

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 18-0267V

UNPUBLISHED

M.W.,

Petitioner,

v.

SECRETARY OF HEALTH AND  
HUMAN SERVICES,

Respondent.

Chief Special Master Corcoran

Filed: March 17, 2021

Special Processing Unit (SPU);  
Decision Awarding Damages; Pain  
and Suffering; Pneumococcal  
Conjugate 13-Valent (Prevnar)  
Vaccine; Shoulder Injury Related to  
Vaccine Injury (SIRVA)

*Jimmy A. Zgheib, Zgheib Sayad, P.C., White Plains, NY, for Petitioner.*

*Kimberly Shubert Davey, U.S. Department of Justice, Washington, DC, for Respondent.*

### **DECISION AWARDING DAMAGES<sup>1</sup>**

On February 21, 2018, M.W. 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 alleged that as a result of receiving a pneumococcal conjugate 13-Valent (“Prevnar 13”) vaccine on June 23, 2017, she suffered from a shoulder injury related to vaccine administration (“SIRVA”), including a complete tear of the biceps tendon, a large SLAP tear, partial-thickness tear of the anterolateral supraspinatus, impingement, spurring of the acromioclavicular joint, arthrosis of the acromioclavicular joint and inflammation. Petition at 1. The case was assigned to the Special Processing Unit of the Office of Special Masters, and Petitioner was determined to be entitled to damages – but the parties could not agree on the amount to be awarded.

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<sup>1</sup> Although this Decision has been deemed unpublished, it will be posted on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2012)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). **This means the Decision 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, I agree that the identified material fits within this definition, I will redact such material from public access.

<sup>2</sup> National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all section references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2012).

For the reasons discussed below, and after hearing argument from the parties, I find that Petitioner is entitled to \$195,000.00, representing actual past pain and suffering, plus \$7,996.30 for past unreimbursed expenses, for a total of \$202,996.30.

## **I. Relevant Procedural History**

On July 27, 2020, I entered a ruling finding Petitioner entitled to compensation. The parties then entered into discussions to resolve the amount of damages to be awarded to Petitioner but could not reach agreement. (ECF No. 51). Accordingly, on September 23, 2020, a scheduling order was issued setting a schedule for the parties to file briefs on damages. (ECF Nos. 59 (“Br.”), 60 (“Opp.”), and 61 (“Reply”)). I also proposed that the parties be given the opportunity to argue their positions at a Motions Day hearing, at which time I would decide the disputed damages issues. That hearing was held on February 26, 2021,<sup>3</sup> and the case is now ripe for a determination.

## **II. Relevant Medical History**

### **a. Medical History Prior to Entitlement Ruling**

A detailed recitation of the facts through approximately October 2019 is found in the Ruling on Entitlement issued on July 27, 2020. (ECF No. 51). Since the date of that ruling, Petitioner has undergone additional treatment, so a brief summary is provided below.

On June 23, 2017, Petitioner (age 65) received the Prevnar 13 vaccine in her right deltoid (dominant shoulder) at the office of her primary care provider, Dr. Lacy Anderson, located at Integris Family Care in Norman, Oklahoma. Ex. 2 at 11-12, 84-85; Ex. 3 at ¶¶3; Ex. 4 at ¶3. She had no documented history of right shoulder injuries prior to this date.

Approximately three and one half weeks after vaccination, on July 17, 2017, Petitioner contacted her physician’s office to report shoulder pain after vaccination. Ex. 2 at 86. Over the next few months, Petitioner was seen by her physician and an orthopedic surgeon for her shoulder. After undergoing an MRI followed by conservative treatment (23 physical therapy sessions), she ultimately underwent surgical repair of her right shoulder on March 13, 2018. Ex. 7 at 1-3.

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<sup>3</sup> At the end of the hearing held on February 26, 2021, I issued an oral ruling from the bench on damages in this case. That ruling is set forth fully in the transcript from the hearing, which is yet to be filed with the case’s docket. The transcript from the hearing is, however, fully incorporated into this Decision.

