

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

WAYNE PESTKA, Special Administrator of the Estate of KELSEY LYNN SHORT, deceased.

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

No. 06-708V
Special Master Christian J. Moran

Filed: September 24, 2013

Stipulation; influenza (flu) vaccine; encephalopathy; death

Robert T. Moxley, Robert T. Moxley, P.C., Cheyenne, WY, for Petitioners;
Michael P. Milmo, United States Department of Justice, Washington, D.C., for Respondent.

UNPUBLISHED DECISION¹

On September 23, 2013, respondent filed a joint stipulation concerning the petition for compensation filed by Wayne Pestka, on behalf of his deceased granddaughter, Kelsey Lynn Short, on October 13, 2006. In his petition, petitioner alleged that the influenza ("flu") vaccines, which are contained in the Vaccine Injury Table (the "Table"), 42 C.F.R. § 100.3 (a), and which Kelsey received on or about September 29, 1998, and October 26, 1999, caused her to suffer encephalopathy. Petitioner further alleges that Kelsey died on November 15, 1999, as a result of her encephalopathy. Petitioner represents that there has been no prior award or settlement of a civil action for damages on Kelsey's behalf as a result of her vaccine injury or her death.

Respondent denies that Kelsey suffered any injury as a result of her flu vaccinations of September 29, 1998 or October 26, 1999, and denies that Kelsey's death was a sequela of her allegedly vaccine-related encephalopathy.

¹The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision 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.

Nevertheless, the parties agree to the joint stipulation, attached hereto as Appendix A. The undersigned finds said stipulation reasonable and adopts it as the decision of the Court in awarding damages, on the terms set forth therein.

Damages awarded in that stipulation include:

A lump sum of \$175,000.00 in the form of a check payable to petitioner, Wayne Pestka, representing compensation for all damages that would be available under 42 U.S.C. § 300aa-15(a).

In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment in case 06-708V according to this decision and the attached stipulation.²

Any questions may be directed to my law clerk, Mary Holmes, at (202) 357-6353.

IT IS SO ORDERED.

s/Christian J. Moran
Christian J. Moran
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 United States Court of Federal Claims judge.

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

WAYNE PESTKA, as special)
administrator of the estate of)
KELSEY ANN SHORT,)
)
Petitioner,)
)
v.)
)
SECRETARY OF HEALTH)
AND HUMAN SERVICES,)
)
Respondent.)
_____)

No. 06-708
Special Master Moran
ECF

STIPULATION

The parties hereby stipulate to the following matters:

1. On behalf of his deceased granddaughter, Kelsey Ann Short (“Kelsey”), petitioner Wayne Pestka, as special administrator of Kelsey’s estate, filed a petition for vaccine compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 to 34 (the “Vaccine Program”). The petition seeks compensation for Kelsey’s injury and death allegedly related to Kelsey’s receipt of one or more influenza (“flu”) vaccines, which vaccine is contained in the Vaccine Injury Table (the “Table”), 42 C.F.R. § 100.3 (a).
2. Kelsey received flu vaccines on or about September 29, 1998, and October 26, 1999.
3. The vaccines were administered within the United States.
4. Petitioner alleges that Kelsey suffered the first symptom of encephalopathy within approximately two weeks of receiving her first flu vaccine on September 29, 1998, and exhibited further signs of encephalopathy within approximately two weeks of receiving her second flu vaccine on October 26, 1999, and that her encephalopathy was caused by the vaccinations. Petitioner also alleges that Kelsey died on November 15, 1999, as a result of her encephalopathy.

5. Petitioner represents that there has been no prior award or settlement of a civil action for damages on behalf of Kelsey as a result of her vaccine injury or her death.

6. Respondent denies that Kelsey suffered any injury as a result of her flu vaccinations of September 29, 1998 or October 26, 1999, and denies that Kelsey's death was a sequela of her allegedly vaccine-related encephalopathy.

7. 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 8 of this Stipulation.

8. As soon as practicable after an entry of judgment reflecting a decision consistent with the terms of this Stipulation, and after petitioner has 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 payment:

A lump sum of \$175,000.00 in the form of a check payable to petitioner, representing compensation for all damages that would be available under 42 U.S.C. § 300aa-15(a).

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

10. Payment made pursuant to paragraph 8 of this Stipulation and any amounts awarded pursuant to paragraph 9 will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

11. Petitioner represents and has demonstrated that he is the Personal Representative of the Estate of Kelsey Lynn Short, duly appointed on November 28, 2005 by the District Court, Probate Division of the County of Carver, State of Minnesota, case no 10-PR-OS-92. No payment pursuant to this Stipulation shall be made until petitioner provides the Secretary with documentation establishing the approval for this settlement by that Minnesota state court.

12. In return for the payments described in paragraphs 8 and 9, petitioner, in his individual capacity, and as legal representative of the Estate of Kelsey Ann Short, and on behalf of her heirs, executors, administrators, successors, and assigns, does forever irrevocably and unconditionally release, acquit and discharge the United States and the Secretary of Health and Human Services from any and all actions or causes of action (including agreements, judgments, claims, damages, loss of services, expenses and all demands of whatever kind or nature) that have been brought, could have been brought, or could be timely brought in the United States Court of Federal Claims, under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq., on account of, or in any way growing out of, any and all known or unknown, suspected or unsuspected personal injuries to or death of Kelsey resulting from, or alleged to have resulted from, the flu vaccinations administered on or about September 29, 1998 and October 26, 1999, as alleged by petitioner in a petition for vaccine compensation filed on or about October 13, 2006, in the United States Court of Federal Claims as petition No. 06-708V.

13. If the special master fails to issue a decision in complete conformity with the terms of this Stipulation or if the United States 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 voidable at the sole discretion of either party.

14. This Stipulation expresses a full and complete negotiated settlement of liability and damages claimed under the National Childhood Vaccine Injury Act of 1986, as amended, except as otherwise noted in paragraph 9 above. There is absolutely no agreement on the part of the parties hereto to make any payment or do any act or thing other than is herein expressly stated and clearly agreed to. The parties further agree and understand that the award described in this Stipulation may reflect a compromise of the parties' respective positions as to liability and/or amount of damages.

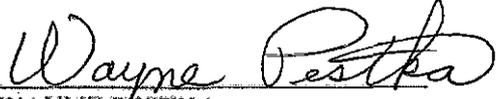
15. This Stipulation shall not be construed as an admission by the United States or the Secretary of Health and Human Services that either of the flu vaccines Kelsey received caused her to suffer encephalopathy or any other injury or her death.

16. All rights and obligations of petitioner hereunder shall apply equally to petitioner's heirs, executors, administrators, successors, and/or assigns, as administrators of Kelsey's estate.

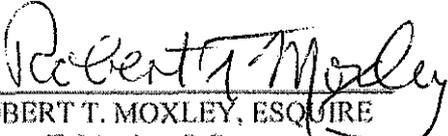
END OF STIPULATION

Respectfully submitted,

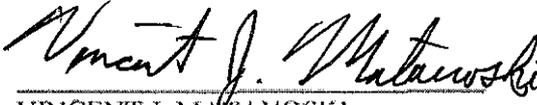
PETITIONER:


WAYNE PESTKA

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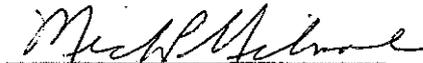
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Dated: September 23, 2013