In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS
No. 94-136V
July 27, 2009
To be Published

TIMOTHY McCOLLUM and LEANN McCOLLUM, Parents of GRANT McCOLLUM, a Minor,	*	
Petitioners,	*	Motions to Modify Judgment and Reopen Case denied
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

ORDER[1]

On March 7, 1994, petitioners filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., alleging that DPT vaccine caused injury to their son Grant F. McCollum (hereinafter, "Grant"). On March 7, 1994, the case was assigned to special

[1] Because this order contains a reasoned explanation for the special master's action in this case, the special master intends to post this order on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

master Richard B. Abell. On April 10, 1996, the case was reassigned to former special master Elizabeth E. Wright. On May 5, 2007, the case was reassigned to the undersigned. A hearing was held on March 25, 1998. On June 5, 1998, the undersigned issued a published decision in favor of petitioners. 1998 WL 338237 (Fed. Cl. Spec. Mstr. 1998).

On August 28, 1998, petitioners filed their life care plan. They supplemented this plan on September 21, 1998. Petitioners filed supplemental exhibits 53-67 on January 28, 1999. The undersigned scheduled a damages hearing for June 25, 1999. This was subsequently cancelled. A stipulation of damages was filed on March 14, 2000. The undersigned issued a damages decision on March 16, 2000. The parties filed a joint notice not to seek review on March 28, 2000. Judgment was entered on March 29, 2000 for a lump sum payment of $607,093.58 to compensate for first year expenses, pain and suffering, lost wages, and past unreimbursable expenses, a lump sum of $79,205.00 representing the current value of compensation for future residential care in year 2014, and $1,326,959.00 for the cost of an annuity to establish an irrevocable reversionary trust for Grant. On April 25, 2000, petitioners filed an election to accept judgment.

Nine years later, on June 12, 2009, petitioners moved for a modification of judgment, claiming the amounts for which they settled in 2000 are inadequate for Grant's needs. On June 22, 2009, petitioners moved to reopen the case. On July 2, 2009, respondent filed a response to petitioners' motions. On July 17, 2009, petitioners filed a reply to respondent's response.

PETITIONERS' POSITION

In petitioners' Motion for a Modification of the Judgment, petitioners state the undersigned may relieve a party from a final judgment for any other reason that justifies relief,

citing Rules of the Court of Federal Claims (RCFC), Rule 60(b)(6). Memo. p. 5. They state that Grant's medical needs have changed since the 2000 stipulation and judgment. Memo. p. 6. At the time of the stipulation, petitioners believed that Grant would enter a residential care facility in 2014. However, since Grant has deteriorated, they state he can no longer be put in a residential care facility because of his susceptibility to serious infections. Memo. p. 7.

Petitioners state this is an extraordinary circumstance and the basis for relief does not fall within any other provision of RCFC Rule 60. Memo. p. 8. Since Grant cannot be confined to a residential facility, he does not benefit from the reversionary trust. *Id.* Petitioners want the funds that were earmarked for a residential care facility to be used instead for an additional home health aide. The reversionary trust contemplated the need for only one home health attendant. *Id.*

Petitioners state there is no prejudice in granting this modification because the reversionary trust has reserved $108,397.51 as the present value of the seed for the 2014 residential facility expenses. The cost of another home health aide would be based on the home attendant care cost in the year 2000 which was $30,398.00 with an annual increase of 4% which equals about $43,000 for 2009. *Id.* Petitioners state that the cost of two home health care aides ($86,000) is almost $24,000 less than the cost of respite care ($108,000). Memo. p. 9.

Petitioners state that petitioner Timothy McCollum, who is Grant's father, will take early retirement to care for Grant at home. *Id.* Under petitioners' proposed modification of the judgment, Timothy McCollum is to be paid the salary of the second home health care aide. Memo. p. 10.

Attached to petitioners' memorandum is the affidavit of petitioner Leann McCollum, who is Grant's mother, dated October 17, 2007. This is an affidavit that was submitted during the pendency of an application before the Surrogate Court of the State of New York, County of Orange. She states that her husband Timothy is employed by IBM. Affidavit ¶ 8. After the stipulation and judgment, she and her husband hired her cousin Sharon Tenbrock, a licensed LPN, to assist in caring for Grant. They paid her from their own resources. Affidavit ¶ 10. Mrs. McCollum states that although the stipulation reserved funds for placing Grant in a residential facility, she and her husband never wanted to place Grant in such a facility, Affidavit ¶ 16. A year ago, she and her husband contacted HHS to request an amendment to the trust agreement which was rejected for lack of jurisdiction to modify the trust agreement. Affidavit ¶ 17.

