In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS
No. 16-1670V
Filed: February 1, 2019
PUBLISHED

Petitioner,
v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,
Respondent.

Special Processing Unit (SPU); Decision Awarding Damages; Pain and Suffering; Tetanus Diphtheria acellular Pertussis (Tdap) Vaccine; Shoulder Injury Related to Vaccine Administration (SIRVA)

Leah VaSahnja Durant, Law Offices of Leah V. Durant, PLLC, Washington, DC, for petitioner.

Darryl R. Wishard, U.S. Department of Justice, Washington, DC, for respondent.

DECISION AWARDING DAMAGES

Dorsey, Chief Special Master:

On December 20, 2016, ("petitioner") filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, et seq.,² (the "Vaccine Act"). Petitioner alleges that she suffered a shoulder injury related to vaccine administration ("SIRVA") as a result of a Tetanus Diphtheria acellular Pertussis ("Tdap") she received on March 28, 2016. Petition at 1. The case was assigned to the Special Processing Unit of the Office of Special Masters.

¹ The undersigned intends to post this decision on the United States Court of Federal Claims' website. **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, the undersigned agrees that the identified material fits within this definition, the undersigned will redact such material from public access. Because this published decision contains a reasoned explanation for the action in this case, the 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).

² 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).

On February 2, 2018, the undersigned issued a ruling finding petitioner entitled to compensation. (ECF No. 27). A damages order was issued the same day. (ECF No. 28). The parties were unable to reach an agreement on the appropriate amount to award for her pain and suffering. This case is now ripe for adjudication on damages.

I. Procedural History

filed her petition for compensation on December 20, 2016. (ECF No. 1). Two days later, she filed five medical record exhibits in support of her petition. (ECF No. 6). On February 4, 2017, filed several additional updated medical records exhibits. (ECF No. 9). On May 12, 2017, respondent filed a status report stating that a review of the case was complete and respondent agreed to pursue a litigative risk settlement. (ECF No. 18).

On May 16, 2017, the parties contacted the staff attorney managing this case to inform the court that they had reached a tentative agreement in this case. The undersigned issued a 15-week order setting a deadline for respondent to file a status report confirming that a joint stipulation had been sent to petitioner for her signature. (ECF No. 19). However, on June 12, 2017, respondent filed a status report stating that the authorized representative of the Attorney General had declined to grant settlement approval for the proposed tentative settlement in this case. Respondent requested a status conference to discuss further proceedings and to set a deadline for filing his report pursuant to Vaccine Rule 4(c). (ECF No. 20).

On June 28, 2017, respondent filed his report pursuant to Vaccine Rule 4(c) stating that this case was not appropriate for compensation under the terms of the Vaccine Act. Respondent's Report at 1. Respondent argued that petitioner had not alleged a SIRVA claim, claiming that petitioner's medical history demonstrated that the onset of her symptoms was greater than 48 hours and thus, did not qualify as a Table SIRVA injury. *Id.* at 6. In addition, respondent argued that petitioner's evidence also failed to meet her burden for a causation-in-fact claim because she had not provided a medical theory that causally connected her vaccination to an alleged vaccine-related injury. *Id.* Respondent also argued that petitioner had not provided a logical sequence of cause and effect implicating a vaccination, nor did petitioner provide an expert report in support of her claim. *Id.* at 7.

On June 29, 2017, the undersigned issued an order withdrawing the previously issued 15-week order. (ECF No. 23). Petitioner was ordered to file an affidavit describing the facts and circumstances surrounding the onset of her SIRVA in addition to any other evidence petitioner wished to have considered regarding her vaccine-related injury or any issues raised in Respondent's Rule 4(c) report. (ECF No. 24)

On August 15 and 16, 2017, petitioner filed her own affidavit, several witness affidavits, and her payroll records. (ECF No. 27-28). On September 5, 2017, respondent was ordered to file a status report indicating how he intended to proceed in light of the additional information filed by petitioner. (ECF No. 30).

On September 7, 2017, respondent filed a status report stating that the case could not be settled. The parties reported that the record was complete and requested a ruling on entitlement. (ECF No. 31).

On September 14, 2017, petitioner filed updated medical records. (ECF No. 33). Respondent filed a status report on October 6, 2017, indicating that he would rely on his June 28, 2017 Rule 4(c) report in lieu of providing a motion for ruling. (ECF No. 34). filed her motion for ruling on the record on October 10, 2017. (ECF No. 25). She also requested additional updated medical records on January 29, 2018.

On February 2, 2018, the undersigned issued a ruling finding petitioner entitled to compensation. (ECF No. 27). A damages order was issued the same day. (ECF No. 28).

On March 16, 2018, petitioner filed a status report stating that the parties were unable to informally resolve the damages in this case. Petitioner requested that the undersigned schedule a hearing to resolve damages, arguing that she was continuing to experience pain and suffering as a result of the vaccination and that she was anxious to have the case resolved. Petitioner stated that she had a modest claim for lost wages and past unreimbursed expenses, but the primary issue for resolution was the appropriate amount for her pain and suffering. (ECF No. 39). Petitioner continued to file updated medical records. (ECF No. 40, 47, 48, 52).

The parties filed their pre-hearing submissions on August 1, 2018. (ECF Nos. 50-51). A damages hearing was held on August 23, 2018, in Boston, Massachusetts. (See Transcript of Proceedings ("Tr.") at ECF No. 56). Petitioner, her daughter, and her former co-worker, all testified. *Id.*

Following the hearing, petitioner filed additional documentation of her medical expenses as well as additional medical records. (ECF Nos. 57, 60). On November 2, 2018, the parties filed a joint status report confirming respondent's proffer of \$4,931.06 for petitioner's past unreimbursable expenses in this case. (ECF No. 63). This matter is now ripe for adjudication on the issue of damages.

