

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

*****	*	
TSUYOSHI and MARIE MIYAKE, as legal	*	
representatives of their minor daughter,	*	No. 06-459V
AGATA MIYAKE,	*	Special Master Christian J. Moran
	*	
Petitioners,	*	
	*	Filed: August 4, 2010
v.	*	
	*	
SECRETARY OF HEALTH	*	Damages decision based on proffer;
AND HUMAN SERVICES,	*	diphtheria-tetanus-pertussis vaccine,
	*	encephalopathy.
Respondent.	*	
	*	
*****	*	

David L. Terzian, Conway, Rawls & McNelis, P.C., Richmond, VA, for petitioners;
Glenn A. MacLeod, Esq., United States Dep't of Justice, Washington, D.C., for respondent.

UNPUBLISHED DECISION AWARDING DAMAGES*

In 2006, the Miyakes filed a petition on behalf of their minor daughter, Agata Miyake (“Agata”) seeking compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-1 et seq., alleging that the diphtheria-tetanus-pertussis vaccine caused Agata to suffer “an encephalopathy.” On September 8, 2006, the respondent conceded that compensation was appropriate.

* Because this published 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).

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 clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and to move to delete such information before the document’s disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

On July 28, 2010, respondent filed a Proffer on Award of Compensation. Petitioners agreed to each item of compensation in the proffer. Based upon the record as a whole, the special master finds the proffer reasonable and that petitioners are entitled to an award as stated in the Proffer. Pursuant to the attached Proffer, attached as Appendix A, the court awards petitioner:

1. **A lump sum payment of \$971,095.03, in a check made payable to petitioners, as the court-appointed guardian(s)/conservator(s) of estate of Agata Miyake, for the benefit of Agata Miyake**, representing compensation for life care expenses to be incurred during the first two years after judgment (\$126,594.13), lost future earnings (\$627,000.90) and pain and suffering (\$217,500.00). The parties agree that no payment shall be made until petitioners provides respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Agata Miyake's estate;
2. **A lump sum payment of \$21,957.19, in a check made payable to petitioners, Tsuyoshi and Mari Miyake**, representing compensation for past unreimburseable expenses; and
3. An amount sufficient to purchase an annuity contract(s), subject to the conditions described in the Proffer (Appendix A).

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.

Any questions may be directed to Francina Segbefia at (202) 357-6358.

IT IS SO ORDERED.

S/ Christian J. Moran

Christian J. Moran
Special Master

B. Lost Future Earnings

The parties agree that based upon the evidence of record, Agata Miyake will never be gainfully employed. Therefore, respondent proffers that Agata Miyake should be awarded full lost future earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B). Respondent proffers that the appropriate award for Agata Miyake's lost future earnings is \$627,000.90. Petitioners agree.

C. Pain and Suffering

Respondent proffers that Agata Miyake should be awarded \$217,500.00 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). Petitioners agree.

D. Past Unreimbursable Expenses

Evidence supplied by petitioners documents their expenditure of past unreimbursable expenses related to Agata Miyake's vaccine-related injury. Respondent proffers that petitioners should be awarded past unreimbursable expenses in the amount of \$21,957.19. Petitioners agree.

E. Medicaid Lien

Petitioners represent that there are no Medicaid liens outstanding against Agata Miyake.

II. Form of the Award

The parties recommend that the compensation provided to Agata Miyake 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 \$971,095.03, representing compensation for life care expenses expected to be incurred during the first two years after judgment (\$126,594.13), lost future earnings (\$627,000.90) and pain and suffering (\$217,500.00), in the form of a check payable to petitioners, as the court-appointed guardian(s)/conservator(s) of the estate of Agata Miyake, for the benefit of Agata Miyake. No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Agata Miyake's estate;

B. A lump sum payment of \$21,957.19, representing compensation for past un-reimbursable expenses, payable to Tsuyoshi and Mari Miyake, petitioners;

C. An amount sufficient to purchase an annuity contract(s), subject to the conditions described below, that will provide payments for the life care items contained in the life care plan, as illustrated by the chart at Tab A attached hereto, paid to the life insurance company(ies)² from which the annuity(ies) will be purchased. 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 an annuity(ies), which annuity(ies) shall make payments to petitioners only so long as Agata Miyake is alive at the time a particular payment is due. At the Secretary's

² 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.

sole discretion, the periodic payments may be provided to petitioners in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Tab A describe only the total yearly sum to be paid to petitioners 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. Petitioners agree.