If Mr. McCollum takes early retirement from IBM to serve as a home health aide for Grant, petitioners would have to pay $900 per month to maintain Mr. McCollum's health insurance. Part of the modification is to allow this additional $900 per month for health insurance. Affidavit ¶ 19. Because Grant gets five cases of pneumonia yearly, his parents do not want to put him in school or a residential facility. Affidavit ¶ 18. {This is the second paragraph 18. The first paragraph 18 precedes paragraph 19.) Grant also has right middle lobe syndrome, narrowing of the bronchial tubes, and deficiencies in growth hormone and cortisol. *Id.* The cold New York winters are exacerbating Grant's problems. Therefore, petitioners intend to buy a house in Florida with their own funds. Their cousin Sharon Tenbrock will go with them. Affidavit ¶ 20.

The costs petitioners seek from restructuring the trust agreement are $900 monthly for health insurance and additional funds to supplement Mr. McCollum's reduced income which will

decrease from $80,000.00 to $30,000.00 yearly on his early retirement. Affidavit ¶ 22. They seek this approximate $40,000.00 out of the $108,394 fund set aside for residential care in the trust. Affidavit ¶ 23.

Also attached to petitioners' Memorandum is an affidavit from Dr. Ann Nunez. Ex. B. Dr. Nunez is a pediatrician who has been treating Grant for 13 years and has treated him for recurring pneumonia. Affidavit ¶¶ 1, 2. Grant's cortisol deficiency compromises his immune system. He takes cortisol injections to increase the effectiveness of antibiotics. Affidavit ¶ 2. Dr. Nunez believes that due to Grant's severely damaged lungs, he would have a lower risk of infection if he lived in Florida. Affidavit ¶ 5.

On June 22, 2009, petitioners moved to reopen the case.

RESPONDENT'S RESPONSE TO PETITIONERS' MOTIONS

On July 2, 2009, respondent responded in opposition to petitioners' motion to modify the judgment and motion to reopen the case. Respondent states that petitioners sought an order from the Surrogate Court of the State of New York for disbursement of funds from the reversionary trust, as they do here, but also an additional disbursement of funds from the Grant McCollum Settlement Fund Management Trust (managed by Wachovia Bank) in the amount of $185,000.00 to purchase a home in Florida. The Honorable James D. Pagones, Surrogate, denied the relief that petitioners sought. Respondent attached as exhibit A to the Response the decree of Judge Pagones, dated November 14, 2008. Judge Pagones did permit the appointment of a different standby guardian, but denied all other requests from petitioners. Decision at 4.

Respondent states relief under RCFC Rule 60(b)(6) may be granted only in exceptional or extraordinary circumstances. Response at 5, 6. Damages are typically based on the

projections of the parties' life care planners, using the best information at the time. Changes in circumstances do not rise to the level of extraordinary circumstances. Response at 6.

Moreover, one year after Congress passed the Vaccine Act, Congress amended the Act to delete the provision which allowed for post-judgment revision of the vaccine award. Thus, since the 1987 amendment to the Vaccine Act, petitioners may no longer seek post-judgment revisions of their vaccine awards. Respondent cites to Neher v. Sec'y of HHS, 984 F.2d 1195, 1199-1200 (Fed. Cir. 1993) as confirmation that congressional intent was to eliminate post-judgment revision of Vaccine Act awards. Response at 7.

Respondent astutely notes that petitioners are not seeking modification of the court's judgment since the terms of the reversionary trust agreement are not stated in the judgment. Response at 8. Rather petitioners seek to modify the terms of the reversionary trust agreement into which they entered as Grant's guardians, together with the Department of Health and Human Services as Grantor, and PeoplesBank, as Trustee. *Id.* This reversionary trust agreement is a private agreement among these parties. Respondent states there is a provision for amending the terms of the Trust, although respondent does not specify what that provision states. Response at 9. What respondent does state is that an amendment to the trust cannot occur through any change in the March 29, 2000 judgment. *Id.*

Respondent also notes that petitioners have mischaracterized Grant's situation by stating they are forfeiting money that is set aside for his placement in a residential facility if he does not go to one. *Id.* The funds made available in 2007 for the cost of residential facility expenses permit Grant to remain in his home with attendant care or to be placed in a residential facility. Response at 9-10. In essence, petitioners have posited a dire situation which does not exist.

