

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

No. 07-372V
Filed: October 13, 2010
Not to be Published

STEPHEN TORDAY, M.D.,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

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Proffer on Award; Influenza vaccine;
Guillain-Barré Syndrome, GBS

Lisa Annette Roquemore, Broker & Associates, P.C., Irvine, C.A., for petitioner.
Darryl R. Wishard, United States Department of Justice, Washington, D.C., for respondent.

DECISION¹

GOLKIEWICZ, Special Master.

On November 18, 2009, the undersigned found that petitioner was entitled to compensation for the Guillain-Barré Syndrome (“GBS”) he suffered following an influenza vaccination received on October 16, 2003. Memorandum Ruling on Entitlement and Order, filed November 18, 2009. On October 8, 2010, respondent filed Respondent’s Proffer on Award for Compensation, attached. Proffer, filed October 8, 2010 (“Proffer”). Petitioner’s acceptance to the award is set forth within the Proffer.

After a complete 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 Appendix A, Items of Compensation for Stephen I. Torday. The court is convinced, based on its experience and information in the

¹ The undersigned intends to post this decision on the United States Court of Federal Claims’ website, 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.

record, that this award shall provide reasonable compensation to cover petitioner's vaccine-related expenses.

Form of Compensation Award

As stated in the Proffer, "the parties recommend that the compensation provided to [petitioner] should be made through a combination of a lump sum payment and future annuity payments" Proffer at 2.

A. Lump Sum:

The court awards a lump sum payment of \$907,330.39, representing life care expenses for Year One (\$6,899.15), lost earnings (\$650,000.00), pain and suffering (\$200,431.24), and past unreimbursable expenses (\$50,000.00) in the form of a check payable to petitioner.

B. Annuity:

Section 15(f)(4) requires that payment of compensation be based on the net present value of the elements of compensation. One way of discounting to net present value is to use the cost of an annuity to provide periodic payments to meet projected needs of a petitioner for the remainder of her life. Special masters are specifically empowered by § 15 (f)(4) of the Act to order that the compensation awarded under the Program be used to purchase an annuity. The court considers it in petitioner's best interest to order that the compensation for life care items be awarded beyond one year post-judgment be paid in the form of an annuity, which annuity shall be purchased as soon as practicable after entry of judgment.

The court awards an amount sufficient to purchase an annuity contract, subject to the conditions described below, that will provide payments for the life care items contained in the life care plan, reflected by the attached chart, Appendix A- Items of Compensation for Stephen I. Torday, paid to the life insurance company² 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, Stephen I. Torday, only so long as Stephen I. Torday is alive at the time a particular payment is due.

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 organizations;

- a) A.M. Best Company: A++, A+, A+g, A+p, A+r or A+s;
- b) Moody's Investors 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.

At the Secretary's sole discretion, the periodic payments may be provided to petitioner in monthly, quarterly, annual or other installments. The "annual amounts," with the rate reflected in the attached chart, Appendix 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. Proffer at 3. The growth rates outlined in the Proffer, Proffer at II(B)(1), should be applied to the life care items. Proffer at 4. The petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as he is alive at the time that a particular payment is due. Petitioner agrees to make arrangements to ensure that written notice is provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Stephen I. Torday's death.

CONCLUSION

Petitioner is entitled to an award under the Vaccine Program to provide for compensable expenses. Petitioner's award of compensation shall be in the following form:

- A. A lump sum payment of \$907,330.39 in the form of a check payable to petitioner.
- B. Additionally, the Secretary of Health and Human Services agrees to purchase an annuity contract subject to the conditions described herein, that will provide payment for the life care items contained in the life care plan for petitioner, as reflected by the chart attached to the Proffer, Appendix A, which annuity shall be purchased as soon as practicable after entry of judgment.

The undersigned recognizes the good efforts of counsel. Based on the foregoing, this Court adopts the parties' Proffer and finds that petitioner is entitled to compensation in the amount and on the terms set forth therein.

The court hereby **ADOPTS** respondent's Proffer and Appendix A, attached, and awards compensation in the amount and upon the terms set forth therein. **Specifically, petitioner is awarded a lump sum of \$907,330.39 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 October 8, 2010.

The Clerk of the Court is directed to enter judgment accordingly.³

IT IS SO ORDERED.

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
Special Master

³ 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

_____)	
STEPHEN I. TORDAY, M.D.,)	
)	
Petitioner,)	
)	
v.)	No. 07-372V ECF
)	Special Master Golkiewicz
SECRETARY OF)	
HEALTH 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 Laura Fox, MSN, RN, CLCP, and petitioner engaged life care planner Liz Holakiewicz, RN, BSN, CCM, CNLCP, to provide an estimation of Stephen I. Torday’s future vaccine injury-related needs. All items of compensation identified in the life care plan are supported by the evidence, and are illustrated by the chart entitled **Items of Compensation for Stephen I. Torday**, attached hereto as Appendix A.¹ Respondent proffers that Stephen I. Torday should be awarded all items of compensation set forth in the life care plan and illustrated by the chart attached at Appendix A. Petitioner agrees.