2. Life-contingent annuity(ies)

Petitioners will continue to receive the annuity payments from the Life Insurance Company only so long as Agata Miyake is alive at the time that a particular payment is due. Petitioners shall provide written notice to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Agata Miyake's death.

3. Guardianship

No payments under section II. A. shall be made until petitioners provide the Secretary with documentation establishing their appointment as guardian(s)/conservator(s) of Agata Miyake's estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of Agata Miyake at the time a payment 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(s)/conservator(s) of the estate of Agata Miyake upon submission of written documentation of such appointment to the Secretary.

III. Summary of Recommended Payments Following Judgment

- A. Lump Sum paid to petitioners, as guardian(s)/conservator(s) of the estate of Agata Miyake, for Yr 1 and Yr 2 life care expenses, lost future earnings, and pain and suffering: **\$ 971,095.03**
- B. A lump sum paid to petitioners: **\$ 21,957.19**
- C. An amount sufficient to purchase the annuity contract(s) described above in section II. C.

Respectfully submitted,

TONY WEST
Assistant Attorney General

TIMOTHY P. GARREN
Director
Torts Branch, Civil Division

MARK W. ROGERS
Deputy Director
Torts Branch, Civil Division

CATHARINE E. REEVES
Assistant Director
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/s/**GLENN A. MACLEOD**
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Dated: July 28, 2010

TAB A

(Appendix A: Items of Compensation for Agata Miyake)

Appendix A: Items of Compensation for Agata Miyake

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Yr 1 & Yr 2	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Year 6	Compensation Year 7	Compensation Year 8
				2010	2011	2012	2013	2014	2015	2016	2017
Respite Care	4%		M	41,540.64		20,770.32	20,770.32	20,770.32	20,770.32	20,770.32	20,770.32
Caregiver/ Sheltered Workshop	4%		M								
Neurologist	5%	*		120.00		60.00	60.00	60.00	60.00	60.00	60.00
EEG	5%	*									
Physiatrist or Dev. Pediatrician	5%	*		60.00		30.00	30.00	30.00	30.00	30.00	30.00
Ophthalmologist	5%	*		60.00		30.00	30.00	30.00	30.00	30.00	30.00
Vision Field Test	4%	*									
Gastroenterologist	5%	*		120.00		60.00	60.00	60.00	60.00		
Summer Camp	4%			2,480.00		1,240.00	1,240.00	1,240.00	1,240.00	1,240.00	1,240.00
Re-Hospitalization: Seizure Mnmgt	5%	*		550.00		275.00	275.00	275.00	275.00	275.00	275.00
Lost Future Earnings				627,000.90							
Pain and Suffering				217,500.00							
Past Unreimbursable Expenses				21,957.19							
Annual Totals				993,052.22	-	56,884.47	41,691.07	35,315.07	35,227.56	33,240.07	34,662.57

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 the court-appointed guardian(s)/custodian(s) of the estate of Agata Miyake, for the benefit of Agata Miyake, for lost future earnings (\$627,000.90), pain and suffering (\$217,500.00), and Yr 1 and Yr 2 life care expenses (\$126,594.13): \$971,095.03.
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Tsuyoshi and Mari Miyake, for past un-reimbursable expenses: \$21,957.19.
 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 in column "G.R." above, compounded annually from the date of judgment. Annuity payments to begin on second anniversary of the date of judgment (Compensation Yr 3).
 Items denoted with an asterisk (*) covered by health insurance and/or Medicare.
 At respondent's discretion, items denoted with an "M" payable in 12 monthly installments totaling the annual amount indicated.

