

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-1266 V

Originally Filed: May 20, 2011

Filed Redacted: June 14, 2011

Not for Publication

SHAWNTE AYALEW, on behalf of her *
Minor Daughter, S.D., *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

*

Damages decision based on stipulation;
DTaP, chronic seizure disorder, ataxia,
dizziness, epilepsy, encephalopathy,
status epilepticus

Peter H. Meyers, Washington, D.C., for petitioner.

Julia W. McInerney, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING DAMAGES¹

On May 17, 2011, the parties filed the attached stipulation in which they agreed to settle this case and described the settlement terms. Petitioner alleged that her daughter S.D. suffered from chronic seizure disorder and related problems, including but not limited to: ataxia, dizziness, epilepsy, encephalopathy, status epilepticus, and other neurological injuries following a diphtheria-tetanus-acellular pertussis (“DTaP”) vaccination. Respondent denies that S.D.’s injuries were caused in fact by her DTaP vaccination. Nonetheless, the parties agreed to resolve this matter informally.

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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. On May 20, 2011, petitioner filed a motion to redact this decision. Petitioner’s motion is GRANTED in part and DENIED in part. The minor child’s name has been redacted to initials. Her parent’s name is not covered by the Vaccine Act or Rule 18(b)’s redaction provisions. Therefore, the minor child’s name has been redacted to initials in both the decision and the attached stipulation, but the parent’s name has not.

The court hereby adopts the parties' stipulation, and awards compensation in the amount and on the terms set forth therein. Pursuant to the stipulation, the court awards:

- a. a lump sum of **\$81,460.00**, which represents \$51,460.00 for first year life care expenses and \$30,000.00 as compensation for all other damages that would be available under 42 U.S.C. § 300aa-15(a), in the form of a check payable to petitioner as guardian/conservator of S.D.'s estate;
- b. a lump sum of **\$95,089.25**, representing reimbursement of the State of California Medicaid lien, in the form of a check payable jointly to petitioner and:

State of California Medi-Cal
Department of Healthcare Services
1500 Capitol Avenue
3rd Floor, MS 4720
Attn: Ms. Teresa Abbes; and

- c. An amount sufficient to purchase the annuity contract described in paragraph 10 of the stipulation, paid to the life insurance company from which the annuity will be purchased (the "Life Insurance Company").

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: June 14, 2011

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

SHAWNTE AYALEW, on behalf of her)
minor daughter, [REDACTED])
)
Petitioner,)
v.)
)
SECRETARY OF HEALTH AND)
HUMAN SERVICES)
)
Respondent.)

No. 05-1266V
Special Master Millman
ECF

STIPULATION

The parties hereby stipulate to the following matters:

1. On behalf of her daughter [REDACTED] (“[REDACTED]”), 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 [REDACTED]’s receipt of the diphtheria-tetanus-pertussis (“DTP”) vaccine, later confirmed to be diphtheria-tetanus-acellular pertussis (“DTaP”) vaccine, which vaccine is contained in the Vaccine Injury Table (the “Table”), 42 C.F.R. § 100.3 (a).
2. [REDACTED] received her DTaP immunization on December 19, 2002.
3. The vaccine was administered within the United States.
4. Petitioner alleges that the DTaP vaccine caused [REDACTED] to develop a chronic seizure disorder and related problems, including but not limited to: ataxia, dizziness, epilepsy, encephalopathy, status epilepticus, and other neurological injuries, that were caused in fact by the vaccination, and that [REDACTED] 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 on behalf of [REDACTED] as a result of her condition.

6. Respondent denies that the DTaP vaccine caused [REDACTED]'s seizure disorder, neurological injuries, and current disabilities; denies that [REDACTED]'s current disabilities are sequelae of her alleged injury; and denies that [REDACTED] experienced the residual effects of this injury for more than six months.

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 \$81,460.00, which amount represents \$51,460.00 for first year life care expenses and \$30,000.00 as compensation for all other damages that would be available under 42 U.S.C. § 300aa-15(a), except as set forth below in paragraphs 8.b. and 8.c. below, in the form of a check payable to petitioner as guardian/conservator of [REDACTED]'s estate. No payments shall be made until petitioner provides respondent with documentation establishing that she has been appointed as the guardian/conservator of [REDACTED]'s estate; and

b. A lump sum of \$95,089.25, representing reimbursement of the State of California Medicaid lien, in the form of a check payable jointly to petitioner and

State of California Medi-Cal
Department of Healthcare Services
1500 Capitol Avenue
3rd Floor, MS 4720
Attn: Ms. Teresa Abbes; and

c. An amount sufficient to purchase the annuity contract described in paragraph 10 below, paid to the life insurance company from which the annuity will be purchased (the "Life Insurance Company").

9. 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.

