OFFICE OF SPECIAL MASTERS

No. 94-1096V

Filed: January 23, 1997

MARGARET TINA LOUISE ASHE-ROBINSON,	*	
Petitioner,	*	PUBLISHED
v.	*	
SECRETARY OF THE DEPT. OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Thomas B. Shuttleworth, Virginia Beach, Virginia, for petitioner.

Elizabeth Kroop, Washington D.C., for respondent.

GOLKIEWICZ, Chief Special Master

DECISION & ORDER

Introduction

Margaret Tina Louise Ashe-Robinson filed a petition for compensation on December 28, 1994 under the

National Childhood Vaccine Injury Act of 1986 ("the Act").[1] See Pet. filed 12/28/94. In her petition, Ms. Ashe-Robinson asserted that she suffers demyelinating peripheral polyneuropathy as a result of an oral polio vaccine administered on April 17, 1992. See Pet. at 1-2.

Respondent filed a report pursuant to Vaccine Rule 4 on March 28, 1995, which concluded that petitioner failed to prove that she incurred over $1,000 in unreimbursable expenses as a result of her alleged vaccine injury.[2] See R Rpt., filed 3/28/94, at 6.[3]

Petitioner filed addenda to her original petition in an effort to substantiate the $1,000 requirement. See e.g., P Addendum to petition, filed 9/15/95; see also P Addendum to Petition, filed 4/22/96. The court subsequently conducted a hearing on June 13, 1996, in order to ascertain whether petitioner did in fact incur over $1,000 in unreimbursable vaccine-related expenses.[4] Following the hearing, and pursuant to a June 18, 1996, Court Order, the parties filed supplemental information relating to the $1,000 requirement, including medical reports on the vaccine relatedness of the claimed expenses. See P Petition and Exhibits A-N, filed 8/23/96; see also R Exh. A, B, filed 11/8/96. Based upon the information in the record, the court makes the findings herein.

As an initial matter, the court notes that in calculating the unreimbursable expenses, this court has repeatedly held that the the expenses need not be "medical" in nature. See Ferguson v. Secretary of DHHS, No. 93-376V, slip op. at 4 (Fed. Cl. Spec. Mstr. October 19, 1995) (holding that the plain language of the Act does not limit expenses to "medical expenses."). See also Hutchings v. Secretary of DHHS, No. 94-388V (Fed. Cl. Spec. Mstr. July 20, 1994); Mathiesen v. Secretary of DHHS, No. 94-703V (Order, Fed. Cl. Spec. Mstr. May 2, 1994).

Furthermore, this court has generally relied on the "but for" test as the appropriate analysis for analyzing which expenses should be used in calculating the $1,000. See e.g., Ferguson, slip op. at 5 (holding that reasonable expenses which would not have been incurred but for the vaccine related injury should be used in calculating the $1,000).

Because petitioner was in the military at the time of her April, 1992, vaccination, and subsequent onset of her polyneuropathy, petitioner's medical bills have largely been paid through military benefits. However, petitioner has submitted evidence, through filings and oral testimony, of mileage and travel expenses, medical bills, phone bills, economic loss involving the sale of a vehicle, and a health club membership, all of which petitioner claims are unreimbursable, and would not have been incurred but for the vaccination. Similar expenses have been considered legally sufficient in numerous past cases with a determination of vaccine-relatedness. The court now turns to petitioner's claimed expenses.

Mileage

Petitioner's Addendum lists 3,110 miles travelled as a result of medical problems caused by her alleged vaccine injury.[5] This court has held that petitioner can use vaccine-related travel expenses to substantiate the $1,000 requirement. See e.g., Ferguson, slip op. at 4. This court calculates petitioner's mileage expense by using the IRS figure for mileage deduction for business purposes. However, two issues arise with respect to mileage claimed by petitioner in the present case. See Addendum to petition, filed 4/22/96. First was the mileage an expense incurred by petitioner within the meaning of section 300aa-11(c)(1)(D)(i), even when petition did not use her own car for transportation? Secondly, which

claimed trips were causally related to the alleged vaccine injury, and which were not?

