In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

Filed: September 27, 2010

MARY BROWNING, mother and next friend of her daughter, MAEVE BRYNILDSON,	)	No. 02-928V
Petitioner,	)	TO BE PUBLISHED
v.	)	Attorneys' Fees and Costs; Reasonable basis;
SECRETARY OF HEALTH AND HUMAN SERVICES,	)	Mercury toxicity; Unopposed
Respondent.	)	

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA for Petitioner.
Lynn E. Ricciardella, United States Department of Justice, Washington, D.C. for Respondent.

ATTORNEYS' FEES AND COSTS DECISION[1]

LORD, Chief Special Master.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Mary Browning filed this case under the National Childhood Vaccine Injury Act ("Vaccine Act" or the "Act"), 42 U.S.C. § 300aa-10 et seq., on behalf of her daughter, Maeve Brynildson. Petitioner alleges that thimerosal-containing vaccines ("TCVs") caused her daughter to suffer from "mercury toxicity," leading to a variety of developmental injuries. This case was consolidated with Petitioner's claim on behalf of Maeve's sister, Katherine (Kate), and brother, Colin. See Order, June 11, 2008. I have issued fee decisions in all three cases contemporaneously.[2] My decisions in Kate's and Colin's cases may provide helpful context for this decision. See Browning (Katherine) v. Sec'y of Dep't of Health & Human Servs., No. 02-929V, Fee Decision [hereinafter "Kate's Fee Decision"]; Browning (Colin) v. Sec'y of Dep't of Health & Human Servs., No. 07-453V, Fee Decision.

[1] 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 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). In the absence of a timely motion, the entire ruling will be available to the public. Id.

[2] Although I am issuing a separate decision in each of the three cases, from time to time, I will refer in one decision to portions of another decision.

On March 19, 2010, I issued a decision granting Respondent's motion for summary judgment and denying entitlement. Subsequently, Petitioner timely filed an application for fees and costs. After Petitioner discussed the application with Respondent, Petitioner filed an amended fee application, to which Respondent did not object.[3]

Petitioner was represented by the firm Conway, Homer & Chin-Caplan, P.C. ("CHC"). Ronald C. Homer, Esq., was the attorney of record, but the billing records show that multiple attorneys worked on this case. Because the fee application in Kate's case (approximately $132,000.00) represented about five times the amount sought in Maeve's case, I convened several status conferences to discuss these fee applications.[4] On June 1, 2010, before any of these status conferences, Respondent, in Colin's case, objected to the entire request for fees and costs, amounting to $42,565.02. In total, CHC has requested $197,926.05 in fees and costs in these three cases, none of which produced evidence or expert opinion sufficient to sustain Petitioner's allegations.[5]

After filing the fee application, Petitioner informed the court during a status conference that work performed for Maeve's case (and for others that were grouped by counsel under the rubric "mercury toxicity" cases), was billed to Kate's case. I therefore undertook a detailed review of the record in this case and the other "mercury toxicity" cases before issuing this decision. After reviewing the records in both Maeve's and Kate's cases, I conclude that the $23,361.03 sought in Maeve's case represents amounts incurred that were specific to Maeve's case, such as the costs of gathering and filing Maeve's medical records.[6]

On August 2, 2002, Petitioner filed this claim and Kate's claim. The facts and allegations in both cases were essentially the same, and during the entitlement phase, Petitioner filed substantially the same the briefs and evidence in both cases. Despite making a number of efforts to obtain medical records and a medical expert opinion to support her claims, Petitioner was unable in the course of eight years to produce sufficient evidence of causation in any of Petitioner's cases. Therefore, on March 19, 2010, I granted Respondent's motion for summary judgment. [7]

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[3] Special masters are not bound by Respondent's lack of objection. See § 300aa-15(e)(1). See Savin v. Sec'y of Dep't of Health & Human Servs., 85 Fed. Cl. 313, 317-18 (2008).

[4] Status conferences regarding Petitioner's fee application were convened on June 21, 2010, July 9, 2010, and August 12, 2010. The July 9, 2010 and August 12, 2010 status conferences were recorded by the Court's Electronic Digital Recording System ("EDR"). The times noted in citations to those status conferences refer to the EDR record.

