

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-2479V

Filed: June 9, 2006

NOT FOR PUBLICATION

PATRICIA LEE, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Proffer; Life Care Plan; Life-Contingent Annuity; Lost Future Earnings; Fibromyalgia

Donald P. Edwards, Atlanta, Georgia, for petitioner.

Catharine E. Reeves, United States Department of Justice, Washington, D.C., for respondent.

DECISION ON DAMAGES¹

GOLKIEWICZ, Chief Special Master.

On April 8, 2005, the undersigned issued an entitlement decision finding that the hepatitis B vaccine that petitioner received caused in-fact petitioner’s fibromyalgia and that petitioner is

¹Because this decision contains a reasoned explanation for the special master’s action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims’s website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Therefore, as provided by Vaccine Rule 18(b), each party has fourteen (14) days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and 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.

entitled to compensation under the Vaccine Act.² On May 30, 2006, respondent filed a “Proffer on Award of Compensation [hereinafter “Proffer”],” including Tab A, a chart entitled “Items of Compensation for Patricia Lee, D.O.B. 04/05/1963,” which reflects all items included in the parties’ joint life care plan. In addition to the life care items set forth in Tab A of the Proffer, the Proffer included proposed compensation for lost future earnings, pain and suffering, and past unreimbursable medical expenses. Lastly, the Proffer set forth a proposal for the form of payment. On June 5, 2006, petitioner orally acceded to the Secretary’s Proffer. The case is now ripe for decision.

After a complete review of the record, the undersigned is convinced that, based upon experience and information contained in the record, the award contained in the Proffer shall provide reasonable compensation to cover Ms. Lee’s vaccine-related expenses.

Form of the Award

1. **Lump Sum:**

Petitioner shall be awarded a lump sum in the amount of **\$29,249.63**, which represents compensation for life care expenses for Year One (\$10,539.20) and past unreimbursable expenses (\$18,710.43). This amount shall be payable, in the form of a check, to petitioner.

The total award for pain and suffering is \$157,504.00. The award shall be paid in a combination lump sum payment of **\$100,000.00** in a check made payable to petitioner, with the remaining amount of \$57,504.00 to be combined with the award for lost future earnings of \$75,000 to purchase an annuity, as described below in Part 2, subpart B, to compensate for these items.

2. **Annuities:**

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 his 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 Proffer provides for two annuities to be purchased for Patricia Lee.

²The statutory provisions governing the Vaccine Act are found at 42 U.S.C. §§ 300aa-10 to 300aa-34 (2003). Hereinafter, for ease of citation, all references will be to the relevant subsection of 42 U.S.C. § 300aa.

A. Annuity for Life Care Items

The court considers it in Patricia Lee's best interest to order that the compensation for life care items awarded beginning in Year Two post-judgment be paid in the form of an annuity. The annuity will be purchased to provide payments for the life care items listed in the life care plan as set forth in the chart at Tab A. The annuity shall make payments to petitioner only so long as petitioner is alive at the time the payment is due. At the sole discretion of the Secretary, the periodic payments shall be made to petitioner in monthly, quarterly, annual or other appropriate installments. The Personal Representative of the Estate of Patricia Lee shall provide written notice to the Secretary of Health and Human Services and Life Insurance Company within twenty (20) days of petitioner's death.

The insurance company from which the annuity will be purchased shall meet the following criteria:³

- 1) has a minimum of \$100,000,000 of capital and surplus, exclusive of any mandatory security valuation reserve; and
- 2) has one of the following ratings from two of the following rating organizations:
 - a) A.M. Best Company: 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) Duff & Phelps Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+ or AAA.

B. Annuity for Periodic Payments

The parties agree that based upon the record, petitioner will likely suffer lost earnings as a result of her vaccine injury. The parties also agree that an award of \$75,000.00 is appropriate compensation. Using the \$75,000.00 in combination with the remaining compensation from pain and suffering, which is \$57,504.00, see Part 1 above, respondent shall purchase an annuity in the amount of **\$132,504.00** which will provide future periodic payments to petitioner. More specifically, beginning on the anniversary of the date of judgment, in the year 2011, a monthly

³These criteria are taken from the December 1990 draft of the Uniform Periodic Payment of Judgments Act.

amount of \$955.11⁴ payable for life with 20 years guaranteed shall be paid directly to petitioner, or in the event that she is not living, paid to her estate. Thereafter, payments will continue to Ms. Lee only so long as she is alive at the time a particular payment is due. The Personal Representative of the Estate of Patricia Lee shall provide written notice to the Secretary of Health and Human Services and Life Insurance Company within twenty (20) days of petitioner's death.

