

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

JACQUELINE BRAND, *
 *
 * Petitioner, * No. 12-549V
 * Special Master Christian J. Moran
 *
v. * Filed: May 24, 2013
 *
 *
SECRETARY OF HEALTH * Damages; decision based on proffer;
AND HUMAN SERVICES, * influenza vaccination; injection-related
 * shoulder injury
 *
 * Respondent. *

Ronald C. Homer, Conway, Homer & Chin-Caplan, Boston, MA, for Petitioner;
Lisa A. Watts, U.S. Department of Justice, Washington, DC, for Respondent.

UNPUBLISHED DECISION AWARDING DAMAGES¹

On August 30, 2012, Jacqueline Brand filed a petition seeking compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-1 et seq., alleging that the influenza vaccination she received on September 3, 2009 caused her to suffer an injection-related shoulder injury. On December 4, 2012, petitioner was found to be entitled to compensation under the Vaccine Act. Ruling Awarding Compensation, filed Dec. 4, 2012.

On May 22, 2013, respondent filed a Proffer on Award of Compensation, which petitioner agrees to. Based upon the record as a whole, the special master finds the proffer reasonable and that petitioner is entitled to an award as stated in the Proffer. Pursuant to the attached Proffer, with Tab A, the court awards petitioner:

- A. A lump sum payment of \$216,569.62 representing compensation for life care expenses expected to be incurred during the first year after judgment (\$35,015.57), pain and suffering (\$178,225.98), and past unreimbursable expenses (\$3,328.07), in the form of a check payable to petitioner, Jacqueline Brand; and**

¹ The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

B. An amount sufficient to purchase an annuity contract, subject to the conditions described in the attached Proffer (attached as Appendix A), that will provide payments for the life care items contained in the life care plan, as illustrated by the associated chart at Tab A (Items of Compensation for Jacqueline Brand) paid to the life insurance company from which the annuity will be purchased. 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 petitioner, Jacqueline Brand, only so long as Jacqueline Brand 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 sum to be paid to petitioner and do not require that the payment be made in one annual installment.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment according to this decision and the attached proffer.²

Any questions may be directed to my law clerk, Jay All, at (202) 357-6353.

IT IS SO ORDERED.

s/Christian J. Moran
Christian J. Moran
Special Master

² Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.

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

JACQUELINE BRAND,)	
)	<u>ECF</u>
Petitioner,)	
v.)	No. 12-549V
)	Special Master
SECRETARY OF HEALTH)	Christian J. Moran
AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

RESPONDENT'S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

The respondent engaged life care planner Linda Curtis, RN, MS, CNLCP, and petitioner engaged life care planner Maureen Clancy, RN, BSN, CLCP, to provide an estimation of Jacqueline Brand’s future vaccine-injury related needs. The Joint Life Care Plan was filed as Petitioner’s Exhibit 22. For the purposes of this proffer, the term “vaccine related” is as described in the special master’s Ruling Awarding Compensation filed December 4, 2012. All items of compensation identified in the joint life care plan are supported by the evidence, and are illustrated by the chart entitled Appendix A: Items of Compensation for Jacqueline Brand, attached hereto as Tab A.¹ Respondent proffers that Jacqueline Brand should be awarded all items of compensation set forth in the life care plan and illustrated by the chart attached at Tab A. Petitioner agrees.

¹ The chart at Tab A illustrates the annual benefits provided by the life care plan. The annual benefit years run from the date of judgment up to the first anniversary of the date of judgment, and every year thereafter up to the anniversary of the date of judgment.

B. Lost Earnings

The parties agree that based upon the evidence of record, Jacqueline Brand has not suffered a past loss of earnings and likely will not suffer a loss of earnings in the future. Therefore, respondent proffers that Jacqueline Brand should not be awarded lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A). Petitioner agrees.

C. Pain and Suffering

Respondent proffers that Jacqueline Brand should be awarded \$178,225.98 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 Jacqueline Brand's expenditure of past unreimbursable expenses related to her vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$3,328.07. Petitioner agrees.

E. Medicaid Lien

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

II. Form of the Award

The parties recommend that the compensation provided to Jacqueline Brand 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 \$216,569.62, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$35,015.57), pain and

suffering (\$178,225.98), and past unreimbursable expenses (\$3,328.07), in the form of a check payable to petitioner, Jacqueline Brand.

