

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 09-540V
Filed: December 17, 2010

CAMELIA H. HABITO,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

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Proffer on award; Entitlement to
compensation; Diphtheria-tetanus
acellular pertussis vaccine, DTaP;
Brachial neuritis

DECISION¹

GOLKIEWICZ, Special Master.

On August 17, 2009, petitioner filed a Petition for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-10 to -34 (hereinafter “Vaccine Act” or “the Act”). The Petition alleged petitioner suffered a vaccine reaction following a tetanus vaccine she received on February 27, 2009. Petition (“Pet.”) at 1, filed August 17, 2009. Following her vaccination, petitioner suffered escalating arm pain and discomfort, which was ultimately diagnosed as acute brachial neuritis. On March 17, 2010, respondent filed the Rule 4(c) Report, noting that petitioner met the criteria for a Table Injury and recommending compensation be awarded. R Report, filed March 17, 2010. At that point, petitioner acquired representation and the parties moved into the damages phase. See P Notice of Filing, filed June 1, 2010; Minute Entry, June 22, 2010. Petitioner filed her Life Care Plan on October 1, 2010. Respondent’s Life Care Plan was filed on December 9, 2010, and reflected a consensus between the parties’ life care planners. R Ex C, filed December 9, 2010. Respondent filed a Proffer on Award of Compensation on December 15, 2010. Petitioner’s acceptance is set forth within the Proffer. Id.

¹ The undersigned intends to post this decision on the website for the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). **As provided by Vaccine Rule 18(b), each party has 14 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 entire decision will be available to the public. Id. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing. Further, consistent with the statutory requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.**

After a review of the record, the undersigned finds that petitioner is entitled to compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10 et seq., as reflected in respondent's Proffer and the attached Tabs: Tab A, Summary of Life Care Items, and Tab B, Annuity Funding Portfolio. The court is convinced, based on its experience and the information in the record, that this award shall provide reasonable compensation to cover petitioner's vaccine-related expenses.

As stated in the Proffer, petitioner is entitled to compensation in two parts. "The parties recommend that the compensation provided to [petitioner] should be made through a combination of lump sum payments and future annuity payments as described [in the Proffer], and request that the Special Master's decision and the Court's judgment award" compensation as set out in the Proffer. Proffer at II. The Proffer states the court should award a lump sum payment of \$252,869.00, representing compensation for lost past and future earnings (\$110,000.00), pain and suffering (\$120,000.00), past unreimbursable expenses (\$776.00), and life care expenses for Year One and a portion of Year Two (\$22,093.00); further, petitioner is awarded "an amount sufficient to purchase an annuity contract, subject to the conditions described" in the Proffer, which "will provide payments for the life care items contained in the life care plan . . . paid to the life insurance company from which the annuity will be purchased.

CONCLUSION

The undersigned recognizes the good efforts of all involved in this matter. Based on the foregoing, the court hereby **ADOPTS** respondent's Proffer, attached, and awards compensation in the amount and upon the terms set forth therein. **Specifically, petitioner is awarded a lump sum of \$252,869.00 in the form of a check payable to petitioner; and an amount sufficient to purchase the annuity contract described in the Proffer, section II.B.** See Proffer, filed December 15, 2010.

The Clerk of the Court is directed to enter judgment accordingly.²

IT IS SO ORDERED.³

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
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.

³ This document constitutes a final "decision" in this case pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of the Court shall enter judgment in accord with this decision.

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

CAMELIA H. HABITO,)	
)	
Petitioner,)	
)	
v.)	No. 09-540V
)	Special Master Gary J. Golkiewicz
SECRETARY OF HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

RESPONDENT’S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

The parties engaged life care planners to provide an estimation of Camelia H. Habito’s (“petitioner”) future vaccine injury-related needs, and the parties’ planners came to a joint consensus regarding appropriate items of care. All items of compensation identified in the far right-hand column of the joint life care plan, filed on December 9, 2010, as Respondent’s Exhibit C, are supported by the evidence, and are illustrated by the chart entitled Summary of Life Care Items, attached hereto as Tab A. Respondent proffers that petitioner should be awarded all items of compensation set forth in the joint life care plan and illustrated by the chart attached at Tab A. Petitioner agrees.

B. Lost Future Earnings

The parties agree that based upon the evidence of record, petitioner will never again be gainfully employed. Therefore, respondent proffers that petitioner should be awarded lost past and future earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A). Respondent proffers that the appropriate award for petitioner’s lost past and future earnings is \$110,000.00. This amount reflects that the award for lost future earnings has been reduced to net present value. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that petitioner should be awarded \$120,000.00 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). Petitioner agrees.

