

**Cindy Oxley and Steven Oxley v.
Secretary of the Department of Health and Human Services**

61 of 70 DOCUMENTS

CINDY OXLEY and STEVEN OXLEY, as Legal Representatives for RICHELLE OXLEY, a minor, Petitioners, v. SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES Respondent.

90-566V & 90-565V

UNITED STATES CLAIMS COURT

1991 U.S. Cl. Ct. LEXIS 575

November 27, 1991, Filed

COUNSEL: [*1] Anthony M. Colantoni, Chicago, Illinois, for petitioner.

Nina S. Pelletier, Department of Justice, Washington, D.C., for respondent.

JUDGES: FRENCH

OPINION BY: E. LAVON FRENCH

OPINION

DECISION ON ATTORNEYS' FEES

FRENCH, Special Master

A decision on the merits of this case was filed on July 11, 1991; judgment was entered September 17, 1991. Petitioner filed her Application For Attorneys' Fees and Other Costs, pursuant to Vaccine Rule 13, on October 28, 1991. During a telephone conference call between petitioner's counsel, respondent's counsel, and the undersigned's law clerk, held on November 25, 1991, respondent's counsel notified the court that respondent has no objection to this fee request.

Based on a review of the materials submitted by petitioner, the court finds that an award of \$ 30,000 for fees and costs is reasonable. 1

1 The court notes that petitioner's fee request far exceeds the statutory cap of \$ 30,000; petitioner requests attorneys' fees and costs of \$ 70,622.50.

Accordingly, absent a motion for review filed pursuant to [*2] RUSCC Appendix J, the

Clerk is directed to enter judgment in accordance with this decision.

IT IS SO ORDERED

E. LaVon French

Special Master

62 of 70 DOCUMENTS

CINDY OXLEY and STEVEN OXLEY, as Legal Representatives for RICHELLE OXLEY, a minor, Petitioners, v. SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent

Nos. 90-566V, 90-565V

UNITED STATES CLAIMS COURT

1991 U.S. Cl. Ct. LEXIS 381

August 9, 1991, Filed

CORE TERMS: vaccine, annually, seizure, annuity, special masters, residential facility, unrelated, disorder, Vaccine Act, administered, attendant, therapy, rating, shot, present value, lump sum, annual, vaccine-related, encephalopathy, progressive, residual, disease, paying, reasonably necessary, vaccination, screaming, symptoms, injured person, preponderance, time period

COUNSEL: [*1] Boyd McDowell III with whom also was Anthony M. Colantoni, Chicago, Illinois, for petitioners.

Nina S. Pelletier, Department of Justice, Washington, D.C., for respondent.

JUDGES: E. LaVon French, Special Master.

OPINION BY: FRENCH

OPINION

DECISION 1

This case concerns the eligibility of Richelle Oxley (hereinafter Richelle) for compensation under the National Childhood Vaccine Injury Compensation Act (hereinafter Vaccine Act or Act). 2 For reasons set forth below, the court concludes that

petitioners are entitled to an award as specified hereafter.

1 This decision supersedes the decision issued July 11, 1991, which is hereby withdrawn. A motion for reconsideration was filed on August 9, 1991. This decision is issued in response to that motion. While the Vaccine Rules do not specifically provide for reconsideration of decisions by special masters, a special master has inherent jurisdiction to correct errors in a decision prior to the time judgment is entered, a motion for review is filed, or the statutory time period allotted to the special master expires.

2 The statutory provisions governing the Vaccine Act are found at 42 U.S.C.A. § 300aa-1 et seq. (West Supp. 1991). Hereinafter, for ease of citation, all references will refer to the amended version of 42 U.S.C.

[*2] PROCEDURAL BACKGROUND

On June 25, 1990, Cindy and Steve Oxley filed a petition for injuries allegedly sustained by their minor daughter, Richelle Oxley, as a result of a diphtheria-pertussis-tetanus vaccine (hereinafter DPT) administered on May 21, 1979 in Binghamton, New York. The petition (No. 90-565V) alleges that Richelle exhibited high pitched screaming, shaking, and anorexia within 12 hours of receiving the vaccine. Petitioners allege that these symptoms were the first manifestations of a vaccine-related encephalopathy and residual seizure disorder.

On June 25, 1990, petitioners also filed a second petition for injuries allegedly sustained by Richelle as a result of a DPT vaccine administered on July 30, 1979. The second petition (No. 90-566V) alleges that Richelle suffered a grand mal seizure and cardio-respiratory arrest within 12 hours of the administration of the vaccine and that these symptoms were the first manifestations of a vaccine-related residual seizure disorder and encephalopathy.

On October 18, 1990, the court granted respondent's Motion to Consolidate Petitions for Compensation. 3

3 The legislative history of the Vaccine Act indicates that recovery for multiple vaccinations is permissible but only under the unusual circumstances in which separate and distinct injuries occur. H.R. Rep. No. 908, 99th Cong. at 14.

[*3] Respondent filed its report on November 13, 1990 recommending that compensation be denied in both cases. Respondent argues that there is insufficient evidence of a compensable injury following the DPT shot administered on May 21, 1979. Respondent argues further that Richelle's injuries following the July 30, 1979 vaccination were caused by an underlying progressive neurological condition unrelated to the DPT vaccine.

A hearing on all matters was held in Chicago, Illinois on March 12, 1991. Petitioners presented three witnesses: Cindy Oxley, Richelle's mother; Dr. John Mencke, pediatric

neurologist, and professor emeritus at U.C.L.A. School of Medicine and author of the textbook *Child Neurology* now in its 5th edition; and Mr. Alan Spector, rehabilitation specialist. Respondent presented the testimony of three expert witnesses: Dr. Russell D. Synder, Professor of Neurology and Pediatrics and Director of Pediatric Neurology at the University of New Mexico School of Medicine, Alan G. Spector, M.A., rehabilitation specialist, and Lillian Denham, R.N. At the close of the hearing, the court issued a bench ruling in favor of petitioners. The court reaffirms that decision.

