

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-0752V

Filed: March 17, 2009

JASON AGRESTI and)	
KAMLAWATTIE PERSAUD,)	
as guardians ad litem for their daughter,)	
JAYASHREE AGRESTI,)	
)	Stipulation; Diphtheria, Tetanus,
Petitioners,)	and acellular Pertussis vaccination;
)	Hemophilus Influenza type b
v.)	Vaccination
)	
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

Thomas P. Gallagher, Gallagher & Gallagher, Somers Point, NJ, for petitioners

Julia W. McInerny, U.S. Department of Justice, Washington, D.C., for respondent

DECISION¹

GOLKIEWICZ, Chief Special Master.

This is an action seeking an award under the National Childhood Vaccine Injury Compensation Program (the "Act" or "the Program"), 42 U.S.C. §300aa-10 et seq., on account of an injury to the petitioners' daughter, Jayashree Agresti. The parties to the above captioned case

¹ The undersigned intends to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party that (1) that is a trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" decision will be available to the public. Id.

filed a Stipulation on February 23, 2009, memorializing their agreement as to the appropriate amount of compensation in this case. See Stipulation.

Jayashree received two vaccinations on September 19, 2003: a Diphtheria, Tetanus, acellular Pertussis (DTaP) vaccination and a Hemophilus Influenzae type b (Hib) vaccination. Stipulation at 1. In their petition, petitioners allege that Jayashree sustained the first symptom or manifestation of an encephalopathy within the appropriate time frame after receiving her September, 19, 2003 DTaP vaccination. Id. Petitioners also allege that Jayashree suffered chronic encephalopathy with injuries “including, but not limited to, global developmental delays, behavioral disorders, social anxiety disorder, selective mutism and motor delay,” as a result of her DTaP vaccination. Id. In the alternative, petitioners allege that Jayashree’s injuries and her vaccine-related sequellae were caused by her DTaP and Hib vaccinations. Id.

Respondent denies that the Jayashree suffered an encephalopathy within the time period set forth in the Vaccine Table for a DTaP vaccination; and also denies that her injuries and related sequellae were caused by her vaccinations. Stipulation at 2. Nonetheless, the parties have agreed informally to resolve this matter.

After a complete review of the record, the court finds that petitioners are entitled to compensation under the National Childhood Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10 et seq., as reflected in the parties’ attached Stipulation. The court is convinced, based on its experience and information in the record, that this award shall provide reasonable compensation to cover Jayashree Agresti’s vaccine-related expenses.

Form of Compensation Award

1. Lump Sum:

- a. A lump sum of **\$769,803.00**, representing compensation for first year, post-judgment, vaccine-related expenses (\$53,444.00), pain and suffering (\$173,648), and lost earnings (\$542,611.00), in the form of a check payable to petitioners, Jason Agresti and Kamlawattie Persaud, as guardians/conservators of Jayashree’s estate, or any successor guardian or conservator; and
- b. A lump sum of **\$3,217.58** in the form of a check payable to petitioners, Jason Agresti and Kamlawattie Persaud, for past unreimbursed expenses.

2. Annuity:

Section 15(f)(4) requires that payment of compensation be based on the net present value of the elements of compensation. One way of discounting to net present value is to use the cost of an annuity to provide periodic payments to meet projected needs of a petitioner for the

remainder of her life.² Special masters are specifically empowered by § 15 (f)(4) of the Act to order that the compensation awarded under the Program be used to purchase an annuity.

The court awards an amount sufficient to purchase the annuity contract(s), in accordance with the attached Stipulation and subject to the conditions described in the following footnote, that will provide payment for the life care items described in paragraph eleven (11) of the Stipulation, paid to the life insurance company from which the annuity will be purchased.³ Compensation for year two vaccine-related expenses (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 petitioners, or their successor guardian or conservator.

At the Secretary's sole discretion, the periodic payments may be provided to the petitioners in monthly, quarterly, annual or other installments. The "annual amounts," set forth in the parties' Stipulation, describe only the total yearly sum to be paid to the petitioners and do not require that the payment be made in one annual installment.

CONCLUSION

Petitioners, Jason Agresti and Kamlawattie Persaud, as legal representatives of Jayashree Agresti, a minor, are entitled to an award under the Vaccine Program to provide for compensable expenses as reflected in the attached Stipulation. In summary, petitioners are awarded compensation, in accordance with the form of payment titled "1. Lump Sum" above, of

²The personal representative of the estate of Jayashree Agresti shall provide written notice to respondent within twenty days of her death.

