

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

WALTER RAY GRAVES and LISA GRAVES
as representatives of the estate of
HAYLEY NICOLE GRAVES, deceased

Petitioners,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

* No. 02-1211V
* Senior Judge James F.
* Merow
*
* Special Master Christian
* J. Moran
*
* Filed: April 17, 2012
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* damages, quantifying
* emotional distress
* endured before death
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Richard Gage, Richard Gage, P.C., Cheyenne, WY, for Petitioners;
Lisa A. Watts, United States Department of Justice, Washington, D.C., for
Respondent.

PUBLISHED RULING REGARDING PAIN AND SUFFERING¹

Hayley Graves received a set of vaccinations when she was nine months old. Two days later, she had her first seizure. The seizures, despite extensive efforts by doctors, did not abate and, eventually, led to Hayley’s death when she was ten months old.

¹ The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this ruling on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

The United States Court of Federal Claims found that a vaccine caused the death of Hayley Graves. The Court remanded to determine the amount of compensation to which her estate is entitled. 101 Fed. Cl. 310 (2011). As part of that process, I held that Hayley's emotional distress was compensable. Ruling, filed Jan. 27, 2012, 2012 WL _____.

The pending ruling concerns the amount of compensation. For the reasons explained below, Hayley's estate is entitled to receive \$60,000 for Hayley's suffering.

Procedural History

Acting as the representatives of Hayley's estate, Mr. and Ms. Graves claimed that vaccines caused her death. On July 5, 2011, the Court found in their favor and this case entered the damages phase. Since then, the parties have been attempting to determine the amount of compensation to which Hayley's estate is entitled.

During an informal status conference on October 4, 2011, the Graveses argued that Hayley's estate should receive compensation for Hayley's emotional distress. The Secretary argued that this claim lacked legal viability. I suggested that despite the legal arguments, the parties attempt to stipulate to an amount of compensation. At the follow-up status conference on October 26, 2011, the Graveses proposed filing a motion for summary judgment. They also announced that they intended to seek the maximum amount the statute authorizes for pain and suffering (\$250,000.00). The Secretary agreed that a motion for summary judgment was an appropriate vehicle to resolve the legal issue. The Secretary also reported that she did not intend to stipulate to an amount of compensation, assuming that Hayley's estate was entitled to any compensation.

The Graveses presented their argument that emotional distress damages were available in a motion for summary judgment, filed on November 30, 2011. The legal basis for this claim was Zatuchni v. Sec'y of Health & Human Servs., 516 F.3d 1312 (Fed. Cir. 2008). The Secretary opposed this claim.

The motion for summary judgment, which presented a pure issue of law, was resolved in a January 27, 2012 ruling. This ruling held that the Graveses were entitled to some amount of compensation for Hayley's pain and suffering.

On February 13, 2012, petitioners filed a memorandum on the amount of damages for pain and suffering. Although the Secretary previously “decline[d] to take a position on the amount of such an award,” Resp’t Opp’n, filed Dec. 21, 2011, at 2 n.2, the Secretary was given a second opportunity to file a brief. The Secretary did not, leaving only the Graveses’ memorandum.

Standards for Adjudication

Compensation for a vaccine-related injury or death includes: “For actual and projected pain and suffering and emotional distress from the vaccine-related injury, an award not to exceed \$250,000.” 42 U.S.C. § 300aa-15(a)(4). A handful of appellate decisions have interpreted this provision, but they provide relatively little guidance on how a special master is to measure emotional distress.²

Awards for emotional distress are inherently subjective and cannot be set by using a mathematical formula. Nevertheless, in one case relatively early in the Vaccine Program, a special master identified three factors that are useful in attempting to make this quantification somewhat more objective. These factors are “[1] the ability to understand the injury, *i.e.*, the injured’s mental faculties are intact; [(2)] the degree of severity of the injury; and [(3)] the potential number of years the individual is subjected to the injury.” McAllister v. Sec’y of Health & Human Servs., No. 91-1037V, 1993 WL 777030, at *3 (Fed. Cl. Spec. Mstr. Mar. 26, 1993), vacated and remanded on other grounds, 70 F.3d 1240 (Fed. Cir. 1995).

Special masters have also placed awards of emotional distress on a continuum so that the people who have suffered the most received the greatest award. *E.g.*, Hocraffer v. Sec’y of Health & Human Servs., No. 99-533V, 2007 WL 914914, at *4 (Fed. Cl. Spec. Mstr. Feb. 28, 2007) (“In making this award, the undersigned considered not only the facts of this particular case, but also compared this case to other awards the undersigned has made and awards made by my colleagues.”); Long v. Sec’y of Health & Human Servs., No. 94-310V, 1995 WL 470286, at *12 (Fed. Cl. Spec. Mstr. July 24, 1995). Special masters have reasoned that Congress capped the amount of emotional distress at \$250,000.

² For example, Youngblood v. Sec’y of Health & Human Servs., 32 F.3d 552 (Fed. Cir. 1994), instructs special masters to divide the amount of emotional distress into two components, one for past emotional distress and the other for future emotional distress. The future emotional distress must be reduced to present value. This methodology is not used in the present case because all of Hayley’s emotional distress occurred in the past.

According to the committee endorsing the proposed legislation, it did “not intend that all petitions for which compensation is awarded be given this maximum level but rather that the Master consider the individual pain and suffering of the injured person, as well as the benefits conferred by other forms of compensation within the legislation.” H.R. Rep. No. 99-908, at 21 (1986), reprinted in 1986 U.S.C.C.A.N 6344, 6362.

