

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 06-148V

December 18, 2013

\*\*\*\*\* UNPUBLISHED  
SANDRA MYER, as next friend of \*  
JUSTIN MYER, \* Special Master Dorsey  
\*  
Petitioner, \* Proffer; hepatitis B vaccine;  
\* autoimmune encephalitis;  
v. \* death  
\*  
SECRETARY OF HEALTH \*  
AND HUMAN SERVICES, \*  
\*  
Respondent. \*

\*\*\*\*\*

Brian Robert Arnold, Brian R. Arnold & Associates, Dallas, TX, for petitioner;  
Glenn Alexander MacLeod, U.S. Department of Justice, Washington, DC, for  
respondent.

## DECISION AWARDING DAMAGES<sup>1</sup>

On February 27, 2006, Justin Myer filed a petition for compensation under the National Vaccine Injury Compensation Program,<sup>2</sup> 42 U.S.C. §§ 300aa-1 to -34 (2006), in which he alleged that he suffered autoimmune encephalitis as a result of a hepatitis B

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<sup>1</sup> Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this ruling on the website of the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b).

<sup>2</sup> The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-1 to -34 (2006) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

vaccine he received on October 25, 2002. During the pendency of his claim, Justin died, and his mother, Sandra Myer (“petitioner”), was appointed guardian of Justin’s estate.<sup>3</sup>

The special master previously assigned to this case found that petitioner was entitled to compensation. Ruling on Entitlement, filed July 28, 2011, at 2.

On December 17, 2013, respondent filed a Proffer on Award of Compensation (“Proffer”). In that Proffer, respondent represented that petitioner agrees with the proffered award. Based on the record as a whole, the undersigned finds that petitioner is awarded is entitled to an award as stated in the Proffer.

Pursuant to the terms stated in the Proffer, attached to this decision as Appendix A, the undersigned awards petitioner:

- A. A lump sum payment to petitioner, as Personal Representative of the Estate of Justin Myer, of **\$603,451.58**, which amount includes the death benefit compensation (\$250,000.00), past pain and suffering (\$250,000.00), and past lost wages (\$103,451.58). No payments shall be made until petitioner provides respondent with documentation establishing that she has been appointed as the Personal Representative of Justin Myer’s estate;
- B. A lump sum payment of **\$60,381.95**, representing compensation for past unreimbursable expenses, payable to Sandra Myer, petitioner; and
- C. A lump sum payment of **\$23,144.61**, representing compensation for satisfaction of the State of Texas Medicaid lien, payable jointly to petitioner, Sandra Myer, as Personal Representative of Justin Myer’s estate and

TMHP/Medicaid  
Attn: Tort Receivables  
TPL/ Tort Department  
P.O. Box 202948  
Austin, TX 78720-2948  
Re: MYER. JUSTIN  
Medicaid Number: 524649550

Petitioner agrees to endorse this payment to the State of Texas.

Petitioner represents that she presently is, or within 90 days of the date of judgment will become, duly authorized to serve as Legal Representative or conservator of Justin Myer’s estate under the laws of the State of Texas. No payments pursuant to this Proffer shall be made until petitioner provides the Secretary with documentation establishing her appointment as Legal Representative or conservator of Justin Myer’s

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<sup>3</sup> As discussed below, petitioner has not provided respondent or the court with documentation establishing that she has been appointed as the personal representative of Justin Myer’s estate.

estate. If petitioner is not authorized by a court of competent jurisdiction to serve as Legal Representative or conservator of the estate of Justin Myer at the time a payment pursuant to this Proffer 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 Legal Representative(s) or conservator(s) of the estate of Justin Myer upon submission of written documentation of such appointment to the Secretary.

Proffer, at 4-5.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court **SHALL ENTER JUDGMENT** herewith.<sup>4</sup>

**IT IS SO ORDERED.**

s/ Nora Beth Dorsey  
Nora Beth Dorsey  
Special Master

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<sup>4</sup> Pursuant to Vaccine Rule 11(a), entry of judgment is expedited by the parties' joint filing of notice renouncing the right to seek review.

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

\*\*\*\*\*

**SANDRA MYER, as Next Friend of  
JUSTIN MYER,**

Petitioner,

v.

**SECRETARY OF HEALTH  
AND HUMAN SERVICES,**

Respondent.

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**No. 06-148V (ECF)  
SPECIAL MASTER  
NORA B. DORSEY**

**RESPONDENT’S PROFFER ON AWARD OF COMPENSATION**

The procedural history of this case is detailed in the Special Master’s Decision on Entitlement. See Myer v. HHS, No. 06-148V, 2011 WL 3664358 (Fed. Cl. Spec. Mstr. Jul. 28, 2011). Petitioner, Sandra Myer, filed a petition under the National Childhood Vaccine Injury Act (“Vaccine Act” or “Act”), alleging her son, Justin Myer, suffered an encephalopathy that was caused in fact by a Hepatitis B (“Hep B”) vaccination he received in October 2002. Respondent denied that Justin suffered a vaccine injury, or that his death resulted from the administration of the Hep B vaccine. Following the submission of additional medical records and the parties’ expert reports, an entitlement hearing was held on November 12, 2009, in Houston, Texas. On July 28, 2011, Special Master Lord published a decision finding petitioner entitled to compensation. The special master determined that Justin Myer had suffered a vaccine-related encephalopathy, and that his death was caused by his vaccine-related encephalopathy. Following this decision, the parties discussed the amount of compensation available to petitioner under the Vaccine Act. Respondent hereby submits the following proffer

regarding the award of compensation.