[5] To be clear, this is not a case in which Petitioner ever sought a hearing. On the contrary, all of her efforts were designed to forestall indefinitely the time when she would have to produce evidence to prove her case. Petitioner recognized, as did counsel, that the evidence she needed to prove causation did not exist when the petition was filed. See Kate's Fee Decision, slip op. at 9-12.

[6] It is a confusing picture, to be sure. Apart from Colin's and Kate's fee petitions, the amounts sought in the other fee petitions in the "mercury toxicity" group seem to be in line with the amount sought in Maeve's case. See, e.g., Jakymowych v. Sec'y of Dep't of Health & Human Servs., No. 05-518V.

[7] Notwithstanding her difficulties finding supporting evidence in Kate's and Maeve's cases, in June 2007, Petitioner filed Colin's case. Petitioner voluntarily dismissed Colin's case in October 2009.

On May 3, 2010, Petitioner's counsel filed a motion for attorneys' fees in each Brynildson sibling's case. On May 27, 2010, Petitioner filed in this case "Petitioner's Amended Application For Attorneys' Fees and Costs" ("Fee Application"). In the Fee Application, Petitioner requested $21,846.20 in attorneys' fees, $1,364.83 in attorneys' costs, and $150.00 in Petitioner's costs. Id. In accordance with General Order #9, Petitioner represented that she incurred $150.00 of personal litigation costs. Pet'r & Counsel Statement, May 3, 2010.

II. DISCUSSION

The question is whether there was a reasonable basis to spend so much time and effort pursuing these cases, whether as a group or individually. In my approach to this question, I am guided by the provisions of the Vaccine Act, the statutory scheme and legislative history, and applicable case law. In particular, I am mindful of the importance of providing prompt and adequate compensation to injured vaccinees and the attorneys representing them. Those attorneys play a crucial and much-appreciated role in carrying out the purposes of the Act.

A. Standard for Awarding Attorneys' Fees

The Vaccine Act mandates the award of reasonable attorneys' fees and costs to successful petitioners. § 300aa-15(e). If a petitioner does not establish entitlement to compensation, the special master may award reasonable attorneys' fees and costs if the petition was brought in good faith and there was a reasonable basis for the claim. § 300aa-15(e)(1); Saxton v. Sec'y of Dep't of Health & Human Servs., 3 F.3d 1517, 1520-21 (Fed. Cir. 1993). If the petition for compensation is denied, a petitioner does not have a right to an award of attorneys' fees and costs; the Vaccine Act leaves such an award to the special master's discretion. Saxton, 3 F.3d at 1520. Even if good faith and a reasonable basis are found, a fee award is not mandatory. § 300aa-15(e)(1); Di Roma v. Sec'y of Dep't of Health & Human Servs., No. 90-3277V, 1993 WL 496981, *1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). "Because public policy concerns warrant against an attorneys' fees proceeding escalating to the level of full litigation, the special master is given 'reasonably broad discretion' to determine the proper amount of an award." Carrington v. Sec'y of Dep't of Health & Human Servs., 85 Fed. Cl. 319, 322-23 (2008) (quoting Wasson v. Sec'y of Dep't of Health & Human Servs., 24 Cl. Ct. 482, 483 (1991), aff'd, 988 F.2d 131 (Fed. Cir. 1993)).

B. Definition of Reasonable Basis

The term "reasonable basis" is not defined in the statute; the case law, however, gives some interpretive guidance. "[T]he 'reasonable basis' requirement 'is objective, looking not at the likelihood of success of a claim but more to the feasibility of the claim.'" Turner v. Sec'y of Dep't of Health & Human Servs., No. 99-544V, 2007 WL 4410030, *6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) (quoting Di Roma, 1993 WL 496981, at *1). Counsel has an ongoing obligation to ensure that the claim is founded upon a reasonable basis. As more evidence about a claim is discovered, "the reasonable basis that may have been sufficient to bring the claim [can] cease[] to exist, [and] it can[] [no longer] be said that the claim is maintained in good faith." Perreira v. Sec'y of Dep't of Health & Human Servs., 33 F.3d 1375, 1377 (Fed. Cir. 1994).