They do not have to forfeit funds set aside for residential facility placement if they choose to keep Grant at home. Response at 10.

Respondent notes that petitioners' request to supplement Mr. McCollum's loss of income from $80,000.00 to $30,000.00 annually if he takes early retirement is not recoverable under the Vaccine Act. *Id.* Under § 300aa-15(a)(1)(A), vaccinees may receive compensation for future care expenses including rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary. Section 15(a)(1)(A) does not include payment for a parent's lost or reduced wages. The section also does not include payment for a parent's services as home health aide. Response at 11.

Respondent notes it is disingenuous for petitioners to claim in their current motion for modification that they never wanted to place Grant in a residential facility when their own life care plan and supplement to the life care plan included an option for placement of Grant in a residential care facility when he turns 21. Response at 12.

Before the 1987 amendment to the Vaccine Act, the original Vaccine Act (Pub. L. 99-660) did permit revisions to awards. Section 2112(f). Public Law 100-203, effective 1987, repealed this provision. Response at 13. Respondent quotes the Federal Circuit in Neher, 984 F.2d at 1199-1200: "Such amendment suggests congressional intent to limit vaccine petitioners' entitlement to compensation to costs that can be reasonably anticipated at the time of the award." *Id.*

PETITIONERS' REPLY TO RESPONDENT'S RESPONSE

On July 17, 2009, petitioners replied to respondent's response in opposition to petitioners' motion for modification of the judgment and motion to reopen. They assert that changed needs are extraordinary circumstances. Reply at 2. They insist Grant cannot survive in a residential facility and petitioners need additional funds to accommodate his needs. Reply at 3. They state they do not seek to modify their stipulation but to modify the March 29, 20000 judgment that set forth the terms of the award. Reply at 4. They argue that an amount to compensate Mr. McCollum for reduced yearly wages if he retires early is not the point. Rather the sums for such payment would fall under the category of direct expenses incurred or which will arise in future. *Id.* They state that Mr. McCollum's lost wages will transform into wages for being a home health aide and are therefore recoverable: "Although wages that are lost are generally not reimbursable, this does not extend to future lost income, because it would instead be compensation paid to Mr. McCollum." Reply at 5. They cite Warner v. Sec'y of HHS, No. 92-201V, 1992 WL 405286 (Fed. Cl. Spec. Mstr. 1992), a case which petitioner lost. Petitioner in Warner attempted unsuccessfully to use his lost wages to satisfy the then-prerequisite of having spent more than $1,000 in unreimbursed expenses in order to file a petition. 42 U.S.C. § 300aa-11(c)(1)(D)(I). The special master also held that petitioner may not use any expenses incurred in bankruptcy proceedings to satisfy the $1,000 in unreimbursed expenses threshold. The special master dismissed the case. Warner provides no assistance whatsoever to petitioners' characterization of Mr. McCollum's future lost wages as merely compensation as a home health aide. Petitioners seem unaware that the Vaccine Act does not compensate parents for taking care of their children.

Petitioners state that Mr. McCollum has left IBM and is now working for a local college. Reply at 5. They assert that Grant needs a second home health aide and only if Mr. McCollum is compensated can he take on that role. *Id.* Petitioners cite Riley v. Sec'y of HHS, No. 90-466V, 1991 WL 123583, at *5 (Cl. Ct. Spec. Mstr. 1991), even though the special master therein held that Mrs. Riley could not receive lost wages for giving up her legal career to take care of her damaged son.

Petitioners insist that Grant needs two home health aides and although they could pay for an aide outside the family, they prefer that Mr. McCollum be that second aide. Reply at 5. Petitioners cite Gilbert v. Sec'y of HHS, 52 F.3d 254 (Fed. Cir. 1995), for the proposition that petitioners can provide proof that justifies modification of an award. Reply at 6. But Gilbert concerned petitioners who untimely moved to elect to sue civilly and reject the judgment of the Court of Federal Claims. Their motion was denied and the Federal Circuit affirmed the denial based on lack of jurisdiction. The decision has nothing whatever to do with modifying an award of damages.