The first issue arises since petitioner admitted at hearing that many of the claimed trips in the Addendum to Petition did not involve a car owned by either petitioner or her husband. Tr. at 76-78. The court has consistently used the IRS mileage deduction for business purposes in order to calculate the mileage expense for purposes of the $1,000 requirement. See e.g., Williams v. Secretary of DHHS, No. 90-2239V (Fed. Cl. Spec. Mstr. October 10, 1996). As Special Master Hastings set out in Williams, this business deduction figure represents the "full cost of driving an automobile" including depreciation, maintenance, gasoline, tires, insurance, and registration.[(6)] Williams, slip op. at 2. For those trips in which petitioner's own car was not involved, petitioner's attempt to claim the IRS business deduction of 28 cents/per mile, and 29 cents/per mile is illogical. See P Exhs. A-C, filed 8/23/96. The expenses, such as depreciation, gasoline, maintenance, and automobile registration, which make up the IRS figure were simply not incurred by petitioner, but instead by the owner of the car used.

In a recent Federal Circuit decision, the court interpreted section 11's statutory reference to expenses "incurred" by the injured person. The Federal Circuit stated that this reference

was plainly meant to refer to expenses incurred on behalf of the victim by his legal representatives, and the statute has consistently been construed in that manner.

Black v. Secretary of DHHS, 93 F.3d 781, 786 (Fed. Cir. 1996). In the present case, the automobile expenses of many trips claimed by petitioner, e.g., depreciation and gasoline consumption, are costs borne by the owner of the car, not petitioner. In addition, the cars were owned by individuals other than the petitioner's legal representatives. Therefore, it is clear that the expenses were not "incurred on behalf of the victim by [her] legal representative." See Black supra. Thus the court holds that, pursuant to the Act and relevant caselaw, petitioner can only use the IRS mileage figure when petitioner's cars (her car or her husband's car) were used. For those trips when another family member or a friend's car was used, the court will instead award petitioner's actual expense, i.e., monies paid by petitioner for meals, gas, or other proven travel-related expenses.

The following entries are eliminated from petitioner's calculation based on the fact that petitioner did not use her own car for those trips: 8/5/92, 9/15/92, 11/10/92, 12/18/92, 1/12/94, 1/13/94. See Tr. at 76-78, 84-89. However, based on petitioner's testimony at hearing, petitioner incurred $34.00 in actual expenses (e.g., meals and gas) at times when friends, or family members used their cars to transport petitioner. Tr. at 108-111. This amount is a legitimate expense which will be included toward calculating the $1,000. Accord Ferguson, slip op. at 9 (allowing meals and travel expenses in calculating $1,000).

Furthermore, the court will only allow petitioner to claim mileage expenses for trips which used petitioner's car, **and which were related to the alleged vaccine injury**. In other words, those trips to care providers for reasons other than the alleged vaccine related condition are not allowable. Petitioner's own expert conceded that trips to petitioner's doctors for treatment of acne, pelvic pain, and an ovarian cyst, were not causally related to the alleged vaccine injury. See P Exh. N, filed 8/23/96.[(7)] In light thereof, petitioner can use only trips which are reasonably related to the alleged vaccine injury, rather than every medical treatment occurring after the vaccine.

Based upon the medical records, and petitioner's expert report at Exhibit N, the following entries are eliminated[(8)] since they involve treatment for a condition other than the alleged vaccine injury: 1/25/94,[(9)] 1/27/94,[(10)] 2/16/94,[(11)] 2/23/94,[(12)] 3/18/94,[(13)] 5/11/94,[(14)] 5/20/94,[(15)] 8/10/94.[(16)]

In sum, eliminating the above entries for the reasons set forth results in a reduction of petitioner's mileage calculation. Using the actual mileage submitted by petitioners at hearing,[(17)] the court finds that petitioner had 242 allowable miles in 1993 at $.28 per mile, and 1,686[(18)] allowable miles in 1994 at $.29 per mile,[(19)] i.e. $556.70 allowable mileage expense plus $34.00 in actual travel expense, for a total of $590.70 in unreimbursable travel expenses.

