

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 17-12V

Filed: February 25, 2019

██████████

██████████,
Petitioner,
v.
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

Special Processing Unit (SPU);  
Decision Awarding Damages;  
Decision on the Written Record;  
Influenza (Flu); Shoulder Injury  
Related to Vaccine Administration  
(SIRVA)

*Shealene Priscilla Mancuso, Muller Brazil, LLP, Dresher, PA, for petitioner.  
Glenn Alexander MacLeod, U.S. Department of Justice, Washington, DC, for  
respondent.*

### **RULING AWARDING DAMAGES – SPECIAL PROCESSING UNIT<sup>1</sup>**

**Dorsey**, Chief Special Master:

On January 4, 2017, petitioner filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*,<sup>2</sup> (the “Vaccine Act”). Petitioner alleges that █████ suffered a left shoulder injury caused by an influenza (“flu”) vaccination. Petition at 1. The case was assigned to the Special Processing Unit (“SPU”) of the Office of Special Masters and the undersigned issued a Ruling on Entitlement finding petitioner entitled to compensation for a Shoulder Injury Related to Vaccine Administration (“SIRVA”). For the reasons discussed below, the undersigned finds that petitioner should receive \$37,921.48 for lost wages. Petitioner

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<sup>1</sup> The undersigned intends to post this ruling on the United States Court of Federal Claims' website. **This means the ruling will be available to anyone with access to the internet.** In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, the undersigned agrees that the identified material fits within this definition, the undersigned will redact such material from public access. Because this published ruling contains a reasoned explanation for the action in this case, undersigned is required to post it on the United States Court of Federal Claims' website in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services).

<sup>2</sup> 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 (2012).

should also receive an award for actual pain and suffering in the amount of \$185,000.00 and an award for future pain and suffering in the amount of \$1,500.00 per year, for petitioner's remaining life expectancy of 30 years.<sup>3</sup>

### **I. Procedural History**

On January 4, 2017, along with the petition, petitioner filed medical records and an affidavit marked as exhibits 1-9. ECF No. 1. Petitioner filed a statement of completion on January 18, 2017. ECF No. 7. Subsequently, during the initial status conference held February 8, 2017, petitioner indicated that there was a claim for lost wages and an associated workers' compensation claim. ECF No. 8. On March 2, 2017, petitioner filed an affidavit, and on March 10, 2017, a status report. ECF Nos. 9, 10. The status report stated that a workers' compensation carrier was covering petitioner's medical expenses and paid wage loss benefits, but that petitioner would assert a small wage loss claim to recoup the balance between the benefits paid and actual wage loss. ECF No. 10.

On May 15, 2017, respondent filed a status report stating that additional records were requested. ECF No. 11. Petitioner filed the requested records between May 31, 2017 and June 5, 2017, along with an amended statement of completion on June 5, 2017. ECF Nos. 21-23.

On December 7, 2017, respondent filed his Rule 4(c) report in which he conceded that petitioner was entitled to compensation in this case. ECF No. 36. On December 8, 2017, the undersigned issued a ruling on entitlement finding petitioner entitled to compensation for his SIRVA. ECF No. 37. The parties then began the process of negotiating the appropriate amount of damages.

On March 29, 2018, petitioner filed a status report indicating that the parties had reached an impasse during settlement discussions. ECF No. 44. On April 10, 2018, the parties discussed the impasse during a status conference. ECF No. 45. Petitioner stated that the damages were comprised of pain and suffering and lost wages. Both parties stated that they were amenable to briefing the issue of damages. *Id.* On April 30, 2018, petitioner filed a joint status report stating that there was no dispute on the issue of lost wages, and that the parties were willing to submit pain and suffering briefs. ECF No. 46.

On April 25, 2018, following a status conference on May 22, 2018, a scheduling order was issued. ECF No. 51. The scheduling order noted that the only issue in dispute was damages relating to past and future pain and suffering. *Id.* At that time, petitioner's counsel stated she would attempt to obtain updated medical records, and submit a supplemental affidavit regarding petitioner's condition before receiving the

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<sup>3</sup> Based on petitioner's birth date of August 22, 1975, petitioner is expected to live for approximately 30 additional years. See *Nat'l Ctr. for Health Statistics, United States Life Tables, 2015 (2018)* at Table A.

undersigned's review of the complete record and in consideration of the undersigned's experience evaluating SIRVA claims, the undersigned finds that an award of \$185,000.00 in actual pain and suffering and \$1,500.00 per year for ■■■ life expectancy (reduced to net present value) in future pain and suffering is appropriate in this case.

