

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

DONNA and KANE DALEY, *
parents of JACOB DALEY, a minor, *
Petitioners, *

No. 09-468V
Special Master Christian J. Moran

Filed: February 18, 2011

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *
Respondent. *

Stipulation; Tetanus-diphtheria-acellular
Pertussis vaccine; acute demyelinating
encephalomyelitis; neurological deficits

UNPUBLISHED DECISION¹

Andrew D. Downing, Esq., Rhodes, Hieronymus, et al., Tulsa, OK, for Petitioner;
Debra A. Filteau Begley, Esq., U.S. Department of Justice, Washington, D.C., for Respondent.

On February 16, 2011, the parties filed a joint stipulation concerning the petition for compensation filed by Donna and Kane Daley, as parents of their son Jacob Daley (Jacob) on July 21, 2009. In their petition, the petitioners alleged that the Tetanus-diphtheria-acellular Pertussis (“Tdap”) vaccine, which is contained in the Vaccine Injury Table (the “Table”), 42 C.F.R. §100.3(a), and which Jacob received on or about March 11, 2009, caused Jacob to develop acute demyelinating encephalomyelitis (ADEM), as well as neurological deficits in the form of reduced visual acuity, speech impairment, and deficits in gross and fine motor skills as sequelae of his alleged injury, the effects of which lasted 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¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of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 Jacob's Tdap vaccine caused his ADEM and denies that his current disabilities are sequelae of his alleged vaccine injury.

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. A lump sum payment of \$10,000.00 in the form of a check payable to petitioners as guardians/conservators of Jacob Daley. This amount represents partial compensation for damages that would be available under 42 U.S.C. §300aa-15(a);**
- B. An amount sufficient to purchase the annuity contract described in paragraph 10 (of the stipulation – attached as Appendix A) paid to the life insurance company from which the annuity will be purchased (the “Life Insurance Company”).**

These amounts represent compensation for all damages 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 9-468V 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

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OFFICE OF SPECIAL MASTERS**

DONNA and KANE DALEY,
parents of **JACOB DALEY,** a minor.

Petitioners,

v.

**SECRETARY OF HEALTH AND
HUMAN SERVICES,**

Respondent.

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No. 09-468V
SPECIAL MASTER
CHRISTIAN J. MORAN

STIPULATION

The parties hereby stipulate to the following matters:

1. On behalf of their son, Jacob Daley (“Jacob”), 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 Jacob’s receipt of the Tetanus-diphtheria-acellular Pertussis (“Tdap”) vaccine, which vaccine is contained in the Vaccine Injury Table (the “Table”), 42 C.F.R. § 100.3 (a).

2. Jacob received his Tdap, varicella, and meningococcal vaccines on or about March 11, 2009.

3. These vaccines were administered within the United States.

4. Petitioners allege that Jacob developed acute demyelinating encephalomyelitis (ADEM) that was caused in fact by his Tdap vaccine. They further allege that he developed neurological deficits in the form of reduced visual acuity, speech impairment, and deficits in

gross and fine motor skills as sequelae of his alleged injury, and that Jacob experienced residual effects of this injury 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 Jacob as a result of his condition.

6. Respondent denies that Jacob's Tdap vaccine caused his ADEM and denies that his current disabilities are sequelae of his alleged vaccine injury.

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 payments:

- a. A lump sum of \$10,000.00 in the form of a check payable to petitioners as guardians/conservators of Jacob Daley. This amount represents partial compensation for damages that would be available under 42 U.S.C. §300aa-15(a);
- b. 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").

These amounts represent compensation for all damages available under 42 U.S.C. § 300aa 15(a).

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 Jacob, pursuant to which the Life Insurance Company will agree to make payments periodically to Jacob Daley as follows:

- a. Beginning on April 22, 2015, \$12,256.78 payable annually, for a period of eight years certain.
- b. Beginning on April 22, 2015, \$916.85 per month, for a period of 10 years certain.

The certain payments provided in this paragraph 10 shall be made as set forth above. Should Jacob Daley predecease the exhaustion of the certain payments during the certain period specified above, any remaining payments shall be made to his estate. However, petitioners shall provide written notice to the Secretary of Health and Human Services and to the Life Insurance Company within twenty (20) days of Jacob Daley'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 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.

13. Petitioners and their attorney represent that compensation to be provided pursuant to this Stipulation is not for any items or services for which the Program is not primarily liable under 42 U.S.C. Sec. 15(g), to the extent that payment has been made or can reasonably be expected to be made under any State compensation programs, insurance policies, Federal or State health benefits programs (other than Title XIX of the Social Security Act (42 U.S.C. sec. 1396 et seq.)), or by 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 Jacob 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. 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 Jacob'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 Jacob's estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardians/conservators of the estate of Jacob Daley 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 guardians/conservators of the estate of Jacob Daley upon submission of written documentation of such appointment to the Secretary.

17. In return for the payments described in paragraphs 8 and 12, petitioners, in their individual capacities and as legal representatives of Jacob, on behalf of themselves, Jacob, and his heirs, executors, administrators, successors or assigns, do 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. § 300 aa-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 Jacob resulting from, or alleged to have resulted from, the Tdap, varicella, and/or meningococcal vaccinations administered on or about March 11, 2009, as alleged by petitioners in a petition for vaccine compensation filed on or about July 21, 2009, in the United States Court of Federal Claims as petition No. 09-468V.

18. If Jacob 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. Petitioners hereby authorize respondent to disclose documents filed by petitioners 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 Jacob's Tdap vaccine caused ADEM or his current disabilities.

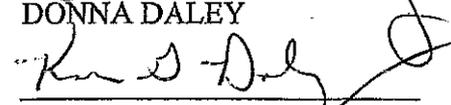
23. All rights and obligations of petitioners hereunder shall apply equally to petitioners' heirs, executors, administrators, successors, and/or assigns as legal representatives of Jacob Daley.

END OF STIPULATION

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Respectfully submitted,

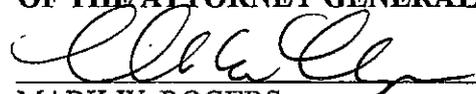
PETITIONERS:


DONNA DALEY

KANE DALEY

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