OFFICE OF SPECIAL MASTERS

No. 91-1057V

(Filed: June 27, 1997)

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VERNA MAY,	*	
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	*	
Petitioner,	*	**TO BE PUBLISHED**
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	
* *		

Thomas C. Knowles, Oakland, California, appeared for petitioner.

Michael Milmoe, Department of Justice, Washington, D.C., appeared for respondent.

RULING CONCERNING "$1000 ISSUE"

HASTINGS, Special Master.

This is an action seeking an award under the National Vaccine Injury Compensation Program (hereinafter "the Program"). See 42 U.S.C. § 300aa-10 *et seq*.[(1)] In this case, the petitioner alleges that her ongoing problem with pain in her joints was caused by a rubella vaccination. With respect to that claim, a chief issue has been whether petitioner has successfully demonstrated that she incurred more than $1000 in unreimbursed out-of-pocket expenses due to her joint symptoms, within three years of the onset of those symptoms. See § 300aa-11(c)(1)(D)(i). Having carefully considered both parties' arguments concerning this issue, I hereby rule that petitioner has in fact demonstrated compliance with that requirement for a Program award.

I

BACKGROUND

A. The relevant statutory provision

Section 300aa-13(a)(1) provides that Program compensation will be awarded if the special master finds that the petitioner has demonstrated "the matters required in the petition by section 300aa-11(c)(1) of this title." Section 300aa-11(c)(1)(D)(i), in turn, provides that a Program petitioner must demonstrate [(2)] that he or she "incurred unreimbursable expenses due in whole or part to [the vaccine-related injury] in an amount greater than $1,000 * * *." Such expenses must be incurred within the statutory limitations period for filing the Program petition, which in this case means the three-year period from the onset of petitioner's symptoms in April of 1990. See *Black v. Secretary of HHS*, 93 F. 3d 781, 790 (Fed. Cir. 1996).

B. Relevant facts

Petitioner received her vaccination at issue, a rubella vaccination, on April 5, 1990. Within a few days thereafter, petitioner experienced the onset of chronic pain in multiple joints. (For reasons set forth elsewhere, I have concluded that these symptoms were caused by that vaccination.) These symptoms resulted in extensive medical treatment for petitioner. Because the symptoms were considered to be the result of petitioner's vaccination, and the vaccination was received as a condition of petitioner's employment as a nurse, petitioner's medical expenses relating to her joint symptoms, for approximately the first 13 months of her ailment, were completely paid by her employer, pursuant to her state's "worker's compensation" system.[(3)] And even after that "worker's compensation" coverage expired, most of her related medical expenses were covered by her general health insurance policy. Therefore, while petitioner received much medical attention for her chronic joint ailment, the amounts that actually went from petitioner's own pocket directly to medical personnel for treatment of her joint symptoms during the three-year period after the onset of her joint symptoms were limited.[(4)]

Petitioner's joint symptoms, however, also made it impossible for her to return to her employment, so that petitioner eventually lost her job as a result of this disability.[(5)] In approximately December of 1990, petitioner lost the health insurance coverage that had formerly been provided by her employer, and was forced thereafter to pay for her health insurance directly out of her own pocket. From December of 1990 through March of 1993, petitioner's payments for these health insurance premiums totalled at least $4,700. (See petitioner's Ex. J-3, filed as part of her "Supplemental Rubella Filing" on September 10, 1993.)

II

DISCUSSION

Respondent does not seem to contest the key facts set forth above--*i.e.*, that petitioner lost her job because of her joint symptoms; that her job had provided her with health insurance coverage; and that

during the relevant three-year period, after losing her job, petitioner made payments for health insurance coverage far exceeding $1,000. Rather, the issue here is a *legal* one. That is, given the above facts, do petitioner's out-of-pocket payments for health insurance in the period after she lost her job qualify toward the "$1000 requirement" of § 300aa-11(c)(1)(D)(i)? Petitioner argues that they do, respondent that they do not.