³The annuity company must meet the following criteria, adapted from the Proffer; these criteria appear to be taken from the December 1990 draft of the Uniform Periodic Payment of Judgments Act.

- 1) has a minimum of \$250,000,000 of capital and surplus, exclusive of any mandatory security valuation reserve; and
- 2) has one of the following ratings from two of the following organizations;
 - a) A.M. Best Company: A+, A+g, A+p, A+r or A+s;
 - b) Moody's Investors 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.

\$769,803.00, for first year, post-judgment, vaccine-related expenses , pain and suffering, and lost wages; a lump sum of \$3,217.58, to reimburse petitioners for past unreimbursed expenses; and in accordance with the form of payment titled “2. Annuity” above, an amount sufficient to purchase the annuity contract to provide payments in accordance with the parties’ Stipulation.

Based on the foregoing, this Court adopts the parties’ Stipulation and finds that petitioners are entitled to compensation in the amount and on the terms set forth therein. The Clerk of the Court is directed to enter judgment according to this decision.⁴

IT IS SO ORDERED.

s/Gary J. Golkiewicz
Gary J. Golkiewicz
Chief Special Master

⁴ Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a U.S. Court of Federal Claims Judge.

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

**JASON AGRESTI and KAMLAWATTIE
PERSAUD**, Guardians Ad Litem
for their daughter, **JAYASHREE
AGRESTI**, a minor

Petitioners,

v.

**SECRETARY OF HEALTH AND
HUMAN SERVICES**,

Respondent.

No. 05-0752V
Chief Special Master
GARY GOLKIEWICZ

STIPULATION

The parties hereby stipulate to the following matters:

1. On behalf of their daughter, Jayashree Agresti, ("Jayashree"), petitioners filed a petition for vaccine injury compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq. (the "Vaccine Program"). The petition seeks compensation for injuries allegedly related to Jayashree's receipt of the Diphtheria, Tetanus and acellular Pertussis ("DTaP") and Hemophilus Influenzae type b ("Hib") vaccines, which vaccines are contained in the Vaccine Injury Table (the "Table"), 42 C.F.R. § 100.3(a).
2. Jayashree received her DTaP/Hib immunization on September 19, 2003, when she was sixteen months old.
3. The vaccine was administered within the United States.
4. Petitioners allege that Jayashree sustained the first symptom or manifestation of an encephalopathy within the time period set forth in the Table for the DTaP vaccine. They further allege that she suffered chronic encephalopathy with injuries including but not limited to, global developmental delays, behavioral disorders, social anxiety disorder, selective mutism, and motor delay. In the alternative, petitioners allege that Jayashree's injuries were caused-in-fact by the DTaP/Hib vaccines and that such injuries and sequelae were vaccine-related.

5. Jayashree suffered the residual effects or complications of her encephalopathy for more than six months after her vaccination.

6. Petitioners represent that there has been no prior award or settlement of a civil action for damages on behalf of Jayashree as a result of her condition.

7. Respondent denies that Jayashree suffered the onset of an encephalopathy within the time period set forth in the Table, and denies that her current disabilities are sequela of her alleged Table injury. Respondent further denies that Jayashree's injuries were caused-in-fact by the vaccination.

8. 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 9 of this Stipulation.

9. As soon as practicable after an entry of judgment reflecting a decision consistent with the terms of this Stipulation, and after petitioners have 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 the following vaccine compensation payments:

- a. a lump sum of \$769,803.00, in the form of a check payable to petitioners, as guardians/conservators of Jayashree's estate, or any successor guardian or conservator. This amount represents compensation for first year, post-judgment, vaccine-related expenses (\$53,544.00), pain and suffering (\$173,648.00, which amount is not in excess of any applicable statutory maximums), and lost earnings (\$542,611.00);
- b. a lump sum payment of \$3,217.58, in the form of a check payable to petitioners, Jason Agresti and Kamlawattie Persaud, for past unreimbursed expenses; and
- c. an amount sufficient to purchase the annuity contract(s) described in paragraph 11 below, paid to the life insurance company from which the annuity will be purchased (the "Life Insurance Company").