D. Past Unreimbursable Expenses

Evidence supplied by petitioner documents her 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 \$776.00. Petitioner agrees.

E. Medicaid Lien

To the best of respondent's knowledge and based upon the representation of petitioner, petitioner has never received Medicaid benefits as a result of her vaccine-related injury. Accordingly, there is no Medicaid lien.

F. Attorneys' Fees and Costs

This proffer does not address final attorneys' fees and costs. Petitioner is entitled to reasonable attorneys' fees and costs, to be determined at a later date upon petitioner filing substantiating documentation.

II. Form of the Award

The parties recommend that the compensation provided to Camelia H. Habito 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 for all compensation available under 42 U.S.C. § 300aa-15(a):

A. A lump sum payment of **\$252,869.00**, (representing compensation for lost past and future earnings (\$110,000.00), pain and suffering (\$120,000.00), past unreimbursable expenses (\$776.00), and life care expenses for Year One and a portion of Year Two (\$22,093.00)), in the form of a check payable to petitioner; and

B. An amount sufficient to purchase an annuity contract,¹ 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 entitled Annuity Funding Portfolio, attached hereto as Tab B, paid to the life insurance company from which the annuity will be purchased.² Compensation for Year Two, less the amount previously paid in Year One, (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 Camelia H. Habito, only so long as Ms. Habito 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 structured annuity benefits" set forth in the chart at Tab B 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 care items, in accordance with the Schedule at Tab A. Thus, the benefits illustrated in the chart at Tab A that are to be paid through annuity payments should grow as follows: four percent

¹ To satisfy the conditions set forth herein, in respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

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.

(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.

2. Life-contingent annuity

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

3. Guardianship Issues

Petitioner is a legally competent adult, and aforementioned payments will be made directly to petitioner.

III. Summary of Recommended Payments Following Judgment

- A. Lump sum paid to petitioner: **\$252,869.00**
- B. An amount sufficient to purchase the annuity contract described above in section II. B.

Respectfully submitted,

TONY WEST
Assistant Attorney General

TIMOTHY P. GARREN
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Torts Branch, Civil Division

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s/ RYAN D. PYLES
RYAN D. PYLES
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DATED: December 15, 2010

Respondent's Proffer on Award of Compensation

Tab A

Habito v. HHS, No. 09-540V

Pet. Camelia Habito
D.O.B. 11/18/1948

DATE: 12/14/10
TIME: 02:47 PM

SUMMARY OF LIFE CARE ITEMS - JOINT LIFE CARE PLAN dated December 2, 2010

ITEM OF CARE		Insurance	Medical Care	Ancillary Services	Medications OTC	Supplies & Equipment	Home Services	TOTALS of Items with a 5.0% Growth Rate	TOTALS of Items with a 4.0% Growth Rate	TOTALS OF 4.0% & 5.0% ITEMS & APPLYING THE GROWTH RATE
GROWTH RATE		5.0%	5.0%	4.0%	4.0%	4.0%	4.0%			
AGE	YEAR									
63	2011	6,473.88	37.50	855.00	2,977.95	892.39	5,700.00	6,511	10,425	16,937
64	2012	2,425.20	126.80	1,969.00	412.00	250.31	5,450.00	2,552	8,081	11,084
65	2013	878.40	91.40	1,864.00	412.00	184.71	5,450.00	970	7,911	9,625
66	2014	878.40	91.40	1,864.00	412.00	184.71	5,450.00	970	7,911	10,021
67	2015	878.40	91.40	1,864.00	412.00	184.71	5,450.00	970	7,911	10,433
68	2016	878.40	91.40	1,864.00	412.00	184.71	4,800.00	970	7,261	10,072
69	2017	878.40	91.40	1,864.00	412.00	184.71	4,800.00	970	7,261	10,487
70	2018	878.40	91.40	1,122.50	412.00	184.71	4,800.00	970	6,519	9,943
71	2019	878.40	91.40	1,084.00	412.00	184.71	4,800.00	970	6,481	10,302
72	2020	878.40	91.40	1,084.00	412.00	184.71	4,800.00	970	6,481	10,729
73	2021	878.40	91.40	1,084.00	412.00	184.71	4,800.00	970	6,481	11,173
74	2022	878.40	91.40	1,084.00	412.00	184.71	4,800.00	970	6,481	11,635
75	2023	878.40	91.40	1,084.00	412.00	184.71	4,800.00	970	6,481	12,117
76	2024	878.40	91.40	1,084.00	412.00	184.71	4,800.00	970	6,481	12,620
77	2025	878.40	91.40	1,084.00	412.00	184.71	4,800.00	970	6,481	13,143
78	2026	878.40	91.40	1,084.00	412.00	184.71	4,800.00	970	6,481	13,688
79	2027	878.40	91.40	1,084.00	412.00	184.71	4,800.00	970	6,481	14,255
80	2028	878.40	91.40	304.00	412.00	184.71	4,800.00	970	5,701	13,327
81	2029	878.40	91.40	304.00	412.00	184.71	4,800.00	970	5,701	13,883
82	2030	878.40	91.40	304.00	412.00	184.71	4,800.00	970	5,701	14,461
83	2031	878.40	91.40	304.00	412.00	184.71	4,800.00	970	5,701	15,064
84	2032	878.40	91.40	304.00	412.00	184.71	4,800.00	970	5,701	15,692
		26,467	1,992	24,543	11,630	4,837	109,100	28,459	150,109	270,691
		14.82%	1.12%	13.74%	6.51%	2.71%	61.10%			100.00%