After surgery, Petitioner attended post-operative physical therapy. By June 13, 2018, Petitioner reported to her orthopedic surgeon that her right shoulder pain was “essentially resolved” and that she had done “great with therapy”. Ex. 8 at 6.

However, more than a year later, Petitioner returned to her physician complaining that her shoulder pain had returned. Ex. 13 at 77. She reported that her pain had been ongoing and slowly progressing. *Id.* She attended an additional round of physical therapy in August and September 2019. Ex. 13 at 15. By October, she had reported that her pain was “manageable” and she intended to continue with her home exercise program.” Ex. 13 at 47.

b. Subsequent Medical History after Entitlement Ruling

Due to the Covid-19 pandemic, Petitioner stated that she was unable to seek treatment for her shoulder for several months in 2020. She resumed treatment in August 2020, and underwent another 15 sessions of physical therapy through November 2020. She rated her pain at a 6/10 at the time.

Petitioner underwent a third MRI on December 1, 2020, which demonstrated mild tendinopathy of the supraspinatus and infraspinatus tendon with minuscule insertional tears of the infraspinatus. Ex. 28 at 28. There was also evidence of a torn long head tendon of the bicep. *Id.* Her orthopedic surgeon, Dr. Ringus, recommended that Petitioner undergo a second surgery to repair her shoulder. *Id.* at 29.

Petitioner underwent this second surgery (a right shoulder arthroscopy with extensive debridement) on her right shoulder on January 12, 2021. Ex. 25 at 19-21. She underwent an additional 11 sessions of post-operative physical therapy. Ex. 25 at 5-18; Ex. 29 at 2. During her most recent visit on February 22, 2021, Petitioner reported that she was experiencing “shooting pain from time to time,” rated her pain at a 4/10, and reported severe pain when raising her arm up. Ex. 29 at 2. On examination, she exhibited strength and range of motion deficits. *Id.*

At the time of the hearing, Petitioner was continuing to receive treatment for her shoulder. She reports that she remains symptomatic to this day.

**III. Legal Standard**

Compensation awarded pursuant to the Vaccine Act may include an award “[f]or actual and projected pain and suffering and emotional distress from the vaccine-related injury, . . . not to exceed \$250,000.” Section 15(a)(4). Additionally, a petitioner may recover “actual unreimbursable expenses incurred before the date of judgment award

such expenses which (i) resulted from the vaccine-related injury for which petitioner seeks compensation, (ii) were incurred by or on behalf of the person who suffered such injury, and (iii) were for diagnosis, medical or other remedial care, rehabilitation . . . determined to be reasonably necessary.” Section 15(a)(1)(B). Petitioner bears the burden of proof with respect to each element of compensation requested. *Brewer v. Sec’y of Health & Human Servs.*, No. 93-0092V, 1996 WL 147722, at \*22-23 (Fed. Cl. Spec. Mstr. Mar. 18, 1996).

There is no precise formula for assigning a monetary value to a person’s pain and suffering and emotional distress. *I.D. v. Sec’y of Health & Human Servs.*, No. 04-1593V, 2013 WL 2448125, at \*9 (Fed. Cl. Spec. Mstr. May 14, 2013) (“Awards for emotional distress are inherently subjective and cannot be determined by using a mathematical formula”); *Stansfield v. Sec’y of Health & Human Servs.*, No. 93-0172V, 1996 WL 300594, at \*3 (Fed. Cl. Spec. Mstr. May 22, 1996) (“the assessment of pain and suffering is inherently a subjective evaluation”). Factors to be considered when determining an award for pain and suffering include: 1) awareness of the injury; 2) severity of the injury; and 3) duration of the suffering. *I.D.*, 2013 WL 2448125, at \*9 (quoting *McAllister v. Sec’y of Health & Human Servs.*, No 91-1037V, 1993 WL 777030, at \*3 (Fed. Cl. Spec. Mstr. Mar. 26, 1993), *vacated and remanded on other grounds*, 70 F.3d 1240 (Fed. Cir. 1995)).