10. 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.

11. The Secretary of Health and Human Services agrees to purchase an annuity contract or annuity contracts from the Life Insurance Company for the benefit of Jayashree, pursuant to which the Life Insurance Company will agree to make payments periodically to petitioners or their successor guardian or conservator for the following items of compensation:

a. For future unreimbursable Medicare premium and deductible expenses, beginning on the anniversary of the date of judgment in the year 2038, an annual amount of \$1,291.80, to be paid for the remainder of Jayashree's life, this amount increasing at the rate of four percent (4%), compounded annually from the date of judgment;

b. For future unreimbursable pediatric care/internist care and developmental pediatric expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$500.00, to be paid up to the anniversary of the date of judgment in the year 2011, then beginning on the anniversary of the date of judgment in year 2011, an annual amount of \$180.00 to be paid up to the anniversary of the date of judgment in the year 2024, then beginning on the anniversary of the date of judgment in year 2024, an annual amount of \$80.00 to be paid up to the anniversary of the date of judgment in the year 2038, then beginning on the anniversary of the date of judgment in the year 2038, an annual amount of \$16.00, to be paid for the remainder of Jayashree's life, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment;

c. For future unreimbursable physical medicine and rehabilitation expenses, beginning on the anniversary of the date of judgment in the year 2024, an annual amount of \$125.00, to be paid up to the anniversary of the date of judgment in the year 2038, then beginning on the anniversary of the date of judgment in the year 2038, an annual amount of \$25.00, to be paid for the remainder of Jayashree's life, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment;

d. For future unreimbursable specialized dental care expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$150.00, to be paid for the remainder of Jayashree's life, this amount increasing at the rate of four percent (4%), compounded annually from the date of judgment;

e. For future unreimbursable computer and educational software expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$400.00 to be paid up to the anniversary of the date of judgment in the year 2024, this amount increasing at the rate of four percent (4%), compounded annually from the date of judgment;

f. For future unreimbursable speech therapy expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$9,600.00 to be paid up to the anniversary of the date of judgment in the year 2011; then on the anniversary of the date of judgment in the year 2011, an annual amount of \$4,800.00 to be paid up to the anniversary of the date of judgment in the year 2024, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment;

g. For future unreimbursable occupational therapy expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$9,600.00 to be paid up to the anniversary of the date of judgment in the year 2011; then on the anniversary of the date of judgment in the year 2011, an annual amount of \$4,800.00 to be paid up to the anniversary of the date of judgment in the year 2014, then on the anniversary of the date of judgment in the year 2014, an annual amount of \$1,200.00 to be paid up to the anniversary of the date of judgment in the year 2024, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment;

h. For future unreimbursable visual perceptual therapy expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$4,800.00 to be paid up to the anniversary of the date of judgment in the year 2014, this amount increasing at the rate of four percent (4%), compounded annually from the date of judgment;

i. For future unreimbursable therapy evaluation expenses, beginning on the anniversary of the date of judgment in the year 2024, an annual amount of \$476.00, to be paid up to the anniversary of the date of judgment in the year 2038, then beginning on the anniversary of the date of judgment in the year 2038, an annual amount of \$95.20, to be paid for the remainder of Jayashree's life, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment;

j. For future unreimbursable case management expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$1,080.00, to be paid for the remainder of Jayashree's life, this amount increasing at the rate of four percent (4%), compounded annually from the date of judgment;

k. For future unreimbursable neuro-psychological testing expenses, an annual amount of \$2,800.00 to be paid on the anniversary of the date of judgment in years 2010, 2014, 2017 and 2020 only, this amount increasing at the rate of four percent (4%), compounded annually from the date of judgment;

l. For future unreimbursable psychological counseling expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$2,000.00 to be paid up to the anniversary of the date of judgment in year 2020; then, beginning on the anniversary of the date of judgment in year 2022, an annual amount of \$1,200.00 to be paid for one year only; then, beginning on the anniversary of the date of judgment in year 2027, an annual amount of \$1,800.00 to be paid for one year only; then, beginning on the anniversary of the date of judgment in year 2032, an annual amount of \$1,800.00 to be paid for one year only; then, beginning on the anniversary of the date of judgment in year 2042, an annual amount of \$900.00 to be paid for one year only, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment;