FACTS

The following [*4] facts are supported by the record and are so found. Richelle Oxley was born in Binghamton, New York on February 5, 1979. With the exception of a mild case of jaundice and an intolerance for milk, both of which were resolved satisfactorily, she enjoyed normal health and development. On March 22, 1979, Richelle received her first DPT shot. Except for sleeping longer than usual following the vaccination, Richelle apparently had no adverse reaction. On May 21, at the age of three and one-half months, she received her 2nd DPT shot. Shortly thereafter, she became irritable. Her crying became high pitched, "more like a scream." At times she would scream so hard "that she would raise her arms up and her arms would shake from the screaming." Transcript at 21 (hereinafter Tr. at). She did not want to take her bottle, and although she would drop off to sleep briefly, she would awaken screaming. At approximately 1:00 a.m., Richelle fell asleep for the night. She was fine the next morning. Tr. at 22. The next five weeks were without incident and Richelle was apparently happy, alert, and playing with toys. Tr. at 23.

On July 30, 1979, Richelle received her third DPT shot from a physician in [*5] Binghamton, N.Y. Approximately 10 hours later, Richelle suffered a grand mal seizure. She was admitted to the emergency room of the Binghamton General Hospital in status epilepticus followed by cardio-respiratory arrest. A second seizure occurred a week later, to be followed during the ensuing months by virtually dozens of seizures. A few of these seizures were accompanied with fever, but the majority were afebrile.

No etiology of Richelle's seizure disorder has ever been determined. She is twelve years old and suffers from mental retardation and a partially controlled seizure disorder. The family has expended in excess of \$ 1,000 in unreimbursable expenses due to her disabilities. They have not received an award or settlement in any civil action for damages related to Richelle's injuries.

STATUTORY REQUIREMENTS

Causation in Vaccine Act cases can be established in one of two ways: either through the statutorily prescribed presumption of causation, or by proving causation in fact. Petitioner must prove one or the other in order to recover under the Act. 4 The Vaccine Injury Table lists certain injuries and conditions which, if found to occur within a prescribed time period, create [*6] a rebuttable presumption that the vaccine caused the injury or condition. 5 The Table lists encephalopathy and residual seizure disorder as compensable

injuries which create such a presumption if they occur within a three-day time period. The presumption may be overcome by an affirmative showing that the injury was caused by a factor unrelated to the administration of the vaccine. Section 13(a)(1)(B). Section 13(a)(2) states that the term "factors unrelated to the administration of the vaccine" does not include "any idiopathic, unexplained, unknown, hypothetical, or undocumentable cause, factor, injury, illness, or condition" 6

4 § 14(a)

5 Sections 14(a)(I)(B) and (D); § 11(c)(1)(C)(i).

6 Petitioners must prove their case by a preponderance of the evidence which requires that the trier of fact "believe that the existence of a fact is more probable than its nonexistence before [the special master] may find in favor of the party who has the burden to persuade the [special master] of the fact's existence." *In re Winship*, 397 U.S. 358, 372-73 (1970) (Harlan, J., concurring) quoting *F. James*, *Civil Procedure* 250-51 (1965). Mere conjecture or speculation will not establish a probability. *Snowbank Enter. v. United States*, 6 Cl. Ct. 476, 486 (1984).

[*7] Other prerequisites to compensation include: (1) that the injured person must suffer the residual effects of a vaccine-related injury for more than six months after the administration of the vaccine (§ 11(c)(1)(D)(i)); (2) that the vaccine be administered in the United States (§ 11(c)(1)(B)(i)(II)); (3) that the petitioner incur expenses of more than \$ 1,000 in unreimbursed medical expenses as a result of the vaccine-related injury (§ 11(c)(1)(D)(i)); (4) that the petitioner has not previously collected a judgment or settlement in a prior civil action (§ 11(c)(1)(E)); and (5) that the action be brought by the injured person's legal representatives. § 11(b)(1)(A).

DISCUSSION

Petitioners have pursued their claims as table cases. The court will address each of the two claims separately. As to petitioners' first claim, the court cannot ascribe to Richelle's symptoms following the May 21, 1979 vaccination the level of severity sufficient to establish a Table injury. While the period of excessive screaming raises an alarm, there is every indication that by the following morning Richelle had recovered, and during the period between the second and third DPT shots, she was described as a happy [*8] and alert baby.

The alleged facts surrounding the second claim, however, are sufficient to establish a table injury after the shot administered on July 30, 1979. Richelle's symptoms are consistent with the statutory description of a residual seizure disorder, and the first manifestations arose within the statutory time frame. Petitioners, therefore, are entitled to the statutory presumption that Richelle's injuries were caused by the vaccine. Unless respondent is able to prove by a preponderance of the evidence that her seizure disorder was caused by factors unrelated to the administration of the vaccine, petitioners are

entitled to compensation.

Based on the opinion of Dr. Russell D. Snyder, respondent alleges an alternative cause of Richelle's injuries. Respondent argues that Richelle suffers from an underlying progressive neurologic condition, "not yet manifest," but unrelated to the DPT vaccine. Respondent bases its claim on a noncontemporaneous medical record which suggests that Richelle may have had a seizure or convulsion at 6 weeks of age, 7 and on the fact that doctors suspected a progressive disease in the early stages of Richelle's injuries. Exhaustive investigation did [*9] not reveal an etiology of Richelle's condition, but Dr. Snyder is of the opinion that "the very fact that exhaustive investigation was undertaken reinforces the progressive nature of her condition." Letter of October 11, 1990 filed with Respondent's Report.

7 This notation is an anomaly and its accuracy is challenged. The court agrees with Dr. Mencke's opinion that this notation is most likely a simple error and should have read "six months of age rather than 6 weeks." Tr. at 89.