The insurance company from which the annuity will be purchased must meet the same criteria as that described in Part 2, subpart A, found above.

3. **Growth Rate:**

As indicated in the Proffer as well as in Tab A, a growth rate of four percent (4%) shall be applied to all non-medical life care items, and a five percent (5%) growth rate shall be applied to all medical life care items.

4. **Life Expectancy:**

A finding on life expectancy is unnecessary because this annuity will be a lifetime annuity.

Conclusion

Petitioner is entitled to an award under the Vaccine Program to provide for compensable expenses as stated in the attached Tab A. Petitioner's award of compensation shall be in the form of two annuities as provided for in Part 2, above, together with the following lump sum payments:

- A. An award of **\$129,249.63** representing compensation for pain and suffering, life care expenses for Year One, as well as past unreimbursable expenses to be paid to petitioner.

The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.



Gary J. Golkiewicz
Chief Special Master

⁴The monthly amount of \$955.11 represents the annuity payment that could be purchased as of late May, 2006; since the annuity will not be purchased until after judgment has entered, in the event that the cost of the annuity changes at the time of purchase, the monthly payment shall be adjusted upward or downward accordingly to ensure that the total cost of the annuity is not more or less than \$132,504.00.

ITEMS OF COMPENSATION FOR
PATRICIA LEE, D.O.B. 04/05/1963

ITEM NO.	ITEM	GROWTH RATE	PAID IN CASH 2006	2007	2008	2009	2010	2011 2027	2028 LIFE
MEDICAL CARE/MEDS/LABORATORY/DIAGNOSTICS									
1	PULMONOLOGIST (for sleep apnea care)	5%	552	367	367	367	367	367	163
2	RHEUMATOLOGIST	5%	89.40	89.40	89.40	89.40	89.40	89.40	53
3	MENTAL HEALTH COUNSELING	4%	768	384					
4	ALTERNATIVE THERAPIES	4%	1,080	1,080	1,080	1,080	1,080	1,080	1,080
5	PRESCRIPTIONS	5%	540	540	540	540	540	540	540
6	LABS	5%	40	40	40	40	40	40	0
7	SLEEP STUDY (Age 65: \$410 / 5 = \$82)	5%							82
8	POTENTIAL SURGERY (Max. Out of Pocket)		2,000						
HOME ASSISTANCE									
9	LAWN SERVICE	4%	1,320	1,320	1,320	1,320	1,320	1,320	1,320
10	HOUSE CLEANING	4%	1,440	1,440	1,440	1,440	1,440	1,440	1,440
11	CASE MANAGEMENT	4%	800	320	320	320	320	320	320
DMED/ADAPTIVE EQUIPMENT									
12	AUTO TRITRATING RESPIRATORY MACHINE	4%	400	40	40	40	40	40	40
13	MASK REPLACEMENTS	4%	31	31	31	31	31	31	31
14	BATH SPA	4%	78.90	15.78	15.78	15.78	15.78	15.78	15.78
15	BODY PILLOW	4%	78.90	15.78	15.78	15.78	15.78	15.78	15.78
16	HEATING PAD		10	3.33	3.33	3.33	3.33	3.33	3.33
17	ADAPTIVE AIDS FOR DRESSING/COOKING, ETC.	4%	100	50	50	50	50	50	50
18	BATH SAFETY EQUIPMENT	4%	165	17.77	17.77	17.77	17.77	17.77	17.77
MISCELLANEOUS									
19	HEALTH CLUB	4%	570	480	480	480	480	480	480
20	TRANSPORTATION	4%	231	231	231	231	231	231	231
21	MILEAGE	4%	245	245	146	146	146	146	146
SUB-TOTAL - 1ST YEAR EXPENSES			\$ 10,539.20						
PAST UNREIMBURSED EXPENSES				18,710.43					
PAIN AND SUFFERING (\$157,504 less \$57,504 for purchase of annuity)									
LOST WAGES (\$75,000 less \$75,000 for purchase of annuity)				0.00					
TOTALS:			\$ 129,249.63	\$ 6,710.06	\$ 6,227.06	\$ 6,227.06	\$ 6,227.06	\$ 6,320.46	\$ 6,028.66