

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-584V

(Filed: January 7, 2010)

TO BE PUBLISHED¹

FRED KING and MYLINDA KING,
parents of Jordan King, a minor,

Petitioners,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

Vaccine Act Interim Costs;
Fees for Omnibus Proceedings.

DECISION AWARDING INTERIM COSTS

HASTINGS, *Special Master*.

In this case under the National Vaccine Injury Compensation Program (hereinafter “the Program”), the petitioners seek, pursuant to 42 U.S.C. § 300aa-15(e),² an interim award for attorneys’ costs incurred in the course of the petitioners’ attempt to obtain Program compensation. After careful consideration, I have determined to grant the request, in part, at this time, as it pertains to the PSC Committee Costs, for the reasons to be set forth below.

¹ Because I have designated this document to be published, each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b); 42 U.S.C. § 300aa-12(d)(4)(B). Otherwise, this entire document will be available to the public.

² The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2006). Hereinafter, for ease of citation, all “§” references will be to 42 U.S.C. (2006).

I

BACKGROUND

This case concerning Jordan King is one of more than 5,000 cases filed under the Program in which it has been alleged that a child's disorder known as "autism," or an autistic spectrum disorder, was caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the 5,000 cases in this court, was set forth in my decision filed in the case of *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), and will not be repeated here. However, a very brief summary of that history follows.

A. The Omnibus Autism Proceeding

Beginning in 1998, certain theories became popular in the public suggesting that the measles-mumps-rubella ("MMR") vaccine, and/or a mercury-based preservative known as "thimerosal" contained in several childhood vaccinations, might be causing the neurodevelopmental disorder known as autism. The emergence of those theories led to a large number of claims filed under the Program, each alleging that an individual's autism, or a similar disorder, was caused by the MMR vaccine, by thimerosal-containing vaccines, or by both. To date, more than 5,000 such cases have been filed with this court, and most of them remain pending.

To deal with this group of cases involving a common factual issue – *i.e.*, whether these types of vaccinations can cause autism – the Office of Special Masters (OSM) devised special procedures. On July 3, 2002, the Chief Special Master, acting on behalf of the OSM, issued a document entitled *Autism General Order #1*,³ which set up a proceeding known as the Omnibus Autism Proceeding (OAP). In the OAP, a group of counsel selected from attorneys representing petitioners in the autism cases, known as the Petitioners' Steering Committee (PSC), was charged with obtaining and presenting evidence concerning the *general issue* of whether vaccines can cause autism, and, if so, in what circumstances. The evidence obtained in that general inquiry was to be applied to the individual cases. *Autism General Order #1*, 2002 WL 31696785, at *3, 2002 U.S. Claims LEXIS 365, at *8.

³ *Autism General Order #1* is published at 2002 WL 31696785, 2002 U.S. Claims LEXIS 365 (Fed. Cl. Spec. Mstr. July 3, 2002). I also note that the documents filed in the Omnibus Autism Proceeding are contained in a special file kept by the Clerk of this court, known as the "Autism Master File." An electronic version of that File is maintained on this court's website. This electronic version contains a "docket sheet" listing all of the items in the File, and also contains the complete text of most of the items in the File, with the exception of a few documents that are withheld from the website due to copyright considerations or due to 42 U.S.C. § 300aa-12(d)(4)(A). To access this electronic version of the Autism Master File, visit this court's website at www.uscfc.uscourts.gov. Select the "Vaccine Info" page, then the "Autism Proceeding" page.

Ultimately, the PSC elected to present two different theories concerning the causation of autism. The first theory alleged that the *measles* portion of the MMR vaccine can cause autism, in situations in which it was alleged that thimerosal-containing vaccines previously weakened an infant's immune system. That theory was presented in three separate Program "test cases" during several weeks of trial in 2007. The second theory alleged that the mercury contained in the thimerosal-containing vaccines can *directly affect* an infant's brain, thereby substantially contributing to the development of autism. The second theory was presented in three additional "test cases," including this *King* case, during several weeks of trial in 2008.

On February 12, 2009, decisions were issued concerning the three "test cases" pertaining to the PSC's *first* theory. In each of those three decisions, the petitioners' causation theories were rejected. I issued the decision in *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Patricia Campbell-Smith issued the decision in *Hazlehurst v. Secretary of HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Denise Vowell issued the decision in *Snyder v. Secretary of HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009).

Decisions have not yet been issued in the test cases concerning the PSC's *second* theory, including this *King* case.

B. The Request for "Interim" Costs in this Case

On November 4, 2008, the petitioners in this case filed their application for interim fees and costs. Respondent filed a response on February 6, 2009, and a number of additional materials addressing the application have been filed by both parties since that time.

In their application, petitioners sought a total of \$7,202,653 for interim fees and costs. This total reflected the fact that this case was, as explained above, one of the "test cases" in the OAP. Because this was a "test case" in which the petitioners sought to present *all* of the "general causation" evidence concerning the theory that thimerosal-containing vaccines can cause autism, several different law firms participated in the development and presentation of the evidence, while five expert witnesses prepared expert reports and testified at length for petitioners during the evidentiary hearing. The high total sought by petitioners reflects the participation of all those law firms and expert witnesses.

This fees and costs application dwarfs any previous fees application in the history of the Program, in the amount sought, the number of law firms involved, and in the scope and complexity of the disputes between the parties concerning individual issues. During unrecorded telephonic status conferences, I have discussed with counsel for both sides strategies for most efficiently dealing with these many issues.