Medical expenses

Petitioner submitted receipts to support her claim that she incurred $284.18 in unreimbursable medical bills. See P Exh. B Attached to Addendum to Petition, filed 9/15/95. The vaccine-relatedness of the submitted bills was not questioned.

Instead respondent questioned that these bills were in fact "unreimbursable." At hearing, respondent's counsel attempted to argue that although petitioner's medical bills were not reimbursed, they would have been reimbursed, had petitioner re-submitted those bills. Tr. at 64-65. However, respondent submitted only argument to the court, and did not follow up with any persuasive evidence that these expenses are indeed reimbursable. The court is left therefore with petitioner's credible testimony that CHAMPUS has continually refused to reimburse petitioner for an amount of medical expenses equal to $284.18. Tr. at 59, 65. Therefore, the court finds that $284.18 in medical expenses can be used in meeting the $1,000 requirement.

Telephone expenses

Petitioner submitted actual phone records accompanied by detailed explanation for those phone calls which were placed to care providers in reference to the alleged vaccine injury. P Exh. C. Attached to Addendum to Petition, filed 4/22/96. Respondent did not provide persuasive evidence to rebut this evidence. Therefore, the court counts $64.46 in telephone calls toward the $1,000 requirement.

Automobile

Petitioner testified that she had to sell her manual transmission vehicle, and purchase an automatic transmission vehicle, as a result of her alleged vaccine injury. Tr. at 37-39. Counsel attempted to elicit evidence at hearing that petitioner suffered an economic loss by selling her manual transmission automobile at less than the NADA blue book value, and by purchasing an automatic vehicle at more

than the NADA blue book value.[(20)] The court agrees that the transaction did indeed involve economic loss. However, there is an issue as to whether this economic loss is an allowable expense for purposes of the $1,000 requirement. In analogous cases, involving the issue of lost wages, the court has held that lost wages are clearly an economic loss, but not an incurred expense within the meaning of 300aa-11(a)(1)(D)(i). See e.g., Robinson v. Secretary of DHHS, No. 93-530V (Fed. Cl. Spec. Mstr. February 23, 1994). The court sees no logical reason to distinguish the economic loss from the sale of a car from the lost wages. In each case, there is a theoretical, economic loss, but no incurred expense. Petitioner presented no cogent information or argument for viewing the transaction otherwise. Accordingly, the court finds that the economic loss claimed by the petitioner in the present case is not an "incurred expense."

Yet assuming arguendo that the economic loss involved in the exchange of vehicles, is in fact an incurred expense, petitioner still failed to persuade the court that this expense was reasonably related to the alleged vaccine related injury. Specifically, the court questions whether the alleged loss was due to an unreasonable transaction on the part of the petitioner, as opposed to an economic loss which would not have otherwise occurred but for the vaccine injury. Petitioner's evidence on this issue was simply vague and unpersuasive, and therefore the court finds that for legal and factual reasons, any alleged economic loss involved in the sale of petitioner's manual transmission vehicle, cannot count toward the $1,000 requirement.

Health club membership

It is petitioner's burden to substantiate the $1,000 requirement. Petitioner testified at the hearing that she joined a health club to keep up her muscle tone as a result of her neuropathy, and that she would not have joined the health club but for the fact that she was suffering from neuropathy. Tr. at 44-45. Two issues exist with respect to this membership. First of all, petitioner's only evidence of this membership is a contract which lists Janet Ashe, petitioner's mother, as the "buyer." See P Exh. 6, filed at hearing. However petitioner testified that she reimbursed her mother for the $199 membership, and thus the court finds that this was an expense actually incurred by petitioner. Tr. at 46-47.

