

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-2820V

Filed: July 31, 2012

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|-----------------------------------|---|---------------------------------|
| HARRY TEMBENIS and GINA TEMBENIS, |) | |
| administrators of the estate of |) | |
| ELIAS TEMBENIS, deceased, |) | |
| |) | |
| Petitioners, |) | NOT TO BE PUBLISHED |
| |) | |
| v. |) | Damages; Proffer on Award |
| |) | of Compensation; Diphtheria- |
| SECRETARY OF |) | Tetanus-acellular-Pertussis |
| HEALTH AND HUMAN SERVICES, |) | (DTaP); seizure disorder; death |
| |) | |
| Respondent. |) | |
| |) | |

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA, for Petitioners;
Ryan D. Pyles, U.S. Dep't of Justice, Washington, D.C. for Respondent.

DECISION¹

LORD, Special Master

On December 16, 2003, Petitioner Harry Tembenis filed a petition on behalf of his son, Elias Tembenis, seeking compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq. (2006). Petitioner filed a "Short-Form Autism Petition for Vaccine Compensation," and joined the Omnibus Autism Proceeding ("OAP"). On August 27, 2008, Petitioner filed a notice to proceed separately from the OAP, and he also filed an amended petition that alleged that a Diphtheria-Tetanus-acellular-Pertussis ("DTaP") vaccination administered on December 26, 2000, caused Elias to develop a seizure disorder that eventually led to his death. On November 13, 2008, the caption was amended to name Harry and Gina Tembenis, as administrators of Elias's estate, as Petitioners. An entitlement hearing was convened on October 23, 2009, and a decision finding Petitioners entitled to compensation issued on November, 29, 2010.

On July 26, 2012, Respondent filed a Proffer on Award of Compensation setting forth all items of compensation to which the parties agreed should be awarded to

¹ In accordance with Vaccine Rule 18(b), Petitioners have 14 days to file a proper motion seeking redaction of medical or other information that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Redactions ordered by the special master, if any, will appear in the document as posted on the United States Court of Federal Claims' website.

Petitioners. Based upon the record as a whole, I find the Proffer reasonable and that Petitioners are entitled to an award as stated in the Proffer. Pursuant to the Proffer, attached as Appendix A, the Court awards Petitioners:

A lump sum payment of \$1,084,955.61, representing the estate benefit (\$250,000.00), past unreimbursable expenses and actual pain and suffering (\$175,000.00), and lost future earnings (\$659,955.61) in the form of a check payable to Petitioners as administrators/ executors of the estate of Elias Tembenis.

The Court thanks the parties for their cooperative efforts in resolving this matter. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the Clerk is directed to enter judgment accordingly.²

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Special Master

² Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.

Special Master ruled otherwise in her Ruling on Compensation for Lost Earnings of Elias Tembenis (Ruling), dated October 26, 2011. Accordingly, this proffer for lost earnings was determined in accordance with the Special Master's Ruling made over the objection of respondent, and respondent reserves the right to seek review of that Ruling once the final decision on damages has been issued by the Special Master.

In light of the Special Master's Ruling, respondent proffers that the appropriate amount to be awarded for Elias's lost future earnings is \$659,955.61. This amount reflects that the award for lost future earnings has been reduced to net present value. Petitioners agree.

D. Attorneys' Fees and Costs

This proffer does not address final attorneys' fees and costs. Petitioners are entitled to reasonable final attorneys' fees and costs, to be determined at a later date upon petitioners filing substantiating documentation.

II. Form of the Award

The parties recommend that the compensation provided to petitioners should be made in a lump sum payment of \$1,084,955.61 in the form of a check payable to petitioners as administrators/executors of the estate of Elias Tembenis.

III. Guardianship

Petitioners represent that they presently are, or within 90 days of the date of judgment will become, duly authorized to serve as executors or administrators of the Estate of Elias Tembenis under the laws of the State of Massachusetts.

IV. Summary of Recommended Payments Following Judgment

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|----|---|-----------------------|
| A. | Lump sum paid to petitioners: | \$1,084,955.61 |
| B. | Reasonable final attorneys' fees and costs: | TBD |

Respectfully submitted,

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Acting Assistant Attorney General

RUPA BHATTACHARYYA
Director
Torts Branch, Civil Division

MARK W. ROGERS
Deputy Director
Torts Branch, Civil Division

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s/ RYAN D. PYLES
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DATED: July 26, 2012