II. Factual History

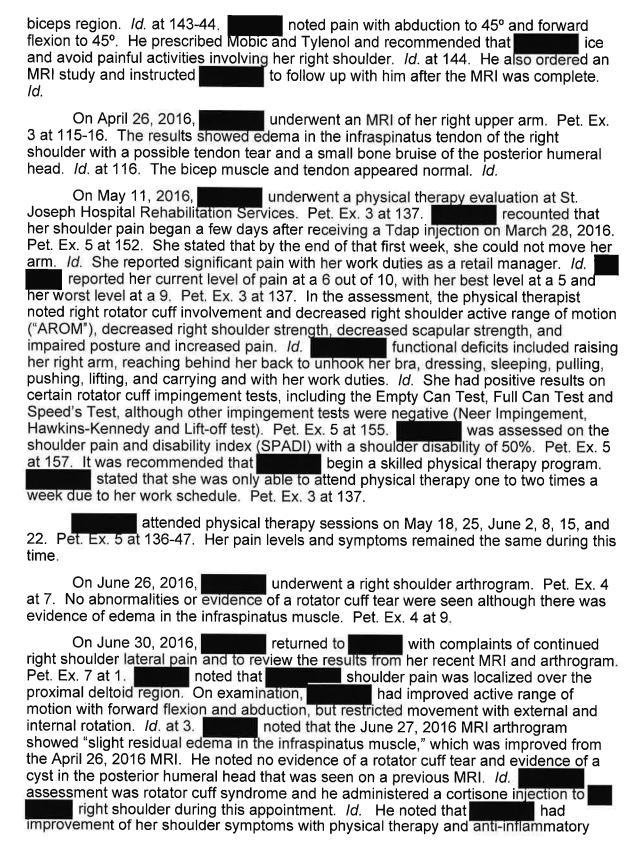
On March 28, 2016, shoulder (her dominant arm) during an annual routine gynecological appointment at Dartmouth-Hitchcock Medical Center located in Lebanon, New Hampshire. Petitioner's Exhibit ("Pet. Ex.") 1 at 1; Pet. Ex. 2 at 1; Tr. 23. Her medical history is significant for lower back pain, a herniated disc, anemia, gastroesophageal reflux, dysmenorrhea and a hysterectomy. *Id.*; Pet. Ex. 3 at 1-3. The state of the contributory to her claim in this case. Tr. 19.

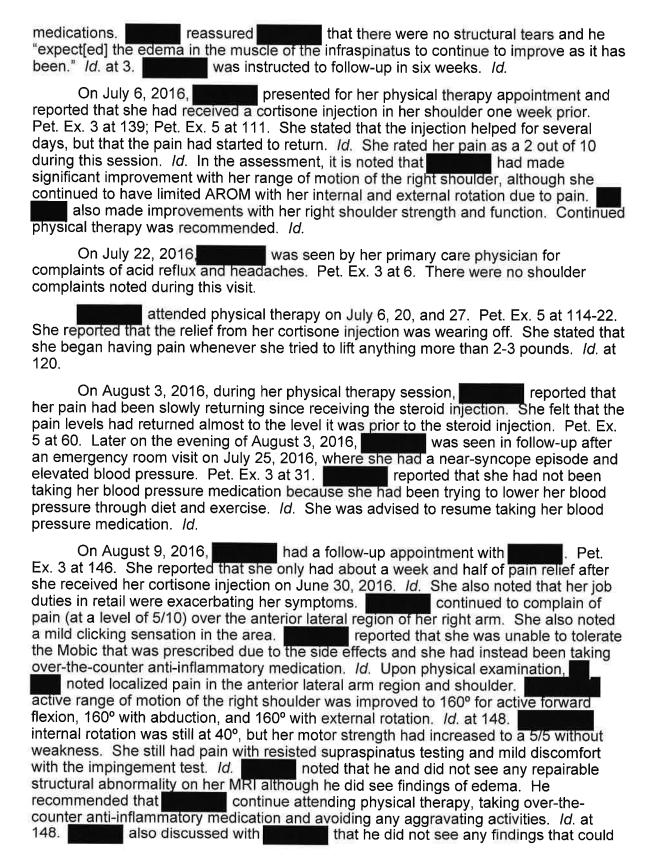
testified that she experienced pain as soon as the Tdap vaccine entered her shoulder. Pet. Ex. 8 at 1; Tr. 22. She averred that "[t]he pain I experienced was immediate and severe. In fact, when I expressed to the nurse how badly the shot hurt at the time she administered it, she told me that pain with the Tdap shot was normal. I figured the pain would go away on its own." *Id.* at 1, ¶3; Tr. 22. When she arrived home, stated that she iced her arm as she had been instructed to do by the nurse. Tr. 24.

By the next day, March 29, 2016, described the pain as "unbearable." She stated that although she went to work, she was unable to perform her work duties

also stayed home from work the next day, Wednesday, March 30, 2016, due to the pain. <i>Id.</i> ; Pet. Ex. 8 at 1, ¶4. By the following week, the pain had worsened to the point that she could barely lift her right arm. <i>Id.</i> at 2, ¶5; Tr. 26.
On April 8, 2016, 11 days after vaccination, called her gynecologist's office complaining that her right arm was still painful where the Tdap vaccine was administered. Pet. Ex. 2 at 7; Tr. 25. She explained to the nurse that over the past three days, her arm had become painful to lift. <i>Id.</i> She described the pain as "feeling like the muscle is torn." <i>Id.</i> ; Pet. Ex. 8 at 2, ¶5 (Affidavit). During her hearing testimony,
searing, intense pain, and I couldn't even shift my shoulder away from my body. Like it was literally stuck here in this position, and each time I did try to move it it was like intense to the point where I just balled because it hurt so bad. I'm like, what's going on on?'
Tr. 27. told the nurse that she had been taking ibuprofen, icing, and applying warm compresses to the injection site to treat her pain to no avail. Pet. Ex. 8 at 2, ¶5 (Affidavit). She was advised by the nurse to contact her primary care physician for an evaluation. Explained that she had already contacted her primary care physician but was unable to obtain an appointment for several weeks. The nurse consulted one of the physicians in the practice, Dr. Feltmate, who prescribed Lidoderm patches to in the meantime. <i>Id.</i> ; Tr. 25. By April 12, 2016, as stated that the Lidoderm patches were not helping, but she was scheduled to see her primary care physician the next day. <i>Id.</i>
On April 13, 2016, presented to her primary care physician, for a previously scheduled follow-up appointment for pressure. Pet Ex. 3 at 42. During this appointment, reported to that her right arm had been hurting "ever since" she received the Tdap vaccine on March 28, 2016. <i>Id.</i> She reported that she "started to notice intense pain involving her right upper arm that she describe[d] as a constant dull ache that becomes worse with certain movements." also described the pain as throbbing and burning and rated the pain as a 7 out of 10. Pet. Ex. 3 at 42-43. In noticed a decrease in her range of motion of her right shoulder. <i>Id.</i> Upon physical examination, exhibited tenderness to palpation over her right upper bicep tendon and in the general area of her right humerus. <i>Id.</i> at 44. She had "significant weakness" to isometric resistance as compared to her left arm. <i>Id.</i> An x-ray examination was ordered and was given a referral for an orthopedic consultation. <i>Id.</i> The results of her shoulder x-ray were normal. Pet. Ex. 3 at 133-36; Pet. Ex. 4 at 13-14.
On April 15, 2016, presented to orthopedist, initial evaluation. Pet. Ex. 3 at 142. In noted that the short and "developed soreness at the injection site" and is unable to "move her arm complaining of intense pain." Id. In noted that the shoulder pain as an 8 out of 10. Id. Upon examination, was guarding her right arm stating that she was unable to move it. She complained of pain in the lateral shoulder at the deltoid and the anterior