Petitioner's claim is strongly supported by the testimony of Dr. John Menkes who believes that Richelle sustained a post-pertussis vaccine encephalopathy. Tr. at 104. According to Dr. Menkes, the many tests and studies carried out over the course of Richelle's illness effectively ruled out any underlying degenerative disease. Dr. Menkes insists that Richelle's encephalopathy was not "progressive" but "static" in nature and that she did not exhibit a progressively downhill course. Any loss of ground that occurred, according to Dr. Menkes, [*10] was the result of further brain damage caused by recurrent seizures, including a catastrophic seizure incident that occurred in December of 1983. 8

8 In December of 1983, Richelle was hospitalized for four days following an extremely severe seizure resulting in cardio-respiratory arrest. She required CPR and was intubated. Following this incident, Richelle lost her vocabulary and some skills "for a long time after that." Tr. at 43-45.

Careful consideration of the record leads the court to conclude that insufficient evidence exists to prove an underlying alternative cause of the injuries or to overcome the presumption in favor of petitioners. Dr. Snyder has raised merely the "possibility" of alternative causes without substantiation. Dr. Snyder stated that he could not identify a specific disease or condition, but proposed, at least eight possibilities. 9 The court finds that these projected causes are highly speculative, hypothetical, and undocumentable and as such, their consideration as factors unrelated to the administration [*11] of the vaccine is precluded by § 13(a)(2). The court finds Dr. Menkes' explanations more credible. While one cannot entirely rule out the possibility of an alternative cause, there is simply no evidence to overcome the strong probability that the DPT was the most likely cause.

9 Among the possible causes, Dr. Snyder proposes the following: shigella diarrhea; Krabbe's disease; metachromatic and adreno leukodystrophy; Tay Sachs disease; and

metabolic problems.

The court finds that there is not a preponderance of the evidence that Richelle's condition is due to factors unrelated to the administration of the vaccine. The court finds further that all other statutory requirements have been met, and concludes that petitioners are entitled to compensation for injuries sustained as a result of the DPT vaccine administered on July 30, 1979.

AMOUNT OF AWARD

Present Condition.

Richelle Nicole Oxley is a twelve year old who has lived at the Cobb Memorial School for the past five years. The school is open nine months of the [*12] year. For the remainder of the year, Richelle lives with her mother, her adoptive father, and her two brothers in Binghamton, New York. **Richelle's disabilities include autistic-like behavior, hyperactivity, and partially controlled seizures.**

Richelle is totally dependent on others for her care and needs constant supervision and assistance. She is able to take semi-solids from the spoon and drinks from a cup. Richelle is mobile but is awkward and stumbles. She is only partly toilet trained and adheres primarily to a time training schedule. She is non-verbal but signs several words. For leisure activities, she listens to music and looks at magazines.

Elements of Compensation.

A life care plan was prepared for petitioners by Mr. Alan Spector, 10 and an alternative plan was prepared for respondent by Lillian Denham, R.N. Following extensive consultations, the parties have reached an agreement on several items of care. The court has considered carefully the respective positions of the parties and the areas of agreement. The following elements of compensation are found to be appropriate and are allowed:

10 Mr. Spector, a rehabilitation specialist, received a bachelor's degree in special education from Roosevelt University in Chicago and a master's degree in administration and supervision from Loyola University in Chicago. He currently serves as executive director of Glenkirk, a not-for-profit community organization that provides a variety of services to approximately one thousand disabled persons.

[*13] I. Therapeutic Services.

The parties have agreed to a variety of therapies to supplement those Richelle currently receives at the Cobb School. The court will allow the following which provide a concentration of therapies as recommended by experts for both parties:

Therapies, evaluations & assessments

annually for life \$ 4,428

II. Attendant care.

Although the parties agreed to 12 hours of daily attendant care during the 90 days Richelle is at home, this amount does not meet the reasonably necessary standard. Richelle does not exhibit behavioral problems that necessitate the highest level of care. Based on the level of care provided in other vaccine cases for persons of Richelle's level of disabilities, the court will allow 6 hours of attendant care daily for 90 days to age 21 at the hourly rate of \$ 10. At age 21 Richelle will reside in a full time residential facility. Attendant care is not reasonably necessary thereafter.
Attendant care annually to age 21 \$ 5,400

III. Case Management Services.

The parties have agreed to 26 sessions annually for case management services [*14] to age 21 and 12 sessions annually thereafter at \$ 75 per session. This item is allowed.
Case management annually through age 21 \$ 1,950

annually thereafter 900

IV. Medications.

The parties have agreed to the amount of \$ 400 annually for medications. This item is allowed.

V. Medical Supplies.

Richelle is only partially toilet trained. Petitioners request \$ 900 annually for diapers. This item is allowed.

VI. Medical Costs.

Petitioners request \$ 600 11 annually for blood tests and visits to the orthopedist and neurologist. The court finds these costs to be reasonably necessary. The amount of \$ 600 is allowed annually for life.

11 Actual costs for these services amounts to \$ 3,000 annually. The amount provided here is for the contributions required from the family after insurance offsets have been applied.

VII. Dental Costs.

Petitioners request \$ 200 annually for dental costs. The record contains no evidence that [*15] Richelle's dental requirements are related to the vaccine. This item is disallowed.

VIII. Transportation.

Petitioners request \$ 2,000 annually for transportation. The Cobb School is located in Altamont, New York, approximately 140 miles from the family home in Binghamton. Mr. Oxley takes time off from work to transport Richelle to and from the school. The court will allow an annual amount of \$ 1,000 for transportation to age 21. At age 21, Richelle will reside at the Deveraux Facility in Pennsylvania. The family must bear responsibility for the cost of visits after age 21.