To determine whether a claim has a reasonable basis, courts have looked to a number of factors, "including the factual basis, the medical support and jurisdictional issues." Di Roma, 1993 WL 496981, at *1. The court also should consider the circumstances under which a petition was filed. See Turner, 2007 WL 4410030, at *6. A petitioner does not need to establish causation to show a claim has a reasonable basis. A reasonable basis can still exist, for

example, where an expert interprets ambiguous evidence to reach a result that differs from the court's interpretation, or where the trier of fact decides that the strength of testimony is insufficient to support a particular finding. See Stevens v. Sec'y of Dep't of Health & Human Servs., No. 90-221V, 1992 WL 159520, *3 (Fed. Cl. Spec. Mstr. June 9, 1992). Historically, special masters have been "quite generous in finding a reasonable basis for petitioners." Turner, 2007 WL 4410030, at *8 (quoting Turpin v. Sec'y of Dep't of Health & Human Servs., No. 99-564V, 2005 WL 1026714, *2 (Fed. Cl. Spec. Mstr. Feb. 10, 2005)).

Special masters have been less generous to petitioners when counsel fails to investigate the facts or continues to prosecute a case after it should have been recognized that the evidence was manifestly insufficient. See, e.g., Perreira, 33 F.3d at 1377 (denying fees incurred at hearing when petitioner's counsel knew his expert's opinion was legally insufficient).[8] In Perreira, the Federal Circuit affirmed the special master's finding that, once petitioner's only expert submitted an opinion that was legally insufficient to establish causation, the case no longer had reasonable basis. Id. Nor does the submission of an expert report, by itself, establish a reasonable basis for the claim; the report must fit the facts of the case. See Perreira, 33 F.3d at 1377; Stevens, 1992 WL 159520 (denying fees based on lack of reasonable basis when expert report was based solely on mother's affidavit, with no reference to the medical records).

Counsel has a "duty to the court to avoid frivolous litigation." Perreira, 33 F.3d at 1377. "Rather than waste the court's time and efforts, an attorney should use reasoned judgment in determining whether to . . . pursue a claim." Murphy, 30 Fed. Cl. at 62. However, "the [Vaccine] Program's interest in promoting attorney representation in vaccine cases, as contemplated by the attorneys' fees provision of the statute, must be balanced carefully against the court's examination of the reasonableness of the basis for bringing the vaccine petition." Turner, 2007 WL 4410030, at *11. In any event, counsel's "ethical obligation to be a zealous advocate" does not give counsel "a blank check to incur expenses without regard to the merits of [the] claim." Perreira v. Sec'y of Dep't of Health & Human Servs., 27 Fed. Cl. 29, 34-35 (1992), aff'd, 33 F.3d 1375 (Fed. Cir. 1994).

C. The Reasonable Basis That Existed When the Case Was Filed Ceased After It Became Clear Petitioner Could Not Provide Evidence Of Causation.

The record in Kate's and Maeve's cases documents counsel's efforts to protract the proceedings indefinitely, in the hope that someday evidence of vaccine injury causation would be discovered. See Kate's Fee Decision, slip op. at 6-12. This raises questions as to whether,

[8] See also Murphy v. Sec'y of Dep't of Health & Human Servs., 30 Fed. Cl. 60, 61 (1993), aff'd 48 F.3d 1236 (Fed. Cir. 1995) (affirming special master's finding of no reasonable basis when the medical and other written records contradicted the claims in the petition); Everett v. Sec'y of Dep't of Health & Human Servs., No 91-1115V, 1992 WL 35863 (Fed. Cl. Spec. Mstr. Feb. 7, 1992) (denying fees when the medical records did not support petitioner's claim of an adverse reaction to vaccination and no expert report was filed); Stevens, 1992 WL 159520, at *3-*4 (denying fees when counsel relied on a medical expert's opinion that had "no plausible factual support" and counsel failed to adequately investigate the facts); Collins v. Sec'y of Dep't of Health & Human Servs, No. 91-821V, 1992 WL 164512 (Fed. Cl. Spec. Mstr. June 23, 1992) (denying fees when the injuries alleged in the petition were not supported by medical records or expert opinion); cf. Turner, 2007 WL 4410030, at *10 (finding a reasonable basis when, after filing a skeletal petition, counsel promptly investigated the case, and "counsel [did] not unduly prolong[] the proceeding but [] moved promptly for judgment on the record" after being unable to find an expert).

in the absence of factual support, a reasonable basis for the claims ever existed, and, if a reasonable basis did exist, when it ceased.