Appendix A: Items of Compensation for Agata Miyake

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 Year 15	Compensation Year 16
				2018	2019	2020	2021	2022	2023	2024	2025
Respite Care	4%		M	20,770.32	20,770.32	20,770.32	20,770.32	20,770.32	20,770.32		
Caregiver/ Sheltered Workshop	4%		M							183,261.00	183,261.00
Neurologist	5%	*		60.00	60.00	60.00	60.00	60.00	60.00	60.00	60.00
EEG	5%	*									
Physiatrist or Dev. Pediatrician	5%	*		30.00	30.00	30.00	30.00	30.00	30.00	30.00	30.00
Ophthalmologist	5%	*		30.00	30.00	30.00	30.00	30.00	30.00	30.00	30.00
Vision Field Test	4%	*									
Gastroenterologist	5%	*									
Summer Camp	4%			1,240.00	1,240.00	1,240.00	1,240.00	1,240.00	1,240.00		
Re-Hospitalization: Seizure Mnmgt	5%	*		275.00	275.00	275.00	275.00	275.00	275.00	275.00	275.00
Lost Future Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Annual Totals				32,605.07	35,297.57	33,317.41	32,605.07	33,240.07	34,662.57	186,452.00	189,715.99

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.
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Appendix A: Items of Compensation for Agata Miyake

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Years 17-18 2026-2027	Compensation Year 19 2028	Compensation Years 20-21 2029-2030	Compensation Year 22 2031	Compensation Years 23-24 2032-2033	Compensation Years 25-48 2034-2057	Compensation Years 49-Life 2058-Life
UVA Health Plan MOP	5%			2,500.00	2,500.00	2,500.00	2,500.00	2,500.00		
UVA Health Plan Premium	5%		M	2,124.00	2,124.00	2,124.00	2,124.00	6,156.00		
Medicare Part B Premium	5%		M						1,326.00	1,326.00
Medigap	5%								744.00	744.00
Medicare Part B Deductible	5%								155.00	155.00
Medicare RX Benefit	5%								5,249.97	5,249.97
Neuropsych Eval	5%									
Nutritional Eval	4%	*		30.00	30.00	30.00	30.00	30.00		
Functional Behavioral Assess.	4%									
ST (to suppl IDEA)	4%									
OT (to suppl IDEA)	4%									
Play Therapy	4%									
Family Counseling	4%									
Family Counseling: Transitions	4%									
Tutorial Services	4%		M							
Case Mngt	4%									
Educational Advocate	4%									
Computer	4%				629.00	209.67	209.67	209.67	209.67	209.67
Touch Screen for Computer	4%			101.00	101.00	101.00	101.00	101.00	101.00	101.00
Educational Software	4%									
TLSO Brace	4%	*								
Grab Bars	4%									
Bathing Equipment	4%			50.00	50.00	50.00	50.00	50.00	50.00	50.00
Topamax	5%	*		72.00	72.00	72.00	72.00	72.00		
Keppra	5%	*		72.00	72.00	72.00	72.00	72.00		
Diastat	5%	*			6.00		6.00			
Lamictal	5%	*		72.00	72.00	72.00	72.00	72.00		
Mic-Key Button	4%	*								
60cc Syringe for Flush & Feeding	4%	*								
Kindercal w/ Fiber	4%		M							
Pull-ups	4%		M							
Wipes	4%		M							

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Respite Care	4%		M							
Caregiver/ Sheltered Workshop	4%		M	183,261.00	183,261.00	183,261.00	183,261.00	183,261.00	183,261.00	201,480.00
Neurologist	5%	*		60.00	60.00	60.00	60.00	60.00		
EEG	5%	*								
Physiatrist or Dev. Pediatrician	5%	*		30.00	30.00	30.00	30.00	30.00		
Ophthalmologist	5%	*		30.00	30.00	30.00	30.00	30.00		
Vision Field Test	4%	*								
Gastroenterologist	5%	*								
Summer Camp	4%									
Re-Hospitalization: Seizure Mnmgt	5%	*		275.00	275.00	275.00	275.00	275.00		
Lost Future Earnings										
Pain and Suffering										
Past Unreimbursable Expenses										
Annual Totals				188,677.00	189,312.00	188,886.67	188,892.67	192,918.67	191,096.64	209,315.64

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