

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 12-269V

Filed: April 8, 2013

Not for publication

DONALD PRESGRAVE,

*

*

Petitioner,

*

*

Damages decision based on proffer

v.

*

*

SECRETARY OF HEALTH
AND HUMAN SERVICES,

*

*

*

Respondent.

*

*

Ronald C. Homer, Boston, MA, for petitioner.

Alexis B. Babcock, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING DAMAGES¹

On April 8, 2013, respondent filed a Proffer on Award of Compensation. Based on the record as a whole, the special master 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:

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.

- a. a lump sum payment of **\$778,627.17**, representing compensation for life care expenses for the first year after judgment (\$12,713.29), lost earnings (\$588,662.36), pain and suffering (\$176,832.07), and past unreimbursable expenses (\$419.45), in the form of a check payable to Donald Presgrave, petitioner; and
- b. an amount sufficient to purchase an annuity contract subject to the conditions described in section II. B. of the attached Proffer.

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: April 8, 2013

/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

DONALD PRESGRAVE,)	
)	<u>ECF</u>
)	
Petitioner,)	No. 12-269V
v.)	Special Master Millman
)	
SECRETARY OF HEALTH)	
AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

RESPONDENT'S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

Respondent engaged life care planner Linda Curtis, RN, MS, CCM, CNLCP, and petitioner engaged Maureen Clancy, RN, BSN, CLCP, to provide an estimation of Donald Presgrave's future vaccine-injury related needs. For the purposes of this proffer, the term "vaccine related" is as described in respondent's Rule 4(c) report filed on July 24, 2012. All items of compensation identified in the joint life care plan are supported by the evidence, and are illustrated by the chart entitled Appendix A: Items of Compensation for Donald Presgrave, attached hereto as Tab A.¹ Respondent proffers that Donald Presgrave should be awarded all items of compensation set forth in the joint life care plan and illustrated by the chart attached at Tab A. Petitioner agrees.

¹ The chart at Tab A illustrates the annual benefits provided by the joint 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.

B. Lost Future Earnings

The parties agree that based upon the evidence of record, Donald Presgrave has suffered a past loss of earnings and will continue to suffer a loss of earnings in the future. Therefore, respondent proffers that Donald Presgrave 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 Donald Presgrave's lost earnings is \$588,662.36. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that Donald Presgrave should be awarded \$176,832.07 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 Donald Presgrave'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 \$419.45. 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 Donald Presgrave 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 \$778,627.17, representing compensation for life care

expenses expected to be incurred during the first year after judgment (\$12,713.29), lost earnings (\$588,662.36), pain and suffering (\$176,832.07), and past unreimbursable expenses (\$419.45), in the form of a check payable to petitioner, Donald Presgrave.

B. An amount sufficient to purchase an annuity contract,² subject to the conditions described below, that will provide payments for the life care items contained in the joint life care plan, as illustrated by the chart at Tab A. attached hereto, paid to the life insurance company³ from which the annuity will be purchased.⁴ 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, Donald Presgrave, only so long as Donald Presgrave is alive at the time a particular payment is due. 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.

² In respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

³ 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.

⁴ 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.

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, Donald Presgrave, 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 Donald Presgrave'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, Donald Presgrave: | \$778,627.17 |
| B. | An amount sufficient to purchase the annuity contract described above in section II. B. | |

Respectfully submitted,

STUART F. DELERY
Principal Deputy Assistant Attorney General

RUPA BHATTACHARYYA
Director
Torts Branch, Civil Division

VINCENT J. MATANOSKI
Deputy Director
Torts Branch, Civil Division

LINDA S. RENZI
Senior Trial Counsel
Torts Branch, Civil Division

/S/ALEXIS B. BABCOCK
ALEXIS B. BABCOCK
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, D.C. 20044-0146
Telephone: (202) 616-7678