IX. Supervised Vacations.

Petitioners request \$ 2,000 annually for vacations to such places as Graceland (the Elvis Presley home) and Disneyworld. According to petitioners, such vacations are part of the normal life cycle. While recognizing that travel opportunities enrich an individual's life, the court finds that such personal experiences are the responsibility of all families whether individual members are disabled or not. This item is unrelated to Richelle's vaccine-related injury and is disallowed. See *Anderson v. Secretary of HHS*, No. 89-106V, slip op. at 10 (Cl. Ct. Spec. Mstr. Dec. 6, 1990).

[*16] X. Special Equipment.

Petitioners request \$ 3,000 every 5 years for equipment such as therapy balls, a walking rail, and a balance beam to be used when Richelle is living at home. The court will allow a one-time cost of \$ 6,000 for special equipment. See *Messner v. Secretary of HHS*, No. 90-552V, slip, op. (Cl. Ct. Spec. Mstr. April 22, 1991).

XI. Computer.

The parties have agreed to a one-time cost of \$ 2,000 for a computer and \$ 800 annually thereafter for software and replacement costs. The court agrees that a computer will maximize Richelle's communication skills, but disagrees that \$ 800 is reasonably necessary for annual costs. The court will allow \$ 2,000 to purchase a computer and \$ 286 annually thereafter. ¹²

¹² A computer is likely to need replacement every 7 years. The amount of \$ 286 represents the annualized cost of replacement.

XII. Home Modifications.

Petitioners request \$ 10,000 to modify the home and provide additional space for a therapy room and items such as water temperature [*17] regulators and no-slide foot treads on stairways. Insufficient evidence has been submitted to justify the amount requested. This item is not allowed.

XIII. Child and Adult Residential Facilities.

For the past five years Richelle has lived at the Cobb Memorial School and has made substantial progress. 13 Her parents would like for her to remain at Cobb. The court will allow an amount that will permit Richelle to remain in this structured environment until age 21. The annual cost is \$ 30,295.

13 Mrs. Oxley testified that Richelle is thriving at the Cobb School and stated that it was "the first educational program where we have seen results."

The Cobb School will no longer be available once Richelle reaches age 21. Petitioners request \$ 51,845 annually thereafter for a group residential facility. These amounts are reasonable and are allowed.

Residential school annually to age 21 \$ 30,295

Adult residential facility annually
thereafter 51,845

[*18] Adjustments to the Award.

The Act provides that payment of compensation shall not be made for any item or services to the extent payment can be reasonably expected to be made under a state or federal compensation program. § 15(g). Title XIX of the Social Security Act (Medicaid) is excepted from this provision. Richelle is the beneficiary of insurance benefits that pays up to 65% of medically related items. These benefits have been offset against the levels of care allowed by this opinion. Amounts to be awarded represent costs not allowed by insurance.

REDUCTION TO NET PRESENT VALUE

Section 15(f) requires that payment of compensation be determined on the basis of the net present value of the elements of compensation and paid in four equal installments. 14 It is within the court's discretion to select the proper method of calculating the amount needed to provide for the future care of an injured person. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 552-53 (1983). Indeed, the technical amendments to the Vaccine Act passed in December 1989 empower the special master to order the purchase of an annuity. 15 The Claims Court has determined that the use [*19] of an annuity is an appropriate measure of net present value under the Vaccine Act. See *Loe v. Secretary of HHS*, No. 89-82V, slip op. at 6-7 (Cl. Ct. Jan. 22, 1991). Moreover, the award may be made in the form of an annuity whether or not petitioner consents to such a mechanism of payment. See *Ruben v. Secretary of HHS*, No. 89-103V (Cl. Ct. Jan. 3, 1991); *Huber v. Secretary of HHS*, No. 89-72V (Cl. Ct. Jan. 8, 1991). The undersigned has determined that an annuity will be in Richelle's best interests and will also be the most appropriate and practical vehicle to provide for her needs and guarantee a future stream of payments for the allowed items of cost.

14 Section 15(f)(4)(B).

15 Id.

Annuities offer distinct advantages: they insure a specific stream of payments for the lifetime of the recipient; they protect the corpus of the award from mismanagement or waste by the parent or guardian; and they represent the opinion of the marketplace as to net present value of future benefits ordered by the special [*20] master. 16 An annuity plan also protects the interests of the respondent, whose responsibility includes protecting the Vaccine Injury Compensation Trust Fund by providing the lowest cost for benefits outlined under the plan.

16 The purchase price of an annuity is a valid measure of the present value of damages. See *Scott v. United States*, 884, F.2d 1280 (9th Cir. 1989).

The allowance of a small portion of the award in a lump sum, however, would increase confidence levels, provide a reserve, and permit flexibility in meeting needs which are foreseeable but the timing of which is not totally predictable. (This is not an additional amount for a "contingency fund," but simply an early payment for future needs already determined. See *Potter v. Secretary of HHS*, 22 Cl. Ct. 701 (1991)). Payment of this compensation, therefore, shall be made through the combination of a \$ 50,000 lump sum to be paid in four equal annual installments of \$ 12,500 and through an annuity paying out the monthly benefits [*21] necessary to fund the above annual costs (reduced by 2.62% to take into account the lump sum award). 17

17 The percentage reduction is determined by a ratio of \$ 50,000 to a lump sum of the annuitized items. The lump sum was computed using the average of the rated ages for the life expectancy and a 1.5% discount factor.

In order to award an annuity, the court is obliged to select an inflation factor reasonably assured to provide what is needed for future care. An inflation factor as low as 4% based on historic rates taken from the Consumer Price Index (CPI) has been found reasonable by special masters. See, e.g., *Latorre v. Secretary of HHS*, No. 89-27v, slip op. at 14 (Cl. Ct. Spec. Mstr. June 15, 1990) and cases cited therein. Using the average percentage change, the overall CPI has increased by 4.31% annually from 1952 to 1986 inclusively. Some items have increased at a considerably lower rate, while others, most notably medical expenses, have increased more rapidly. The court finds that an inflation [*22] factor of 5% for medically-related items and the residential facilities 18 and 4% for all other items is reasonable and will assure that the benefits provided herein will cover Richelle's expenses for the remainder of her life.