¹The chart at Appendix 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, petitioner has suffered a partial loss of earnings related to his vaccine injury and that it is unlikely that he will be employed on a full time basis in the future. Therefore, respondent proffers that Stephen I. Torday should be awarded \$650,000.00 in 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 Stephen I. Torday should be awarded \$200,431.24 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 his expenditure of past unreimbursable expenses related to his vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$50,000.00. Petitioner agrees.

E. Medicaid Lien

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

II. Form of the Award

The parties recommend that the compensation provided to Stephen I. Torday should be made through a combination of a lump sum payment 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 \$907,330.39, representing life care expenses for Year One (\$6,899.15), lost earnings (\$650,000.00), pain and suffering (\$200,431.24), and past unreimbursable expenses (\$50,000.00), in the form of a check payable to petitioner;

B. An amount sufficient to purchase an annuity contract, 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 Appendix A attached hereto, paid to the life insurance company² 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, Stephen I. Torday, only so long as Stephen I. Torday 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 Appendix 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.

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.

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 Appendix 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 he, Stephen I. Torday, is alive at the time that a particular payment is due. Petitioner agrees to make arrangements to ensure that written notice is provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Stephen I. Torday'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

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|--|----------------------|
| A. Lump Sum paid to petitioner: | \$ 907,330.39 |
| 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
Director
Torts Branch, Civil Division

MARK W. ROGERS
Deputy Director
Torts Branch, Civil Division

CATHARINE E. REEVES
Assistant Director
Torts Branch, Civil Division

/S/DARRYL R. WISHARD
DARRYL R. WISHARD
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) 616-4357

Dated: October 8, 2010

Appendix A: Items of Compensation for Stephen I. Torday

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum	Compensation							
				Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Years 7-10	Years 11-12	Years 13-Life
				2010	2011	2012	2013	2014	2015	2016-2019	2020-2021	2022-Life
Health Ins. Deductible	5%			2,500.00	2,500.00							
Medicare Part D	5%					1,746.00	1,746.00	1,746.00	1,746.00	1,746.00	1,746.00	1,746.00
Medigap F	5%		M			1,968.00	1,968.00	1,968.00	1,968.00	1,968.00	1,968.00	1,968.00
Neurology/Physical Med.	5%	*		105.00	140.00							
Pain Management	5%	*		105.00	210.00							
Urology	5%	*		35.00	35.00							
Attendant Care	4%		M								18,720.00	18,720.00
Comp. Metabolic Panel	5%	*		51.00	51.00							
Phlebotomy Charge	5%	*		11.70	11.70							
Urodynamic Testing	5%	*										
Comp. Pain Mngt Prgm	5%	*		1,898.40								
Gym Membership	4%					419.88	419.88	419.88	419.88	419.88	419.88	419.88
Lyrica (Rx Ded. Applied)	5%	*		76.00	76.00							
Ultram	5%	*		51.36	51.36							
Wellbutrin XL	5%	*		120.00	120.00							
Uroxetral	5%	*		624.04	624.04							
Inderal	5%	*		20.00	20.00							
Scooter	4%						1,395.00					
Travel Kit	4%						39.00					
Batteries	4%						1,390.00	278.00	278.00	278.00	278.00	278.00
Seat Cane	4%			35.00	17.50	17.50	17.50	17.50	17.50	17.50	17.50	17.50
Back Support for Veh.	4%			119.60	34.17	34.17	34.17	34.17	34.17	34.17	34.17	34.17
Soft Cervical Collar	4%			52.00	52.00	52.00	52.00	52.00	52.00	52.00	52.00	52.00
Tempurpedic Pillow	4%			99.00	33.00	33.00	33.00	33.00	33.00	33.00	33.00	33.00
Extra Pillows - Positioning	4%			50.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00
Epidural Inj - Lumbar	5%	*		166.40	249.60							
Epidural Inj - Cervical	5%	*		83.20	249.60							
Fluroscopy	5%	*		24.18	48.36							
Sedation	5%	*		44.07	88.14							
Facility Fee	5%	*		628.20	506.40							
Stair Lift	4%								19,000.00			

Appendix A: Items of Compensation for Stephen I. Torday

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 Years 7-10	Compensation Years 11-12	Compensation Years 13-Life
				2010	2011	2012	2013	2014	2015	2016-2019	2020-2021	2022-Life
Lost Earnings				650,000.00								
Pain and Suffering				200,431.24								
Past Expenses				50,000.00								
Annual Totals				907,330.39	5,142.87	4,295.55	7,119.55	4,573.55	23,573.55	4,573.55	23,293.55	22,873.67

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 (\$6,899.15), lost earnings (\$650,000.00), pain and suffering (\$200,431.24), and past unreimbursable expenses (\$50,000.00): \$907,330.39

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.

At respondent's discretion, items denoted with an "M" payable in 12 monthly installments totaling the annual amount indicated.