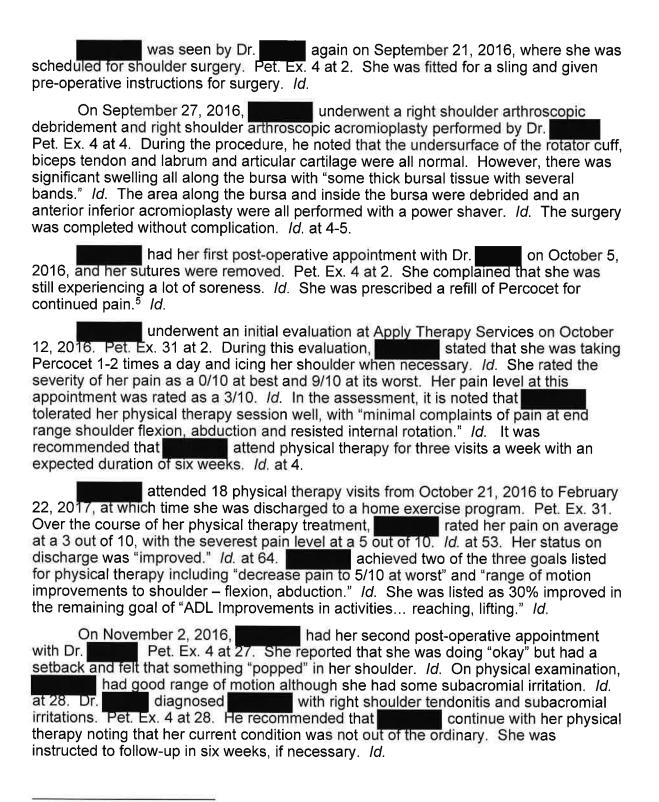
recorded an incorrect date of the Tdap vaccination as April 1, 2016, throughout his records.



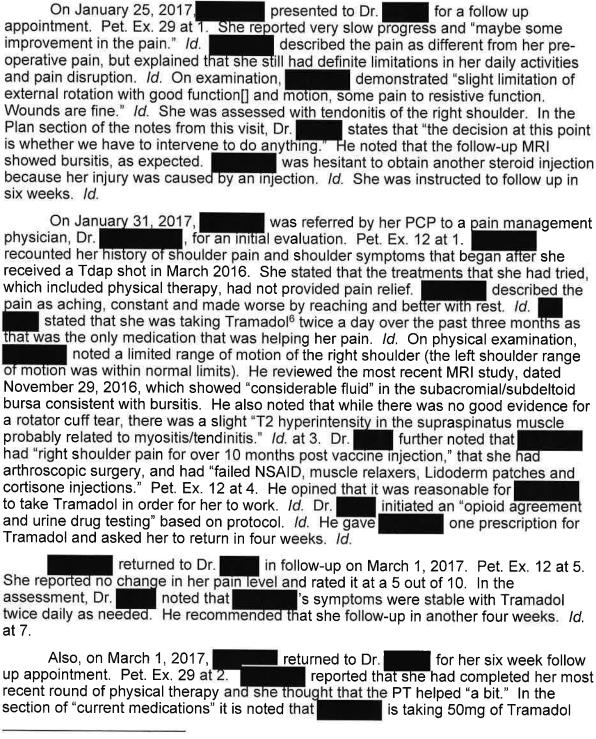


be improved with surgical intervention. Id. He instructed her to follow up in two months for a re-evaluation. *Id.* attended physical therapy on August 10, 17, and 24. Pet. Ex. 5 at 63-72. During this time, her pain levels continued to increase and she reported feeling discouraged by her progress. On August 17, 2016, had another follow up appointment with her primary care physician for her blood pressure. Pet. Ex. 3 at 69. During this visit, requested a referral to another orthopedist to evaluate her chronic right shoulder pain. She reported that her current orthopedist, had diagnosed her with bursitis and tendinitis of the right shoulder. She stated that had given her a cortisone injection and that she had completed physical therapy which improved her range of motion of the right shoulder, but she was continuing to have pain. Id. She was given a referral to another orthopedist. Id. at 72. On August 24, 2016. presented to orthopedist, Dr. for an initial evaluation. Pet. Ex. 4 at 25. reported that she began having difficulty with her right shoulder several days after her tetanus vaccine. She explained who attempted to conservatively treat her symptoms with physical therapy, a steroid injection and with time, but she was continuing to experience pain. Id. On examination, Dr. noted that had good range of motion of the right shoulder, but definite pain to "resistive function". He did not see frozen shoulder syndrome and noted that her MRI showed "a little irregularity and thickening in the rotator cuff and bursa." Id. Dr. diagnosis was tendonitis of the right shoulder with pain after vaccination. He explained that the conservative treatment she had previously undergone with Dr. is what he generally would have recommended. Dr. proposed prescribing a Medrol Dose Pak to decrease the inflammation. He stated that surgical intervention was a possibility later in time, but that he would not recommend surgery at this time. Id. A physical therapy note from the same date documented that had a shoulder disability index of 49%. Pet. Ex. 5 at 57. On September 14, 2016, returned to Dr. for a follow up of her right shoulder symptoms. Pet. Ex. 4 at 2, 24. reported that she took the Medrol Dose Pak without relief. Pet. Ex. 4 at 2. She still complained of shoulder stiffness in the morning. Id. Dr. revisited the possibility of shoulder surgery with stating that there was a possibility that an acromioplasty4 could be of benefit. He explained that with an acromioplasty, he would inspect the shoulder tendon and remove any scarred bursa. Dr. advised that the surgery may not completely relieve her symptoms, but hopefully would provide some short and/or long-term relief. ld. elected to proceed with surgery. Pet. Ex. 6 at 3. underwent her annual physical exam with her primary care physician on September 21, 2016. Pet. Ex. 3 at 15. In the musculoskeletal portion of the physical exam, it is noted that had "full range of motion of all joints with no swelling or deformity," although it is also documented in her medical history that she sees an orthopedic for chronic right shoulder pain. Id. at 15, 18.