m. For future unreimbursable group therapy expenses, beginning on the anniversary

of the date of judgment in the year 2011, an annual amount of \$1,200.00, to be paid up to the anniversary of the date of judgment in the year 2020, this amount increasing at the rate of four percent (4%), compounded annually from the date of judgment;

n. For future unreimbursable home care and assistance expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$26,208.00 to be paid up to the anniversary of the date of judgment in year 2034; then, then beginning on the anniversary of the date of judgment in the year 2034, an annual amount of \$76,650.00 to be paid for the remainder of Jayashree's life, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment;

o. For future unreimbursable in-home residential rehabilitation expenses, beginning on the anniversary of the date of judgment in year 2024, an annual amount of \$39,000.00 to be paid up to the anniversary of the date of judgment in the year 2034, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment; and,

p. For future unreimbursable transportation expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$1,000.00 to be paid for the remainder of Jayashree's life, this amount increasing at the rate of four percent (4%), compounded annually from the date of judgment.

At the sole discretion of the Secretary of Health and Human Services, the periodic payments may be provided to petitioners in monthly, quarterly, annual or other installments. The "annual amounts" set forth above describe only the total yearly sum to be paid to the petitioners and do not require that the payment be made in one annual installment. The petitioners will continue to receive the annuity payments from the Life Insurance Company only so long as Jayashree is alive at the time that a particular payment is due. Petitioners or the personal representative of Jayashree's estate shall provide written notice to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Jayashree's death.

12. The annuity contract(s) will be owned solely and exclusively by the Secretary of Health and Human Services and will be purchased as soon as practicable following the entry of a judgment in conformity with this Stipulation. The parties stipulate and agree that the Secretary of Health and Human Services and the United States of America are not responsible for the payment of any sums other than the amounts set forth in paragraph 9 herein, the amounts awarded pursuant to paragraph 13 herein, and that they do not guarantee or insure any of the

future annuity payments. Upon the purchase of the annuity contract(s), the Secretary of Health and Human Services and the United States of America are released from any and all obligations with respect to future annuity payments.

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

14. Payments made pursuant to paragraph 9 and any amounts awarded pursuant to paragraph 13 of this Stipulation will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

15. The parties and their attorneys further agree and stipulate that, except for any award for attorneys' fees and litigation costs, the money provided pursuant to this Stipulation either immediately or as part of the annuity contract(s), will be used solely for the benefit of Jayashree 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).

16. Petitioners represent that they presently are, or within 90 days of the date of judgment will become, duly authorized to serve as guardians/conservators of Jayashree's estate under the laws of the State of New York. No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardians/conservators of Jayashree's estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardians/conservators of the estate of Jayashree Agresti 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 guardians/conservators of the estate of Jayashree Agresti upon submission of written

documentation of such appointment to the Secretary. In the event that petitioners relocate to another state or territory, petitioners agree to become duly authorized to serve as guardians/conservators of Jayashree's estate in the state or territory where Jayashree resides.

17. In return for the payments described in paragraphs 9 and 13, petitioners, in their individual capacities and as legal representatives of Jayashree, on behalf of themselves, Jayashree, and Jayashree's heirs, executors, administrators, successors or assigns, do forever and fully expressly release, acquit and discharge the Secretary of Health and Human Services and the United States of America from any and all actions, causes of action, agreements, judgments, claims, damages, loss of services, expenses and all demands of whatever kind or nature on account of, or in any way growing out of, any and all known or unknown personal injuries to or death of Jayashree Agresti resulting from, or alleged to have resulted from, the DTaP/Hib vaccine administered to her on September 19, 2003, as alleged by petitioners in a petition for vaccine compensation filed on July 14, 2005, in the United States Court of Federal Claims as petition No. 05-752V.

18. If Jayashree should die prior to receiving the payments described in paragraphs 9(a) and (b), this agreement shall be considered voidable upon a proper notice to the Court on behalf of either or both of the parties.

19. 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 null and void at the sole discretion of either party.

20. This Stipulation expresses a full and complete settlement of liability and damages claimed under the National Childhood Vaccine Injury Act of 1986, as amended, except as otherwise noted in paragraph 13 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.

21. All rights and obligations of petitioners hereunder shall apply equally to their successors and assigns as legal representatives of Jayashree Agresti.

END OF STIPULATION