

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
No. 07-0439V
(Not to be published¹)

*
THEO A. JONES, *
*
*
 Petitioner, *
*
*
 v. *
*
SECRETARY OF HEALTH AND *
HUMAN SERVICES *
*
*
 Respondent. *
*

Filed: December 7, 2011

Decision by Proffer; Damages;
Influenza Vaccine; Guillain-Barre
Syndrome (GBS)

DECISION

HASTINGS, Special Master.

This is an action seeking an award under the National Vaccine Injury Compensation Program² on account of an illness suffered by Theo A. Jones. After discussions between the parties, on December 5, 2011, respondent filed “Respondent’s Proffer on Award of Compensation.” That document indicates that petitioner accepts the Proffer as a reasonable measure of the amount of the award in this case.

I have reviewed respondent’s Proffer and Appendix A, and find that they define appropriate compensation in this case pursuant to 42, U.S.C. § 300aa-15(b). I conclude that compensation should be awarded based on those documents. I have attached to this Decision the Proffer and Appendix A as filed by respondent, and incorporate by reference said Proffer and

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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)). In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to delete medical or other information, that satisfies the criteria in § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

² The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2006 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (2006 ed.).

Appendix A into this Decision so as to become a part thereof. I order that respondent make a lump sum payment and purchase the annuity contracts as described below.

1. Lump Sum

Respondent shall make a total lump sum payment of \$1,236,943.53, representing compensation for life care expenses expected to be incurred during the first two years after judgment (\$304,342.53), lost earnings (\$566,601.00), pain and suffering (\$225,000.00), and past unreimbursable expenses (\$141,000.00), in the form of a check payable to petitioner, Theo A. Jones.

2. Annuity

I consider it in Theo A. Jones' best interest that compensation for life care items awarded beyond Year Two post-judgment be paid in the form of two annuity contracts, which shall be purchased as soon as practicable after entry of judgment. Accordingly, pursuant to 42 U.S.C. § 300aa-15(f)(4), I order respondent to purchase, and take ownership of, two annuity contracts, pursuant to which the insurance companies will agree to make periodic payments to Theo A. Jones, commencing on the second anniversary of the date of judgment. The total amount of the annuity payments in each year will be calculated based on the 6-page summary of "Items of Compensation for Theo A. Jones," attached hereto as Appendix A.

Each insurance company must meet the following criteria:

- 1) have a minimum of \$250,000,000 of capital and surplus, exclusive of any mandatory security valuation reserve; and
- 2) 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.

Under the statute governing the Program, as well as the "Vaccine Rules" adopted by this court, the special master must now enter a decision endorsing that Proffer, and the clerk must enter judgment, in order to authorize payment of the award. See § 300aa-12(d)(3)(A) and (e)(3); § 300aa-13(a); Vaccine Rules 10(a), 11(a).³

Theo A. Jones is entitled to an award under the Vaccine Act to provide compensation for his injury. The award shall be partly in the form of a lump sum payment, and partly in the form of annuities, as provided above.

³ The "Vaccine Rules of the United States Court of Federal Claims" are found in Appendix B of the Rules of the United States Court of Federal Claims.

In the absence of a timely-filed motion for review of this Decision, the clerk shall enter judgment in accord with this Decision.

IT IS SO ORDERED.

 /s/ George L. Hastings, Jr.
George L. Hastings, Jr.
Special Master

B. Lost Future Earnings

The parties agree that based upon the evidence of record, Theo A. Jones has suffered a past loss of earnings and will not be gainfully employed in the future. Therefore, respondent proffers that Theo A. Jones should be awarded lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A). Respondent proffers that the appropriate award for Theo A. Jones's lost earnings is \$566,601.00. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that Theo A. Jones should be awarded \$225,000.00 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 Theo A. Jones's expenditure of past unreimbursable expenses related to his vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$141,000.00. Petitioner agrees.

E. Medicaid Lien

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

II. Form of the Award

The parties recommend that the compensation provided to Theo A. Jones should be made through a combination of lump sum payments 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 \$1,236,943.53, representing compensation for life care expenses expected to be incurred during the first two years after judgment (\$304,342.53), lost earnings (\$566,601.00), pain and suffering (\$225,000.00), and past unreimbursable expenses (\$141,000.00), in the form of a check payable to petitioner, Theo A. Jones.