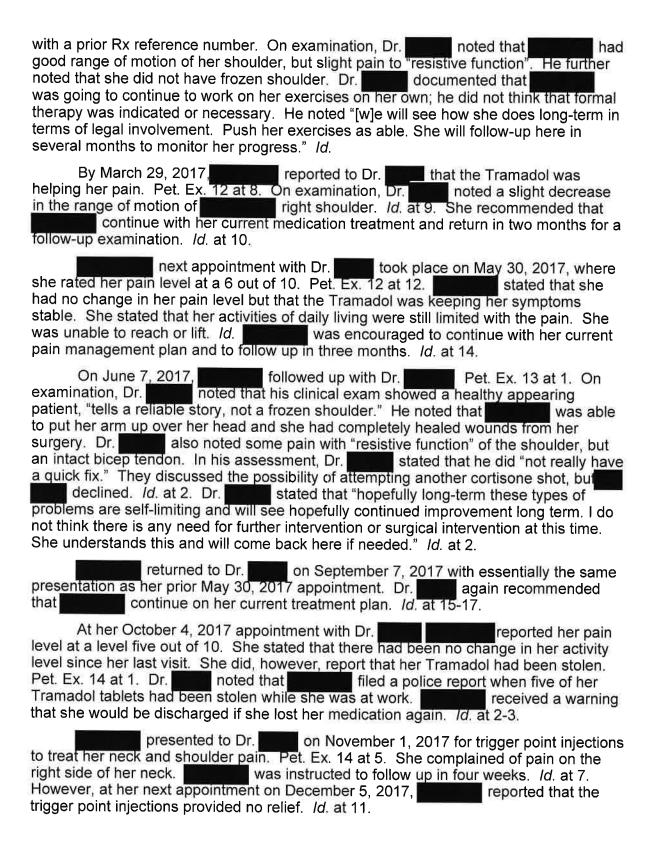
⁴ Acromioplasty is defined as a "surgical removal of an anterior spur of the acromion to relieve mechanical compression of the rotator cuff during movement of the glenohumeral joint." Dorland's at 20.



testified she was first prescribed Tramadol by her primary care physician in October 2016; however, this record has not been located. Tr. at 54. The prescription records from Rite Aid Pharmacy filed as petitioner's exhibit 24 confirms that Dr. Karavasilis first prescribed Tramadol to November 29, 2016. Pet. Ex. 24 at 2.



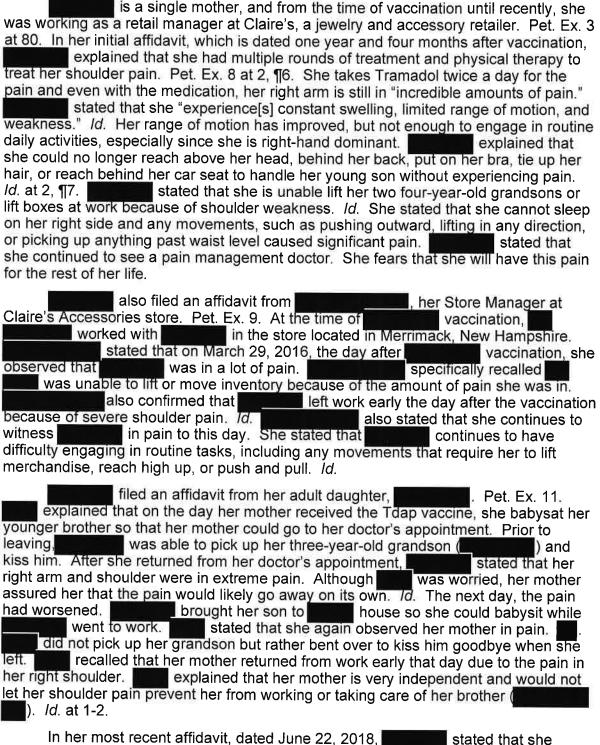
⁶ The notes state: "She takes Tramadol twice daily that is the only medication has been helping. She has been on the medication for three months. She is referred by her primary care provider to take over Tramadol. She has no pain contract." Pet. Ex. 12 at 1. testified that she was first prescribed Tramadol by her primary care physician in October 2016. Tr. at 54-55. However, the record of this visit and the documentation of the first prescription of Tramadol is not contained within the records. See also Post-Hearing Scheduling Order dated August 28, 2018. (ECF No. 54).



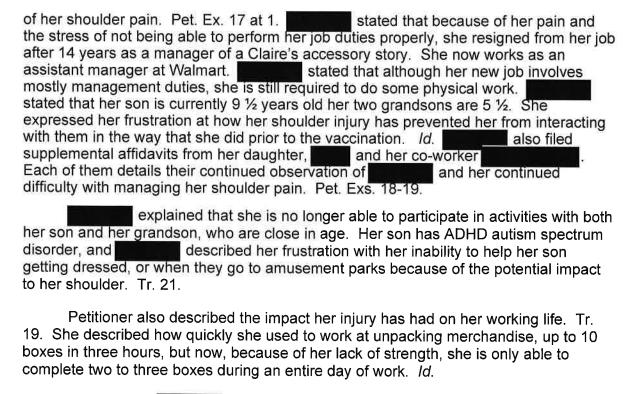
On January 23, 2018, presented to certified nurse practitioner, stated that she continued to work her retail job despite the pain and that some days were harder than others due to the increased workload. reported that she took Tramadol twice daily, although she sometimes took an extra ½ tablet with worsening pain and then another day she would take ½ dose less. After a physical examination, noted an assessment of bursitis of the right shoulder and prescribed Tramadol with five extra tablets to take as needed. stated that she would look into craniosacral massage as Nurse stated that her trapezius muscle would greatly benefit from the massage. <i>Id.</i> at 14.
continued to see Nurse on February 27, 2018, March 27, 2018, and May 24, 2018, with essentially the same symptoms. She was advised to continue on her current treatment plan. Pet. Ex. 15; Pet Ex. 16. During her May 24, 2018 appointment, stated that she had recently started a new job at Walmart that required that she wake up earlier than normal and as a result, her sleep quality had been poor. Pet. Ex. 16 at 1. She stated that her new job would involve much less physical labor. <i>Id</i> .
During her July 5, 2018 appointment with Nurse reported that her symptoms were worsening. Pet. Ex. 20 at 1. She stated that she was doing more physical work at Walmart than anticipated, and in addition to focal shoulder pain, she now felt pain radiating from her right scapula down into her right triceps, and occasionally into her wrist and fingers. <i>Id.</i> Nurse suspected a certain degree of cervical radiculopathy and ordered a cervical MRI for further evaluation. <i>Id.</i> at 3.
underwent the MRI on July 18, 2018, which demonstrated a small syrinx from C3-C4 to C6-C7, which was present on the previous cervical spine MRI in 2015. <i>Id.</i> at 2. There was no evidence of significant stenosis in the cervical spine level, although Nurse presented to Nurse to review the results of her cervical MRI. Pet. Ex. 21 at 1. Nurse prescribed physical therapy and encouraged to attend as her schedule allowed. <i>Id.</i>
On August 30, 2018, presented to Nurse in follow up. Pet. Ex. 30 at 1. Nurse noted that continued to take her medication as prescribed and was reporting a benefit with the medications. <i>Id.</i> However, felt that her shoulder pain was worsening and she reported intermittent swelling and pain in her neck. <i>Id.</i> She was assessed with bursitis of the right shoulder and cervical radiculopathy. She was instructed to continue on her current treatment plan and to return in follow-up in four weeks. Pet. Ex. 30 at 3-4. Nurse also recommended that try a repeat craniosacral massage in conjunction with physical therapy to "see if we can make some progress with her symptoms and also look at medication reduction if possible." <i>Id.</i> at 4.

