

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. [redacted]V

Originally Filed: September 24, 2009

Issued Redacted: October 15, 2009

Not for publication

JANE DOE/48,

*

*

Petitioner,

*

*

v.

*

Damages decision based on proffer

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SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

*

*

*

Respondent.

*

*

Clifford J. Shoemaker, Vienna, VA, for petitioner.

Alexis Babcock, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING DAMAGES¹

On September 22, 2009, respondent filed a Proffer on Award of Compensation. On September 24, 2009, petitioner orally accepted respondent's Proffer. 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. This decision is being redacted because of petitioner's October 8, 2009, motion which was granted.

1. A lump sum payment of \$ **951,530.88**, representing the life care expenses for Year One (**\$169,817.20**), lost earnings (**\$534,593.00**), pain and suffering (**\$230,121.77**), and past unreimbursable expenses (**\$16,998.91**) in the form of a check payable to petitioner, JANE DOE/48; and
2. An amount sufficient to purchase an annuity contract, subject to the conditions described in paragraph II. B. of the attached Proffer, paid to the life insurance company from which the annuity will be purchased.

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: September 24, 2009

/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

_____)	
████████████████████,)	
)	
Petitioner,)	
)	
v.)	No. ██████████
)	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 Suzanne Labansky, MSN, CRRN, CCM, CLCP, MSC, and petitioner engaged life care planner Terry Kennedy Arnold, RN, CDMS, CRRN, CLCP, CNLCP, to work together to provide an estimation of ██████████'s future vaccine-injury related needs. All items of compensation identified in the life care plan are supported by the evidence, and are illustrated by the chart entitled **Items of Compensation for ██████████**, attached hereto as Tab A.¹ Respondent proffers that ██████████ should be awarded all items of compensation set forth in the 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 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 Earnings

The parties agree that based upon the evidence of record, petitioner has suffered a loss of earnings related to her vaccine injury and that it is unlikely that she will be gainfully employed in the future. Therefore, respondent proffers that [REDACTED] should be awarded \$534,593.00 in lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A). Petitioner agrees.

C. Pain and Suffering

Respondent proffers that [REDACTED] should be awarded \$230,121.77 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 her expenditure of past unreimbursable expenses related to her vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$16,998.91. Petitioner agrees.

E. Medicaid Lien

Petitioner represents that there are no Medicaid liens outstanding against her.

II. Form of the Award

The parties recommend that the compensation provided to [REDACTED] should be made through a combination of a lump sum payment 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 \$951,530.88, representing life care expenses for Year One (\$169,817.20), lost earnings (\$534,593.00), pain and suffering (\$230,121.77), and past unreimbursable expenses (\$16,998.91), in the form of a check payable to [REDACTED], petitioner;

B. An amount sufficient to purchase an annuity contract, subject to the conditions described below, that will provide payments for the life care items contained in the life care plan, as illustrated by the chart at Tab A attached hereto, paid to the life insurance company² from which the annuity will be purchased. 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, [REDACTED], only so long as [REDACTED] 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 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.

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 she, [REDACTED], is alive at the time that a particular payment is due. Petitioner agrees to make arrangements to ensure that written notice is provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of [REDACTED] 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: **\$ 951,530.88**
- B. An amount sufficient to purchase the annuity contract described above in section II. B.

Respectfully submitted,

TONY WEST
Assistant Attorney General

TIMOTHY P. GARREN
Director
Torts Branch, Civil Division

MARK W. ROGERS
Deputy Director
Torts Branch, Civil Division

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

/s/ Alexis B. Babcock

ALEXIS B. BABCOCK
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Benjamin Franklin Station
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Telephone: (202) 616-7678

Dated: September 22, 2009

CERTIFICATE OF SERVICE

I certify that on this ___ day of September, 2009, a copy of RESPONDENT'S PROFFER ON AWARD OF COMPENSATION was served, by first-class mail, postage pre-paid, upon:

Renee J. Gentry
Counsel for Petitioner
SHOEMAKER & ASSOCIATES
9711 Meadowlark Road
Vienna, Virginia 22182-1951
(703) 281-6395

