

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

JEFF KAY and PAMELA KAY, *
Parents of MASON KAY, a Minor, *
 *
 Petitioners, *
 *
 v. *
 *
 SECRETARY OF HEALTH *
 AND HUMAN SERVICES, *
 *
 Respondent. *

No. 08-607
Special Master Christian J. Moran

Filed: November 5, 2010

Stipulation; Diphtheria-Tetanus-
acellular Pertussis; Hemophilus
influenza type b; inactivated Polio;
Pevnar; Rotavirus; encephalopathy;
seizure disorder

UNPUBLISHED DECISION¹

Andrew D. Downing, Esq., Rhodes, Hieronymus, et al., Tulsa, OK, for Petitioner;
Chrysovalantis P. Kefalas, Esq., U.S. Department of Justice, Washington, D.C., for Respondent.

On November 4, 2010, the parties filed a joint stipulation concerning the petition for compensation filed by Jeff and Pamela Kay on behalf of their son Mason on August 28, 2008. In their petition, the Kay’s alleged that the Diphtheria-Tetanus-acellular Pertussis (“DTaP”), Hemophilus influenza type b (“Hib”), inactivated Polio (“IP”), Pevnar, and Rotavirus vaccines, which are contained in the Vaccine Injury Table, 42 C.F.R. §100.3(a), and which Mason received on March 3, 2008, caused him to sustain the first symptom of the onset of an encephalopathy and sustain a seizure disorder, the effects of which have occurred for more than six months.

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of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).

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 clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, the person submitting the information has 14 days to identify and to move to delete such information before the document’s disclosure. If the special master agrees that the identified material fits within the categories listed above, the special master shall redact such material from public access. 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

Respondent denies that Mason suffered the onset of an encephalopathy within the time period set forth in the Table, and that Mason's seizure disorder and alleged residual effects were caused-in-fact by the DTaP, Hib, IP, Prevnar, and Rotavirus vaccines.

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 payment of \$650,000.00 in the form of a check payable to petitioners as guardians/conservators of Mason's estate.

This amount represents 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 08-607V according to this decision and the attached stipulation.

Any questions may be directed to my law clerk, Jennifer C. Chapman, at (202) 357-6358.

IT IS SO ORDERED.

S/ Christian J. Moran

Christian J. Moran
Special Master

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

JEFF KAY and PAMELA KAY,)	
parents of MASON KAY, a minor,)	
)	
Petitioners,)	
)	
v.)	No.08-607V
)	Special Master Moran
SECRETARY OF HEALTH AND HUMAN)	
SERVICES,)	
)	
Respondent.)	
_____)	

STIPULATION

The parties hereby stipulate to the following matters:

1. On behalf of their son, Mason Kay (“Mason”), Jeff Kay and Pamela Kay (“petitioners”) 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 Mason’s receipt of the Diphtheria-Tetanus-acellular Pertussis (“DTaP”), Hemophilus influenzae type b (“Hib”), inactivated Polio (“IP”), Prevnar, and Rotavirus vaccines, which vaccines are contained in the Vaccine Injury Table (the “Table”), 42 C.F.R. § 100.3(a).
2. Mason received his DTaP, Hib, IP, Prevnar, and Rotavirus immunizations on March 3, 2008.
3. The vaccines were administered within the United States.
4. Petitioners allege that Mason sustained the first symptom or manifestation of the onset of an encephalopathy within the time period set forth in the Table as a consequence of receiving the DTaP vaccine, and that Mason sustained a vaccine-related injury diagnosed as a seizure

disorder as a result of receiving the DTaP, Hib, IP, Prevnar, and Rotavirus vaccines. Petitioners further allege that Mason experienced the residual effects of his seizure disorder for more than six months.

5. Petitioners represent that there has been no prior award or settlement of a civil action for damages on behalf of Mason as a result of his condition.

6. Respondent denies that Mason suffered the onset of an encephalopathy within the time period set forth in the Table, and that Mason's seizure disorder and alleged residual effects were caused-in-fact by the DTaP, Hib, IP, Prevnar, and Rotavirus vaccines.

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 petitioners have 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. A lump sum of \$650,000.00 in the form of a check payable to petitioners as guardians/conservators of Mason's estate. This amount represents 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 petitioners have 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 and any amounts awarded pursuant to paragraph 9 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, the money provided pursuant to this Stipulation will be used solely for the benefit of Mason 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. Petitioners represent that they presently are, or within 90 days of the date of judgment will become, duly authorized to serve as guardians/conservators of Mason's estate under the laws of the State of Oklahoma. No payments pursuant to this Stipulation shall be made until petitioners provide the Secretary with documentation establishing their appointment as guardians/conservators of Mason's estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardians/conservators of the estate of Mason Kay at the time a payment pursuant to this Stipulation is to be made, any such payment shall be paid to the party or parties appointed by a court of competent jurisdiction to serve as guardian/conservator of the estate of Mason Kay upon submission of written documentation of such appointment to the Secretary.

13. In return for the payments described in paragraphs 8 and 9, petitioners, in their individual capacity and as legal representatives of Mason, on behalf of themselves, Mason, and his heirs, executors, administrators, successors or assigns, do forever and fully expressly release, acquit and discharge the Secretary of Health and Human Services and the United States of America from any and all actions, causes of action, agreements, judgments, claims, damages,

loss of services, expenses and all demands of whatever kind or nature on account of, or in any way growing out of, any and all known or unknown personal injuries to or death of Mason resulting from, or alleged to have resulted from, the DTaP, Hib, IP, Prevnar, and Rotavirus vaccinations administered on March 3, 2008, as alleged by petitioners in a petition for vaccine compensation filed on or about August 28, 2008, in the United States Court of Federal Claims as petition No. 08-607V.

14. If Mason should die prior to receiving the payment described in paragraph 8, this agreement shall be considered voidable upon proper notice to the Court on behalf of either or both of the parties.

15. 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 null and void at the sole discretion of either party.

16. This Stipulation expresses a full and complete 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 to do any act or thing other than is herein expressly stated and clearly agreed to.

17. All rights and obligations of petitioners hereunder shall apply equally to petitioners' successors and assigns as legal representatives of Mason Kay.

END OF STIPULATION

Respectfully submitted,

PETITIONERS:



JEFF KAY



PAMELA KAY

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Dated: November 4, 2010