**I. Items of Compensation**

A. Death Benefit

Based upon the evidence of record, respondent proffers that petitioner, as Personal Representative of the Estate of Justin Myer, is entitled to receive an award of \$250,000.00 for the death of the Justin Myer, as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(2).

Petitioner agrees.

B. Future Medical Care Expenses

As this is a death case, petitioner is not entitled to an award for projected unreimbursable medical care expenses incurred from the date of judgment as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(1)(A). Petitioner agrees.

C. Lost Earnings

Based upon the evidence of record, respondent proffers that petitioner, as Personal Representative of the Estate of Justin Myer, is entitled to an award for past lost earnings as provided under the Vaccine Act in the amount of \$103,451.58. Respondent proffers that petitioner, as Personal Representative of the Estate of Justin Myer, is not entitled to an award for lost future earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A).

Petitioner agrees.

D. Pain and Suffering

Respondent proffers that petitioner, as Personal Representative of the Estate of Justin Myer, should be awarded \$250,000.00 for Mr. Myer's actual pain and suffering as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(4). Petitioner agrees.

E. Past Unreimbursable Expenses

Based upon the evidence of record, respondent proffers that petitioner is entitled to an award of \$60,381.95 in past unreimbursable expenses incurred as a result of Mr. Myer's vaccine-related injury, as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(1)(B). Petitioner agrees.

F. Medicaid Lien

Respondent proffers that petitioner, as Personal Representative of the Estate of Justin Myer, should be awarded funds to satisfy the State of Texas lien in the amount of \$23,144.61, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action the State of Texas may have against any individual as a result of any Medicaid payments the State of Texas has made to or on behalf of Justin Myer, deceased, from the date of his eligibility for benefits through the date of judgment in this case as a result of his vaccine-related injury and death under Title XIX of the Social Security Act. Petitioner represents that there are no other outstanding Medicaid liens related to Mr. Myer's vaccine-related injury or death.

**II. Form of the Award**

The parties recommend that the compensation provided to petitioner, as Personal Representative of the Estate of Justin Myer, should be made through lump sum payments and request that the special master's decision and the Court's judgment award the following:

- A. A lump sum payment to petitioner, as Personal Representative of the Estate of Justin Myer, of \$603,451.58, which amount includes the death benefit compensation (\$250,000.00), past pain and suffering (\$250,000.00), and past lost wages (\$103,451.58). No payments shall be made until petitioner provides

respondent with documentation establishing that she has been appointed as the Personal Representative of Justin Myer's estate;

- B. A lump sum payment of \$60,381.95, representing compensation for past unreimbursable expenses, payable to Sandra Myer, petitioner; and
- C. A lump sum payment of \$23,144.61, representing compensation for satisfaction of the State of Texas Medicaid lien, payable jointly to petitioner, Sandra Myer, as Personal Representative of Justin Myer's estate and

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Petitioner agrees to endorse this payment to the State of Texas.

Petitioner represents that she presently is, or within 90 days of the date of judgment will become, duly authorized to serve as Legal Representative or conservator of Justin Myer's estate under the laws of the State of Texas. No payments pursuant to this Proffer shall be made until petitioner provides the Secretary with documentation establishing her appointment as Legal Representative or conservator of Justin Myer's estate. If petitioner is not authorized by a court of competent jurisdiction to serve as Legal Representative or conservator of the estate of Justin Myer at the time a payment pursuant to this Proffer 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 Legal Representative(s) or conservator(s) of the estate of Justin Myer upon submission of written

documentation of such appointment to the Secretary.

**III. Summary of Recommended Payments Following Judgment**

A.	Lump sum paid to petitioner, Sandra Myer, as Personal Representative of the Estate of Justin Myer:	\$ 603,451.58
B.	Lump sum paid to petitioner Sandra Myer:	\$ 60,381.95
B.	Lump sum paid jointly to petitioner, Sandra Myer, as Personal Representative of the Estate of Justin Myer and the State of Texas Medicaid Office:	\$ <u>23,144.61</u>
	<b>TOTAL AWARD:</b>	<b>\$ <u>686,978.14</u></b>

Respectfully submitted,

STUART F. DELERY  
Assistant Attorney General

RUPA BHATTACHARYYA  
Director  
Torts Branch, Civil Division

VINCENT J. MATANOSKI  
Deputy Director  
Torts Branch, Civil Division

MICHAEL P. MILMOE  
Senior Trial Counsel  
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/s/ GLENN A. MACLEOD  
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DATE: December 17, 2013