Dated: April 8, 2013

Appendix A: Items of Compensation for Donald Presgrave

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Year 6	Compensation Year 7	Compensation Year 8
				2013	2014	2015	2016	2017	2018	2019	2020
Multi Plan Health Premium	5%		M	3,017.40	3,017.40	3,017.40	3,017.40	3,017.40	3,017.40	3,017.40	3,017.40
Medicare Part B Deductible	5%										
Neurologist	5%	*		210.00	210.00	35.00	35.00	35.00	35.00	35.00	35.00
Psychologist	5%	*		576.00	576.00					576.00	
Future Physiatrist/Other Specialist	5%	*		35.00	7.00	7.00	7.00	7.00	7.00	7.00	7.00
EMG	5%	*		780.00			780.00			780.00	
Hydroxyzine	5%	*		63.00	63.00	63.00	63.00	63.00	63.00	63.00	63.00
Buspirone	5%	*		63.00	63.00	63.00	63.00	63.00	63.00	63.00	63.00
Zoloft	5%	*		63.00	63.00	63.00	63.00	63.00	63.00	63.00	63.00
Aspirin	4%			10.66	10.66	10.66	10.66	10.66	10.66	10.66	10.66
Tylenol	4%			94.75	94.75	94.75	94.75	94.75	94.75	94.75	94.75
Advil	4%			68.26	68.26	68.26	68.26	68.26	68.26	68.26	68.26
PT	4%	*		864.00	864.00			216.00			216.00
OT	4%	*		864.00	864.00			144.00			144.00
Shower Transfer Bench	4%									130.00	18.57
Hand Held Shower	4%									32.00	4.57
Grab Bars	4%			274.00							274.00
Over the Toilet Commode	4%									179.00	25.57
Kitchen/Pers. Care/Adapt. Equip.	4%			250.00					150.00	30.00	30.00
Step Stool	4%			48.95	4.90	4.90	4.90	4.90	4.90	4.90	4.90
YMCA	4%		M	446.00	396.00	396.00	396.00	396.00	396.00	396.00	396.00
Home Care	4%		M	3,276.00	3,276.00	3,276.00	3,276.00	3,276.00	3,276.00	4,368.00	4,368.00
Handy Man	4%		M	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00
Mileage	4%		M	1,109.27	1,105.25	1,031.95	1,031.95	1,031.95	1,031.95	1,031.95	1,031.95
Lost Earnings				588,662.36							
Pain and Suffering				176,832.07							
Past Unreimbursable Expenses				419.45							
Annual Totals				778,627.17	11,283.22	8,730.92	9,510.92	9,090.92	8,880.92	11,549.92	10,535.63

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 (\$12,713.29), lost earnings (\$588,662.36), pain and suffering (\$176,832.07), and past unreimbursable expenses (\$419.45): \$778,627.17

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.

At respondent's discretion, items denoted with "M" payable in 12 monthly installments totaling the annual amount indicated.

Appendix A: Items of Compensation for Donald Presgrave

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 9	Compensation Year 10	Compensation Year 11	Compensation Year 12	Compensation Year 13	Compensation Year 14	Compensation Years 15-16	Compensation Year 17
				2021	2022	2023	2024	2025	2026	2027-2028	2029
Multi Plan Health Premium	5%		M	3,017.40	3,017.40	3,017.40	3,017.40	3,017.40	3,017.40	3,017.40	
Medicare Part B Deductible	5%										147.00
Neurologist	5%	*		35.00	35.00	35.00	35.00	35.00	35.00	35.00	18.80
Psychologist	5%	*					576.00				192.00
Future Psychiatrist/Other Specialist	5%	*		7.00	7.00	7.00	7.00	7.00	7.00	7.00	12.00
EMG	5%	*			780.00			780.00			
Hydroxyzine	5%	*		63.00	63.00	63.00	63.00	63.00	63.00	63.00	63.00
Buspirone	5%	*		63.00	63.00	63.00	63.00	63.00	63.00	63.00	63.00
Zoloft	5%	*		63.00	63.00	63.00	63.00	63.00	63.00	63.00	63.00
Aspirin	4%			10.66	10.66	10.66	10.66	10.66	10.66	10.66	10.66
Tylenol	4%			94.75	94.75	94.75	94.75	94.75	94.75	94.75	94.75
Advil	4%			68.26	68.26	68.26	68.26	68.26	68.26	68.26	68.26
PT	4%	*				216.00			216.00		72.00
OT	4%	*				144.00			144.00		48.00
Shower Transfer Bench	4%			18.57	18.57	18.57	18.57	18.57	18.57	18.57	18.57
Hand Held Shower	4%			4.57	4.57	4.57	4.57	4.57	4.57	4.57	4.57
Grab Bars	4%			39.14	39.14	39.14	39.14	39.14	39.14	39.14	39.14
Over the Toilet Commode	4%			25.57	25.57	25.57	25.57	25.57	25.57	25.57	25.57
Kitchen/Pers. Care/Adapt. Equip.	4%			30.00	30.00	30.00	30.00	30.00	30.00	30.00	30.00
Step Stool	4%			4.90	4.90	4.90	4.90	4.90	4.90	4.90	4.90
YMCA	4%		M	396.00	396.00	396.00	396.00	396.00	396.00	396.00	348.00
Home Care	4%		M	4,368.00	4,368.00	4,368.00	4,368.00	4,368.00	4,368.00	4,368.00	6,552.00
Handy Man	4%		M	600.00	600.00	600.00	600.00	600.00	600.00	600.00	600.00
Mileage	4%		M	1,031.95	1,031.95	1,031.95	1,031.95	1,031.95	1,031.95	1,031.95	1,031.95
Lost Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Annual Totals				9,940.77	10,720.77	10,300.77	10,516.77	10,720.77	10,300.77	9,940.77	9,507.17