⁷ The medical records note that Nurse saw saw under the supervision of Dr.

III. Impact on Personal Life



In her most recent affidavit, dated June 22, 2018, stated that she continues to feel pain in her shoulder. She stated that it has been more than two years since her Tdap vaccination and she is still under the care of her physician for treatment



Significantly, explained that she takes a strong pain opioid medication, Tramadol, because it is the only medication that provides her with some pain relief. Tr. 54-55. explained that Tramadol does not take away her pain entirely, but does "take the edge off the pain" to allow her to get through her working day. Tr. 55, 62. Currently, it is expected that will continue to take Tramadol as long as it continues to provide pain relief, but there are concerns about the long-term use of Tramadol, such as the potential for the medication to cause liver and kidney damage. Tr. 55. testified, "I am in a position where I am stuck because we can't go any higher [with the amount of Tramadol prescribed] but I can't be off it either..." Tr. 55.

IV. Party Contentions

A. Petitioner's Position

In addition to compensation for her past unreimbursable medical expenses, petitioner seeks an award of compensation for her past pain and suffering of \$250,000, the most allowed for pain and suffering cases in the Vaccine Program under the statutory cap.⁸ Petitioner's Brief Regarding Damages ("Pet. Brief") at 1.

Injuries lasting six months: \$100,000 - \$125,000
Injuries from six months to one year: \$125,000 - \$160,000
Injuries lasting one year to two: \$160,000 - \$190,000

⁸ Petitioner proposes that SIRVA claims should be categorized based on severity and duration as "rough guidelines" for awarding compensation. (ECF No. 50, p. 25.) Specifically, petitioner asserts that appropriate awards for pain and suffering would be as follows:

Petitioner argues that her case is different from other SIRVA cases because it is one involving failed surgery, thus making her injury permanent. She states that she suffered excruciating pain and significant limitations in her range of motion from the time of her vaccination on March 28, 2016, until the time of her shoulder surgery on September 27, 2016. P's brief at 10. The surgery did not relieve her pain and petitioner argues that it has made her condition worse. *Id.* Consequently, petitioner also seeks an award for future pain and suffering of \$20,000.00 per year for the remainder of her life⁹, an amount to be reduced to net present value. *Id.* at 2.

B. Respondent's Position

Respondent's brief is comprised mainly of a legal analysis of pain and suffering awards in the Vaccine Program. Respondent's Brief on Damages ("Resp. Brief") at 5. By way of background, respondent explains that since the inception of the Program, the Office of Special Masters has interpreted the Vaccine Act's provision for actual and projected pain and suffering to reserve the statutory maximum "for those who are both the most severely injured and who actually have suffered or will suffer the most pain, suffering or emotional distress." Id. at 4 citing Stotts v. Sec'y of Health & Human Servs., No. 89-108V, 1990 WL 293856, at *16 (Cl.Ct. Spec. Mstr. Oct. 11, 1990), rev'd on other grounds, 23 Cl.Ct. 352 (1991). As discussed supra, this approach was called into question in Graves v. Sec'y of Health & Human Servs., 109 Fed. Cl. 579, 590 (2013) (finding that the "special master policy is not rooted in the statute or precedent"). The Court in Graves set forth an approach whereby a special master would first determine the amount of pain and suffering damages, without regard to the \$250,000.00 cap, and then if necessary, apply the statutory cap. Id. Respondent agrees with Graves to the extent it calls for an individualized assessment of damages based on the specific facts of a petitioner's case. However, respondent argues that to the extent Graves is interpreted to endorse a methodology where the vast majority of claimants would recover the statutory maximum for pain and suffering, this approach would be inconsistent with the legislative history of the Vaccine Act and the previous approach utilized by the Office of Special Masters for the past two decades. Resp. Brief at 5.

As such, respondent proposes a pain and suffering award of no more than \$120,000.00. Resp. Brief at 1. Respondent notes that petitioner's course of treatment for her injury included arthroscopic surgery, several prescription pain medications, two cortisone injections for short-term pain relief, and several courses of PT. Respondent also notes that symptoms are stable with Tramadol and she has continuously worked in retail store management since her vaccine injury. Recognizing

\$175,000 - \$250,000

over \$250,000 (reduced by cap to \$250,000)

Permanent residua (non-debilitating):

Permanent residua (debilitating):

⁽ECF No. 50, p. 25-26.) The undersigned notes that, as described below, these proposed awards are significantly higher than what has *typically* been awarded in SIRVA cases. *See Kim, infra*.

⁹ Based on life expectancy, petitioner argues she will suffer her current condition for 39.2 years. (ECF No. 50, p. 26.)

required arthroscopic surgery akin to the petitioner in *Collado*, and under the totality of the circumstances, respondent argues that an award of no more than \$120,000.00 for pain and suffering is just and fair compensation. Resp. Brief at 12. Respondent has proffered \$4,931.06 for petitioner's past unreimbursed expenses, which petitioner has accepted. See Joint Status Report filed Nov. 2, 2018 (ECF No. 63).