18 The court has received evidence in other cases that the cost of residential facilities is closely allied with rising medical costs. For this reason, the cost of child and adult residential facilities shall be computed on a 5% growth factor.

CONCLUSION

For reasons cited above, petitioners are awarded compensation to provide for the future

compensable expenses allowed herein (and summarized in the attached table) in the form and manner set out above. Specifically, petitioners are awarded the amount of \$ 50,000 in a lump sum and an annuity with future periodic payments under the annuity reduced as provided herein. See above and footnote 17. Respondent shall purchase and take ownership of an annuity contract or contracts from an insurance company that meets the following criteria: 19 [*23]

19 This criteria is taken from the december, 1990 draft of the Uniform Periodic Payment of Judgments Act.

(1) has a minimum of \$ 100,000,000 of capital and surplus, exclusive of any mandatory security valuation reserve; and

(2) has one of the following ratings from two of the following rating organizations at the time of judgment:

a) A.M. Best Company: A++, A+g, A+p, A+r, or A+s;

b) Moody's Investors Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;

c) Standard and Poor's Corporation Insurer Claims Paying Ability Rating: AA-, AA, AA+, or AAA;

d) Duff & Phelps Credit Rating Company Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA.

The contract shall be based on a growth factor of 4% for non medically related items and 5% for medically related items and the residential facilities.

In the absence of a motion for review filed pursuant to RUSCC Appendix J, 20 the Clerk of the court is directed to enter judgment in accordance herewith.

20 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 claims court judge.

[*24] IT IS SO ORDERED.

APPENDIX

DAMAGES FOR RICHELLE OXLEY

TIME	1991	1992 -	2000 -	2015 ++
ITEM		1999	2014	

[Age(s)]	12	13 - 20	21 - 35	36 +
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Case	1,950	1,950	900	900
Management				

Therapies	4,428	4,428	4,428	4,428
Attendant Care	5,400	5,400	- 0 -	- 0 -
Group Home	30,295		30,295	51,845
Medical Supplies	900	900	900	900
Medication	400	400	400	400
Transpor- tation	1,000	1,000	- 0 -	- 0 -
Special Equipment	6,000	- 0 -	- 0 -	- 0 -
Medical Services	600	600	600	600
Computer	2,000	286	286	286
TOTALS	52,973.00		45,259.00	59,359.00

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Nos. 90-566V, 90-565V

UNITED STATES CLAIMS COURT

1991 U.S. Cl. Ct. LEXIS 330

July 11, 1991, Filed

CORE TERMS: vaccine, annually, seizure, annuity, residential facility, unrelated,

disorder, Vaccine Act, administered, attendant, therapy, rating, shot, special master, present value, vaccine-related, encephalopathy, progressive, residual, disease, reasonably necessary, vaccination, screaming, symptoms, injured person, preponderance, level of care, inflation factor, cardio-respiratory, rehabilitation

COUNSEL: [*1] Boyd McDowell III with whom also was Anthony M. Colantoni, Chicago, Illinois, for petitioners.

Nina S. Pelletier, Department of Justice, Washington, D.C., for respondent.

JUDGES: E. LaVon French, Special Master.

OPINION BY: FRENCH

OPINION

DECISION

This case concerns the eligibility of Richelle Oxley (hereinafter Richelle) for compensation under the National Childhood Vaccine Injury Compensation Act (hereinafter Vaccine Act or Act). 1 For reasons set forth below, the court concludes that petitioners are entitled to an award as specified hereafter.

1 The statutory provisions governing the Vaccine Act are found at 42 U.S.C.A. § 300aa-1 et seq. (West Supp. 1991). Hereinafter, for ease of citation, all references will refer to the amended version of 42 U.S.C.

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On October 18, 1990, the court granted respondent's Motion to Consolidate Petitions for

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2 The legislative history of the Vaccine Act indicates that recovery for multiple vaccinations is permissible but only under the unusual circumstances in which separate and distinct injuries occur. H.R. Rep. No. 908, 99th Cong. at 14.

[*3] Respondent filed its report on November 13, 1990 recommending that compensation be denied in both cases. Respondent argues that there is insufficient evidence of a compensable injury following the DPT shot administered on May 21, 1979. Respondent argues further that Richelle's injuries following the July 30, 1979 vaccination were caused by an underlying progressive neurological condition unrelated to the DPT vaccine.

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FACTS

The [*4] following facts are supported by the record and are so found. Richelle Oxley was born in Binghamton, New York on February 5, 1979. With the exception of a mild case of jaundice and an intolerance for milk, both of which were resolved satisfactorily, she enjoyed normal health and development. On March 22, 1979, Richelle received her first DPT shot. Except for sleeping longer than usual following the vaccination, Richelle apparently had no adverse reaction. On May 21, at the age of three and one-half months, she received her 2nd DPT shot. Shortly thereafter, she became irritable. Her crying became high pitched, "more like a scream." At times, she would scream so hard "that she would raise her arms up and her arms would shake from the screaming." Transcript at 21 (hereinafter Tr. at). She did not want to take her bottle, and although she would drop off to sleep briefly, she would awaken screaming. At approximately 1:00 a.m., Richelle fell asleep for the night. She was fine the next morning. Tr. at 22. The next five weeks were without incident and Richelle was apparently happy, alert, and playing with toys. Tr. at 23.

On July 30, 1979, Richelle received her third DPT shot from a physician [*5] in Binghamton, N.Y. Approximately 10 hours later, Richelle suffered a grand mal seizure. She was admitted to the emergency room of the Binghamton General Hospital in status epilepticus followed by cardio-respiratory arrest. A second seizure occurred a week later, to be followed during the ensuing months by virtually dozens of seizures. A few of these

seizures were accompanied with fever but the majority were afebrile.

