

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

No. 11-0047V

Filed: August 26, 2013

YANPING XU, Natural Father, and *
QIUYUE YU, Natural Mother, of *
KYLE XU, a minor, *

Petitioners, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

Stipulation; Inactivated Polio Virus
Vaccine; Diphtheria, Tetanus, and
Acellular Pertussis Vaccine;
Transverse Myelitis.

Kathy Ann Lee, Esq., Cline, Farrell, et al., Indianapolis, IN, for petitioners;
Chrysovalantis Kefalas, Esq., U.S. Dep't of Justice, Washington, DC, for respondent.

DECISION ON JOINT STIPULATION¹

Vowell, Special Master:

Yanping Xu and Qiuyue Yu ["petitioners"] filed a petition for compensation under the National Vaccine Injury Compensation Program² on January 18, 2011. Petitioners allege that their son, Kyle Xu ["Kyle"], developed transverse myelitis as a result of the inactivated polio virus ["IPV"] and diphtheria, tetanus, and acellular pertussis ["DTaP"] vaccines he received on or about May 7, 2008. They further allege that Kyle developed neurogenic bladder, dysphagia, and dysfunction of his upper and lower extremities as sequelae of his injury, and that he experienced residual effects of this injury for more than six months. See Stipulation, filed Aug. 23, 2013, at ¶¶ 2, 4. Respondent denies

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to delete medical or other information, that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

that Kyle's vaccines caused his transverse myelitis and current disabilities, and denies that his current disabilities are sequelae of his alleged injury. Stipulation at ¶ 6.

Nevertheless, the parties have agreed to settle the case. On August 23, 2013, the parties filed a joint stipulation agreeing to settle this case and describing the settlement terms.

Respondent agrees to pay petitioner:

- A. A lump sum of \$100,000.00 in the form of a check payable to petitioners, as the court-appointed guardian(s)/conservator(s) of the estate of Kyle Xu for the benefit of Kyle Xu. No payments shall be made until petitioner provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Kyle Xu's estate. This amount represents partial compensation for all damages that would be available under § 300aa-15(a).**

- B. An amount sufficient to purchase the annuity contract described in paragraph 10 of the attached stipulation, paid to the life insurance company from which the annuity will be purchased (the "Life Insurance Company").**

The special master adopts the parties' stipulation attached hereto, and awards compensation in the amount and on the terms set forth therein. The clerk of the court is directed to enter judgment in accordance with this decision.³

IT IS SO ORDERED.

s/ Denise K. Vowell
Denise K. Vowell
Special Master

³ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party filing a notice renouncing the right to seek review.

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XU, a minor,

Petitioners,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES

Respondent.

No. 11-47V
Special Master Vowell
ECF

STIPULATION

The parties hereby stipulate to the following matters:

1. On behalf of their son, Kyle Xu ("Kyle"), petitioners filed a petition for vaccine compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10 to 34 (the "Vaccine Program"). The petition seeks compensation for injuries allegedly related to Kyle's receipt of the inactivated polio virus ("IPV") and diphtheria-tetanus-acellular pertussis ("DTaP") vaccines, which vaccines are contained in the Vaccine Injury Table (the "Table"), 42 C.F.R. § 100.3 (a).
2. Kyle received his IPV and DTaP immunizations on or about May 7, 2008.
3. The vaccines were administered within the United States.
4. Petitioners allege that Kyle sustained the first symptom or manifestation of the onset of transverse myelitis within the time period set forth in the Table. They further allege that he developed neurogenic bladder, dysphagia, and dysfunction of his upper and lower extremities as sequelae of his injury, and that Kyle experienced residual effects of this injury for more than six

months.

5. Petitioners represent that there has been no prior award or settlement of a civil action for damages on behalf of Kyle as a result of his condition.

6. Respondent denies that Kyle's vaccines caused his transverse myelitis and current disabilities, and denies that his current disabilities are sequelae of his alleged injury.

