

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
No. 14-340V
(Not to be Published)

CRYSTAL LA VECK and MARK *
OSTERHOUDT, Parents of B.O., a minor, *

Petitioners, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

Filed: September 11, 2015

Decision by Proffer; Damages
Measles-Mumps-Rubella (“MMR”)
Vaccination; Idiopathic
Thrombocytopenic Purpura (“ITP”)

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA, for Petitioner.

Sarah C. Duncan, U.S. Dep’t of Justice, Washington, DC, for Respondent.

DECISION AWARDING DAMAGES¹

On April 23, 2014, Crystal La Veck and Mark Osterhoudt, as parents of their minor child B.O., filed a petition seeking compensation under the National Vaccine Injury Compensation Program.² Petitioners allege that O.B. suffered from idiopathic thrombocytopenic purpura (“ITP”) as a result of receiving the measles-mumps-rubella (“MMR”) vaccination on June 14, 2011.

¹ Because this decision contains a reasoned explanation for my actions in this case, I will post it 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 (Dec. 17, 2002) (current version at 44 U.S.C. § 3501 (2014)). As provided by 42 U.S.C. § 300aa-12(d)(4)(B), however, the parties may object to the published decision’s inclusion of certain kinds of confidential information. Specifically, under Vaccine Rule 18(b), each party has fourteen 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). Otherwise, the whole decision will be available to the public. *Id.*

² The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C. § 300aa-10 through 34 (2012)).

In her Rule 4(c) report, filed on July 9, 2014, Respondent stated that the Division of Vaccine Injury Compensation (“DVIC”), Department of Health and Human Services, had reviewed the facts of this case and concluded that “B.O.’s alleged injury is consistent with ITP as defined in the Vaccine Injury Table, 42 C.F.R. § 100.3(b)(2).” Accordingly, “Petitioners are entitled to a presumption of causation, as B.O.’s ITP manifested between seven and thirty days after his MMR vaccination.” The report indicated that Respondent therefore determined that “she will not further defend entitlement in this case.” Moreover, “DVIC did not identify any other causes for B.O.’s ITP, and based upon the medical records outlined above, [P]etitioners met the statutory requirement to show that B.O. suffered the requisite six months of residuals from his ITP. *See* 42 U.S.C. § 300aa-13(a)(1)(B); 42 U.S.C. § 300aa-11(c)(D)(I).”

In view of Respondent’s concession, and based on my own review of the record, I issued a ruling on July 10, 2014, finding that Petitioners had established that they were entitled to compensation for B.O.’s injury.

On September 9, 2015, Respondent filed a proffer proposing an award of compensation. I have reviewed the file, and based upon that review I conclude that the Respondent’s proffer (as attached hereto) is reasonable. I therefore adopt it as my decision in awarding damages on the terms set forth therein.

The proffer awards:

- A lump sum payment of \$147,889.83, representing compensation for life care expenses for Year One (\$10,889.83) and pain and suffering (\$137,000.00), in the form of a check payable to Petitioners as guardian(s)/conservator(s) of B.O.’s estate, for the benefit of B.O.;
- A lump sum payment of \$1,414.06 representing compensation for past unreimbursable expenses, in the form of a check payable to Petitioners Crystal La Veck and Mark Osterhoudt;
- A lump sum payment of \$12,392.95, representing compensation for satisfaction of the Otsego County Department of Social Services Medicaid lien, payable jointly to Petitioners and

NYS Department of Health
CIN: EK 25886J
NYS DOH P.O. Box 415874
Boston, MA 02241; and

- An amount sufficient to purchase the annuity contract, subject to the conditions described in the attached proffer, that will provide payments for life case items contained in the parties' joint life care plan, paid to the insurance company from which the annuity will be purchased.

These amounts represents compensation for all elements of compensation under 42 U.S.C. § 300aa-15(a) to which Petitioners are entitled. Proffer at 1.

I approve a Vaccine Program award in the requested amounts set forth above to be made to Petitioner. 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.³

IT IS SO ORDERED.

/s/ Brian H. Corcoran
Brian H. Corcoran
Special Master

³ Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by each filing (either jointly or separately) a notice renouncing their right to seek review.

B. Lost Future Earnings

The parties agree that based upon the evidence of record, B.O. more likely than not will be gainfully employed in the future. Therefore, respondent proffers that B.O. should not be awarded lost future earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B). Petitioners agree.

C. Pain and Suffering

Respondent proffers that B.O. should be awarded \$137,000.00 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). Petitioners agree.

D. Past Unreimbursable Expenses

Evidence supplied by petitioners documents their expenditure of past unreimbursable expenses related to B.O.'s vaccine-related injury. Respondent proffers that petitioners should be awarded past unreimbursable expenses in the amount of \$1,414.06. Petitioners agree.

E. Medicaid Lien

Respondent proffers that B.O. should be awarded funds to satisfy the Otsego County Department of Social Services, New York, lien in the amount of \$12,392.95, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action the Otsego County Department of Social Services may have against any individual as a result of any Medicaid payments the Otsego County Department of Social Services has made to or on behalf of B.O. from the date of his eligibility for benefits through the date of judgment in this case as a result of his vaccine-related injury suffered on or about June 14, 2011, under Title XIX of the Social Security Act.