NOTE: This schedule projects costs through 2032, Petitioner's Normal Life Expectancy.
The expenses indicated for 2032 are expected to continue for the Life of the Petitioner.

Respondent's Proffer on Award of Compensation

Tab B

Habito v. HHS, No. 09-540V

ANNUITY FUNDING PORTFOLIO

JOINT LIFE CARE PLAN dated December 2, 2010

4.0 % and 5.0% GROWTH RATES

DATE: 12/14/10
TIME: 02:48 PM

Pet. Camelia Habito
D.O.B. 11/18/1948

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	
Life Care Item	TOTAL	ANNUAL	CASH &	ANNUITY	ANNUITY	ANNUITY	ANNUITY	ANNUAL	CUMULATIVE	
Starting Amount	MEDICAL	STRUCTURED	ANNUITY	1,069	5,929	844	1,546	SAFETY	SAFETY	
Inflation Factor	CARE NEEDS	ANNUITY	LUMP	5.00%	4.00%	4.00%	4.00%	MARGIN	MARGIN	
Beginning Year	2011	BENEFITS	SUMS	2013	2012	2013	2013	2011	2011	
Ending Year	2032			LIFE	LIFE	2027	2015	2032	2032	
AGE	YEAR	TOTAL NEEDS	S/S TOTAL	Cash & Lump Sums	Deferred Annuity	Deferred Annuity	Deferred Annuity	Deferred Annuity	Safety Margin	Cum.Safety Margin
63	2011	16,937	22,093	22,093					5,156	5,156
64	2012	11,084	5,929			5,929			-5,155	1
65	2013	9,625	9,625		1,069	6,166	844	1,546	0	1
66	2014	10,021	10,021		1,122	6,413	878	1,608	0	1
67	2015	10,433	10,433		1,179	6,669	913	1,672	0	0
68	2016	10,072	11,108	1,985	1,238	6,936	949		1,036	1,037
69	2017	10,487	9,500		1,299	7,214	987		-986	50
70	2018	9,943	9,893		1,364	7,502	1,027		-50	0
71	2019	10,302	10,303		1,433	7,802	1,068		1	1
72	2020	10,729	10,729		1,504	8,114	1,111		1	1
73	2021	11,173	11,173		1,579	8,439	1,155		1	2
74	2022	11,635	11,636		1,658	8,776	1,201		1	2
75	2023	12,117	12,118		1,741	9,127	1,249		1	3
76	2024	12,620	12,620		1,828	9,493	1,299		1	3
77	2025	13,143	13,143		1,920	9,872	1,351		1	4
78	2026	13,688	13,688		2,016	10,267	1,405		1	5
79	2027	14,255	14,256		2,117	10,678	1,462		1	5
80	2028	13,327	13,327		2,222	11,105			0	6
81	2029	13,883	13,883		2,333	11,549			0	6
82	2030	14,461	14,461		2,450	12,011			0	6
83	2031	15,064	15,064		2,573	12,492			0	6
84	2032	15,692	15,692		2,701	12,991			0	6
ITEMIZED TOTALS		270,691	270,697	24,078	35,348	189,545	16,900	4,826		6

NOTE: The annuity benefits indicated in columns 4 and 5 will continue to grow at the specified rate and be paid for the LIFE of the Petitioner as indicated.

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