A special master may also look to prior pain and suffering awards to aid in the resolution of the appropriate amount of compensation for pain and suffering in each case. *See, e.g., Doe 34 v. Sec’y of Health & Human Servs.*, 87 Fed. Cl. 758, 768 (2009) (finding that “there is nothing improper in the chief special master’s decision to refer to damages for pain and suffering awarded in other cases as an aid in determining the proper amount of damages in this case.”). And, of course, a special master may rely on his or her own experience adjudicating similar claims. *Hodges v. Sec’y of Health & Human Servs.*, 9 F.3d 958, 961 (Fed. Cir. 1993) (noting that Congress contemplated the special masters would use their accumulated expertise in the field of vaccine injuries to judge the merits of individual claims). Importantly, however, it must also be stressed that pain and suffering is not determined based on a continuum. *See Graves v. Sec’y of Health & Human Servs.*, 109 Fed. Cl. 579 (2013).

In *Graves*, Judge Merrow rejected the special master’s approach of awarding compensation for pain and suffering based on a spectrum from \$0.00 to the statutory \$250,000.00 cap, criticizing this as constituting “the forcing of all suffering awards into a global comparative scale in which the individual Petitioner’s suffering is compared to the most extreme cases and reduced accordingly.” *Graves*, 109 Fed. Cl. at 590. Instead, he found that pain and suffering should be assessed by looking to the record evidence, prior pain and suffering awards within the Vaccine Program, and a survey of similar injury

claims outside of the Vaccine Program, applying the statutory cap only thereafter. *Id.* at 595.

#### **IV. Appropriate Compensation in this SIRVA Case**

##### **a. Awareness of Suffering**

Awareness of suffering is not typically a disputed issue in cases involving SIRVA – and it does not appear to be disputed herein. Thus, based on the circumstances of this case, I find that Petitioner had full awareness of her suffering, and proceed to analyze the severity and duration of the injury.

##### **b. Severity and Duration of Pain and Suffering**

With respect to the severity and duration of the injury, Petitioner’s medical records and her affidavit provide a description of the pain she experienced throughout the duration of her injury.

As of the date of the damages hearing in this case (February 26, 2021), Petitioner has undergone a total of 71 sessions of physical therapy, three MRIs and two shoulder surgeries. In the most recently dated physical therapy session, Petitioner reported ongoing pain rated 4/10, difficulty sleeping, severe pain when raising her arm up and to the side, and objective range of motion deficits and weakness. Petitioner complains that she has difficulty performing her duties as a schoolteacher which involved prolonged typing and writing notes on the board for her students. She continues to receive ongoing treatment for her shoulder.

Despite Petitioner’s second surgery and ongoing treatment, Respondent argued during the hearing that Petitioner should receive only \$107,500 for her past pain and suffering in this case. Although Respondent did not specifically discuss any comparable cases in his brief or during oral argument, he argued that taking into account the overall amounts awarded to date in SPU SIRVA cases, plus the severity and duration of pain reported by Petitioner, an award of \$107,500 for her pain and suffering is generous and appropriate. Petitioner’s first surgery was “successful,” in that she had a good recovery, and that her orthopedic surgeon, Dr. Ringus, noted that Petitioner’s shoulder injury had “essentially resolved” in June 2018, which was just three months after her first surgery. Respondent also stressed that Petitioner did not seek additional treatment for more than a year after that particular visit. She therefore had not shown by preponderant evidence that any treatment she sought in 2019 and 2020 was directly related to her vaccination, but instead corresponded to a “new” shoulder injury that began in 2019.

I agree with Petitioner that this case most analogous to *Schoonover v. Sec'y of Health & Human Servs.*, No. 16-1324V, 2020 WL 1040642 (fed. Cl. Jan. 20, 2019). There, the petitioner reported constant pain, even at rest, and often described pain with activity as severe, with a rating of eight out of ten. Furthermore, the pain did not improve following multiple courses of physical therapy or two surgeries. *Id.* at \*4. That petitioner also underwent lengthy and significant medical and surgical care and treatment, and suffered episodes of severe pain and limited mobility. *Id.* at \*5. In deciding *Schoonover*, former Chief Special Master Dorsey observed that it was (at the time) the only SIRVA case in the Program where a petitioner underwent *two* shoulder surgeries on top of multiple steroid injections and numerous physical therapy sessions. *Id.* As a result, the *Schoonover* petitioner was awarded \$200,000 in past pain and suffering, plus \$1,200 per year for her life expectancy, reduced to net present value. *Id.* at \*6.