B. An amount sufficient to purchase an annuity contract,² 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 company³ from which the annuity will be purchased.⁴ 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 petitioner, Jacqueline Brand, only so long as Jacqueline Brand 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 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

² In respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

³ 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.

⁴ 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.

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 annuity

Petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as she, Jacqueline Brand, 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 Jacqueline Brand'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, Jacqueline Brand: **\$216,569.62**
- B. An amount sufficient to purchase the annuity contract described above in section II. B.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

RUPA BHATTACHARYYA
Director
Torts Branch, Civil Division

VINCENT J. MATANOSKI
Deputy Director
Torts Branch, Civil Division

MICHAEL P. MILMOE
Senior Trial Counsel
Torts Branch, Civil Division

s/Lisa A. Watts
LISA A. WATTS
Senior Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, D.C. 20044-0146
Telephone: (202) 616-4099

Dated: May 22, 2013.

Appendix A: Items of Compensation for Jacqueline Brand

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
				2013	2014	2015	2016	2017	2018	2019	2020
Medicare Part B Deductible	5%										
Primary Care	5%	*		169.00	169.00	169.00	169.00	169.00	169.00	169.00	169.00
Orthopedic	5%	*		181.00	181.00	181.00	181.00	181.00	181.00	181.00	181.00
Neurologist	5%	*		300.00					300.00		
MRI	5%	*							1,350.00		
Ativan	5%			208.00	208.00	208.00	208.00	208.00	208.00	208.00	208.00
Ibuprofen OTC	4%			13.96	13.96	13.96	13.96	13.96	13.96	13.96	13.96
Arnica	4%			135.00	135.00	135.00	135.00	135.00	135.00	135.00	135.00
Zyflamend OTC	4%			438.84	438.84	438.84	438.84	438.84	438.84	438.84	438.84
PT	4%	*		815.00			395.00			395.00	
OT	4%	*		290.00			185.00			185.00	
Massage Therapy	4%			504.00	504.00	504.00	504.00	504.00			
Acupuncture	4%			435.00	435.00						
Counselor	4%	*		1,020.00	510.00					510.00	
Raised Toilet Seat	4%										
Kitchen and Personal Care Adaptive Equip	4%			200.00	100.00	33.33	33.33	33.33	33.33	33.33	33.33
Computer Equip	4%			500.00						250.00	
Heat Wrap	4%			17.97	17.97	17.97	17.97	17.97	17.97	17.97	17.97
Neck & Shoulder Heat Wrap	4%			34.99	17.50	17.50	17.50	17.50	17.50	17.50	17.50
YMCA	4%		M	693.00	693.00	693.00	693.00	693.00	693.00	693.00	693.00
Home Health Aide	4%		M	12,740.00	12,740.00	12,740.00	12,740.00	12,740.00	12,740.00	12,740.00	12,740.00
Mileage: Drs & YMCA	4%		M	224.62	224.62	224.62	224.62	224.62	224.62	224.62	224.62
Mileage: Massage Therapy	4%			31.32	31.32	31.32	31.32	31.32			
Mileage: Therapy	4%			27.99			12.43			12.43	
Mileage: Acupuncture	4%			19.07	19.07						
Mileage: Counselor	4%			23.04	11.52					11.52	
Grab Bars	0%			419.92							
Walk-in Tub	0%			12,723.85							
Hand Rails	0%			2,850.00							

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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
				2013	2014	2015	2016	2017	2018	2019	2020
Pain and Suffering				178,225.98							
Past Unreimbursable Expenses				3,328.07							
Annual Totals				216,569.62	16,449.80	15,407.54	15,999.97	15,407.54	16,522.22	16,236.17	14,872.22

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 life care expenses (\$35,015.57), pain and suffering (\$178,225.98), and past unreimbursable expenses (\$3,328.07): \$216,569.62.
 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.
 Items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.

Appendix A: Items of Compensation for Jacqueline Brand

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 9 2021	Compensation Year 10 2022	Compensation Year 11 2023	Compensation Year 12 2024	Compensation Year 13 2025	Compensation Years 14-Life 2026-Life
Pain and Suffering									
Past Unreimbursable Expenses									
Annual Totals				21,149.17	21,160.97	21,362.54	21,158.06	21,659.67	21,264.72

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 life care expenses (\$35,015.57), pain and suffering (\$178,225.98), and past unreimbursable expenses (\$3,328.07): \$216,569.62.
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