V. Discussion and Analysis

There is no formula for assigning a monetary value to a person's pain and suffering and emotional distress. See I.D. v. Sec'y of Health & Human Servs., No. 04-1593V, 2013 WL 2448125 at *9 (Fed. Cl. Spec. Mstr. May 14, 2013), originally issued Apr. 19, 2013 ("I.D.") ("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. 93-172V, 1996 WL 300594 at *3 (Fed. Cl. Spec. Mstr. May 22, 1996) ("the assessment of pain and suffering is inherently a subjective evaluation"). Compensation awarded pursuant to the Vaccine Act shall include "actual and projected pain and suffering and emotional distress from the vaccine-related injury . . . not to exceed \$250,000." § 15(a)(4). In determining an award for pain and suffering and emotional distress, it is appropriate to consider the severity of injury and awareness and duration of suffering. See I.D., 2013 WL 2448125 at *9-11(citing McAllister v. Sec'y of Health & Human Servs., No. 91-1037V, 1993 WL 777030 (Fed. Cl. Spec. Mstr. Mar. 26. 1993), vacated and remanded on other grounds, 70 F.3d 1240 (Fed. Cir. 1995)). In evaluating these factors, the undersigned has reviewed the entire record, including medical records, affidavits submitted by petitioner and others, and hearing testimony.

The undersigned may also look to prior pain and suffering awards to aid in her resolution of the appropriate amount of compensation for pain and suffering this case. See, e.g., Jane 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, the undersigned also may rely on her own experience adjudicating similar claims. See 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, it must be stressed that pain and suffering is not determined based on a continuum. See Graves, 109 Fed. Cl. 579.

In *Graves*, the Court 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. The Court noted that this constituted "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, the Court assessed pain and suffering 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. *Id.* at 595.

In that regard, the undersigned notes that over the past four years the Special Processing Unit ("SPU") has amassed a significant history regarding damages in SIRVA cases. In *Kim v. Sec'y of Health & Human Servs.*, the undersigned explained that after four years of SPU experience, 864 SIRVA cases were resolved informally as of July 1, 2018. No. 17-418V, 2018 WL 3991022, at *6 (Fed. Cl. Spec. Mstr. July 20, 2018). The undersigned noted that the median award for cases resolved via government proffer is \$100,000.00 and the median award for cases resolved via stipulation by the parties is \$71,355.26. ¹⁰ *Id.* In *Kim*, the undersigned rejected petitioner's citation to a few isolated proffers and noted that "to the extent prior informal resolutions are to be considered, the undersigned finds that the overall history of informal resolution in SPU provides a more valuable context for assessing the damages in this case. Since it reflects a substantial history of resolutions among many different cases with many different counsel, the undersigned is persuaded that the full SPU history of settlements and proffers conveys a better sense of the overall arms-length evaluation of the monetary value of pain and suffering in a typical SIRVA case." ¹¹ *Id.* at *9.

Additionally, since the inception of SPU in July 2014, there have been a number of reasoned decisions by the undersigned awarding damages in SPU SIRVA cases where the parties were unable to informally resolve damages. Typically, the primary point of dispute has been the appropriate amount of compensation for pain and suffering. To date, these decisions are¹²: *Desrosiers v. Sec'y of Health & Human Servs.*, No. 16-224V, 2017 WL 5507804 (Fed. Cl. Spec. Mstr. Sept. 19, 2017) (awarding \$85,000.00 for pain and suffering and \$336.20 in past unreimbursable medical expenses); *Dhanoa v. Sec'y of Health & Human Servs.*, No. 15-1011V, 2018 WL 1221922 (Fed. Cl. Spec. Mstr. Feb. 1, 2018) (awarding \$94,900.99 for pain and suffering and \$862.14 in past unreimbursable medical expenses); *Marino v. Sec'y of Health & Human Servs.*, No. 16-622V, 2018 WL 2224736 (Fed. Cl. Spec. Mstr. Mar. 26, 2018) (awarding \$75,000.00 for pain and suffering and \$88.88 in unreimbursable medical expenses); *Knauss v. Sec'y of Health & Human Servs.*, No. 16-1372V, 2018

¹⁰ The undersigned further stressed that the "typical" range of SIRVA awards – meaning the middle quartiles – is \$77,500.00 to \$125,000.00 for proffered cases and \$50,000.00 to \$95,228.00 for stipulated cases. The total range for all informally resolved SIRVA claims – by proffer or stipulation – spans from \$5,000.00 to \$1,500,000.00. *Kim v. Sec'y of Health & Human Servs., No. 17-418V,* 2018 WL 3991022, at *6 (Fed. Cl. Spec. Mstr. July 20, 2018). Importantly, these amounts represent total compensation and typically do not separately list amounts intended to compensate for lost wages or expenses. *Id.* The undersigned noted that "[t]hese figures represent four years' worth of *past* informal resolution of SIRVA claims and represent the bulk of prior SIRVA experience in the Vaccine Program. However, these figures are subject to change as additional cases resolve and do not dictate the result in this or any future case. Nor do they dictate the amount of any future proffer or settlement." *Id.*

¹¹ Petitioner cited the following informal resolutions: *Deak v. Sec'y of Health & Human Servs.*, No. 14-668V (\$160,000.00); *Jenny v. Sec'y of Health & Human Servs.*, No. 14-338V (\$140,000.00); *Brand v. Sec'y of Health & Human Servs*, No. 12-549 (\$178,225.98); and *Strobel v. Sec'y of Health & Human Servs*, No. 15-1375V (\$184,750.00). Additionally, petitioner sought to distinguish the informal resolutions in *Curtis v. Sec'y of Health & Human Servs.*, No. 16-85V (\$91,217.75) and *Ponsness*, No. 15-826V (\$95,000.00).

¹² This list is limited to those decisions which have been made public at the time of issue of this decision.

