OFFICE OF SPECIAL MASTERS

May 22, 2002

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FRANK GALLAGHER and LAURA GALLAGHER, as Parents and Next Friends of COURTNEY LEIGH GALLAGHER,	*	
Petitioners,	*	
	*	No. 95-191V
v.	*	PUBLISHED
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

DECISION AWARDING FEES AND COSTS

Petitioners' counsel, Robert Moxley, filed an incomplete Application for Award of Attorneys'[sic] Fees and Reimbursement of Costs on April 9, 2002 for $37,803.29. On April 29, 2002, petitioners' counsel filed a completed Motion for Reimbursement for Fees and Costs in the amount of $1,613.16 for petitioners' costs and $36,190.13 in counsel's fees and costs. Respondent did not object to petitioners' motion. Counsel's fees and costs consist of:

		Fees	Costs
Litigating the Case Before the Undersigned		$23,202.50	$3,022.81
Appeal	1. Motion for Review	$3,720.00 (21.6 hours[1])	$41.87
	2. Motion for Reconsideration and for New Trial	$6,072.50 (34.7 hours[2])	$130.45

[1] 20.8 hours was billed at Mr. Moxley's rate of $175.00, 0.8 hours was billed at a law clerk rate of $100.00.

[2] 34.7 hours was billed at Mr. Moxley's rate of $175.00.

Total	$32,995.00	$3,195.13

The undersigned grants the petition in part and awards fees and costs associated with litigating the case before the undersigned. However, the undersigned denies the petition in part, denying fees and costs associated with the appeal because it was not undertaken in good faith since the issues Mr. Moxley raised have been decided in his numerous other appeals to the US Court of Federal Claims and the US Court of Appeals for the Federal Circuit.

Pursuant to 42 U.S.C. § 300aa-15(e)(1)(B), a special master is authorized to award compensation for petitioner's reasonable attorney's fees and costs incurred in any proceeding related to the petition when there is a determination that the petition and related proceedings were brought in good faith.

In the past, Mr. Moxley or his partner Mr. Gage (who litigated the instant case at the trial level) has sought compensation for petitions and appeals that were not brought in good faith. In *Phillips v. Secretary of HHS,* No. 90-1249V, 1994 WL 390154 (Fed. Cl. Spec. Mstr. July 13, 1994), Mr. Gage's fees and costs for appeal were denied as unreasonable since appealing the special master's determination of witness' credibility was fruitless.

In *Perreira v. Secretary of HHS,* 27 Fed. Cl. 29 (Fed. Cl. 1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994), Mr. Moxley's appeal of a denial of fees to the US Court of Federal Claims was denied. Senior Judge Harkins stated that "petitioners are not given a blank check to incur expenses without regard to the merits of their claim. Nor does this court have a responsibility to compensate counsel in vaccine cases after there no longer is a reasonable basis for their claim." 27 Fed. Cl. at 34. Mr. Moxley appealed *Perreira* further to the Federal Circuit which affirmed the denial, holding that "when the reasonable basis that may have been sufficient to bring the claim ceases to exist, it cannot be said that the claim is maintained in good faith." 33 F.3d at 1377. Additionally, the Federal Circuit noted that "counsel's duty to zealously represent their client does not relieve them of their duty to the court to avoid frivolous litigation." *Id.*

In the instant case, petitioners based their appeal on four objections:

1. As a matter of precedent, law, and fact, the "Omnibus" rule of *Barnes, et al. v. Secretary of HHS,* No. 92-0032V, 1997 WL 620115 (Fed. Cl. Spec. Mstr. Sept. 15, 1997), requires a finding of entitlement.
2. The special master erroneously refused to "rule out" [sic] the presumptive influence of DPT as established by the Table.
3. This and all post-*Barnes* cases were decided under a standard which is contrary to law.
4. The special master failed to consider the record "as a whole".

Regarding the first objection, the undersigned regards this as frivolous because the undersigned wrote the *Barnes* decision and decided that petitioners in the instant action did not

merit entitlement under the principles that the undersigned created in the Omnibus TS decision. Judge (now Chief Judge) Edward J. Damich affirmed this court's holding in the instant action. *Gallagher v. Secretary of HHS,* No. 95-191V (Fed. Cl. Nov. 6, 2001).

Regarding the second objection, the undersigned recognizes the presumption of causation and stated that the burden passed to respondent to prove a known factor unrelated to the vaccine caused petitioners' child's illness. Respondent met that burden.

The third objection is extraordinary because the Federal Circuit reviewed and upheld the standards that the undersigned has applied in these TS cases. *Hanlon v. Secretary of HHS,* 191 F.3d 1344 (Fed. Cir. 1999), *cert. denied,* 120 S. Ct. 2212 (2000); *Plavin v. Secretary of HHS,* 184 F.3d (Fed. Cir. 1999), *cert. denied,* 120 S. Ct. 2212 (2000).

Finally, regarding the fourth objection, the undersigned did consider the record as a whole.

After the decision in the instant case was affirmed on appeal, Mr. Moxley filed a Motion for Reconsideration and for New Trial which was out of time and rehashed the issues that the undersigned decided in numerous TS cases whose decisions the US Court of Federal Claims and the Federal Circuit affirmed.[3] Even had Mr. Moxley's Motion for Reconsideration and for New Trial been timely, it would not have been in good faith because he was raising the same issues.

Consistent with the holdings in *Phillips* and *Perreira,* the undersigned finds that petitioners' appeal herein was not brought in good faith since the appeal covered issues ruled upon in numerous decisions by the US Court of Federal Claims and by the Federal Circuit.

Counsel requested $36,190.13 for fees and his own costs. The undersigned denies that part of the petition consisting of $9,792.50 for fees and $172.32 in costs, all related to the appeal and the Motion for Reconsideration and for New Trial.

The clerk shall enter judgment for **$1,613.16** for petitioners and shall direct that the award be made payable in the form of a check to petitioners in that amount. The clerk shall also enter judgment in the amount of **$26,225.31** for petitioners' counsel's fees and costs, and shall direct the award be made payable jointly in the form of a check to petitioners and Mr. Moxley. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is

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[3] *Turner v. Secretary of HHS; Flanagan v. Secretary of HHS,* 268 F.3d 1334 (Fed. Cir. 2001) (consolidated appeal) (denied that the undersigned created an improper presumption in favor of the government in all TS cases; held that the undersigned properly considered the relevant evidence, drew plausible inferences, and stated a rational basis for the decisions); *Hanlon* and *Plavin* (held that the undersigned properly considered all the evidence in finding TS to be a known factor unrelated); *Hulbert v. Secretary of HHS,* 49 Fed. Cl. 485 (Fed. Cl. May 11, 2001) (held that the undersigned did not improperly shift the burden of proof to petitioners and deny them the statutory presumption of causation).

directed to enter judgment herein.[4]

IT IS SO ORDERED.

Dated:_____ _____

Laura D. Millman
Special Master

[4] Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.