In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-12 V Filed: October 22, 2010 Not for Publication

JAMES BURGHARDT,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Damages decision based on stipulation; Measles-Mumps-Rubella ("MMR") vaccine, rash, joint swelling and pain, residual arthralgia; attorneys' fees and costs

Martin J. Rubenstein, Staten Island, NY, for petitioner. Ryan D. Pyles, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING DAMAGES¹ DECISION AWARDING ATTORNEYS' FEES AND COSTS

On October 20, 2010, the parties filed the attached stipulation, in which they agreed to settle this case and described the settlement terms. Petitioner alleged that he developed a rash, joint swelling and pain, and residual arthralgia following a Measles-Mumps-Rubella ("MMR") vaccination. Respondent denies that petitioner's rash, joint swelling and pain, and residual arthralgia were caused in fact by his MMR vaccination. Nonetheless, the parties agreed to resolve this matter informally.

Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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.

The court hereby adopts the parties' said stipulation, attached hereto, and awards compensation in the amount and on the terms set forth therein. Pursuant to the stipulation, the court awards a lump sum of \$75,000.00 in the form of a check made payable to petitioner.

In the stipulation, the parties also agreed to settle the attorneys' fees and costs in this case and described the settlement terms. In accordance with the General Order #9 requirements, petitioner states that he has incurred no costs to pursue his petition. The court finds the amount by petitioner to be reasonable.

The court hereby adopts the parties' said stipulation, attached hereto, and awards compensation in the amount and on the terms set forth therein. Pursuant to the stipulation, the court awards a lump sum of \$14,400.00 in the form of a check made jointly payable to petitioner and Martin Rubenstein, Esq., for attorneys' fees and costs in this case.

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: Oct. 22, 2010

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

| JAMES BURGHARDT, | |
|--|-------------------------------------|
| Petitioner, | |
| V. |) No. 09-12V |
| SECRETARY OF HEALTH AND HUMAN SERVICES, |) Special Master Laura D. Millman) |
| Respondent. |))) |

STIPULATION

The parties hereby stipulate to the following matters:

- 1. Petitioner James Burghardt ("petitioner") 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 injuries allegedly related to petitioner's receipt of the Measles-Mumps-Rubella ("MMR") vaccine, which vaccine is contained in the Vaccine Injury Table (the "Table"), 42 C.F.R. § 100.3(a).
 - 2. Petitioner received an MMR vaccine on or about November 4, 2006.
 - 3. The vaccine was administered within the United States.
- 4. Petitioner alleges that the MMR vaccine caused him to develop a rash, joint swelling and pain, and residual arthralgia and that he experienced residual effects of this injury for more than six months.
- 5. Petitioner represents that there has been no prior award or settlement of a civil action for damages as a result of his condition.

- 6. Respondent denies that MMR immunization is the cause of petitioner's alleged rash, joint swelling and pain, residual arthralgia, and/or any other injury.
- 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 payments:
 - a. A lump sum of \$75,000.00 in the form of a check payable to petitioner. This amount represents compensation for all damages that would be available under 42 U.S.C. \$300aa-15(a); and
 - b. A lump sum of \$14,400.00 in the form of a check payable to petitioner and petitioner's attorney, Martin Rubenstein, Esq., for attorneys' fees and costs available under 42 U.S.C. § 300aa-15(e). In compliance with General Order #9, petitioner incurred no out-of-pocket litigation expenses in proceeding on the petition.
- 9. Petitioner and his attorney represent that they have identified to respondent all known sources of payment for items or services for which the Program is not primarily liable under 42 U.S.C. § 300aa-15(g), including State compensation programs, insurance policies, Federal or State health benefits programs (other than Title XIX of the Social Security Act (42 U.S.C. § 1396 et seq.)), or entities that provide health services on a pre-paid basis.
- 10. Payments made pursuant to paragraph 8 of this Stipulation will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.
 - 11. The parties and their attorneys further agree and stipulate that, except for any award

for attorneys' fees and litigation costs, and past unreimbursable expenses, the money provided pursuant to this Stipulation will be used solely for the benefit of petitioner as contemplated by a strict construction of 42 U.S.C. §300aa-15(a) and (d), and subject to the conditions of 42 U.S.C. § 300aa-15(g) and (h).

- 12. In return for the payments described in paragraph 8, petitioner, on behalf of himself and his heirs, executors, administrators, successors or 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 Court of Federal Claims, under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300 aa-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 petitioner resulting from, or alleged to have resulted from, the MMR vaccination administered on November 4, 2006, as alleged by petitioner in a petition for vaccine compensation filed on or about January 6, 2009, in the United States Court of Federal Claims as petition No. 09-12V.
- 13. If petitioner should die prior to entry of judgment, this agreement shall be voidable upon proper notice to the Court on behalf of either or both of the parties.
- 14. If the special master fails to issue a decision in complete conformity with the terms of this Stipulation or if the 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.

- 15. 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. There is absolutely no agreement on the part of the parties hereto to make any payment or to 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, and further, that a change in the nature of the injury or condition or in the items of compensation sought, is not grounds to modify or revise this agreement.
- 16. This Stipulation shall not be construed as an admission by the United States or the Secretary of Health and Human Services that the MMR vaccine caused petitioner's alleged rash, joint swelling and pain, residual arthralgia, and/or any other injury.
- 17. All rights and obligations of petitioner hereunder shall apply equally to petitioner's heirs, executors, administrators, successors, and/or assigns.

END OF STIPULATION

Respectfully submitted.

PETITIONER:

JAMES BURGHARDT

ATTORNEY OF RECORD FOR PETITIONER:

MARTIN J. RUBENSTEIN 260 Christopher Lane, Ste. 102 Staten Island, New York 10314 (718) 494-8800

AUTHORIZED REPRESENTATIVE OF THE SECRETARY OF HEALTH AND HUMAN SERVICES:

EOFFREY EVANS, M.D. Director, Division of

Vaccine Injury Compensation

Healthcare Systems Bureau U.S. Department of Health

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DATED: October 20, 2010

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