

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

[Date Document Filed]

PETITIONER'S NAME,

Petitioner,

v.

**SECRETARY OF HEALTH AND HUMAN
SERVICES,**

Respondent.

DAMAGES ORDER

On January 3, 2013, respondent's counsel filed a Rule 4 report, recommending compensation on the ground that petitioners have satisfied all legal prerequisites for compensation under the Vaccine Act.

Based on respondent's concession, this case is now ready for the damages phase.

This order elaborates on the information that respondent's counsel identified in the Rule 4 report, which will assist her client's assessment of compensation to be awarded in this case. It is intended to provide guidance and a schedule for resolving the damages portion of this case. Section I provides general information, Section II describes necessary supportive materials for the life care plan, and Section III sets the schedule for resolving the amount of damages. The parties in this case will be responsible for complying with these requirements.

I. GENERAL STATEMENT

In Vaccine Act cases, damages issues are typically resolved by a process that begins with petitioners' obtaining a "life care plan" that sets forth their future needs. The respondent then evaluates that plan and when desired, obtains its own life care plan. The parties then attempt to settle any differences. If they are successful, they file a stipulation. When the parties cannot resolve all issues, the case may be referred for

alternative dispute resolution (“ADR”).¹ If they have not settled some or all of the issues, the special master typically conducts a hearing to hear evidence and resolve the disputed issues.

It is the experience of the special masters that in some Program cases, the settlement process has taken far too long – sometimes two years or more from resolution of the entitlement issue – to the financial detriment of the injured party. Because the largest item of damages is usually post judgment care, it is in petitioners’ best interest to resolve the damages issue as expeditiously as practicable. In cases involving vaccinations administered after October 1, 1988, the judgment date is extremely important because damages for costs incurred before judgment are limited to what was actually expended. In contrast, the compensation for care anticipated after judgment is based upon an estimate of what the injured reasonably requires for future care.

The parties must cooperate in identifying necessary information, gathering this supplemental documentation, and coordinating any medical testing or site visits. To that end, the court expects counsel, possibly with their respective life care planners, to discuss the case before the conference call with the court and to be prepared to set a schedule for obtaining information to facilitate the submission of complete and timely life care plans. This procedure places a heavy burden on the parties at the onset of this damages phase, but should result in significant benefits from this early discussion and cooperation.

Additionally, two areas of state law should not be overlooked during the damages phase: Medicaid and legal representation.

1. **Medicaid.** At the beginning of the case on damages, petitioners should ascertain whether a Medicaid lien exists. An early determination about a Medicaid lien may prevent delay at the end of the resolution of damages because HHS and petitioners’ state are still negotiating the amount of Medicaid reimbursement. If the injured vaccinee has been covered by Medicaid at any time after the onset of the vaccine-related injury, the court strongly encourages petitioners to contact the State Administrator of the Medicaid program to ascertain whether the state currently has or will have an interest in or a lien on the compensation awarded by this court to the petitioner. **States have filed liens, after judgment in some Program cases, to recoup past Medicaid payments. If the judgment does not account for past Medicaid expenditures and the state is successful in the litigation, petitioners’ award could be substantially reduced in satisfying the lien.** Accordingly, petitioners’ counsel should work with respondent’s counsel and the state Medicaid office to

¹ ADR is normally sought after the parties’ initial settlement attempts have been unsuccessful. The court will assign an independent special master to assist the parties in reaching an agreement. The ADR procedures vary to meet the needs of a particular case. The only requirement is that the process be completed quickly (anticipated time is less than one month) so that if unsuccessful, case resolution will not be delayed.

determine any continued Medicaid coverage and any reimbursement of Medicaid for past expenses. 42 U.S.C. § 300aa-15(a)(1)(B).

2. **Representation Issues.** The laws of most states require that the person who is to receive the payments on behalf of the injured person be formally appointed as guardian or conservator of the injured person. This is true even in the case of the parents of a minor child. Therefore, petitioners' counsel should determine **now** whether such an appointment will be necessary in this case. If the guardianship or conservatorship is **required** to receive the Vaccine award, the cost of establishing the guardianship or conservatorship may be reimbursable as part of the petitioners' attorney's fees and legal costs.²

The court strongly encourages informal resolution of damages issues. To facilitate the settlement process, the court encourages counsel to arrange for direct communications between damages experts to discuss the injured person's condition, the requested needs, and what information or concerns are seen as outstanding.