WL 3432906 (Fed. CI. Spec. Mstr. May 23, 2018) (awarding \$60,000.00 for pain and suffering and \$170.00 in unreimbursable medical expenses); *Collado v. Sec'y of Health & Human Servs.*, No. 17-225V, 2018 WL 3433352 (Fed. Cl. Spec. Mstr. June 6, 2018) (awarding \$120,000.00 for pain and suffering and \$772.53 in unreimbursable medical expenses); *Kim v. Sec'y of Health & Human Servs.*, No. 17-418V, 2018 WL 3991022 (Fed. Cl. Spec. Mstr. July 20, 2018) (awarding \$75,000.00 for pain and suffering and \$520.00 for medical expenses); *Dobbins*, No. 16-854V, 2018 WL 4611267 (Fed. Cl. Spec. Mstr. Aug. 15, 2018) (awarding \$125,000.00 for pain and suffering and \$3,143.80 for medical expenses); *Cooper v. Sec'y of Health & Human Servs.*, No. 16-1387V, 2018 WL 6288181 (Fed. Cl. Spec. Mstr. Nov. 7, 2018) (awarding \$110,000.00 for pain and suffering and \$3,642.33 in unreimbursable medical expenses).

In their respective briefs, the parties compared the instant case to *Desrosiers*, *Dhanoa*, *Marino*, *Knauss and Collado*. Additionally, petitioner cited two decisions issued by other special masters in prior SIRVA cases. ¹³ In *Anthony v. Sec'y of Health & Human Servs.*, petitioner was awarded \$248,540.00 for pain and suffering. No. 14-680V, 2016 WL 1169147 (Fed. Cl. Spec. Mstr. Mar. 2, 2016). ¹⁴ In *Courbois v. Sec'y of Health & Human Servs.*, petitioner was awarded \$142,794.40 for pain and suffering. No. 13-939V, 2016 WL 2765092 (Fed Cl. Spec. Mstr. Apr. 20, 2016). ¹⁵

A. Determining Petitioner's Award of Pain and Suffering in This Case

The undersigned is mindful of all the above; however, 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. Upon the undersigned's review of the complete record in this case and in consideration of the undersigned's experience in evaluating SIRVA claims, the undersigned finds that an award of \$160,000.00 for petitioner's actual pain and suffering is appropriate in this case.

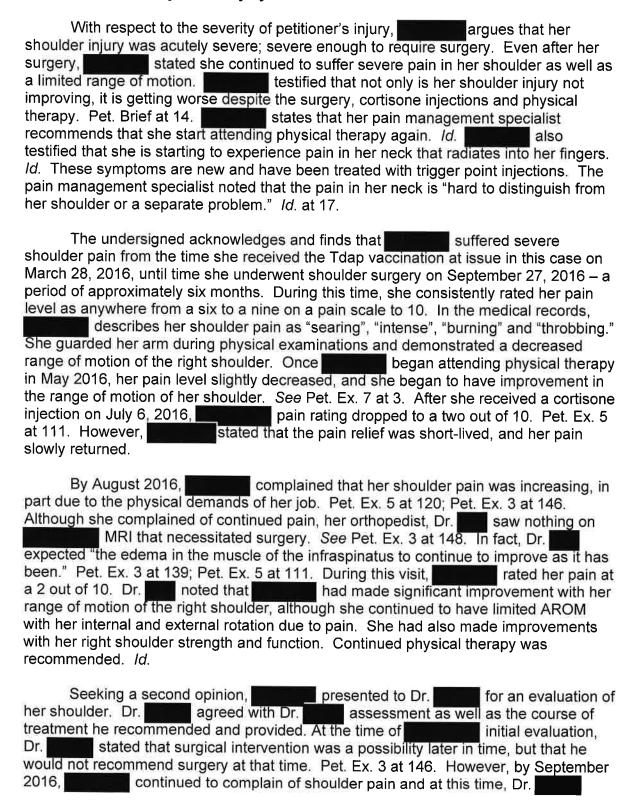
In the experience of the undersigned, awareness of suffering is not typically a disputed issue in cases involving SIRVA. In this case, neither party has raised, nor is the undersigned aware of, any issue concerning petitioner's awareness of suffering and the undersigned finds that this matter is not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

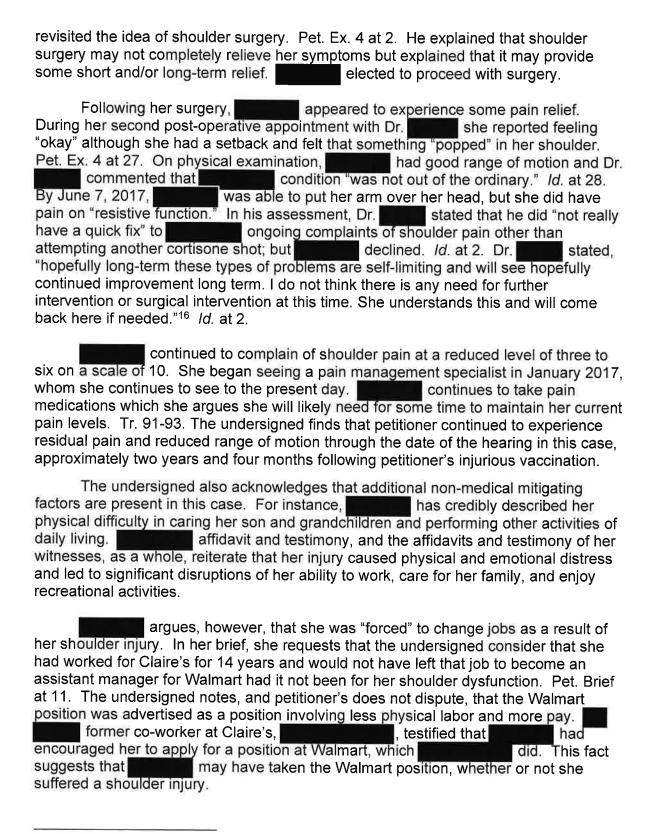
¹³ Petitioner also cited several intussusception cases; however, in the undersigned's view, such cases are not sufficiently analogous to be instructive.

¹⁴ The decision issued in the *Anthony* case did not address the factors that contributed to the special master's award. The special master had previously ruled from the bench following a damages hearing.

¹⁵ Like *Anthony*, the special master in *Courbois* had made a prior oral ruling and the factors contributing to the special master's award were not disclosed.

a. Severity of the Injury





¹⁶ This appears to be last appointment with her orthopedic surgeon.