Like *Schoonover*, the severity of the injury at issue in this case, along with the overall course of injury including the number of interventions, all support a higher than normal award for pain and suffering. Based on the current records, over the course of nearly four years, Petitioner has experienced two surgeries, 71 sessions of PT, and three MRIs. This case definitely provides circumstances warranting a significant pain and suffering award.

While Respondent argues that the gap in treatment from 2018 to 2019 suggests Petitioner's more recent pain and medical interventions pertain to a distinguishable injury, I find this contention unpersuasive. There is no evidence that Petitioner had *any* type of right shoulder injury prior to her June 23, 2017 vaccination. The reemergence of her shoulder pain in 2019 is more likely than not attributed to her initial shoulder injury which I have already found was caused by the vaccination. Her two subsequent MRIs in 2019 and 2020 showed similar findings to her very first MRI in October of 2017. In addition, Petitioner has persuasively established that her schedule as a schoolteacher precluded her from attending additional doctor visits and physical therapy in early 2019. And the gap in treatment in 2020 can easily be explained by the Covid-19 pandemic, where many individuals did not, or could not, seek medical treatment for many months. Accordingly, these "gap" arguments are unavailing, and I find that Petitioner's shoulder injury, while it varied in degree of severity, more likely than not, persisted for the entire nearly four year period of time.

Overall, given the facts of this case and considering the arguments presented by both parties at the hearing, a review of the cited cases, and based on the record as a whole, I find that **\$195,000.00** in compensation for past pain and suffering is reasonable and appropriate in this case.

### c. Award for Past Unreimbursed Expenses

Petitioner requests \$7,996.30 in past unreimbursable expenses. Brief at 9; Ex. 32. This includes an additional \$1,200.18 for out-of-pocket expenses related to Petitioner's January 12, 2021 surgery and her post-operative physical therapy. Respondent, however, proposes only reimbursing Petitioner a total of \$6,796.12. For the reasons set forth more fully in the transcript, Petitioner is awarded the full amount of \$7,996.30 for her past unreimbursable expenses, since I have determined that the recent surgery is associated with Petitioner's SIRVA injury.

### d. Future Pain and Suffering and Unreimbursable Medical Expenses

Petitioner has requested a total of \$20,000 for her projected future pain and suffering, and \$2,000 for her projected future unreimbursable out-of-pocket expenses. (Br. at 16). But I do not find that an award of future pain and suffering is appropriate in this case. It does not appear that Petitioner has the level of disability that some petitioners face after a SIRVA injury, and no doctor has opined that Petitioner's shoulder injury is permanent in any way. Petitioner also has not presented any medical opinions or evidence to support her projected figures for future treatment expenses. The fact that she is continuing to treat for her shoulder injury is not, in and of itself, enough to support her claim (especially since the record suggests her recent procedure was successful, and her post-operative status is proceeding as expected, (see Ex. 25 generally)) and I find her projections, without this support, to be too speculative. Therefore, Petitioner's request for future out-of-pocket damages is also denied.

## V. CONCLUSION

In light of all of the above and consistent with my oral ruling on February 26, 2021 (which is fully adopted herein), I award **Petitioner a lump sum payment of \$202,996.30**, (representing \$195,000.00 for Petitioner's actual pain and suffering and \$7,996.30 for unreimbursable medical expenses) **in the form of a check payable to Petitioner**. This amount represents compensation for all damages that would be available under Section 15(a) of the Vaccine Act. *Id.*

The clerk of the court is directed to enter judgment in accordance with this decision.<sup>4</sup>

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<sup>4</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by the parties' joint filing of notice renouncing the right to seek review.

**IT IS SO ORDERED.**

**s/Brian H. Corcoran**

Brian H. Corcoran

Chief Special Master