

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

Filed: March 28, 2018

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DAMACIO CHEWIWI,	*	UNPUBLISHED
	*	
Petitioner,	*	No. 15-954v
	*	
v.	*	Special Master Gowen
	*	
SECRETARY OF HEALTH	*	Joint Stipulation; Influenza (“Flu”)
AND HUMAN SERVICES,	*	Vaccination; NMDA Receptor
	*	Encephalitis.
Respondent.	*	
* * * * *	*	

Andrew D. Downing, Van Cott & Talamante PLLC, Phoenix, AZ, for petitioner.
Voris E. Johnson, United States Department of Justice, Washington, DC, for respondent.

DECISION ON JOINT STIPULATION¹

On September 1, 2015, Damacio Chewiwi (“petitioner”)² filed a petition for compensation pursuant to the National Vaccine Injury Compensation Program.³ Petitioner received an influenza (“flu”) vaccination in the United States. Petitioner alleged that he subsequently suffered NMDA receptor encephalitis, which he alleged was caused-in-fact by his receipt of the flu vaccination.

¹ Because this decision contains a reasoned explanation for the action in this case, the undersigned intends to post it on the website of the United States Court of Federal Claims, pursuant to the E-Government Act of 2002, see 44 U.S.C. § 3501 note (2012). The court’s website is at <http://www.uscfc.uscourts.gov/aggregator/sources/7>. Before the decision is posted on the court’s website, each party has 14 days to file a motion requesting 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). “An objecting party must provide the court with a proposed redacted version of the decision.” Id. If neither party files a motion for redaction within 14 days, the decision will be posted on the court’s website. Id.

² The petition was originally filed by petitioner’s mother on his behalf, because he was a minor at the time. The case caption was amended on September 5, 2017, after petitioner reached the age of majority.

³ The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-1 to -34 (2012) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

On March 27, 2018, respondent filed a joint stipulation providing that a decision should be entered awarded compensation to petitioner. Joint Stipulation (ECF No. 72). Respondent denies that the flu vaccination caused petitioner to suffer from NMDA receptor encephalitis or any other injury, or his current condition. Id. at ¶ 6. Maintaining their respective positions, the parties nevertheless now agree that the issues between them shall be settled and that a decision should be entered awarding compensation to petitioner according to the terms of the joint stipulation attached hereto as Appendix A.

The joint stipulation awards the following:

- a) **A lump sum of \$155,000.00 in the form of a check payable to petitioner, Damacio Chewiwi. This amount represents compensation for all damages that would be available under 42 U.S.C. § 300aa-15(a), except as noted in paragraph 8.b of the stipulation (and addressed below); and**
- b) **A lump sum payment of \$39,848.34, representing compensation for satisfaction of a State of New Mexico Medicaid lien, payable jointly to petitioner and:**

**HMS
ATTN: Diana Yerena
P.O. Box 165596
Irving, TX 75016-5596
Reference: Damacio Chewiwi, Case File No. 109576**

Petitioner agrees to endorse this payment to HMS.

I find the stipulation reasonable and I adopt it as the decision of the Court in awarding damages, on the terms set forth therein. Accordingly, the Clerk of the Court **SHALL ENTER JUDGMENT** in accordance with the terms of the parties' stipulation.⁴

IT IS SO ORDERED.

s/Thomas L. Gowen
Thomas L. Gowen
Special Master

⁴ Pursuant to Vaccine Rule 11(a), entry of judgment is expedited by the parties jointly or separately filing notice renouncing their right to seek review.

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DAMACIO CHEWIWI,)	
)	
Petitioner,)	
)	No. 15-954V (ECF)
v.)	Special Master Gowen
)	
SECRETARY OF HEALTH)	
AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

The parties hereby stipulate to the following matters:

2. Petitioner received the flu vaccine on December 5, 2014.

3. The vaccine was administered within the United States.

4. Petitioner alleges that he subsequently suffered NMDA Receptor Encephalitis, which petitioner alleges was caused-in-fact by his receipt of the flu vaccine. Petitioner further alleges that he experienced the residual effects of his injury for more than six months.

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

6. Respondent denies that the flu vaccine caused petitioner to suffer from NMDA Receptor Encephalitis or any other injury, or his current condition.

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 petitioner has 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 payment of \$155,000.00 in the form of a check payable to petitioner, Damacio Chewiwi. This amount represents compensation for all damages that would be available under 42 U.S.C. § 300aa-15(a), except as noted in paragraph 8.b., below; and,
- b. A lump sum payment of \$39,848.34, representing compensation for satisfaction of a State of New Mexico Medicaid lien, payable jointly to petitioner and:

HMS
Attn: Diana Yerena
P.O Box 165596
Irving, TX 75016-5596
Reference: Damacio Chewiwi, Case File No. 109576

Petitioner agrees to endorse this payment to HMS.

9. As soon as practicable after the entry of judgment on entitlement in this case, and after petitioner has 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.

10. Petitioner and his 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. § 1396 et seq.), or by entities that provide health services on a pre-paid basis.

11. Payments made pursuant to paragraph 8 and any amounts awarded pursuant to paragraph 9 of this Stipulation will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

12. The parties and their attorneys further agree and stipulate that, except for any award for attorneys' fees and litigation costs and past unreimbursed expenses, the money provided pursuant to this Stipulation will be used solely for the benefit of petitioner, 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).

13. In return for the payments described in paragraphs 8 and 9, petitioner, in his individual capacity, and on behalf of his heirs, executors, administrators, successors or assigns, does forever irrevocably and unconditionally release, acquit and discharge the Secretary of Health and Human Services and the United States of America 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, petitioner resulting from, or alleged to have resulted from, the flu vaccine administered on December 5, 2014, as alleged by petitioner in a petition for vaccine compensation filed on or about September 1, 2015 in the United States Court of Federal Claims as petition No. 15-954V.

14. If petitioner 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.

15. 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.

16. This Stipulation expresses a full and complete negotiated settlement of liability and damages claimed under the National Vaccine Injury Act of 1986, as amended, except as otherwise noted in paragraph 9 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.

17. This Stipulation shall not be construed as an admission by the United States or the Secretary of Health and Human Services that the flu vaccine caused petitioner to suffer NMDA Receptor Encephalitis or any other injury, or his current condition.

18. All rights and obligations of petitioner hereunder shall apply equally to

petitioner's heirs, successors and/or assigns.

END OF STIPULATION

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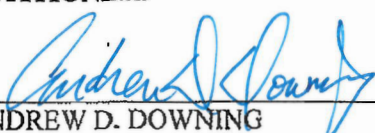
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Respectfully submitted,

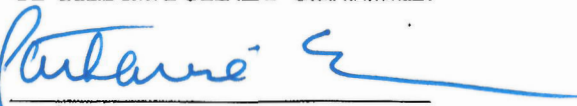
PETITIONER:


DAMACIO CHEWIWI

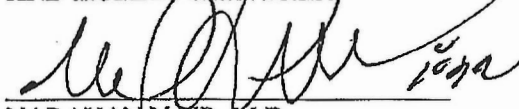
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PETITIONER:**


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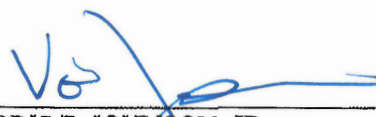
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Dated: 3/27/18