The undersigned also acknowledges that additional non-medical mitigating factors are present in this case. particular, petitioner has credibly explained how her injury has demonstrably impacted her lifestyle taking care of herself, as well as her young child, who has an ADHD autism spectrum disorder, and her two young grandchildren. Tr. 16-20. During her testimony, described in detail her physical difficulty in caring for her son. She also discussed similar difficulties with caring for her grandchildren and performing other activities of daily living. affidavit and testimony, and the affidavits and testimony of her witnesses, as a whole, reiterate that her injury caused physical and emotional distress and led to significant disruptions of her ability to work, care for her family, and enjoy recreational activities.
b. Duration of the Suffering
i. Past Pain and Suffering
argues that for two and a half years after receiving the Tdap vaccine and one year after having surgery, she continued to have very significant pain. She requires monthly visits to a pain management specialist. Because of this, has categorized her injury as a "failed surgery" case and argues for the maximum \$250,000 award for her past pain and suffering for the significant daily pain she has endured for two and a half years.
The undersigned acknowledges and finds that suffered severe shoulder pain from the time she received the Tdap vaccination at issue in this case on March 28, 2016, until time she underwent shoulder surgery on September 27, 2016 – a period of approximately six months. As described above, there is also significant evidence of further residua following this six-month period, involving mostly pain, but also some restricted range of motion. Petitioner remained in physical therapy from a time shortly after her vaccination until her post-operative physical therapy in September 2016. After she completed physical therapy, she continued to be treated by a pain management specialist as her range of motion had improved greatly with physical therapy, but her pain had not subsided.
At the time of the hearing, petitioner continued to be treated by her pain management specialist. Claims that there is no indication that these visits will stop because of the ongoing nature of her pain. Upon the undersigned's review of the record in this case and in consideration of the undersigned's experience evaluating SIRVA claims, the undersigned finds that an award of \$160,000.00 for petitioner's actual pain and suffering to be appropriate in this case.
ii. Future Pain and Suffering

In her brief, argues that her injury is permanent. Pet. Brief at 11. She states, "there can be no legitimate dispute as to this critical fact." Because of this, argues that she is entitled to a "significant" award for future pain and suffering. At the time of the hearing, was 46 years old; she argued that she "will endure

pain each and every day for the remainder of her life." notes that she must take a strong opioid medication to treat her pain every day. She therefore requests \$20,000.00 per year for the rest of her life, nothing that the undersigned must cap her total award for pain and suffering at \$250,000.00. Pet. Brief at 14.

There are only two reasoned SIRVA damages decisions that have awarded compensation for future pain and suffering: *Dhanoa v. Sec'y of Health and Human Serv.*, No. 15-1011V, 2018 WL 1221922 (Fed. Cl. Spec. Mstr. Feb. 1, 2018) and *Curri v. Sec'y of Health & Human Servs.*, 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. 2018 WL 1221922 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. 2018 WL 6273562 at *6.

In this case, the undersigned finds that the evidence is insufficient to support a claim of permanent injury. In Curri, the petitioner filed a record from her orthopedist stating that petitioner's 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. We have no evidence that shoulder injury is permanent. While petitioner adamantly argues that her injury is a "classic case of failed surgery" and thus, her shoulder injury is permanent, has not submitted a statement or medical record from a medical professional to this effect. Petitioner sidesteps this fact by stating that "[n]o physician has ever told her that her condition will improve." Pet. Brief at 18. This statement is not accurate. Dr. stated that he expected condition to improve. And while petitioner testified that Dr. told her that she would have to live indefinitely with her shoulder symptoms, there is no documentary evidence of this prognosis. Tr. 58-60.

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 v. Sec'y of Health & Human Servs.*, No. 93-92V, 1996 WL 147722, at *22-23 (Fed. Cl.Spec. Mstr. Mar. 18, 1996); *Shapiro v. Sec'y of Health & Human Servs.*, 101 Fed. Cl. 532, 537-38 (2011). Moreover, during the damages hearing, petitioner requested time to obtain a statement from Dr. regarding her future treatment. Petitioner was granted additional time, although no statement from Dr. was ever filed. Petitioner filed a Statement of Completion on September 27, 2018 stating that "the record in this matter is now complete." (ECF No. 61).

Based on the statements of treating medical providers, and without adequate medical evidence demonstrating the likelihood that petitioner's shoulder injury, more likely than not, will extend well into the future and the lack of evidence indicating that her shoulder injury is permanent, the undersigned cannot make an award for petitioner's future pain and suffering. This finding is based on several factors. First, in reviewing the records of most recent visit with Dr. on June 7, 2017 regarding shoulder injury Dr. stated that "hopefully long-term these

types of problems are self-limiting and will see hopefully continued improvement long term. I do not think there is any need for further intervention or surgical intervention at this time. She understands this and will come back here if needed." Pet. Ex. 13 at 2. On August 30, 2018, most recent visit with her pain specialist, Nurse it is noted that upper extremity range of motion was "grossly normal" although she did have some decreased range of motion of her cervical spine. Pet. Ex. 30 at 3. Nurse recommended that continue with a repeat craniosacral massage along with additional physical therapy "to see if we can make some progress with her symptoms and also look at medication reduction if possible." Id. at 4. These types of statements from treating physicians and specialists indicate to the undersigned that condition is expected to improve. Nurse indicated that she would be working with to decrease her pain and the amount of medication would be taking in the future. There is no indication in these records that I shoulder injury is permanent. In the most recent medical record filed, range of motion of the shoulder was recorded to be "grossly normal", another distinguishing factor from the petitioner in Curri who had a permanent reduction of the range of motion of her shoulder. 2018 WL 6273562 at *2. Therefore, without any additional information regarding the future prognosis of petitioner's shoulder injury and the lack of medical evidence supporting a finding of a permanent shoulder injury, the undersigned finds that an award for petitioner's future pain and suffering is not appropriate in this case.

B. Award for Past Unreimbursed Expenses

has provided documentation of her past unreimbursable expenses. Pet. Ex. 22-23. On November 2, 2018, the parties filed a joint status report stating confirming respondent's proffer of \$4,931.06 for petitioner's past unreimbursed expenses in this case. (ECF No. 63).

C. Amount of the Award

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. For all the reasons discussed above, the undersigned finds that \$160,000.00 represents a fair and appropriate amount of compensation for petitioner's actual pain and suffering. In addition, the undersigned finds (with the agreement of the parties) that petitioner is entitled to compensation for \$4,931.06 for her past unreimbursed expenses.

VI. Conclusion

In light of all of the above, the undersigned awards the following compensation:

A lump sum payment of \$164,931.06, (representing \$160,000.00 for petitioner's actual pain and suffering and \$4,931.06 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 42 U.S.C. § 300aa-15(a). Id.

The clerk of the court is directed to enter judgment in accordance with this decision.¹⁷

IT IS SO ORDERED.

s/Nora Beth Dorsey
Nora Beth Dorsey
Chief Special Master

¹⁷ 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.