I conclude that this case had a reasonable basis at its commencement. The record shows that Maeve's case was brought at a time when many petitioners were filing claims based on reports that TCVs might cause autism and other developmental disorders. Most of those cases were grouped into the Omnibus Autism Proceeding ("OAP").[9] CHC initially sought and obtained a stay to permit Petitioner to await the results of discovery in the OAP which, it was reasonably believed, might disclose evidence that could be used on behalf of the Brynildsons. For a variety of reasons, including the fact that Maeve and her sister were deemed by their own treating physician not to have disorders on the autism spectrum, the OAP did not yield supporting evidence. Thereafter, CHC diligently attempted to find support in for the Brynildsons' cases. Based on these circumstances, I find that most of the requested fee award is reasonable.

After a period of several more years, however, it became clear that, not only did the case lack factual support in the medical records, there also was no reliable medical theory supporting causation. Maeve's own treating physician and designated expert, Dr. Susan L. Youngs, opined in 2008 that Maeve did not suffer from mercury toxicity or symptoms that would place her on the autism spectrum. See Pet'r Ex. 24. Over the course of these protracted proceedings, which contained abundant enlargements of time and procedural maneuvering, the special masters assigned repeatedly informed Petitioner and counsel that a specific, legally sufficient expert report was needed, and that none of the submissions made by Petitioner satisfied the requirements for proving causation. See Kate's Fee Decision, slip op. at 7-10.

By April 15, 2009, at the very latest, the complete lack of medical support for Petitioner's allegations concerning Maeve should have been clear. On that date, Petitioner submitted the report of Dr. Richard C. Deth, Ph.D., a professor of pharmacology. Dr. Deth's report generally discussed evidence that TCVs could cause autism. It made no mention of Maeve Brynildson, her medical condition, or her vaccinations. With the submission of Dr. Deth's completely unspecific report, following all the other vain efforts to obtain medical evidence and expert testimony to sustain Petitioner's allegations, no reasonable basis for continuing to pursue Maeve's case remained.

I conclude, therefore, that counsel is not entitled to fees for contesting entitlement after Dr. Deth's report was submitted on April 15, 2009.[10]

Disallowing costs from that date forward in the entitlement phase results in a $3,884.80 decrease in the amount to be awarded for attorneys' fees and costs. I add back into the award

[9] The OAP was established to manage thousands of claims brought by petitioners alleging that vaccines caused autism or similar neurodevelopmental disorders. Cedillo v. Sec'y of Dep't of Health & Human Servs., No. 98-916V, 2009 WL 331968, *8 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 2010 WL 3377325 (Fed. Cir. Aug 27, 2010). Among the allegations adjudicated in the OAP was that thimerosal-containing vaccines caused autism. Id. at *10. The OAP Master File contains all the filings in the OAP that are relevant to this discussion. The publicly accessible website, www.uscfc.uscourts.gov/omnibus-autism-proceeding, contains the OAP Master File (under the "docket" link), which includes orders, decisions, and periodic updates issued by the special masters assigned to the autism docket.

[10] My reasoning is set forth in much greater detail in the decision filed in Kate's case. See Kate's Fee Decision.

$1,000, representing a generous estimate of what it would have cost to conclude this case in a timely fashion. This diminishes the amount requested by $2,884.80, resulting in a total award of $20,476.23.

III. CONCLUSION

The Vaccine Act permits an award of reasonable attorneys' fees and costs. § 300aa-15(e). After reviewing the request, the court finds that an award of $20,476.23 in attorneys' fees and costs in this case to be reasonable. Accordingly, I **GRANT IN PART** and **DENY IN PART** the Fee Application.

Pursuant to Vaccine Rule 13, Petitioner is awarded a total of $20,476.23 in attorneys' fees and costs. The judgment shall reflect that Petitioner is awarded $20,326.23 for attorneys' fees and costs in a check made payable jointly to Petitioner and Petitioner's counsel, and that Petitioner is awarded $150.00 for costs in a check made payable to Petitioner.[11]

In the absence of a motion for review filed pursuant to Vaccine Rule 23, the Clerk is directed to enter judgment according to this decision.[12]

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Chief Special Master

[11] This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally Beck v. Sec'y of Dep't of Health & Human Servs., 924 F.2d 1029 (Fed. Cir. 1991).

[12] Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.