In this case, neither party advocated for a particular methodology. The Graveses’ February 13, 2012 memorandum focused on Hayley’s suffering. The Secretary, as previously noted, chose not to offer any suggestions about how to quantify the amount of emotional distress. In the absence of any suggestions from the parties, I will also use the approach usually taken by special masters.³

Analysis

For determining a reasonable amount of compensation for Hayley’s pain and suffering under the Vaccine Program, I have reviewed the records from her pediatrician, Cook Children’s Medical Center and Hermann Hospital. These records tell a very sad story.

Hayley was born in November 1999. At her nine-month appointment, she was in a reasonably good state of health, although she was having some trouble with her gross motor skills. Exhibit 1 at 31 (doctor’s record).⁴ Exhibits 34 and 35 are pictures of her from around this time and show a healthy infant girl. At this appointment, Hayley was given vaccinations. Two days later, on August 10, 2000, she suffered a left arm and left leg focal seizure. She was taken to a local hospital, Cook Children’s Medical Center. Exhibit 2 at 1, 5.

³ The Graveses cite to Brown v. Sec’y of Health & Human Servs., No. 00-0182V, 2005 WL 2659073 (Fed. Cl. Spec. Mstr. Sept. 21, 2005). There, the special master awarded \$250,000 for pain and suffering, which was divided, as required by Youngblood, into portions for past (\$200,000) and future (\$50,000) pain and suffering. I decline to rely upon Brown because that decision did not acknowledge the legislative history indicating that not every petitioner should be awarded the full amount of pain and suffering.

⁴ Although I recognize that Hayley had some developmental delay, this factor has not played a role in determining the amount of compensation for her pain and suffering. There appears to be no evidence that her lack of development in this particular area reduced her ability to feel pain.

After about three weeks, Cook Children's Medical Center transferred Hayley to a hospital offering more advanced services to care for epilepsy, Hermann Hospital. Hayley did not leave Hermann Hospital. She died there on September 24, 2000, 45 days after her seizures began. Her death at such a young age was terribly tragic.

The progress notes and other information from the hospitals charted Hayley's course. Hayley's well-being declined throughout her final 45 days as the seizures continued.⁵ Although Hayley never recovered from the seizures, her course was not a straight decline. For example, after being in the pediatric intensive care unit at Cook Children's Medical Center for ten days, on August 21, 2000, Hayley could open and close her eyes. Exhibit 9 at 68. On the next day, she was more alert and giggled. Id. at 71. At Hermann Hospital, she had less intense seizures on September 10, 2000. Exhibit 10 at 56. On September 20, 2000, she was alert, awake, and playing with a toy. Id. at 92. On September 22, 2000, the doctors were discussing an operation to control her seizures. Id. at 98.⁶

Sadly, Hayley's seizures worsened on September 22, 2000. She became comatose and stopped responding to painful stimuli. Exhibit 10 at 99-105. After consulting Hayley's doctors, her parents recognized that artificial efforts to sustain Hayley's life would not be successful. Hayley was pronounced dead late in the evening on September 24, 2000. Exhibit 10 at 119.

Overall, Hayley suffered pain during her final 45 days. Although the Vaccine Act offers some compensation for Hayley's pain, any amount of money is not adequate. Yet, money is the only type of relief that is possible.

⁵ The Graveses assert that the seizures never stopped. Pet'r Br., filed Feb. 13, 2012, at 1-2. Some medical records, however, indicate that there were isolated days when no seizure was recorded. See exhibit 9 at 42 (August 13, 2000); id. at 56 (August 17, 2000). These seizure-free days occurred only when Hayley was at Cook Children's Medical Center. It is clear that after she was transferred to Hermann Hospital on August 30, 2000, her seizures did continue. See exhibit 10, passim.

⁶ The doctors were entertaining an operation at this time because less invasive methods of seizure control had failed. Doctors had prescribed many medications without success. They also placed Hayley on a ketogenic diet twice but this diet caused Hayley to become hypoglycemic.

After considering the circumstances of Hayley's final 45 days and after considering other cases in which special masters have awarded compensation for a person's emotional distress, I find that \$60,000 is appropriate. See Bragg v. Sec'y of Health & Human Servs., No. 08-477V, 2012 WL 404773, at *29 (Fed. Cl. Spec. Mstr. Jan. 18, 2012) (awarding \$25,000 for pain and suffering to estate of decedent); Hocraffer, 2007 WL 914914, at *4 (citing cases); Long, 1995 WL 470286, at *12 (stating "it seems to have become the norm in Program cases that even many individuals with ongoing seizure disorders, serious neurologic problems, and/or significant mental deficiencies have been limited to awards in the \$100,000 to \$150,000 range" and citing cases). I emphasize that this decision takes place in the Vaccine Program in which, by statute, awards for emotional distress are capped at \$250,000, and in which, by policy, the highest awards are reserved for cases in which the suffering is extreme both in intensity and in duration. While there is no yardstick to measure suffering, the duration can be quantified and compared to the duration in other cases. The length of Hayley's suffering is much less than the pain that some people are forced to endure for decades. Consequently, Hayley's estate does not qualify for an award at the highest amount as the Graveses have requested.

Conclusion

I intend to incorporate this ruling into a forthcoming decision that awards the Graveses compensation. The Graveses are also entitled to the \$250,000 award for a person's death found at 42 U.S.C. § 300aa—15(a)(2). A status conference will be held on **Thursday, May 3, 2012 at 11:00 A.M. Eastern Time** to determine whether other issues relating to damages remain unresolved.

IT IS SO ORDERED.

S/ Christian J. Moran

Christian J. Moran
Special Master