Petitioners state that their substantial rights will be harmed by placing Grant in a residential facility or having to pay out of their own resources for an additional health aide. Reply at 6. They cite Dynacs Engineering Co., Inc. v. US, 48 Fed. Cl. 240 (Fed. Cl. 2000) in support of their plea, but Dynacs Engineering concerns defendant's request for reconsideration of a liability finding in bid protest or alternatively for further proceedings which the court denied. It discusses Rule 59(a)(2) and Rule 60(b)(3), not Rule 60(b)(6) under which petitioners herein are attempting relief. The reason the United States proceeded under Rule 59(a)(2) and Rule 60(b)(3) was that it considered that a fraud, wrong, or injustice has been done to the United

States because of the court's placing undue reliance on a Federal Circuit decision. However, a mistake in law is not fraud, and the court dismissed. This decision is totally inapplicable to the case at hand.

Petitioners end their reply with a request for "funds for a new care plan". Reply at 7. Attached to petitioners' reply is an affidavit by Dr. Roseman who does not give his or her first name. He or she states that he or she has treated Grant who is prone to colds, flu, pneumonia, and other viruses and bacteria, as well as damaged lungs. Affidavit ¶¶ 2, 3. He or she states Grant would have a lower risk of infection if he were at home. Affidavit ¶ 5.

Also attached to petitioners' Reply is another decision of Judge James D. Pagones, dated September 29, 2008. This decision precedes the decree of Judge Pagones, dated November 14, 2008. R. Ex. A. The decision summarizes the management trust agreement and the reversionary trust agreement (neither of which the undersigned has seen) and includes a description of Article IV(A) of the reversionary trust agreement allowing for amendment of the trust as long as the grantor, trustee, and guardians agree in writing. Decision at 6.

Judge Pagones' decision was based on PeoplesBank's motion for an order dismissing so much of the amended petition to amend the decree and trusts and for disbursements of funds from the trust which sought to change the terms of the reversionary trust agreement. Judge Pagones granted PeoplesBank's motion. Petitioners were the same petitioners as in the instant action. Petitioners wanted to modify and amend the decree appointing as Grant's guardian Sharon Tenbrock and appoint Jean Thomaselli in her place as guardian. Petitioners also wanted to modify and amend the Grant McCollum Settlement Fund Management Trust (controlled by Wachovia Bank) to allow for future disbursement from the trust account of certain expenditures

for Grant's comfort, care, welfare, and quality of life. They also wanted authority to apply for and obtain from the settlement trust the sum of $185,000.00 to purchase a house and property in Florida. Finally, petitioners sought to obtain from the reversionary trust a monthly disbursement of $900.00 to cover health insurance costs that Mr. McCollum's employer no longer provided, and an annual amount of $30,000.00 to supplement Mr. McCollum's income when he would take early retirement to care for Grant. Wachovia Bank filed an objection to petitioners' request to receive $185,000.00 from the Management Trust to buy a residence and property in Florida and for an amendment to the trust to allow them increased discretion and authority to request disbursements. Decision at 2 and 3.

Petitioners are the grantors of the Management Trust. Grant is the beneficiary. Wachovia Bank is the trustee. The trust is funded with the net proceeds of the settlement of the case in the Vaccine Program. As of June 1, 2008, the trust principal was about $442,000.00.

The Secretary of Health and Human Services is the grantor of the Reversionary Trust. Grant is the beneficiary. PeoplesBank is the trustee. Petitioners are the guardians of Grant. It is a supplemental needs trust, funded with the amount paid for pain and suffering in the settlement of the case in the Vaccine Program. That trust amount was $165,000.00.

The Management Trust, according to its Article II, may be amended or revoked only by court order. Written consent of the trustee (Wachovia Bank) is required in order to alter or modify it.