In the experience of the undersigned, awareness of suffering is not typically a disputed issue in cases involving SIRVA. In this case, neither party has raised, nor is the undersigned aware of, any issue concerning petitioner's awareness of suffering and the undersigned finds that this matter is not in dispute. Thus, based on the circumstances of this case, the undersigned determines that petitioner had full awareness of ■■■ suffering.

#### **a. Severity of the Injury**

The undersigned finds that petitioner experienced a severe SIRVA. Petitioner first reported left shoulder pain two days following ■■■ flu vaccination on October 22, 2015. Ex. 2 at 11. Thereafter, ■■■ reported significant pain at multiple treatment sessions, rating ■■■ pain at a 10 out of 10. Ex. 2 at 163-171; Ex. 4 at 13; Ex. 5 at 87. Petitioner reported some improvement of ■■■ symptoms with medication and physical therapy, and was pleased with ■■■ initial progress. Ex. 5 at 23-29. However, following a brief lapse in treatment, petitioner's shoulder regressed and ■■■ again reported significant pain on February 25, 2016. Ex. 3 at 26-27. At that time, petitioner's physician remarked that it was the "worst case of frozen shoulder caused by flu injection" and that petitioner's shoulder was "nearly useless...." *Id.* at 27. Petitioner ultimately underwent arthroscopic left shoulder surgery, manipulation and anterior acromioplasty, and a bursectomy on June 3, 2016. Ex. 3 at 6-9. At the end of petitioner's post-surgical physical therapy on October 12, 2016, ■■■ reported that ■■■ was able to perform more activities as ■■■ range of motion continued to improve. Ex. 7 at 101-102. Petitioner also reported that ■■■ pain scale was 4 at worst, 0 at best, and at that time a 1. *Id.* Notably, petitioner's physical therapy goals did not include pain-free activities, but actions such as "performing household activities *with pain*" and "lifting a 10 lb. object onto an overhead shelf *with pain*." Ex. 7 at 101 (emphasis added).

Despite petitioner's post-surgical improvements, ■■■ suffered residual pain and limited range of motion, including a permanent loss of shoulder function. Petitioner's recent medical records describe petitioner's shoulder as "fairly functional but limited" and on August 8, 2017 Dr. Knowles noted that petitioner's range of motion was still limited "with abduction to about 90 Deg[rees], and flexion to about 110 [degrees]. [H]igher than this ■■■ has pain, no pain when arm is held at low angles." Ex. 22 at 9.

Additionally, the undersigned has considered the extent to which petitioner's injury impacted ■■■ personal life. For instance, petitioner has credibly described ■■■ physical difficulty in caring for ■■■ children and performing other activities of daily living. Exs. 10, 16-21. Petitioner's affidavits as a whole reiterate that ■■■ injury caused

physical and emotional distress, and led to significant disruptions of [REDACTED] ability to work, care for and interact with [REDACTED] family, and perform recreational activities. Exs. 10, 16-21.

**b. Duration of the Suffering**

**i. Past Pain and Suffering.**

As described above, the undersigned finds that there is evidence that petitioner suffered moderate to severe pain from the time of vaccination up to and until October 12, 2016, a period of approximately two years. The undersigned acknowledges that during this time, petitioner suffered episodes of severe pain, mostly directly following the vaccination and for the period before [REDACTED] surgery. Further, petitioner's ultimate outcome still involved pain with certain movements and limited mobility. Ex. 7 at 101. Moreover, as of March 16, 2018, petitioner was evaluated by Dr. Knowles as having lost 50% of his left arm function, and [REDACTED] recovery was considered stable but that it had "reached a plateau". Ex. 22 at 5. Based on Dr. Knowles assessment, the undersigned finds that petitioner's current levels of decreased mobility, pain and suffering, are likely to continue as further discussed below.

Thus, in light of all of the above, the undersigned finds that \$180,000.00 represents an appropriate award for petitioner's actual or past pain and suffering.

