

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. XX-XXXV

(E-Filed: April 1, 2011)

JOHN DOE/11 and JANE DOE/11,)	
as Representatives of the Estate of)	UNPUBLISHED
CHILD DOE/11, Deceased,)	
Petitioners,)	Attorneys' Fees and Costs;
)	Reasonable Amount Requested
v.)	to which Respondent Does Not
)	Object
SECRETARY OF HEALTH AND)	
HUMAN SERVICES,)	
)	
Respondent.)	
_____)	

Richard Gage, Cheyenne, WY, for petitioner.

Glenn McLeod, Department of Justice, Civil Division, Torts Branch, Washington, DC, for respondent.

STIPULATED ATTORNEYS' FEES AND COSTS DECISION¹

Campbell-Smith, Special Master

On April 8, 1999, petitioners, John Doe/11 and Jane Doe/11, as representatives of the Estate of Child Doe/11, filed a petition pursuant to the National Vaccine Injury

¹ Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" decision will be available to the public. Id.

Compensation Program² (the Act or the Program). Petitioners alleged that their daughter, a seven week-old, died during the evening of December 21, 1994, as a result of receiving a hepatitis B vaccination earlier that afternoon.

The case has a complicated procedural history. The undersigned reviews that history here.

Procedural History

On January 31, 2008, the undersigned issued a decision dismissing the petition, and petitioners timely sought review. Petitioners argued that the undersigned applied a legally erroneous “compelling proof” standard on causation, and that the undersigned’s fact finding was arbitrary and capricious.

On July 31, 2008, the Court of Federal Claims issued an opinion vacating the undersigned’s decision and remanding the case to the undersigned with instructions to allocate the burden of proof properly, to reweigh the evidence, and to address separately each of the three prongs of the causation test articulated in Althen v. Secretary of Health and Human Services., 418 F.3d 1274, 1278 (Fed. Cir. 2005). See Doe/11 v. Sec’y of Health and Human Servs., 83 Fed. Cl. 157, 176 (2008).

On October 29, 2008, the undersigned issued her decision on remand, again dismissing the petition, finding that petitioners had not established a prima facie case that the vaccine caused their daughter’s death. Doe/11 v. Sec’y of Health and Human Servs., No. 99-212V, 2008 WL 4899356 (Fed. Cl. Spec. Mstr. Oct. 29, 2008).

On December 1, 2008, petitioners sought review of the special master’s decision on remand denying compensation. Petitioners argued that the undersigned had misapplied again the legal standard on causation, and that the undersigned’s fact finding was arbitrary and capricious.

On April 22, 2009, the Court of Federal Claims issued an opinion affirming the undersigned’s remand decision. Doe/11 v. Sec’y of Health and Human Servs., 87 Fed. Cl. 1 (2009). Judgment dismissing the petition was entered on April 24, 2009. On June 18, 2009, petitioners noticed an appeal of that decision to the Federal Circuit. The Federal Circuit affirmed the dismissal of petitioners’ claim. Doe v. Sec’y of Health and Human Servs., 601 F.3d 1349 (Fed. Cir. 2010).

² The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 *et seq.* (hereinafter “Vaccine Act” or “the Act”). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

Subsequently, petitioner filed a writ of certiorari seeking review by the United States Supreme Court. On November 8, 2011, the Supreme Court denied petitioners' writ of certiorari. Doe v. Sebelius, 83 Cl. Ct. 157 (2008), aff'd, 601 F.3d 1349 (Fed. Cir. 2010), cert. denied, 31 S. Ct. 573 (2010).

Prior to the dismissal of the petition on remand and while petitioners' motion for review was pending at the Court of Federal Claims, petitioners' counsel filed, on March 13, 2009, an application for interim attorneys' fees and costs. See Application for Award of Interim Attorneys' Fees and Reimbursement of Costs (Ps' Interim Fee App.). Petitioners requested \$183,353.83 in attorneys' fees and costs. See Ps' Interim Fee App. at 4. On April 30, 2009, respondent's counsel filed a response objecting to the number of hours expended by and the hourly rates charged by Mr. Gage. See Respondent's Response to Petitioners' Application for Award of Interim Attorneys' Fees and Reimbursement of Costs (R's Response to Ps' App.). Respondent's counsel also objected to the number of hours expended by and the hourly rate charged by petitioners' expert immunologist, Dr. Alan Levin. R's Response to Ps' App. at 5.

The undersigned issued an interim fees and costs decision on June 9, 2009, awarding petitioners \$12,985.48. That amount included attorneys' fees for the firm of Gage & Moxley of \$6,968.50,³ and incurred costs of \$6,016.98.⁴ Doe/11 v. Sec'y of Health and Human Servs. No. 99-212V, 2009 WL 1803457 (Fed. Cl. Spec. Mstr. June 9, 2009). The awarded amount of fees and costs was less than the amount requested. See id. Due to questions about the reasonableness of the remaining \$159,985.75⁵ in attorneys' fees and \$10,000.00 in attorneys' costs, the undersigned deferred consideration of the disputed portions of the interim fees and costs request until petitioners submitted their final petition for fees and costs.