10. The Secretary of Health and Human Services agrees to purchase an annuity contract from the Life Insurance Company for the benefit of [REDACTED], pursuant to which the Life Insurance Company will agree to make payments periodically to petitioner for the following items of compensation:

- a. For future unreimbursable Attendant Care expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$50,000.00 to be paid up to the anniversary of the date of judgment in year 2024, increasing at the rate of three percent (3%), compounded annually from the date of judgment;
- b. For future unreimbursable Neurologist and Depakote expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$1,460.00 to be paid up to the anniversary of the date of judgment in year 2024, increasing at the rate of four percent (4%), compounded annually from the date of judgment.

At the sole discretion of the Secretary of Health and Human Services, the periodic payments may be provided to petitioner in monthly, quarterly, annual or other installments. The "annual amounts" set forth above describe only the total yearly sum to be paid to petitioner and do not require that the payment be made in one annual installment. Petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as [REDACTED] is alive at the time that a particular payment is due. Written notice to the Secretary of Health and Human Services and the Life Insurance Company shall be provided within twenty (20) days of Sydney's death.

11. The annuity contract will be owned solely and exclusively by the Secretary of Health and Human Services and will be purchased as soon as practicable following the entry of a judgment in conformity with this Stipulation. The parties stipulate and agree that the Secretary of Health and Human Services and the United States of America are not responsible for the payment of any sums other than the amounts set forth in paragraph 8 herein and the amounts awarded pursuant to paragraph 12 herein, and that they do not guarantee or insure any of the future annuity payments. Upon the purchase of the annuity contract, the Secretary of Health and Human Services and the United States of America are released from any and all obligations with respect to future annuity payments.

12. As soon as practicable after the entry of judgment on entitlement in this case, and after petitioner has 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.

13. Petitioner and her 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.

14. Payments made pursuant to paragraph 8 and any amounts awarded pursuant to paragraph 12 of this Stipulation will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

15. 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 either immediately or as part of the annuity contract, will be used solely for the benefit of [REDACTED], 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).

16. Petitioner represents that she presently is, or within 90 days of the date of judgment will become, duly authorized to serve as guardian/conservator of [REDACTED]'s estate under the laws of the State of California. No payments pursuant to this Stipulation shall be made until petitioner provides the Secretary with documentation establishing her appointment as guardian/conservator of Sydney's estate. If petitioner is not authorized by a court of competent jurisdiction to serve as guardian/conservator of the estate of [REDACTED] 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 [REDACTED] upon submission of written documentation of such appointment to the Secretary.

17. In return for the payments described in paragraphs 8 and 12, petitioner, in [REDACTED] individual capacity and as legal representative of [REDACTED], on behalf of herself, [REDACTED], and [REDACTED]'s 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. § 300aa-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 [REDACTED] resulting from, or alleged to have resulted from, the DTaP vaccination administered on December 19, 2002, as alleged by petitioner in a petition for vaccine compensation filed on or about December 7, 2005, in the United States Court of Federal Claims as petition No. 05-1266V.

18. If [REDACTED] 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.

19. 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.

20. 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, except as otherwise noted in paragraph 12 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. 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.

21. Petitioner hereby authorizes respondent to disclose documents filed by 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.

22. This Stipulation shall not be construed as an admission by the United States or the Secretary of Health and Human Services that the DTaP vaccine caused [REDACTED]'s seizure disorder and neurological injuries; that any current disabilities are sequelae of her alleged injuries; or that [REDACTED] experienced the residual effects of these injuries for more than six months.

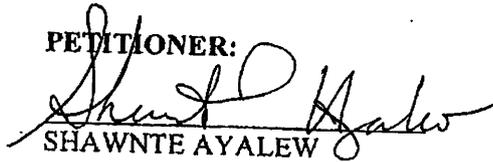
23. All rights and obligations of petitioner hereunder shall apply equally to petitioner's heirs, executors, administrators, successors, and/or assigns as legal representatives of [REDACTED]
[REDACTED]

END OF STIPULATION

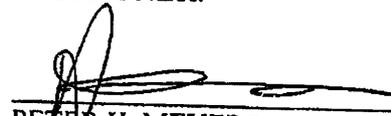
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Respectfully submitted,

PETITIONER:


SHAWNTE AYALEW

**ATTORNEY OF RECORD FOR
PETITIONER:**


PETER H. MEYERS
George Washington University Law School
Vaccine Injury Clinic
2000 G. Street, N.W.
Washington, DC 20052
(202) 994-5793

**AUTHORIZED REPRESENTATIVE
OF THE ATTORNEY GENERAL:**


VINCENT J. MATANOSKI
Acting Deputy Director
Torts Branch
Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, DC 20044-0146

**AUTHORIZED REPRESENTATIVE
OF THE SECRETARY OF HEALTH
AND HUMAN SERVICES:**


GEOFFREY EVANS, M.D.
Director, Division of
Vaccine Injury Compensation
Healthcare Systems Bureau
U.S. Department of Health
and Human Services
5600 Fishers Lane
Parklawn Building, Mail Stop 11C-26
Rockville, MD 20857

**ATTORNEY OF RECORD FOR
RESPONDENT:**


JULIA W. MCINERNEY
Trial Attorney
Torts Branch
Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, DC 20044-0146
(202) 353-3919

Dated: 5/17/11