I find the petitioner's view to be the correct one. In my view, the appropriate test is a simple "but for" test. That is, "but for" for the injury in question, would the expenditure have been necessary? If the answer is "no," then the expenditure qualifies toward the "$1000 requirement" of § 300aa-11(c)(1)(D)(i). Or, to put the same test in other words, did the need to make the expenditure arise as a result of the injury in question? If so, then the expenditure qualifies toward the "$1000 requirement."[(6)]

Application of that test to this case is straight-forward. Prior to the onset of her joint condition, petitioner was employed and received health insurance coverage that was paid by her employer. Petitioner lost her job, and thus lost her health insurance coverage, as a result of her joint condition. Thereafter, she had to make payments out of her own pocket to obtain health insurance. Therefore, those health insurance payments were *unreimbursable expenses incurred* by the petitioner, which she would not have incurred "*but for*" her joint condition. Accordingly, these payments qualify toward the "$1000 requirement" of § 300aa-11(c)(1)(D)(i).

Respondent's arguments to the contrary (see respondent's "Response" filed on December 30, 1996 (hereinafter "R. Response")) are not persuasive. While respondent's brief was less than completely clear, respondent's position seems to be that the payments in question should not be considered applicable toward the "$1000 requirement" because those payments obtained for petitioner health care far beyond that necessary for her vaccine-related injury itself. Respondent's brief seems to take the position that only if the *primary reason* for buying the health insurance was to supply *health care directly relating to petitioner's vaccine-related condition* would the health insurance premiums be applicable toward the "$1000 requirement." Of course, respondent is correct that if that were the case, the premiums would qualify. But as a matter of law, I find that respondent simply takes too narrow a view of the type of expenses that may be counted toward the $1000 requirement. Respondent, it would appear, simply disagrees that the "but for" test is appropriate. Rather, respondent, in effect, seems to be clinging to the argument, raised unsuccessfully by respondent in many past Program cases, that only direct "medical expenses"--*i.e.*, amounts paid for *medical treatment of the vaccine-related injury itself*--are allowable toward the $1000 requirement.

This "medical expenses only" argument of respondent has been addressed and rejected in a number of prior Program cases. See, *e.g.*, *Hutchings v. Secretary of HHS*, No. 94-388V, 1994 WL 808593 (Fed. Cl. Spec. Mstr. July 20, 1994); *Olascoaga v. Secretary of HHS*, No. 93-616V, 1994 WL 100687 (Fed. Cl. Spec. Mstr. March 14, 1994); *Ferguson v. Secretary of HHS*, No. 93-376V, 1995 WL 642693 (Fed. Cl. Spec. Mstr. Oct. 19, 1995); *Williams v. Secretary of HHS*, No. 90-1737, 1997 WL 266964 (Fed. Cl. Spec. Mstr. Apr. 30, 1997); *Ashe-Robinson v. Secretary of HHS*, No. 94-1096V, 1997 WL 53450 (Fed. Cl. Spec. Mstr. Jan. 23, 1997). The "but for" test that I have adopted has also been explicitly endorsed. See *Hutchings*, *supra*; *Ferguson*, *supra*; *Ashe-Robinson*, *supra*. Further, a number of other decisions have also counted non-medical expenses toward the $1000 requirement, in rulings that seem analytically to suggest a test substantially similar to the "but for" test. See, *e.g.*, *Jamieson v. Secretary of HHS*, No. 90-1019V, 1992 WL 229390 (Cl. Ct. Spec. Mstr. Aug. 31, 1992) (counting meal expenses incurred by parents in visiting ill child); *Mathisen v. Secretary of HHS*, No. 92-703V, 1994 WL 808593 (Fed. Cl. Spec. Mstr. May 2, 1994) (allowing mileage expenses); *Lenander v. Secretary of HHS*, No. 92-659V, 1996 WL 614802 (Fed. Cl. Spec. Mstr. Oct. 25, 1996) (allowing expenditures for shoes and boots for person with a polio injury).