No etiology of Richelle's seizure disorder has ever been determined. She is twelve years old and suffers from mental retardation and a partially controlled seizure disorder. The family has expended in excess of \$ 1,000 in unreimbursable expenses due to her disabilities. They have not received an award or settlement in any civil action for damages related to Richelle's injuries.

STATUTORY REQUIREMENTS

Causation in Vaccine Act cases can be established in one of two ways: either through the statutorily prescribed presumption of causation, or by proving causation in fact. Petitioners must prove one or the other in order to recover under the Act. 3 The Vaccine Injury Table lists certain injuries and conditions which, if found to occur within a prescribed time period, [*6] create a rebuttable presumption that the vaccine caused the injury or condition. 4 The Table lists encephalopathy and residual seizure disorder as compensable injuries which create such a presumption if they occur within a three-day time period. The presumption may be overcome by an affirmative showing that the injury was caused by a factor unrelated to the administration of the vaccine. Section 13(a)(1)(B). Section 13(a)(2) states that the term "factors unrelated to the administration of the vaccine" does not include "any idiopathic, unexplained, unknown, hypothetical, or undocumentable cause, factor, injury, illness, or condition . . ." 5

3 § 14(a).

4 §§ 14(a)(I)(B) and (D); § 11(c)(1)(C)(i).

5 Petitioners must prove their case by a preponderance of the evidence which requires that the trier of fact "believe that the existence of a fact is more probable than its nonexistence before [the special master] may find in favor of the party who has the burden to persuade the [special master] of the fact's existence." in re Winship, 397 U.S. 358, 372-73(1970) (Harlan, J., concurring) quoting F. James, Civil Procedure 250-51 (1965). Mere conjecture or speculation will not establish a probability. Snowbank Enter. v. United States, 6 Cl. Ct. 476, 486 (1984).

[*7] Other prerequisites to compensation include: (1) that the injured person must suffer the residual effects of a vaccine-related injury for more than six months after the administration of the vaccine (§ 11(c)(1)(D)(i)); (2) that the vaccine be administered in the United States (§ 11(c)(1)(B)(i)(II)); (3) that the petitioner incur expenses of more than \$ 1,000 in unreimbursed medical expenses as a result of the vaccine-related injury (§ 11(c)(1)(D)(i)); (4) that the petitioner has not previously collected a judgment or settlement in a prior civil action (§ 11(c)(1)(E)); and (5) that the action be brought by the injured person's legal representatives. § 11(b)(1)(A).

DISCUSSION

Petitioners have pursued their claims as table cases. The court will address each of the two claims separately. As to petitioners' first claim, the court cannot ascribe to Richelle's symptoms following the May 21, 1979 vaccination the level of severity sufficient to establish a Table injury. While the period of excessive screaming raises an alarm, there is every indication that by the following morning Richelle had recovered, and during the period between the second and third DPT shots, she was, as described, [*8] a happy and alert baby.

The alleged facts surrounding the second claim, however, are sufficient to establish a table injury after the shot administered on July 30, 1979. Richelle's symptoms are consistent with the statutory description of a residual seizure disorder, and the first manifestations arose within the statutory time frame. Petitioners, therefore, are entitled to the statutory presumption that Richelle's injuries were caused by the vaccine. Unless respondent is able to prove by a preponderance of the evidence that her seizure disorder was caused by factors unrelated to the administration of the vaccine, petitioners are entitled to compensation.

Based on the opinion of Dr. Russell D. Synder, respondent alleges an alternative cause of Richelle's injuries. Respondent argues that Richelle suffers from an underlying progressive neurologic condition, "not yet manifest," but unrelated to the DPT vaccine. Respondent bases its claim on a noncontemporaneous medical record which suggests that Richelle may have had a seizure or convulsion at 6 weeks of age, 6 and on the fact that doctors suspected a progressive disease in the early stages of Richelle's injuries. Exhaustive investigation [*9] at the time did not reveal an etiology of Richelle's condition, but Dr. Snyder is of the opinion that "the very fact that exhaustive investigation was undertaken reinforces the progressive nature of her condition." Letter of October 11, 1990 filed with Respondent's Report.

6 This notation is an anomaly and its accuracy is challenged. The court agrees with Dr. Menkes' opinion that this notation is most likely a simple error and should have read "six months of age rather than 6 weeks." Tr. at 89.

Petitioners' claim is strongly supported by the testimony of Dr. John Menkes who believes that Richelle sustained a post-pertussis vaccine encephalopathy. Tr. at 104. According to Dr. Menkes, the many tests and studies carried out over the course of Richelle's illness effectively ruled out any underlying degenerative disease. Dr. Menkes insists that Richelle's encephalopathy was not "progressive" but "static" in nature and that she did not exhibit a progressively downhill course. Any loss of ground that occurred, according to [*10] Dr. Menkes, was the result of further brain damage caused by recurrent seizures, including a catastrophic seizure incident that occurred in December of 1983. 7

7 In December of 1983, Richelle was hospitalized for four days following an extremely severe seizure resulting in cardio-respiratory arrest. She required CPR and was intubated. Following this incident, Richelle lost her vocabulary and some

skills "for a long time after that." Tr. at 43-45.

Careful consideration of the record leads the court to conclude that insufficient evidence exists to prove an underlying alternative cause of the injuries or to overcome the presumption in favor of petitioners. Dr. Snyder has raised merely the "possibility" of alternative causes without substantiation. Dr. Snyder stated that he could not identify a specific disease or condition, but proposed, at least eight possibilities. 8 The court finds that these projected causes are highly speculative, hypothetical, and undocumentable and as such, their consideration as factors unrelated [*11] to the administration of the vaccine is precluded by § 13(a)(2). The court finds Dr. Menkes' explanations more credible. While one cannot entirely rule out the possibility of an alternative cause, there is simply no evidence to overcome the strong probability that the DPT was the most likely cause.