7. Maintaining their above-stated positions, the parties nevertheless now agree that the issues between them shall be settled and that a decision should be entered awarding the compensation described in paragraph 8 of this Stipulation.

8. As soon as practicable after an entry of judgment reflecting a decision consistent with the terms of this Stipulation, and after petitioners have filed an election to receive compensation pursuant to 42 U.S.C. § 300aa-21(a)(1), the Secretary of Health and Human Services will issue the following vaccine compensation payments:

a. A lump sum of \$100,000.00 in the form of a check payable to petitioners, as the court-appointed guardian(s)/conservator(s) of the estate of Kyle Xu for the benefit of Kyle Xu. No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Kyle Xu's estate. This amount represents partial compensation for all damages that would be available under 42 U.S.C. § 300aa-15(a);

b. An amount sufficient to purchase the annuity contract described in paragraph 10 below, paid to the life insurance company from which the annuity will be purchased (the "Life Insurance Company").

9. 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.

10. The Secretary of Health and Human Services agrees to purchase an annuity contract from the Life Insurance Company for the benefit of Kyle, pursuant to which the Life Insurance Company will agree to make payments periodically to petitioners for all remaining damages that would be available under 42 U.S.C. § 300aa-15(a):

For all remaining damages that would be available under 42 U.S.C. § 300aa-15(a):

- a. Beginning on the first anniversary of the date of judgment, \$1,000.00 per month life contingent, to be paid up to the anniversary of the date of judgment in the year 2025, increasing at three percent (3%), compounded annually from the date payments begin.
- b. Beginning on the anniversary of the date of judgment in the year 2025, \$2,417.00 per month for life only, increasing at three percent (3%), compounded annually from the date payments begin.

The payments provided in this paragraph 10 shall be made as set forth above. Petitioners will continue to receive the annuity payments from the Life Insurance Company only so long as Kyle Xu is alive at the time that a particular payment is due. Written notice to the Secretary of Health and Human Services and the Life Insurance Company shall be provided within twenty (20) days of Kyle Xu's death.

11. The annuity contract will be owned solely and exclusively by the Secretary of Health and Human Services and will be purchased as soon as practicable following the entry of a judgment in conformity with this Stipulation. The parties stipulate and agree that the Secretary of Health and Human Services and the United States of America are not responsible for the payment of any sums other than the amounts set forth in paragraph 8 herein and the amounts awarded pursuant to paragraph 12 herein, and that they do not guarantee or insure any of the

future annuity payments. Upon the purchase of the annuity contract, the Secretary of Health and Human Services and the United States of America are released from any and all obligations with respect to future annuity payments.

12. As soon as practicable after the entry of judgment on entitlement in this case, and after petitioners have filed both a proper and timely election to receive compensation pursuant to 42 U.S.C. § 300aa-21(a)(1), and an application, the parties will submit to further proceedings before the special master to award reasonable attorneys' fees and costs incurred in proceeding upon this petition.

13. Petitioners and their attorney represent that compensation to be provided pursuant to this Stipulation is not for any items or services for which the Program is not primarily liable under 42 U.S.C. § 300aa-15(g), to the extent that payment has been made or can reasonably be expected to be made under any State compensation programs, insurance policies, Federal or State health benefits programs (other than Title XIX of the Social Security Act (42 U.S.C. sec. 1396 et seq.)), or by entities that provide health services on a pre-paid basis.

14. Payments made pursuant to paragraph 8 and any amounts awarded pursuant to paragraph 12 of this Stipulation will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

15. The parties and their attorneys further agree and stipulate that, except for any award for attorneys' fees and litigation costs, and past unreimbursable expenses, the money provided pursuant to this Stipulation either immediately or as part of the annuity contract, will be used solely for the benefit of Kyle as contemplated by a strict construction of 42 U.S.C. § 300aa-15(a) and (d), and subject to the conditions of 42 U.S.C. § 300aa-15(g) and (h).