A second issue for the court is the vaccine relatedness of this expense. Petitioner's expert stated in his report that the health club membership is reasonably related to petitioner's alleged vaccine injury in light of the fact that "the exercises which I understand she was doing at the health spa are the same types which are in rehabilitation therapy departments in hospitals." P Exh. N. In contrast, respondent submitted a medical report opining that a "membership in a health spa in which she [petitioner] was supposed to exercise without medical supervision" is not part of "standard care." R Exh. A.

The court finds both of these expert opinions to be vague and unhelpful. Neither expert supports his theory with factual evidence regarding the specific types of exercises performed by petitioner, and the relatedness or unrelatedness of these exercises to her polyneuropathy. Because the $199 health club membership would bring petitioner's unreimbursed expenses (as set forth in this decision) over $1,000, the court is unwilling to resolve this critical issue on the vague statements of the experts.[(21)]

The court will only allow the health club membership with a specific showing that this membership satisfies the "but for" analysis. Stated another way, with a showing that the exercise regime performed

by petitioner was specifically and causally related to the alleged vaccine injury, and could not have been reasonably performed without the equipment and assistance provided through a club membership, the court will allow the membership in calculating petitioner's $1,000 requirement under the Act.

Additional expenses

As a final matter, the court notes that petitioner has only submitted expenses incurred up to the filing date of her petition in December, 1994. However, since the hearing in this case, the Federal Circuit has held that in calculating $1,000 of unreimbusable expenses, petitioner can count expenses incurred up to the expiration of the relevant statute of limitations period - in the present case up to April-May, 1995.[(22)] See Black, 93 F.3d at 789-792. Thus the court will allow the parties to submit additional evidence regarding vaccine-related expenses incurred post-petition.

ORDER

The court is willing to entertain proposals from the parties as to the most fair and expeditious manner in which to resolve the $1,000 issue. By no later than **February 14, 1997**, the parties shall either contact the court in order to schedule a status conference in this case or file a joint report indicating an agreed upon manner and timetable in which to submit information regarding the health club membership and/or post-petition expenses.

IT IS SO ORDERED.

Gary J. Golkiewicz

Chief Special Master

1. The statutory provisions governing the Act are found at 42 U.S.C. § 300aa-1 et seq. (West 1991 & Supp. 1996). Hereinafter, for ease of citation, individual sections of the Act will be cited without reference to 42 U.S.C. §.

2. The Act requires that among other items, a petition for compensation must include:

an affidavit, and supporting documentation, demonstrating that the person who suffered such injury . . . incurred unreimbursable expenses due in whole or in part to such illness disability, injury, or condition in an amount greater than $1,000 . . . .

300aa-11(c)(1)(D)(i).

3. Respondent further argued that there is not a preponderance of the evidence that petitioner suffered a Table injury pursuant to 300aa-14, nor that petitioner's condition was in fact caused by her April 17 OPV. R Rpt., at 6. However, the parties have agreed that the court should first resolve the $1,000 issue in the present case. Thus the only issue before the court at the present time is whether petitioner has indeed incurred $1,000 in unreimbursable expenses pursuant to 300aa-1)(c)(1)(D)(i).

4. Citations to the transcript from the June 13, 1996, hearing will be referenced as "Tr. at -."

5. At hearing, petitioner amended this mileage figure by accounting for additional trips as well as errors in original mileage calculations. Tr. at 9-20.

6. Respondent has not challenged the use of the IRS figure for business deductions in the present case.

7. Petitioner's expert cited several specific mileage entries which involved pelvic pain, ovarian cyst, and acne treatment, including 2/16/94, 1/25/94, 3/18/94, and 5/11/94. See P Exh. N. However, the court's review of the medical records indicates that based upon petitioner's expert report, several more mileage entries are not allowable since petitioner was seen several additional times for treatment of acne and pelvic pain, rather than for her alleged vaccine induced polyneuropathy.