II. Form of the Award

The parties recommend that the compensation provided to B.O. 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 following²:

A. A lump sum payment of \$147,889.83, representing compensation for life care expenses for Year One (\$10,889.83) and pain and suffering (\$137,000.00), in the form of a check payable to petitioners as guardian(s)/conservator(s) of B.O., for the benefit of B.O. No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of B.O.'s estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of B.O., any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of B.O. upon submission of written documentation of such appointment to the Secretary.

B. A lump sum payment of \$1,414.06 representing compensation for past unreimbursable expenses, in the form of a check payable to petitioners, Crystal La Veck and Mark Osterhoudt.

C. A lump sum payment of \$12,392.95, representing compensation for satisfaction of the Otsego County Department of Social Services Medicaid lien, payable jointly to petitioners and

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Boston, MA 02241

Petitioners agree to endorse this payment to the New York State Department of Health.

² Should B.O. die prior to the entry of judgment, the parties reserve the right to move the Court for appropriate relief. In particular, respondent would oppose any award for future medical expenses and future pain and suffering.

D. An amount sufficient to purchase the annuity contract,³ subject to the conditions described below, that will provide payments for the life care items contained in the joint life care plan, as illustrated by the chart at Tab A attached hereto, paid to the life insurance company⁴ from which the annuity will be purchased.⁵ Compensation for Year Two (beginning on the first anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to petitioners as guardian(s)/conservator(s) of the estate of B.O., only so long as B.O. is alive at the time a particular payment is due. At the Secretary's 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.

³ In respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

⁴ 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.

⁵ Petitioners authorize the disclosure of certain documents filed by the 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.

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

Petitioners will continue to receive the annuity payments from the Life Insurance Company only so long as B.O. 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 B.O.'s death.

3. Guardianship

No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of B.O.'s estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of B.O., any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of B.O. 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 court-appointed guardian(s)/conservator(s) of B.O.'s estate: | \$ 147,889.83 |
| B. | Paid to petitioners, Crystal La Veck and Mark Osterhoudt: | \$ 1,414.06 |
| C. | Medicaid Lien: | \$ 12,392.95 |
| D. | An amount sufficient to purchase the annuity contract described above in section II.D. | |

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

RUPA BHATTACHARYYA
Director
Torts Branch, Civil Division

VINCENT J. MATANOSKI
Deputy Director
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s/ Sarah C. Duncan
Sarah C. Duncan
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Dated: September 9, 2015

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Year 6	Compensation Year 7	Compensation Year 8	Compensation Year 9
				2015	2016	2017	2018	2019	2020	2021	2022	2023
Past Unreimbursable Expenses				1,414.06								
Medicaid Lien				12,392.95								
Annual Totals				161,696.84	10,567.10	10,856.28	10,601.60	10,714.48	10,601.60	6,861.49	6,748.61	5,357.49

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)/conservators(s) of the estate of B.O. for the benefit of B.O., for pain and suffering (\$137,000.00), and Yr 1 life care expenses (\$10,889.83): \$147,889.83.
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Crystal La Veck and Mark Osterhoudt, for past un-reimbursable expenses: \$1,414.06.
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the Ostego County Department of Social Services, as reimbursement of the county's Medicaid lien: \$12,392.95.
 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.
 Items denoted with an asterisk (*) covered by health insurance and/or Medicare.
 Items denoted with an "M" payable in 12 monthly installments at the discretion of respondent.

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 10	Compensation Year 11	Compensation Year 12	Compensation Year 13	Compensation Year 14	Compensation Year 15	Compensation Year 16	Compensation Year 17	Compensation Years 18-21
				2024	2025	2026	2027	2028	2029	2030	2031	2032-2035
Past Unreimbursable Expenses												
Medicaid Lien												
Annual Totals				5,386.41	5,357.49	5,244.61	5,357.49	5,210.11	5,322.99	5,394.99	10,997.25	10,557.57

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)/conservators(s) of the estate of B.O. for the benefit of B.O., for pain and suffering (\$137,000.00), and Yr 1 life care expenses (\$10,889.83): \$147,889.83.
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 Items denoted with an asterisk (*) covered by health insurance and/or Medicare.
 Items denoted with an "M" payable in 12 monthly installments at the discretion of respondent.

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 22	Compensation Years 23-25	Compensation Years 26-42	Compensation Years 43-57	Compensation Years 58-60	Compensation Years 61-66	Compensation Years 67-Life
				2036	2037-2039	2040-2056	2057-2071	2072-2074	2075-2080	2081-Life
Past Unreimbursable Expenses										
Medicaid Lien										
Annual Totals				2,254.01	2,067.71	2,367.71	2,321.13	2,204.13	3,139.93	2,839.93

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)/conservators(s) of the estate of B.O. for the benefit of B.O., for pain and suffering (\$137,000.00), and Yr 1 life care expenses (\$10,889.83): \$147,889.83.
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