Under the Reversionary Trust, HHS shall purchase an annuity contract which PeoplesBank will hold and invest funds received either from the grantor or the annuity, and then make payments to petitioners as the guardians or to third party providers. The guardians, i.e., the

petitioners, will submit requests to the trustee regarding payment of benefits. The medical administrator will provide guidance and expertise to the guardians (parents) and trustee (PeoplesBank) regarding available goods and services within the scope and purpose of the trust. The medical administrator may also submit requests to the trustee (PeoplesBank) regarding payments of benefits. Decision at p. 6. Article II of the reversionary trust agreement establishes an explicit protocol regarding distributions, resolution of questions regarding distributions, payment of recurring expenses, etc. Article IV(A) of the reversionary trust agreement allows for amendment of the trust as long as the grantor (HHS), trustee (PeoplesBank), and guardians (petitioners) agree in writing.

Wachovia Bank, the trustee of the Management Trust, objected to petitioners' application to obtain $185,000.00 from the management trust to buy a house in Florida because petitioners did not demonstrate that they could not purchase said property on their own, and because paying this amount would significantly decrease the trust corpus. The trust does not permit the trustee to invest in real property. Decision at 7. Wachovia Bank did not object to the substitution of another standby guardian.

PeoplesBank, the trustee of the Reversionary Trust, opposed petitioners' petition. Petitioners in their petition in NYS Surrogate Court included the same affidavit from Dr. Nunez as they did in the instant motions, stating that Grant's lung condition and susceptibility to colds required him to move to Florida. Decision at 9. Petitioners also stated to Judge Pagones that the United States was not a necessary party to participate and ultimately resolve the parties' dispute. Decision at 10.

The guardian ad litem for Grant in the Surrogate Court proceeding filed his response to petitioners' petition opposing it in it entirety. Decision at 10-11.

Judge Pagones granted the change of alternate standby guardian from Sharon Tenbrock to Jean Thomaselli. Decision at 11. Judge Pagones sustained Wachovia Bank's objections to petitioners' attempt to obtain $185,000.00 to buy a home in Florida and for other amendments to the Management Trust. He granted PeoplesBank's motion to dismiss petitioners' attempt to amend the Reversionary Trust to obtain $900 per month to pay for health insurance and $30,000 a year to pay Mr. McCollum for his lower income if he took early retirement. *Id.* Judge Pagones states at 12-15:

> The record in this proceeding reveals that petitioners were represented by counsel at the time they resolved their case against the Secretary of the Department of Health and Human Services. That settlement resulted in the creation of the management trust and reversionary trust, the terms of which were agreed to by petitioners.
> Article III of the management trust addresses the trustee's duties and powers. Nowhere is the trustee authorized to invest in real property. ...[P]etitioners have not adequately explained why they cannot undertake the proposed expenditure [to buy a Florida home] from their own resources.
> It is without dispute that petitioners did not include the Secretary of Health and Human Services as a party to this proceeding. The Secretary is the grantor of the trust who will be affected by a decree issued by this court. It is also settled that the reversionary trust does provide a method by which it can be amended. It requires written consent by the grantor, trustee and petitioners. Absent a waiver, sovereign immunity shields the Federal Government and its agencies from lawsuits and special proceedings.
> The question distills to whether the Secretary [of HHS], and by extension the trustee, might be inequitably affected by a decree in this proceeding without the Secretary's participation. This court answers the question in the affirmative. ...
> [T]he express wording in the reversionary trust allows for amendment by written consent of the grantor, trustee and

> petitioners. The factual issue is therefore resolved in favor of the moving trustee. Dismissal is warranted.

Of note, petitioners' counsel in this NYS Surrogate Court proceeding is the same counsel for petitioners herein. In this proceeding, petitioners are suing the grantor (HHS), but the trustee (PeoplesBank) is absent, just the reverse of the situation in NYS Surrogate Court. Petitioners still seek amendment outside the very terms of the trust in which they participated at its inception. They have not obtained the written consent of both HHS and PeoplesBank.

DISCUSSION

The United States is sovereign and no one may sue it without the sovereign's waiver of immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). When Congress waives sovereign immunity, courts strictly construe that waiver. Library of Congress v. Shaw, 478 U.S. 310 (1986); Edgar v. Secretary of HHS, 29 Fed. Cl. 339, 345 (1993); McGowan v. Secretary of HHS, 31 Fed. Cl. 734, 740 (1994); Patton v. Secretary of HHS, 28 Fed. Cl. 532, 535 (1993); Jessup v. Secretary of HHS, 26 Cl. Ct. 350, 352-53 (1992) (implied expansion of waiver of sovereign immunity was beyond the authority of the court). A court may not expand on the waiver of sovereign immunity explicitly stated in the statute. Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1550 (Fed. Cir. 1991).