On July 10, 2009, I issued an interim award for fees and costs attributable to the law firm representing the King family, Williams Love O'Leary & Powers. On July 27, 2009, I issued an

interim award for fees and costs attributable to Ed Kraus, one of the attorneys on the PSC. On September 28, 2009, I issued an interim award for fees and costs to *all* of the other PSC member firms whose interim fees and costs requests remained pending.

This decision awards interim costs for *all* of the experts and expenses listed in Tab C of the November 4, 2008, application, with the exception of the following four experts or consultants: (1) David Geier, (2) Dr. Mark Geier, (3) Dr. Robert Hirsch, and (4) Dr. Heather Young. A separate decision will be issued at a later date regarding compensation for those four experts/consultants.

II

AN INTERIM AWARD IS APPROPRIATE AT THIS TIME

An “interim award” of costs is permissible, if appropriate under the particular circumstances, in a Program case. *Avera v. Secretary of HHS*, 515 F.3d 1343 (Fed. Cir. 2008). I find that the circumstances are appropriate for such an interim award at this time in this case. While in the vast majority of Program cases, only *one* award for *interim* fees and costs, if any, would be appropriate, the extremely unusual circumstances of this case justify the series of interim awards granted in this case..

I conclude that the petitioners filed this petition in good faith, and with a reasonable basis for the claim, so that an award is appropriate pursuant to 42 U.S.C. § 300aa-15(e)(1).

Respondent has requested that I state in writing my reasoning, previously stated orally during an unrecorded status conference, concerning one argument raised in respondent’s response filed on February 6, 2009. In that response, respondent objects to an interim fees and costs award on the grounds that, at this time, the PSC has not established that the \$7,202,653.10 in interim fees and costs claimed are reasonable. According to respondent, it is currently unknown how many, if any, other claims pending in the Program will be “resolved” by the entitlement ruling in this single case. Respondent objects and argues that if the entitlement decision in this case determines the outcome of this case alone, then petitioners’ interim fees and costs request for several million dollars is *per se* unreasonable.

I do not find merit in this argument of the respondent. I conclude that the presentation of the PSC’s second general theory of vaccine causation, presented in this *King* case and in the two other “second theory” test cases, was undoubtedly a crucial and huge step toward resolving the pending autism cases. In the *King*, *Mead*, and *Dwyer* cases, the petitioners presented their evidence concerning one of the PSC’s two general theories of vaccine causation. Those presentations will soon result in rulings by the three special masters. All of the petitioners with pending claims will be able to study those rulings, along with the recently-issued rulings concerning the PSC’s *first* general theory of causation, and consider their impact upon the viability of the pending cases. It is true, of course, that until the rulings of the special masters in the “second theory” test cases are issued, and until any *appeals* concerning any of the six test case rulings are resolved, no one can

know *exactly how* those test case rulings will affect the resolution of the pending petitions. But, based upon both my experience in prior “omnibus proceedings” under the Program (see *Cedillo*, 2009 WL 331968, at *12), and my understanding of the issues involved in these autism cases, I am confident that the massive efforts made by the petitioners’ counsel and experts, the respondent’s counsel and experts, and the special masters, in presenting and resolving this *King* case and the other autism test cases, will ultimately, after the resolution of all appeals, prove to be *very fruitful* in leading to the ultimate resolution of most, if not all, of the pending autism petitions.

In short, I *reject* the respondent’s argument that I cannot determine, at this time, whether the amount of interim fees and costs sought by petitioners in this case is reasonable. I conclude that I am, in fact, in a very good position to evaluate the reasonableness of the interim fees and costs request.

After reviewing the entire record in this case, and the record of the Omnibus Autism Proceeding as well, I conclude that the amount set forth herein is reasonable and appropriate compensation for the costs incurred by the PSC Committee.

III

THE AMOUNT AWARDED IN THIS DECISION IS REASONABLE AND APPROPRIATE

Following respondent’s objections, petitioners’ counsel indicated that the PSC Committee agreed to reduce the amount claimed for interim costs for experts, consultants and expenses (other than those associated with David Geier, Dr. Mark Geier, Dr. Robert Hirsch, and Dr. Heather Young) to \$500,000.00. Respondent’s counsel has indicated that respondent will not object to that amount.⁴

After reviewing the entire record of this case, as well as the record in the Omnibus Autism Proceeding in general, I conclude that such amount, which I award in this Decision, is reasonable and appropriate compensation for the costs in question incurred by the PSC member firms.

Of note, this Decision resolves *all* costs requested by the PSC at Tab C of the *King* interim fees application filed on November 4, 2008, with the exception of the four experts/consultants discussed above. This Decision further resolves *all* subsequent additions and modifications to Tab C.

In this regard, I am aware that the amount that I award in this Decision is very large. I take very seriously my duty and responsibility, in all Program cases, to award Program funds only in

⁴ I note that respondent’s counsel indicated that respondent would not object to a \$500,000.00 award of costs to the PSC only after I informed respondent that I was rejecting her argument that I could not determine the reasonableness of the PSC’s interim fees and costs application at this time.

reasonable and appropriate amounts. However, given the unusual circumstances of this case, I conclude that the amount awarded in this decision is, in fact, reasonable and appropriate.

IV

CONCLUSION

For the reasons set forth above, I hereby make an interim award of PSC Committee costs in this case, pursuant to 42 U.S.C. § 300aa-15(e), in the total amount of \$500,000.00.

In the absence of a timely motion for review of this Decision, the Clerk of this court shall enter judgment accordingly.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master