8 Among the possible causes, Dr. Snyder proposes the following: shigella diarrhea; Krabbe's disease; metachromatic and adreno leukodystrophy; Tay-sachs disease; and metabolic problem.

The court finds that there is not a preponderance of the evidence that Richelle's condition is due to factors unrelated to the administration of the vaccine. The court finds further that all other statutory requirements have been met, and concludes that petitioners are entitled to compensation for injuries sustained as a result of the DPT vaccine administered on July 30, 1979.

AMOUNT OF AWARD

Present Condition.

Richelle Nicole Oxley is a twelve year old who has lived at the Cobb Memorial School for the past five years. The school [*12] is open nine months of the year. For the remainder of the year, Richelle lives with her mother, her adoptive father, and her two brothers in Binghamton, New York. Richelle's disabilities include autistic-like behavior, hyperactivity, and partially controlled seizures.

Richelle is totally dependent on others for her care and needs constant supervision and assistance. She is able to take semi-solids from the spoon and drinks from a cup. Richelle is mobile but is awkward and stumbles. She is only partly toilet trained and adheres primarily to a time training schedule. She is non-verbal but signs several words. For leisure activities, she listens to music and looks at magazines.

Elements of Compensation.

A life care plan was prepared for petitioners by Mr. Alan Spector, 9 and an alternative plan was prepared for respondent by Lillian Denham, R.N. Following extensive consultations, the parties have reached an agreement on several items of care. The court has considered carefully the respective positions of the parties and the areas of agreement. The following elements of compensation are found to be appropriate and are

allowed:

I. Therapeutic Services.

The parties [*13] have agreed to a variety of therapies to supplement those Richelle currently receives at the Cobb School. The court will allow the following which provides a concentration of therapies as recommended by experts for both parties:

Therapies, evaluations & assessments
annually for life \$ 4,428

II. Attendant care.

Although the parties agreed to 12 hours of daily attendant care during the 90 days Richelle is at home, this amount does not meet the reasonably necessary standard. Richelle does not exhibit behavioral problems that necessitate the highest level of care. Based on the level of care provided in other vaccine cases for persons of Richelle's level of disabilities, the court will allow 6 hours of attendant care daily for 90 days to age 21 at the hourly rate of \$ 10. At age 21 Richelle will reside in a full time residential facility. Attendant care is not reasonably necessary thereafter.
Attendant care annually to age 21 \$ 5,400

III. Case Management Services.

The parties have agreed to 26 sessions annually for case management services to age 21 and 12 sessions annually thereafter [*14] at \$ 75 per session. This item is allowed.
Case management annually to age 21 \$ 1,950
annually thereafter 900

IV. Medications.

The parties have agreed to the amount of \$ 400 annually for medications. This item is allowed.

V. Medical Supplies.

Richelle is only partially toilet trained. Petitioners request \$ 900 annually for diapers. This item is allowed.

VI. Medical Costs.

Petitioners request \$ 600 10 annually for blood tests and visits to the orthopedist and neurologist. The court finds these costs to be reasonably necessary. The amount of \$ 600 is allowed annually for life.

VII. Dental Costs.

Petitioners request \$ 200 annually for dental costs. The record contains no evidence that Richelle's dental requirements are related to the vaccine. This item is disallowed.

VIII. Transportation.

Petitioners request \$ 2,000 annually for transportation. The Cobb School is located in Altamont, New York, approximately 140 miles from the family home in Binghamton. Mr. Oxley takes time off from work to transport Richelle to and from the school. The court will allow an annual [*15] amount of \$ 1,000 for transportation to age 21. At age 21, Richelle will reside at the Deveraux Facility in Pennsylvania. The family must bear responsibility for the cost of visits after age 21.

IX. Supervised Vacations.

Petitioners request \$ 2,000 annually for vacations to such places as Graceland (Elvis Presley's home) and Disneyworld. According to petitioners, such vacations are part of the normal life cycle. While recognizing that travel opportunities enrich an individual's life, the court finds that such personal experiences are the responsibility of all families whether individual members are disabled or not. This item is unrelated to Richelle's vaccine-related injury and is disallowed. See *Anderson v. Secretary of HHS*, No. 89-106V, slip op. at 10 (Cl. Ct. Spec. Mstr. Dec. 6, 1990).

X. Special Equipment.

Petitioners request \$ 3,000 every 5 years for equipment such as therapy balls, a walking rail, and a balance beam to be used when Richelle is living at home. The court will allow a one-time cost of \$ 6,000 for special equipment. See *Messner v. Secretary of HHS*, No. 90-552V, slip op. (Cl. Ct. Spec. Mstr. April 22, 1991).

XI. Computer.

The [*16] parties have agreed to a one-time cost of \$ 2,000 for a computer and \$ 800 annually thereafter for software and replacement costs. The court agrees that a computer will maximize Richelle' communication skills, but disagrees that \$ 800 is reasonably necessary for annual costs. The court will allow \$ 2,000 to purchase a computer and \$ 286 annually thereafter. 11

XII. Home Modifications.

Petitioners request \$ 10,000 to modify the home and provide additional space for a therapy room and items such as water temperature regulators and no-slide foot treads on stairways. Insufficient evidence has been submitted to justify the amount requested. This item is not allowed.

XIII. Child and Adult Residential Facilities.

For the past five years, Richelle has lived at the Cobb Memorial School and has made substantial progress. 12 Her parents would like for her to remain at Cobb. The court will allow an amount that will permit Richelle to remain in this structured environment until age 21. The annual cost is \$ 30,295.

