

OFFICE OF SPECIAL MASTERS

No. 00-287V

(Filed: October 30, 2006)

 PATRICIA GROHT, *
 *
 Petitioner, *
 *
 v. *
 *
 SECRETARY OF THE DEPARTMENT OF *
 HEALTH AND HUMAN SERVICES, *
 *
 Respondent. *

To Be PUBLISHED
 Attorney's Fees and Costs,
 Proof of vaccination via
 contemporaneous medical
 record

Clifford J. Shoemaker, Esq., Vienna, Virginia, for Petitioner.
Vincent J. Matanoski, Esq., United States Department of Justice, Washington, D.C., for Respondent.

DECISION ON ATTORNEYS' FEES AND COSTS¹

ABELL, Special Master:

On 16 December 2005, entitlement to compensation was denied this petitioner on the following basis:

Based on the prima facie presentation of the Petition and the lately filed records, prior to any sort of argumentation, it appears that Petitioner has a colorable claim under the Vaccine Act. However, her claim is "unsubstantiated by medical records or by medical opinion." § 13(a)(1).

Judgment entered on the case on 26 January 2006.

In order to prove entitlement to compensation, the Court must find "on the record as a whole":

- (A) that the petitioner has demonstrated by a preponderance of the evidence the matters required in the petition by section

¹ The Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b)(2), she may seek the redaction of material in this decision that "would constitute a clearly unwarranted invasion of privacy."

- 300aa-11(c)(1) of this title, and
- (B) that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition.

The special master or court may not make such a finding based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion. §13(a)(1).

In that same vein, section 300aa-11(c)(1)² requires that a petitioner supply "supporting documentation" demonstrating that he received a vaccine set forth in the Vaccine Injury Table.³

On 22 May 2000, Patricia Groht filed a petition seeking an award under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act)⁴ for alleged vaccine-related injuries resulting from one or several Hepatitis B vaccinations received "[o]n or about April 30 and May 29, 1997." Petition at 1.

Respondent contends that the Petitioner has not supplied adequate evidence to demonstrate that she actually received the vaccination(s) in question; and, hence, this Court lacks jurisdiction over the case and, consequently, the power to award Attorney's Fees and Costs.⁵

Noting that Respondent had not addressed certain key cases, including the Supreme Court's recent decision in Arbaugh v. Y&H Corp., 126 S.Ct. 1235 (2006),⁶ further briefing was ordered. Respondent's brief was received 6 October 2006. On further consideration and having read a full

² According to §11(c)(1)(A):

- A petition for compensation under the Program for a vaccine-related injury or death shall contain -
- (1) except as provided in paragraph (3), an affidavit, and supporting documentation, demonstrating that the person who suffered such injury or who died -
- (A) received a vaccine set forth in the Vaccine Injury Table or, if such person did not receive such a vaccine, contracted polio, directly or indirectly, from another person who received an oral polio vaccine.

Id. (emphasis added).

³ The present iteration of the vaccine injury table can be found at 42 C.F.R. § 100.3.

⁴ The statutory provisions governing the Vaccine Act are found in 42 U.S.C. § 300aa-10 et seq. (2000 ed.). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. § 300aa.

⁵ Typically in cases such as this, where a petitioner is unsuccessful, the Act allows for the recovery of reasonable attorney fees and costs. § 15(e). Such an award is not automatic but may be awarded provided the special master finds that the petition was (1) brought in good faith and (2) there was a reasonable basis for the claim. §15(e)(1).

⁶ In Arbaugh, the Supreme Court again decried "drive-by jurisdictional rulings" and stated that such should have "no precedential effect." Arbaugh v. Y&H Corp., 126 S. Ct. 1235, 1242 -1243 (2006).

accounting of Respondent's position, the Court remains unconvinced as to Respondent's jurisdictional argument.

As recognized by the Respondent in its brief on the jurisdictional issue:

Nor can it be said that receipt of a covered vaccine is merely a matter of pleading, and that a case would not be considered insubstantial as long as the petition merely alleged receipt of a covered vaccine. The Act clearly requires "supporting documentation, demonstrating that the person . . . received a vaccine set forth in the Vaccine Injury Table. . . ."

Respondent's Brief, filed 6 October 2006, at *7 fn 5.