B. An amount sufficient to purchase two annuity contracts, subject to the conditions described below, that will provide payments for the life care items as illustrated by the chart at Tab A attached hereto, paid to the life insurance companies² from which the annuities will be purchased.³ Compensation for Year Three (beginning on the second anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of annuities, which annuities shall make payments directly to petitioner, Theo A. Jones, only so long as Theo A. Jones 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

² The Life Insurance Companies must have a minimum of \$250,000,000 capital and surplus, exclusive of any mandatory security valuation reserve. The Life Insurance Companies 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.

³ Petitioner authorizes the disclosure of certain documents filed by the petitioner in this case consistent with the Privacy Act and the routine uses described in the National Vaccine Injury Compensation Program System of Records, No. 09-15-0056.

sum to be paid to petitioner and do not require that the payment be made in one annual installment.

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 annuities

Petitioner will continue to receive the annuity payments from the Life Insurance Companies only so long as he, Theo A. Jones, is alive at the time that a particular payment is due. Written notice shall be provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Theo A. Jones's 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, Theo A. Jones: | \$1,236,943.53 |
| B. | An amount sufficient to purchase the annuity contracts described above in section II. B. | |

Respectfully submitted,

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s/Lisa A. Watts
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Dated: December 5, 2011.

Appendix A: Items of Compensation for Theo A. Jones

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Yrs 1 & 2	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Year 6	Compensation Year 7	Compensation Year 8
				2011	2012	2013	2014	2015	2016	2017	2018
Antibacterial Soap	4%			86.04		43.02	43.02	43.02	43.02	43.02	43.02
ADL/ Therapeutic Devices	4%			760.00		380.00	380.00	380.00	380.00	380.00	380.00
Electric Adjustable Bed	4%	*									
Manual Wheelchair	4%	*									
Power WC	4%			26,225.00							
Gel Cell Battery for Power WC	4%			373.00		373.00		373.00		373.00	
Battery Charger for WC	4%			273.00							273.00
Jay Cushion	4%	*									
WC Maint (Yr 1 only)	4%	*		490.00							
Portable Ramp	4%			385.00							
Upper Body Exercise Equip	4%			2,850.00							
Exercise Mat	4%			125.00			125.00			125.00	
Shower Chair	4%			1,177.50							1,177.50
Travel Shower Chair	4%			635.00					635.00		
Toto Washlet	4%			1,012.00							1,012.00
Clothing Adaptations	4%			1,560.00		780.00	780.00	780.00	780.00	780.00	780.00
SaeboFlex	4%	*									
AFOs	4%	*									
Adapted Utensils/ Dishware	4%			194.25					194.25		
Walkers/ Canes/ Crutches	4%			215.00					215.00		
Misc Adaptive Equip	4%			500.00		250.00	250.00	250.00	250.00	250.00	250.00
Other Equip Maint	4%			350.00		175.00	175.00	175.00	175.00	175.00	175.00
Home Mods	0%			57,937.50							
ECU/ EADL	4%			10,025.00							10,025.00
ECU Software	4%			650.00				650.00			
Ramp Van	4%								22,000.00	2,750.00	2,750.00
Home Mod Maint	4%			625.00		625.00		625.00		625.00	
Vehicle Mod Maint	4%			1,520.00		760.00	760.00	760.00	760.00	760.00	760.00
Lost Earnings				566,601.00							
Pain and Suffering				225,000.00							
Past Unreimbursable Expenses				141,000.00							

Appendix A: Items of Compensation for Theo A. Jones

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Yrs 1 & 2	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Year 6	Compensation Year 7	Compensation Year 8
				2011	2012	2013	2014	2015	2016	2017	2018
Annual Totals				1,236,943.53	-	98,372.78	97,499.78	99,022.78	120,419.03	101,247.78	163,590.28

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 & Yr 2 life care expenses (\$304,342.53), lost earnings (\$566,601.00), pain and suffering (\$225,000.00), and past unreimbursable expenses (\$141,000.00): \$1,236,943.53.

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.

At respondent's discretion items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.

Appendix A: Items of Compensation for Theo A. Jones

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 Years 15-Life
				2019	2020	2021	2022	2023	2024	2025-Life
Annual Totals				180,759.70	156,758.13	159,060.38	156,880.48	158,653.48	160,433.65	157,802.88

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 & Yr 2 life care expenses (\$304,342.53), lost earnings (\$566,601.00), pain and suffering (\$225,000.00), and past unreimbursable expenses (\$141,000.00): \$1,236,943.53.

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Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

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