16. In return for the payments described in paragraphs 8 and 12, petitioners, in their

individual capacities and as legal representatives of Kyle, on behalf of themselves, Kyle, and his heirs, executors, administrators, successors or assigns, do forever irrevocably and unconditionally release, acquit and discharge the United States and the Secretary of Health and Human Services from any and all actions or causes of action (including agreements, judgments, claims, damages, loss of services, expenses and all demands of whatever kind or nature) that have been brought, could have been brought, or could be timely brought in the Court of Federal Claims, under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq., on account of, or in any way growing out of, any and all known or unknown, suspected or unsuspected personal injuries to or death of Kyle resulting from, or alleged to have resulted from, the IPV and DTaP vaccinations administered on or about May 7, 2008, as alleged by petitioners in a petition for vaccine compensation filed on or about January 18, 2011, in the United States Court of Federal Claims as petition No. 11-47V.

17. Petitioners represent that they presently are, or within 90 days of the date of judgment will become, duly authorized to serve as guardians/conservators of Kyle's estate under the laws of the State of Indiana. No payments pursuant to this Stipulation shall be made until petitioners provide the Secretary with documentation establishing their] appointment as guardians/conservators of Kyle's estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardians/conservators of the estate of Kyle Xu at the time a payment pursuant to this Stipulation 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/conservator of the estate of Kyle Xu upon submission of written documentation of such appointment to the Secretary.

18. If Kyle should die prior to entry of judgment, this agreement shall be voidable upon proper notice to the Court on behalf of either or both of the parties.

19. If the special master fails to issue a decision in complete conformity with the terms of this Stipulation or if the Court of Federal Claims fails to enter judgment in conformity with a decision that is in complete conformity with the terms of this Stipulation, then the parties' settlement and this Stipulation shall be voidable at the sole discretion of either party.

20. This Stipulation expresses a full and complete negotiated settlement of liability and damages claimed under the National Childhood Vaccine Injury Act of 1986, as amended, except as otherwise noted in paragraph 12 above. There is absolutely no agreement on the part of the parties hereto to make any payment or to do any act or thing other than is herein expressly stated and clearly agreed to. The parties further agree and understand that the award described in this Stipulation may reflect a compromise of the parties' respective positions as to liability and/or amount of damages, and further, that a change in the nature of the injury or condition or in the items of compensation sought, is not grounds to modify or revise this agreement. .

21. Petitioners hereby authorize respondent to disclose documents filed by 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.

22. This Stipulation shall not be construed as an admission by the United States or the Secretary of Health and Human Services that Kyle's vaccines caused his transverse myelitis or current disabilities.

23. All rights and obligations of petitioners hereunder shall apply equally to petitioners' heirs, executors, administrators, successors, and/or assigns as legal representatives of Kyle Xu.

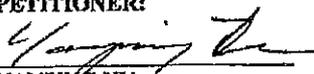
END OF STIPULATION

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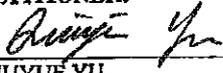
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Respectfully submitted,

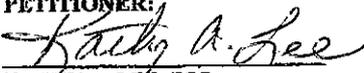
PETITIONER:


YANPING XU

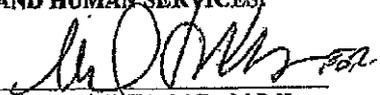
PETITIONER:


QIUYUE YU

ATTORNEY OF RECORD FOR
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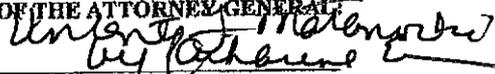

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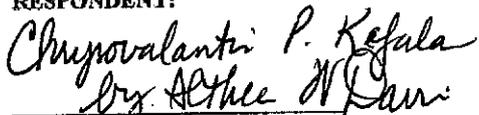

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Dated: 23 August 2013

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