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
Medicare Part B Premium	5%		M	2009 1,156.80	2010 1,156.80	2011 1,156.80	2012 1,156.80	2013 1,156.80	2014 1,156.80	2015 1,156.80	2016 1,156.80
AETNA Golden Choice Select Plan	5%			626.40	626.40	626.40	626.40	626.40	626.40	626.40	626.40
AETNA MOP	5%			3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00
Medicare Part D	5%										
Medigap F Premium	5%		M								
Neurologist	5%	*									
Urologist	5%	*									
Renal Ultrasound	5%	*									
Cysto-metrogram	5%	*									
Ophthal-mologist	5%	*									
Internal Medicine	5%	*									
CBC Liver Function Test BMP	5%	*									
Urinalysis w Culture	5%	*									
MRI of Brain	5%	*									
MRI of Spinal Cord	5%	*									
EMG	5%	*									
Barium Swallow Study	5%	*									
Outpatient Infusion of Solu-medrol	5%	*									
Inpatient treatment of MS	5%	*									
PT and OT Evals	4%	*									
PT and OT	4%	*									
ST Eval	4%	*									
ST	4%	*									
Assistive Tech Eval	4%	*									
Medications	5%	*									
Rolling Walker	4%	*									
Elevated Commode Seat	4%			43.95					43.95		
Bathub Transfer Bench	4%			134.61					134.61		
Rehab Shower Chair	4%									1,200.00	
Junior Portable Folding Lift	4%									1,451.00	
Slings for Lift	4%									195.50	
Sliding Board	4%			355.86					355.86		195.50

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
Lost Earnings				534,593.00							
Pain and Suffering				230,121.77							
Past Unreimbursable Expenses				16,998.91							
Annual Totals				951,530.88	81,781.00	82,156.00	81,781.00	82,156.00	85,399.42	109,092.50	106,066.50

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 (\$169,817.20), lost earnings (\$534,593.00), pain and suffering (\$230,121.77), and past unreimbursable expenses (\$16,998.91): \$951,530.88.
 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.
 Items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.

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 Year 15	Compensation Year 16
Medicare Part B Premium	5%		M	2017	2018	2019	2020	2021	2022	2023	2024
AETNA Golden Choice Select Plan	5%			1,156.80	1,156.80	1,156.80	1,156.80	1,156.80	1,156.80	1,156.80	1,156.80
AETNA MOP	5%			626.40	626.40	626.40	626.40	626.40	626.40	626.40	626.40
Medicare Part D	5%			3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00
Medigap F Premium	5%		M								
Neurologist	5%	*									
Urologist	5%	*									
Renal Ultrasound	5%	*									
Cysto-metrogram	5%	*									
Ophthal-mologist	5%	*									
Internal Medicine	5%	*									
CBC Liver Function Test BMP	5%	*									
Urinalysis w Culture	5%	*									
MRI of Brain	5%	*									
MRI of Spinal Cord	5%	*									
EMG	5%	*									
Barium Swallow Study	5%	*									
Outpatient Infusion of Solu-medrol	5%	*									
Inpatient treatment of MS	5%	*									
PT and OT Evals	4%	*									
PT and OT	4%	*									
ST Eval	4%	*									
ST	4%	*									
Assistive Tech Eval	4%	*									
Medications	5%	*									
Rolling Walker	4%	*									
Elevated Commode Seat	4%					43.95					43.95
Bathub Transfer Bench	4%										
Rehab Shower Chair	4%						1,200.00				
Junior Portable Folding Lift	4%										
Slings for Lift	4%			195.50	195.50	195.50	195.50	195.50	195.50	195.50	195.50
Sliding Board	4%					355.86					355.86

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 Year 15	Compensation Year 16
Lost Earnings				2017	2018	2019	2020	2021	2022	2023	2024
Pain and Suffering											
Past Unreimbursable Expenses											
Annual Totals				106,441.50	106,066.50	153,955.73	111,669.55	142,964.55	142,589.55	142,964.55	146,073.36

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 (\$169,817.20), lost earnings (\$534,593.00), pain and suffering (\$230,121.77), and past unreimbursable expenses (\$16,998.91); \$951,530.88.

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.

Items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 17 2025	Compensation Years 18-20 2026-2028	Compensation Year 21 2029	Compensation Years 22-25 2030-2033	Compensation Years 26-30 2034-2038	Compensation Years 31-35 2039-2043	Compensation Years 36-Life 2044-Life
Lost Earnings										
Pain and Suffering										
Past Unreimbursable Expenses										
Annual Totals				146,312.31	143,858.91	179,515.07	179,621.39	179,939.99	180,197.99	180,373.43

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 (\$169,817.20), lost earnings (\$534,593.00), pain and suffering (\$230,121.77), and past unreimbursable expenses (\$16,998.91); \$951,530.88.

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