**ii. Future Pain and Suffering**

Petitioner also maintains that [REDACTED] continues to suffer the effects of [REDACTED] injury. Petitioner stresses that [REDACTED] continues to experience a lack of mobility, a loss of arm function, and chronic pain entitling [REDACTED] to future pain and suffering. Pet. Brief at 8. It is clear that petitioner's pain following his June 3, 2016 surgery was significantly less than the pain [REDACTED] experienced previously, and [REDACTED] range of motion was much improved. However, as of March 16, 2018, petitioner was evaluated as having lost 50% of [REDACTED] left arm function, and [REDACTED] recovery was considered stable but that it had "reached a plateau". Ex. 22 at 5. Therefore, petitioner's disability is considered permanent. To cover additional pain and suffering petitioner is likely to experience, the undersigned will award some compensation for future pain and suffering.

There are only two reasoned SIRVA damages decisions that have awarded compensation for future pain and suffering: *Dhanoa v. HHS*, No. 15-1011V, 2018 WL 1221922 (Fed. Cl. Spec. Mstr. Feb. 1, 2018) and *Curri v. HHS*, No. 17-432V, 2018 WL 6273562 (Fed. Cl. Spec. Mstr. Oct. 31, 2018). In *Dhanoa*, the special master awarded \$10,000.00 for pain and suffering for the year immediately following the decision, but gave no award for subsequent years. *Id.* at \*7. In *Curri*, taking into account petitioner's significant arm pain, her permanently reduced range of motion, and the unique challenges petitioner faced in her day-to-day life, the special master found that \$550.00 per year to be an appropriate award for petitioner's future pain and suffering. *Id.* at \*7.

In this case, the undersigned finds that petitioner's prognosis regarding the ongoing nature of [REDACTED] pain and suffering is similar to that of the petitioner in the *Curri*

case. *Curri*, 2018 WL 6273562. In *Curri*, the petitioner filed a record from her orthopedist stating that petitioner's left shoulder "had reached its 'maximum medical improvement,' leaving her with a permanent 'scheduled loss of use' of 22.5 percent of her left arm." *Id.* at \*2. The special master awarded petitioner an award of \$550.00 per year for her future pain and suffering considering petitioner's "significant arm and shoulder pain, her permanently reduced range of motion, and the unique challenges her shoulder injury creates in her day-to-day life as a working mother of three children. *Id.* at \*7. In this case, there is a similar statement from petitioner's doctor, Dr. Knowles, regarding the permanent nature of [REDACTED] shoulder injury. In Dr. Knowles most recent treatment record, he noted petitioner "lost about 50% of [REDACTED] L[eft] arm function" but experienced "no pain and good function when using arm below shoulder level." Ex. 22 at 5. Further, Dr. Knowles stated that petitioner had "reached a plateau" and that it was unlikely [REDACTED] would improve further. *Id.*

Petitioner bears the burden of proof with respect to each element of compensation requested and the medical records are the most reliable evidence of petitioner's condition. *Brewer*, 1996 WL 147722 at \*22-23; *Shapiro v. HHS*, 101 Fed. Cl. 532, 537-38 (2011) ("[t]here is little doubt that the decisional law in the vaccine area favors medical records created contemporaneously with the events they describe over subsequent recollections."). Based on the statement of petitioner's medical practitioners, the undersigned finds that an award of \$1,500.00 per year for [REDACTED] life expectancy to be an appropriate award for petitioner's future pain and suffering. This amount is to be reduced to net present value.

## VI. Conclusion

In determining an award in this case, the undersigned does not rely on a single decision or case. Rather, the undersigned has reviewed the particular facts and circumstances in this case, giving due consideration to the circumstances and damages in other cases cited by the parties and other relevant cases, as well as her knowledge and experience adjudicating similar cases. In light of all of the above, and in consideration of the record as a whole, the undersigned finds that petitioner should be awarded \$185,000.00 in compensation for actual pain and suffering, \$1,500.00 per year for [REDACTED] life expectancy for future pain and suffering (reduced to net present value), and \$37,921.48 for lost wages. Petitioner was born on August 22, 1975, and [REDACTED] remaining life expectancy is approximately 30 years.<sup>11</sup> Thus [REDACTED] future pain and suffering damages total approximately \$45,000.00

**The parties are to file a joint status report no later than 30 days, (1) converting the undersigned's award of future pain and suffering to its net present value, and (2) reporting on all outstanding items of damages that remain unresolved, if there are any remaining issues. Once these issues have been resolved, a damages decision will issue.**

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<sup>11</sup> Petitioner's life expectancy was calculated using the tables compiled by the National Center for Health Statistics. See *Nat'l Ctr. for Health Statistics, United States Life Tables, 2015* (2018) at Table A.

**IT IS SO ORDERED.**

**s/Nora Beth Dorsey**

Nora Beth Dorsey

Chief Special Master