

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 08-463V

(Filed: May 19, 2011)

(Not to be published<sup>1</sup>)

\* \* \* \* \*

S.M., by and through RACHEL \*  
and JOEL MOYER, as Parents and Natural \*  
Guardians, \*

Petitioners, \*

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

\* \* \* \* \*

## DECISION

### **HASTINGS, Special Master.**

This is an action seeking an award under the National Vaccine Injury Compensation Program<sup>2</sup> on account of an illness of S.M.. On September 16, 2008, respondent filed a report conceding that petitioners are entitled to compensation in this case.

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<sup>1</sup>This document will not be sent to electronic publishers as a formally “published” opinion. However, because this document contains a reasoned explanation for my action in this case, I intend to post this document 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). Therefore, each party has 14 days within which to request redaction “of any information furnished by that party (1) that is 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, this entire document will be available to the public. *Id.* See also 42 U.S.C. § 300aa-12(d)(4)(B).

<sup>2</sup>The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2006 ed.). Hereinafter, for ease of citation, all “§” references will be to 42 U.S.C. (2006 ed.).

After discussions between the parties, on May 12, 2011, respondent filed “Respondent’s Proffer on Award of Compensation.” Petitioners’ counsel, Anne Toale, during a status conference held on May 13, 2011, indicated that petitioners accept that Proffer as a reasonable measure of the amount of the award in this case.

I have reviewed respondent’s Proffer and the attached Appendix A, and find that they define appropriate compensation in this case pursuant to 42 U.S.C. § 300aa-15(b). I conclude that compensation should be awarded based on those documents. (I have attached the Proffer and Appendix A to this Decision.) I order that respondent make lump sum payments and purchase an annuity contract as described below.

***1. Lump Sums***

- A lump sum payment of \$356,679.58, representing trust seed funds consisting of the present year cost of compensation for residential care expenses in Compensation Years 2027 and 2028 (\$223,022.30) and life care expenses in the first year after judgment (\$133,657.28), in the form of a check payable to Regions Bank, as Trustee of the Reversionary Trust established for the benefit of S.M., as set forth in Appendix A: Items for Compensation for S.M..
- A lump sum payment of \$817,625.21, representing compensation for lost future earnings (\$622,261.55) and pain and suffering (\$195,363.66), in the form of a check payable to the court-appointed guardian(s)/conservator(s) of the estate of S.M. for the benefit of S.M.. No payments shall be made until petitioners provide respondent with documentation establishing the appointment of a guardian(s)/conservator(s) of S.M..
- A lump sum payment of \$2,935.07, representing compensation for past unreimbursable expenses, payable to Rachel and Joel Moyer.
- A lump sum payment of \$17,098.57, representing compensation for reimbursement of the State of Ohio Medicaid lien, in the form of a check payable jointly to petitioners and to the

Ohio Department of Job and Family Services  
The Ohio Tort Recovery Unit  
350 Worthington Road, Suite G  
Westerville, OH 43082  
Attn: Ms. Christine Ewans

Petitioners have agreed to endorse this check to the Ohio Department of Job and Family Services.

## **2. *Annuity***

I consider it in S.M.'s best interest that compensation for life care items awarded beyond Year One post-judgment be paid chiefly in the form of an annuity, which annuity shall be purchased as soon as practicable after entry of judgment. Accordingly, pursuant to 42 U.S.C. § 300aa-15(f)(4), I order respondent to purchase, and take ownership of, an annuity, pursuant to which the insurance company<sup>3</sup> will agree to make periodic payments to Regions Bank, as Trustee of the Reversionary Trust for the benefit of S.M., for the rest of S.M.'s life, commencing on the first anniversary of the date of judgment. The amount of the annuity payments in each year will be calculated based on the summary of "Items of Compensation for S.M." attached hereto as Appendix A.

The insurance company (or companies) must meet the following criteria:

- 1) have a minimum of \$250,000,000 of capital and surplus, exclusive of any mandatory security valuation reserve; and
- 2) 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.

Under the statute governing the Program, as well as the "Vaccine Rules" adopted by this court, the special master must now enter a decision endorsing that Proffer, and the clerk must enter judgment, in order to authorize payment of the award. See § 300aa-12(d)(3)(A) and (e)(3); § 300aa-13(a); Vaccine Rules 10(a), 11(a).<sup>4</sup> I have reviewed the file, and, based on that review, I conclude that respondent's Proffer appears to be appropriate. Accordingly, my decision is that a Program award shall be made to petitioners in the amounts set forth above, with checks made payable to the

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<sup>3</sup>To satisfy the conditions set forth herein, in respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

<sup>4</sup>The "Vaccine Rules of the United States Court of Federal Claims" are found in Appendix B of the Rules of the United States Court of Federal Claims.

individuals and entities set forth above. In the absence of a timely-filed motion for review of this Decision, the clerk shall enter judgment in accordance herewith.

/s/ George L. Hastings, Jr.

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George L. Hastings, Jr.  
Special Master