³ This award of attorneys' fees included fees awarded for work performed by Mr. Gage.

⁴ These costs included the costs incurred for the work performed by petitioners' expert pathologist, Dr. John Shane.

⁵ Petitioners' counsel requested \$159,985.75 in his original interim fee application for the period of time from January 2006 through March 2, 2009. When directed by the undersigned to provide the information on his expended hours and the tasks performed in a spreadsheet format, petitioners' counsel filed an attachment to Petitioners' Response to December 4, 2009 Order (Ps' Response). The information in the attachment reflected a request for fees totaling \$161,051.75. See Ps' Response, Attachment at 11. The undersigned looked not to the dollar amount requested but rather to the number of hours that petitioners' counsel expended in 2006 and 2007 to arrive at a determination of the number of hours in question.

On June 15, 2009, petitioners' counsel moved for review of the interim fees and costs decision. Petitioners' Memorandum in Support of Motion for Review of the Special Master's June 9, 2009, Interim Fees Decision (Ps' Motion for Review). As were petitioners' earlier review motions, petitioners' motion for review of the interim fee decision was assigned to the Honorable Mary Ellen Coster Williams. Judge Williams granted petitioners' motion for review, awarding fees for the period of time that the case was before her on review, and reversing, the portion of the undersigned's interim fee decision deferring consideration of the disputed aspects of the interim fee petition. See Doe/11 v. Sec'y of Health and Human Servs., 89 Fed. Cl. 661 (Nov. 10, 2009) (Opinion and Order).⁶

On June 9, 2009, the undersigned issued an Interim Attorneys' Fees and Costs Decision. On June 19, 2009, petitioners' counsel filed a motion for review with respect to the undersigned's interim award of attorneys' fees and costs. On November 11, 2009, Judge Williams issued an Order and Opinion granting petitioners' motion for review of Special Masters Decision on interim fees and awarding partial interim fees in the amount of \$39,715.80. On November 24, 2009, petitioners' counsel filed a second motion for interim fees and costs, which the undersigned denied. On January 29, 2010, the undersigned issued a Decision on Remand awarding interim attorneys' fees and costs in the amount of \$62,301.48,⁷ an amount in addition to the interim award from Judge Williams for counsel's work performed on review before her. To date, petitioners' counsel has been awarded interim fees in the amount of \$102,017.28.

On February 18, 2011, petitioners' counsel filed yet another interim application for an award of interim attorneys' fees and reimbursement of costs. Petitioners' counsel noted in his motion that "[t]his case is now concluded. Therefore, there should be no further fees or cost[s] incurred in association with the underlying case." Fee App. at 1. The undersigned directed petitioners' counsel to amend his fee petition to reflect that it was in fact a final fee petitioner. On February 22, 2011, petitioners' counsel filed a final application for award of attorneys' fees and reimbursement of costs (Fee App.).

The Parties' Current Stipulation

⁶ Judge William's noted that the undersigned's award of \$12,985.48 was not challenged.

⁷ This amount reflects \$6,968.50 in interim attorneys' fees and \$6,016.98 in interim attorneys' costs previously awarded in the undersigned's June 9, 2009 Decision on Interim Fees and Costs but for which no judgment was entered. The award also included \$41,816.00 in interim attorneys' fees for work performed in 2006-2007 and \$7,500.00 in interim attorneys' costs.

The Vaccine Act permits an award of reasonable attorneys' fees and costs. 42 U.S.C. § 300 aa-15(e). On March 28, 2011, the parties filed a joint stipulation regarding attorneys' fees and costs indicating that respondent's counsel raised objections to certain items in petitioners' Final Fee Application. Based on informal discussions, petitioners' counsel amended the Final Fee Application to request an award of \$76,609.56.⁸ Respondent's counsel did not object to the amended requested award of \$76,609.56.

Based on the reasonableness of petitioners' request and respondent's counsel's lack of objection to petitioners' counsel's fee request, the undersigned **GRANTS** the parties' joint stipulation regarding attorneys' fees and costs.⁹

The undersigned awards a total of \$76,609.56 in attorneys' fees and costs. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court **SHALL ENTER JUDGEMENT** in petitioners' favor in the amount of \$76,609.56 in attorneys' fees and attorneys' costs.¹⁰ The judgment shall reflect that the Richard Gage, Esquire, may collect \$76,609.56 from petitioners.

IT IS SO ORDERED.

s/Patricia Campbell-Smith
Patricia Campbell-Smith
Special Master

⁸ The inconsistency in dollar amounts between paragraph 3 and paragraph 5 of the parties' stipulation were resolved by an oral representation from respondent's counsel on April 1, 2011, wherein he stated that the agreed upon amount for fees and costs was \$74,609.56.

⁹ Pursuant to General Order No. 9, petitioners aver that they did not have any out-of-pocket expenses.

¹⁰ Pursuant to Vaccine Rule 11(a), entry of judgment is expedited by the parties' joint filing of notice renouncing the right to seek review.