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 (\$12,713.29), lost earnings (\$588,662.36), pain and suffering (\$176,832.07), and past unreimbursable expenses (\$419.45): \$778,627.17

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.

At respondent's discretion, items denoted with "M" payable in 12 monthly installments totaling the annual amount indicated.

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 18	Compensation Year 19	Compensation Year 20	Compensation Year 21	Compensation Year 22	Compensation Year 23	Compensation Year 24	Compensation Years 25-Life
				2030	2031	2032	2033	2034	2035	2036	2037-Life
Multi Plan Health Premium	5%		M								
Medicare Part B Deductible	5%			147.00	147.00	147.00	147.00	147.00	147.00	147.00	147.00
Neurologist	5%	*		18.80	18.80	18.80	18.80	18.80	18.80	18.80	18.80
Psychologist	5%	*		38.40	38.40	38.40	38.40	38.40	38.40	38.40	38.40
Future Psychiatrist/Other Specialist	5%	*		12.00	12.00	12.00	12.00	12.00	12.00	12.00	12.00
EMG	5%	*		260.00	52.00	52.00	52.00	52.00	52.00	52.00	52.00
Hydroxyzine	5%	*		63.00	63.00	63.00	63.00	63.00	63.00	63.00	63.00
Buspirone	5%	*		63.00	63.00	63.00	63.00	63.00	63.00	63.00	63.00
Zoloft	5%	*		63.00	63.00	63.00	63.00	63.00	63.00	63.00	63.00
Aspirin	4%			10.66	10.66	10.66	10.66	10.66	10.66	10.66	10.66
Tylenol	4%			94.75	94.75	94.75	94.75	94.75	94.75	94.75	94.75
Advil	4%			68.26	68.26	68.26	68.26	68.26	68.26	68.26	68.26
PT	4%	*				72.00			72.00	360.00	120.00
OT	4%	*				48.00			48.00	240.00	80.00
Shower Transfer Bench	4%			18.57	18.57	18.57	18.57	18.57	18.57	18.57	18.57
Hand Held Shower	4%			4.57	4.57	4.57	4.57	4.57	4.57	4.57	4.57
Grab Bars	4%			39.14	39.14	39.14	39.14	39.14	39.14	39.14	39.14
Over the Toilet Commode	4%			25.57	25.57	25.57	25.57	25.57	25.57	25.57	25.57
Kitchen/Pers. Care/Adapt. Equip.	4%			30.00	30.00	30.00	30.00	30.00	30.00	30.00	30.00
Step Stool	4%			4.90	4.90	4.90	4.90				
YMCA	4%		M	348.00	348.00	348.00	348.00	348.00	348.00	348.00	348.00
Home Care	4%		M	6,552.00	6,552.00	6,552.00	6,552.00	6,552.00	6,552.00	6,552.00	6,552.00
Handy Man	4%		M	600.00	600.00	600.00	600.00	600.00			
Mileage	4%		M	1,031.95	1,031.95	1,031.95	1,031.95	1,031.95	1,031.95	1,031.95	1,031.95
Lost Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Annual Totals				9,493.57	9,285.57	9,405.57	9,285.57	9,280.67	8,800.67	9,280.67	8,880.67

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 (\$12,713.29), lost earnings (\$588,662.36), pain and suffering (\$176,832.07), and past unreimbursable expenses (\$419.45): \$778,627.17

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Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

At respondent's discretion, items denoted with "M" payable in 12 monthly installments totaling the annual amount indicated.