

OFFICE OF SPECIAL MASTERS

No. 02-748V

Filed: December 23, 2005

 JOSEPH DIAB, by and through his Parents *
 and Legal Representatives, *
 MICHLINE DIAB and SAMER DIAB, *
 *
 Petitioners, *
 *
 v. *
 *
 SECRETARY OF THE DEPARTMENT *
 OF HEALTH AND HUMAN SERVICES, *
 *
 Respondent. *

Sol P. Ajalat, Ajalat & Ajalat, LLP, North Hollywood, CA, for petitioners

Catharine E. Reeves, U.S. Department of Justice, Washington, D.C., for respondent

DECISION ON DAMAGES

GOLKIEWICZ, Chief Special Master.

_____ On October 7, 2004, respondent filed a Supplement to his Rule 4 Report conceding petitioners' entitlement to compensation in this case under the Vaccine Act, on behalf of their minor son, Joseph Diab, for his vaccine-related injuries. The parties jointly engaged life care planners for the purpose of ascertaining Joseph Diab's long-term vaccine-related needs. On December 2, 2005, respondent filed his Proffer on Damages, including **Items of Compensation for Joseph Diab** (Tab A). Respondent represented in his filing that petitioners acceded to the Secretary's proffer. The case is now ripe for decision.

After a complete review of the record, the court finds that petitioners, Michline and Samer Diab, are entitled to an award under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10 et seq., as reflected in Respondent's Proffer on Award of Compensation and the attached chart, *Appendix A: Items of Compensation for Joseph Diab*. The court is convinced, based upon its experience and information in the record, that this award shall provide reasonable compensation to cover Joseph Diab's vaccine-related expenses.

Form of Compensation Award

1. **Growth Rate:**

As indicated in Appendix A, the appropriate growth rate for non-medical life care items is 3%, except for the items of nursing care and day programs, to which a 4% growth rate should be applied, and the appropriate growth rate for medical life care items is 5%, compounded annually from the date of judgment.

2. **Lump Sum:**

A lump sum payment in the amount of **\$893,537.93**, representing compensation for lost future earnings (\$535,369.31), pain and suffering (\$217,683.12), and life care expenses for Year One (\$140,485.50), in the form of a check payable to petitioners as guardians/conservators of Joseph Diab's estate, for the benefit of Joseph Diab. No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardians/conservators of Joseph Diab's estate.

A lump sum payment in the amount of **\$477,731.75**, representing compensation for satisfaction of the State of California Medicaid lien, payable jointly to petitioners and

State of California
Department of Health Services
1500 Capital Avenue, Bldg. 172
Mail Stop 4720
Sacramento, CA 95814
Attn: Teresa Abbes

Petitioners agree to endorse this payment to the Commonwealth.

3. **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 his life. 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 considers it in Joseph Diab's best interest to order that the compensation for life care items awarded beyond year one post-judgment be paid in the form of an annuity.

An amount sufficient to purchase an annuity contract(s), 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, paid to the life insurance company from which the annuity(ities) 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(ities), which annuity(ities) shall make payments directly to petitioners as guardians/conservators of the estate of Joseph Diab, for the benefit of Joseph Diab, only so long as Joseph Diab is alive at the time a particular payment is due. The annuity shall be owned solely and exclusively by the Secretary of Health and Human Services and shall be purchased as soon as practicable following entry of judgment in conformity with the respondent's proffer and after petitioners have filed both a proper and timely election to receive compensation pursuant to 42 U.S.C. § 300aa-21(a)(1). 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 petitioners and do not require that the payment be made in one annual installment.

The annuity company must meet the following criteria:¹

- 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 rating 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.

4. **Life-Contingent Annuity:**

Petitioners will continue to receive the annuity payments from the Life Insurance Company only so long as Joseph Diab is alive at the time that a particular payment is due. Petitioners shall provide written notice to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Joseph Diab's death.

5. **Guardianship:**

¹ These criteria are taken from the December 1990 draft of the Uniform Periodic Payment of Judgments Act.

No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardians/conservators of Joseph Diab's estate.

CONCLUSION

Petitioners, as legal representatives of Joseph Diab, are entitled to an award under the Vaccine Program to provide for compensable expenses as stated in the attached Tab A. Petitioners' award of compensation shall be in the form of an annuity as provided for in paragraph 3 above, together with the following lump sum payments:

1. A lump sum payment in the amount of \$893,537.93, representing compensation for lost future earnings (\$535,369.31), pain and suffering (\$217,683.12), and life care expenses for Year One (\$140,485.50), in the form of a check payable to petitioners as guardians/conservators of Joseph Diab's estate, for the benefit of Joseph Diab.

An award for reimbursement of the state's Medicaid lien in the amount of \$477,731.75, which amount shall be payable jointly to petitioners and the State of California, Department of Health Services.

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

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master

² 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.