The court also recognizes that legitimate disagreements will require judicial resolution. **The court's goal is simply to guide the parties as quickly as possible into a position where they either agree to settle or agree to disagree and go to trial.** Either avenue ensures timely case resolution and efficient use of resources.

To assist petitioners in preparing a **properly supported life care plan**, Section II of this order sets forth below the types of information that is usually necessary to support a claim for damages.

II. THE LIFE CARE PLAN

At the beginning of the damages phase, the parties should discuss whether they can agree to use a single life care planner. A single life care planner offers many advantages. If the parties want to proceed jointly, they should inform the court at an early status conference.

² See, e.g., Thomas v. Sec'y of Health & Human Servs., No. 92-46V, 1997 WL 74664 (Fed. Cl. Spec. Mstr. Feb. 3, 1997) (conservatorship costs compensable under the "but for" test; i.e., the costs in establishing a conservatorship would not have been incurred "but for" the court's demand that a conservatorship be set up to protect the Program award); Velting v. Sec'y of Health & Human Servs., No. 90-1423V, 1996 WL 937626 (Fed. Cl. Spec. Mstr. Sept. 24, 1996) (compensation for work spent establishing a conservatorship with the local probate court reasonable because the conservatorship was set up for the **sole purpose** of handling the Program award); but see Mol v. Sec'y of Health & Human Servs., 50 Fed. Cl. 588, 590 (2001) (holding that the Vaccine Act authorizes an award of attorneys' fees only for proceedings on the petition and proceedings on the petition occur only in the Court of Federal Claims or the Court of Appeals for the Federal Circuit); Siegfried v. Sec'y of Health & Human Servs., 19 Cl. Ct. 323, 325 (1990) (denying attorneys' fees incurred in a proceeding in probate court).

Regardless of whether petitioners are retaining their own life care planner or acting jointly with the respondent, the life care plan should be sufficiently detailed to permit the court to evaluate the assumptions and conclusions of the life care planner. Specifically, the life care plan shall contain the following information:³

1. **Background Information.** The plan shall list the sources of information that were used to determine the level of future care for the injured (e.g., conversations with the family, past levels of care, a current medical evaluation, school assessments, and discussions with the treating physicians). The plan shall state specifically petitioners' current types of treatment. If petitioners' request for future care differs from the current types of care, the plan shall explain why the different treatment is necessary. Petitioners shall file copies of any current medical exam, individualized education plan (IEP), and individualized habilitation plan (IHP). Depending on the type and extent of compensation being requested, petitioners may file a **video** tape depicting a day in the life of the injured (15-20 minutes of a home-quality video are sufficient). Such videos have proved extremely helpful in resolving damages issues.
2. **Residential Services.** If residential services are requested, the following questions should be answered:
 - How was the requested level of care determined?

³ In past cases, the court has dictated that the life care expert's hourly rate should not exceed \$100 per hour, with a total cost, including plan design and subsequent trial testimony, not exceeding \$3,000 on average, and in the most difficult cases, not exceeding \$4,000. As a consequence of these limits, petitioners were forewarned of their responsibility to monitor life care expert fees. See Cousins v. Sec'y of Health & Human Servs., No. 90-2052V, 1992 WL 58809 (Cl. Ct. Spec. Mstr. Mar. 9, 1992); see also Crossett v. Sec'y of Health & Human Servs., No. 89-73V (Cl. Ct. Spec. Mstr. Aug. 28, 1990) (unpublished). However, due to the increasing role of the life care planners, not only in their compilation and preparation of the life care plan and its supporting documentation, but also in plan revisions and settlement negotiations, the court recognizes that the specific monetary limitations previously placed on expert fees is no longer reasonable.

Nevertheless, petitioners are still responsible for monitoring life care planner fees. In addition, the court will continue to require that petitioners substantiate the reasonableness of the expert's hourly rate, the number of expert hours expended, and the specific services provided in the case. The court has allowed varied hourly rates for life care planners depending on the level of expertise, the difficulty of the case, and the planner's geographic area of practice. Without specific documentation indicating that the expert's fees are reasonable under the case circumstances, the court may deny unexplained and unreasonable charges in the fee request. See Wilcox v. Sec'y of Health & Human Servs., No. 90-991V, 1997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997).