8. The court does not evaluate the vaccine relatedness of those trips in which petitioner's car was not used. Those trips are eliminated by reasons set forth above. See supra.

9. See P Exh. N, filed 8/23/96.

10. See Tr. at 83-84 (Petitioner testified that the 1/27/94 visit was a follow-up to the 1/12/94 visit for pelvic pain with a diagnosis of ovarian cyst.) See Med. Recs., filed 2/24/95, at 37.

11. See P Exh. N, filed 8/23/96.

12. See Tr. at 84 (2/23/94 entry is a follow-up visit for 2/16/94 visit for pelvic pain, which petitioner's own expert conceded to be unrelated to the alleged vaccine injury). See P Exh. N.

13. See P Exh. N, filed 8/23/96.

14. See P Exh. N, filed 8/23/96.

15. See Med. Recs., filed 12/28/94, at 38-39 (follow-up for ovarian cyst). Petitioner testified that she may have had two appointments that day. Tr. at 81. However, the records submitted indicate only a visit for the ovarian cyst, which according to petitioner's expert, is not related to the vaccine. See P Exh. N.

16. Tr. at 81; Med. Recs., filed 12/28/94, at 85 (This entry was to pick up birth control).

17. As between the two parties' mileage calculations, the court finds that petitioner's figures are the more accurate figures. Respondent's counsel stated at hearing that she had checked several mileage entries against a Rand McNally computer program, and counsel argued that based on that computer program, several of petitioner's claimed mileage entries should be reduced. Tr. at 69-70. However, respondent's counsel admitted that the computer program measures distances from the downtown areas of the respective cities, and not from the exact addresses from which petitioner was actually travelling. Tr. at 74.

On the other hand, petitioner offered the court actual mileage figures. Tr. at 8. For several trips, petitioner had gone back and re-traveled the exact routes in order to accurately offer the mileage. Tr. at 9. For several other longer trips, petitioner obtained maps of direct routes from the AAA travel agency, and submitted those maps to the court at hearing. See P Exhs. 1-3, submitted at 6/13/96, hearing. In sum, based on petitioner's more thorough substantiation of the actual mileage travelled, the court uses petitioner's figures in calculating the mileage expense.

18. Petitioner amended her mileage calculation at hearing to include round-trip mileage incurred for two trips from Kingston, North Carolina to Hampton "VA" Hospital. Petitioner's husband made the first trip to take petitioner to the hospital, and the second to pick up petitioner after she was discharged. Tr. at 26-27. Although petitioner's Addenda filed 9/15/95 and 4/22/96, did not include these trips, they are substantiated by medical records documenting petitioner's hospital admission in December, 1994. See Med. Recs., filed 2/24/95, at 61-64.

19. See P Exh. B, C, filed 8/23/96, for the applicable IRS figures.

20. Counsel: The purpose for which these questions right now are, is that . . . I am trying to establish a range for the Court to consider as a reasonable range which would reduce the value of the [automatic] car that she paid $4,000 for. Theoretically, for example, if that car should have been because it had such high mileage only worth $3500 and she paid $4,000, then arguably she would have suffered a $500 loss for having to buy a $3500 car for $4,000.

Tr. at 41.

21. The sum of the allowable travel expenses, medical expenses, and phone calls is **$939.34**, only $60.67 short of the Act's requirement: "in an amount greater than $1,000." 300aa-11(c)(1)(D)(i).

22. With respect to injuries arising from vaccines administered after the Act's effective date, no petition may be filed "after the expiration of 36 months after the date of the occurrence of **the first symptom or manifestation of onset or of the significant aggravation of such injury**." 300aa-16(a)(2) (emphasis added). In the present case medical records document petitioner's onset in either late April or early May, 1992. See Med. Recs. III., filed 12/28/94, at 1.