATTORNEY OF RECORD FOR
RESPONDENT:



JUSTINE E. DAIGNEAULT
Trial Attorney
Torts Branch
Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, DC 20044-0146
(202) 307-6393

Dated: 10/2/2012