- What facilities providing that level of care are available in the relevant state or region? Provide, if possible, the names of contact persons and phone numbers for the facilities.
- Which facilities were investigated and how were these facilities identified? If a description of the injured was given to the facility to determine appropriate placement, please provide that description (frequently, disputes over the appropriate facility center on the accuracy of the description of the injured given to the facility).

For each facility considered, the following information should be provided:

- Cost;
- Services included in the cost with a description of the level of these services; and
- Reasons for rejecting any facility.

3. Attendant Care. If attendant care is requested, provide the following information (or address the following issues):

- Why the attendant care is necessary (e.g., respite care versus medical monitoring);
- How the number of hours was determined;
- Reasons for the skill level of attendant requested; and
- Cost and how it was determined.

4. Medical Care. For requested examinations, medications and medical tests, provide the following information:

- Basis for the request (a physician's recommendation, current usage, etc.);
- Whether the level of need will change with age; and
- Cost and how it was determined.

5. Therapies. For each type of therapy or counseling requested, provide the following information:

- Frequency;

- Basis for the request (a physician’s recommendation, current usage, etc.);
- Whether the therapy is currently being provided;
- Whether the therapy is provided by the school district through the Education of Individuals with Disabilities Act, 20 U.S.C. 1400 et seq., and, if not, why not; and
- Cost and how it was determined.

6. Miscellaneous Items. For any miscellaneous items (home modifications, equipment, transportation, etc.), provide the following information:

- Basis for the request; and
- Cost and how it was determined.

7. Offsets. Identify and quantify any services currently being rendered by state or local agencies, school districts, private charities, etc. Identify and quantify any sources of financial aid currently or potentially available to offset the requested costs (private insurance, state and federal programs, etc.). Note whether such benefits will be affected by an award under this Program.

8. Method of Payment. Petitioners shall also provide the court and respondent his position on how the award should be paid: through an annuity, lump sum, or some combination thereof. Although legitimate arguments have been made in support of each method of payment, the court has found, in general, that a combination of a lump sum and an annuity meets the legitimate interests of both parties. Petitioners shall discuss these issues with the court in a status conference before incurring any expert fees (e.g., economists’ fees) with respect to this “method of payment issue.

Extremely important is the issue of the appropriate discount rate for any lump sum and the growth rate for any annuity. Based upon testimony presented in past cases, the court routinely awards discount rates of:

- 0% – medical items
- 2% – non-medical items
- 1% – rough average for all items of care

and growth rates of:

- 6% – medical items
- 4% – non-medical items
- 5% – rough average for all items of care.

If the parties do not object to these rates, evidence, including expert testimony, will not be necessary. Also it must be noted that while these rates have been found by the court in past cases, the parties are free to negotiate different rates as part of any settlement or stipulation.

9. **Trusts.** Petitioners should be aware that the court is more and more frequently seeing awards structured in the form of trusts. Respondent actively advocates the use of trusts in many cases. While the court is concerned with the oversight and management of large dollar awards, the court sees trusts as beneficial in some, but not all cases. Other forms of oversight should be considered, including guardianships and conservatorships. The court generally defers to the parties' joint agreement on such issues, as long as it is shown that the method selected is in the best interests of the injured party, is not unduly burdensome, and is cost effective. To prevent the issue of trust formation, or other form of award oversight, from causing undue delay in the damages portion of the case, **the parties shall alert the court as early in the damages process as possible** of either or both parties' intention to use a trust or other form of oversight.

III. SCHEDULE

The first step in resolving damages will be for petitioners to determine whether a life care plan is needed. Petitioners shall file a status report detailing the status of petitioners' efforts to obtain a life care plan within by no later than **February 15, 2013**.

IV. CONCLUSION

This order is meant to be a framework for resolving damages issues. Any and all provisions of the order are subject to modification pursuant to a motion, preferably made jointly, supported by a reasonably detailed explanation. However, the court sees this schedule as a reasonable time frame within which the parties can settle their case or to focus their case for trial. Absent extraordinary circumstances brought to the court's attention in a timely manner, the parties are expected to adhere to this schedule.

If either party has any questions about this order, the court's procedures or any other aspect of the damages process, that party should contact my law clerk, [Law Clerk Name] at (202) [000] - [0000], to arrange for a status conference to discuss those questions.

IT IS SO ORDERED.

Name of Special Master
Special Master