Essentially, buried in this footnote is the crux of the jurisdictional argument: is jurisdiction on the face of the pleadings and the question of whether a Table vaccine was given a factual determination as to whether compensation can be granted rather than a jurisdictional bar? Absorbing as this legal question may be, the Court need not address it in the present instance. Instead, as is easily inferred from Respondent's argument and as is patent in the language of the Act, where a petitioner presents "supporting documentation" of having received a covered vaccine, the jurisdictional question in that regards becomes a non-issue.

In this case, there is a hand-written notation in the medical records of a treating physician that indicates: "4/30/97 - Hep. B. inj. #1 (not given here) (pt. wanted this to be charted)." Petitioner's Exhibit 1 at 19. Based on that notation, this Court, in its 16 December 2005 decision, was "loathe to say that the 30 April 1997 vaccination did not take place given the inclusion of this notation by a medical professional in a contemporaneous record that preceded litigation." (emphasis added). And, in fact, as has long been recognized by this Court and by the Federal Circuit:

Medical records, in general, warrant consideration as trustworthy evidence. The records contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions. With proper treatment hanging in the balance, accuracy has an extra premium. These records are also generally contemporaneous to the medical events.

Cucuras v. Secretary of HHS, 993 F.2d 1525, 1528 (Fed. Cir.1993). Moreover, a petitioner need not provide a "vaccine record" per se. After all, a "lack of contemporaneous, documentary proof of a vaccination does not necessarily bar recovery." Centmehaiey v. Secretary of HHS, 32 Fed. Cl. 612, 621 (Fed. Cl. 1995). But there has to be some type of medical documentation or corroboration and support thereto that can be relied upon by the finder of fact.

In fine, the Court notes that the statement given by Petitioner to her treating physician was made prior to the initiation of litigation. And while that medical provider does not comment on the reliability, vel non, of that statement, the Court does in fact find it to be a reliable statement as it was made in the process of seeking medical care. Hence, this single notation satisfies the supporting documentation requirement found in section 11(c)(1). See Riddick v. Secretary of HHS, No. 99-643V, 2006 WL 2990220 (Fed. Cl. Spec. Mstr. Oct. 4, 2006) (Ruling regarding Petitioner's proof of vaccination).

On 27 July 2006, Petitioner filed an Application for Attorney's Fees and Costs. That application was opposed by Respondent on jurisdictional grounds but not as to the amount requested. Provided a petition was brought in good faith and provided there was a reasonable basis for the claim, the Court may award attorneys' fees and costs. §15(e). The Court finds that the petition was brought in good faith. As to the reasonability of Petitioner's claim, Petitioner has amended her application for Attorneys' Fees and Costs to request **\$8496.67**. As that emendation was filed in August 2006, the Court will append to that amount an additional **\$400** to account for an additional 2 hours: an amount of time which could reasonably have been spent on this case in the interim by one of Petitioner's counsel, Renee Gentry, Esq., whose time is valued at \$200 per hour for 2006.⁷

Given the undersigned's extensive experience in adjudicating matters in the National Vaccine Injury program since May 1991 and based on a review of Petitioner's Application for Attorney's Fees and Costs, the accompanying documentation, as well as the Amended Application and all other briefs, the Court finds reasonable a claim for **\$8,896.67**.

In the absence of a motion for review filed in accordance with RCFC Appendix B, the clerk of the court is directed to enter judgment in favor of Petitioner in the amount of **\$8,896.67**⁸ for reasonable attorneys' fees and costs. **A check for \$8,896.67 shall be paid to Petitioner and Petitioner's counsel jointly.**

IT IS SO ORDERED.

Richard B. Abell
Special Master

⁷ No corroborating evidence was filed regarding an appropriate rate for an attorney in Miss Gentry's location and skill level; hence, it is the Court's understanding that this valuation is less a reflection of the local market to which Miss Gentry belongs and more an understanding reached between the parties as to an amount to which Respondent would not necessarily object.

⁸ This amount is intended to cover all legal expenses and encompasses all charges by the attorney against a client including "advanced costs" as well as fees for legal services rendered. An attorney may not charge or collect fees or costs in addition to the amount awarded herein. See 42 U.S.C. § 300aa-15(e)(3); and Beck v. Secretary of HHS, 924 F.2d 1029 (Fed. Cir. 1991).