The Cobb School will no longer be available once Richelle reaches age 21. Petitioners request \$ 51,845 annually thereafter for a group residential facility. These [*17] amounts are reasonable and are allowed.
Residential school annually to age 21 \$ 30,295

Adult residential facility annually
thereafter 51,845

9 Mr. Spector, a rehabilitation specialist, received a bachelor's degree in special education from Roosevelt University in Chicago and a master's degree in administration and supervision from Loyola University in Chicago. He currently serves as executive director of Glenkirk, a not-for-profit community organization that provides a variety of services to approximately one thousand disabled persons.

10 Actual costs for these services amounts to \$ 3,000 annually. The amount provided here is for the contributions required from the family after insurance offsets have been applied.

11 A computer is likely to need replacement every 7 years. The amount of 286 represents the annualized cost of replacement.

12 Mrs. Oxley testified that Richelle is thriving at the Cobb School and stated that it was "the first educational program where we have seen results."

[*18] Adjustments to the Award.

The Act provides that payment of compensation shall not be made for any item or services to the extent payment can be reasonably expected to be made under a state or federal compensation program. § 15(g). Title XIX of the Social Security Act (Medicaid) is excepted from this provision. Richelle is the beneficiary of insurance benefits that pay up to 65% of medically related items. These benefits have been offset against the levels of care allowed by this opinion. Amounts to be awarded represent costs not allowed by insurance.

REDUCTION TO NET PRESENT VALUE

Section 15(f) requires that payment of compensation be determined on the basis of the net present value of the elements of compensation and paid in four equal installments. 13 It is within the court's discretion to select the proper method of calculating the amount needed

to provide for the future care of an injured person. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 552-53 (1983). Indeed, the technical amendments to the Vaccine Act passed in December 1989 empower the special master to order the purchase of an annuity. 14 The Claims Court has determined that [*19] the use of an annuity is an appropriate measure of net present value under the Vaccine Act. See *Loe v. Secretary of HHS*, No. 89-82V, slip op. at 6-7 (Cl. Ct. Jan. 22, 1991). Moreover, the award may be made in the form of an annuity whether or not petitioner consents to such a mechanism of payment. See *Ruben v. Secretary of HHS*, No. 89-103V (Cl. Ct. Jan. 3, 1991); *Huber v. Secretary of HHS*, No. 89-72V (Cl. Ct. Jan. 8, 1991). The undersigned has determined that an annuity will be in Richelle's best interests and will also be the most appropriate and practical vehicle to provide for her needs and guarantee a future stream of payments for the allowed items of cost.

13 § 15(f)(4)(B).

14 *Id.*

Annuities offer distinct advantages: they insure a specific stream of payments for the lifetime of the recipient; they protect the corpus of the award from mismanagement or waste by the parent or guardian; and they represent the opinion of the marketplace as to net present value of future benefits ordered by the special [*20] master. 15 An annuity plan also protects the interests of the respondent, whose responsibility includes protecting the Vaccine Injury Compensation Trust Fund by providing the lowest cost for benefits outlined under the plan.

15 The purchase price of an annuity is a valid measure of the present value of damages. See *Scott v. United States*, 884, F.2d 1280 (9th Cir. 1989).

In order to award an annuity, the court is obliged to select an inflation factor reasonably assured to provide what is needed for future care. An inflation factor as low as 4% based on historic rates taken from the Consumer Price Index (CPI) has been found reasonable by special masters. See, e.g., *Latorre v. Secretary of HHS*, No. 89-27V, slip op. at 14 (Cl. Ct. Spec. Mstr. June 15, 1990) and cases cited therein. Using the average percentage change, the overall CPI has increased by 4.31% annually from 1952 to 1986 inclusively. Some items have increased at a considerably lower rate, while others, most notably medical expenses, have increased [*21] more rapidly. The court finds that an inflation factor of 5% for medically-related items and the residential facilities 16 is reasonable and will assure that the benefits provided herein will cover Richelle's expenses for the remainder of her life.

16 The court has received evidence in other cases that the cost of residential facilities is closely allied with rising medical costs. For this reason, the cost of child and adult residential facilities shall be computed on a 5% growth factor.

CONCLUSION

For reasons cited above, petitioners are awarded compensation to provide for the future compensable expenses allowed herein (and summarized in the attached table) in the form and manner set out above. Respondent shall purchase and take ownership of an annuity contract or contracts from an insurance company that meets the following criteria: 17

(1) has a minimum of \$ 100,000,000 of capital and surplus, exclusive of any mandatory security valuation reserve; and

(2) has one of the following ratings from two of the [*22] following rating organizations at the time of judgment:

a) A.M. Best Company: A+, A+g, A+p, A+r, or A+s;

b) Moody's Investors Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;

c) Standard and Poor's Corporation Insurer Claims - Paying Ability Rating: AA-, AA, AA+, or AAA;

d) Duff & Phelps Credit Rating Company Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA;

The contract shall be based on a growth factor of 4% for nonmedically related items and 5% for medically related items and the residential facilities.

17 This criteria is taken from the December, 1990 draft of the Uniform Periodic Payment of Judgments Act.

In the absence of a motion for review filed pursuant to RUSCC Appendix J, the Clerk of the court is directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

APPENDIX

DAMAGES FOR RICHELLE OXLEY

TIME	1991	1992 -	2000 -	2015 ++
ITEM	1999	2014		
[Age(s)]	12	13 - 20	21 - 35	36 +
Case Management	1,950	1,950	900	900
Therapies	4,428	4,428	4,428	4,428
Attendant Care	5,400	5,400	0 - 0 -	0 -
Group Home	30,295		30,295	51,845
				51,845

Medical Supplies	900	900	900	900		
Medication	400	400	400	400		
Transportation	1,000	1,000	- 0 -	- 0 -		
Special Equipment	6,000	- 0 -	- 0 -	- 0 -		
Medical Services	600	600	600	600		
Computer	2,000	286	286	286		
TOTALS	52,973.00		45,259.00		59,359.00	59,359.00

[*23]