In short, I find that, contrary to respondent's view, the statute and the case law support the use of a simple "but for" test, and that the expenditures here in question pass that test.

I will also address two other issues raised by respondent's brief. First, respondent has pointed (R. Response at 5) to the cases in which special masters have ruled that to lose the opportunity for earnings as a result of a vaccine-caused injury is not to "incur an expense" within the meaning of § 300aa-11(c)(1)(D)(i). See *Warner v. Secretary of HHS*, No. 92-201V, 1992 WL 405286 (Fed. Cl. Spec. Mstr. Dec. 29, 1992); *Robinson v. Secretary of HHS*, No. 93-530V, 1994 WL 879449 (Fed. Cl. Spec. Mstr. Feb. 23, 1994). But, in my view, my ruling here is not inconsistent with those cases. The difference is that in the cited cases, there was no *actual expense incurred--i.e.*, the injured party did not actually *pay out* any money or incur a debt. Here, in contrast, the petitioner actually did *pay out* specific amounts for health insurance.

Second, I note that respondent's brief included numerous requests for records allegedly relevant to this "$1000 issue." These requests were discussed at the status conference held on February 6, 1997. As noted at that status conference and in my Order dated February 10, 1997, I found reasonable respondent's request for petitioner's employment personnel records, to verify the fact that she lost her job as a result of her vaccine-related condition. Later, in my order filed on May 22, 1997, I also responded to two more of respondent's concerns, by requesting that petitioner file a declaration and documentation relevant to two points. (That documentation was subsequently filed on June 16, 1997.) As to the other documents requested by respondent, I denied respondent's request. The explanation is that those other requests related to documents which would be relevant only to respondent's much narrower theory (discussed above at p. 4) as to how the health insurance payments might qualify. Because I have accepted petitioner's broader legal theory, the respondent's additional record requests seem to be irrelevant.[(7)]

CONCLUSION

For the reasons stated above, I hereby conclude that petitioner has adequately satisfied the

"$1000 requirement" of § 300aa-11(c)(1)(D)(i).

George L. Hastings, Jr.

Special Master

1. The applicable provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (1994 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (1994 ed.).

2. Petitioner has the burden of demonstrating the facts necessary for entitlement to an award by a "preponderance of the evidence." § 300aa-13(a)(1)(A). Under that standard, the existence of a fact must be shown to be "more probable than not." *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J.,

concurring).

3. See petitioner's filing of November 26, 1996, Ex. 3, p. 3, in which petitioner indicates that her "worker's compensation" coverage ended as of May 20, 1991.

4. Note that in her documents filed on November 26, 1996 (see Ex. 3, pp. 3-4), petitioner set forth only about $300 in actual out-of-pocket costs paid directly for joint-related medical care during the applicable three-year period. Later, in her reply brief filed on January 31, 1997, petitioner indicated (p. 3, fn. 1) that she had additional out-of-pocket costs, without specifying what those might be. At the status conference held on February 6, 1997, however, petitioner's counsel clarified that petitioner at this time does not wish to offer any other expenses toward the "$1000 requirement," but instead desires to proceed on the health insurance premium theory. And since I find merit in that theory, there is no need to consider at this time whether petitioner might have other qualifying unreimbursed expenses.

5. See petitioner's Declaration filed on November 26, 1996 (Ex. 4), and also her documentation filed on March 24, 1997.

6. Of course, there is also an implicit requirement that the need for the expenditure be a "reasonable" one, and that the expenditure be a "reasonable" method of meeting that need. For example, if an injured party needed a knee brace, and one made from aluminum costing $500 would suffice, an expenditure of $1000 for a brace made of gold instead of aluminum would fail the "reasonableness" test. Only $500 of such expenditure would count toward the "$1000 requirement."

7. It may also be noted that among respondent's requests was a request for "a copy of the petition for worker's compensation and a copy of the decision ordering it to be paid." (See R. Response, attached letter.) But, as petitioner replied, the "worker's compensation" file had *already* been filed, as petitioner's Ex. I, on September 10, 1993.