Although Congress initially intended in the first version of the Vaccine Act to provide for later revisions of awards in the Vaccine Program after judgment had entered, in 1987, Congress eliminated from the Vaccine Act the provision permitting post-judgment revisions of awards. Thus, congressional intent clearly is to limit the sovereign's waiver of immunity to awards that are made at the culmination of the legal proceeding begun with the filing of a vaccine petition.

The section of what would now be section15 that Congress eliminated in 1987 from the Vaccine Act stated:

> If the court issues a judgment awarding to a petitioner compensation described in section 2115(a)(1)(A) [now §15] for unreimbursable expenses and the compensation is insufficient to meet such expenses, such petitioner may petition the court to (A) review such award, and (B) increase the award to make it sufficient to meet such expenses or amend the periodic payment schedule established under section 2115 [now §15], or both.

Omnibus Budget Reconciliation Act of 1987, H. Rep. 35-15, 100th Cong., 1st Sess., Pub. L. No. 100-203, § 403(d)(2)(A)(1987).

A motion for RCFC 60(b) relief is "extraordinary" and is granted according to the Court's discretion. Sioux Tribe of Indians v. United States, 14 Cl. Ct. 94, 101 (1987), aff'd, 862 F.2d 275 (Fed. Cir. 1988) (citing United States v. Atkinson, 748 F.2d 659, 660 (Fed. Cir. 1984)). In Curtis v. United States, 61 Fed. Cl. 511, 512 (2004), the court stated, "Relief from judgment will not be granted if substantial rights of the party have not been harmed by the judgment." See also Fiskars, Inc. v. Hunt Mfg. Co., 279 F.3d 1378, 1384 (Fed. Cir. 2002), in which the Federal Circuit stated that "evidence arising nearly two years after trial [that] may have cast some doubt on the accuracy of the trial evidence does not create the extraordinary circumstances necessary to invoke Rule 60(b)(6);" Vessels v. Secretary of HHS, 65 Fed. Cl. 563, 569-70 (Fed. Cl. 2005) (success of another petitioner in defeating statute of limitations dismissal on appeal did not warrant reopening petitioner's dismissal under Rule 60(b)(6) and Vaccine Rule 36 because of new favorable precedent).

Because Congress has clearly expressed its intent to narrow the waiver of sovereign immunity by removing a provision that permitted petitioners to seek post-judgment revisions of

vaccine awards and because petitioners have not shown exceptional circumstances justifying revision of a nine-year-old judgment, the undersigned denies petitioners' motions to modify the judgment and to reopen the case.

Curiously, petitioners have not followed the very terms of the Reversionary Trust whose provisions they seek to amend. The trust permits them to amend its terms if the grantor (HHS), the trustee (PeoplesBank), and the petitioners agree in writing. Of particular note is the opposition of the guardian ad litem to petitioners' petition in the NYS Surrogate Court proceeding as well as Judge Pagones' logic. There is nothing prohibiting petitioners from selling their NY home and buying a home in Florida. The terms of the Management Trust do not permit the trustee to expend funds on purchasing real estate. There is nothing prohibiting petitioners from hiring a home health aide, but the Vaccine Act does not permit them to utilize money allocated for Grant's comfort and therapy to pay lost wages due to Mr. McCollum's taking early retirement. Nothing in the terms of the Reversionary Trust requires petitioners to put Grant in a residential facility. Money has been allocated for that purpose in case he needs to go there. The undersigned notes that there is a medical administrator for the Reversionary Trust to provide guidance and expertise to the guardians (petitioners) and trustee (PeoplesBank) regarding available goods and services within the scope and purpose of the trust. The medical administrator may also submit requests to the trustee (PeoplesBank) regarding payments of benefits. Apparently either petitioners herein have not advised this medical administrator of their requests or they have done so and the medical administrator has rejected these requests. Two independent individuals, therefore, the medical administrator and the guardian ad litem whose interest is solely to benefit Grant, have not acceded to petitioners' requests.

Petitioners and their counsel set up a straw man argument in asserting that their substantial rights are being harmed and this is an extraordinary circumstance. Neither point is valid. Petitioners have no more rights under the Vaccine Act than the Act gives them. They received considerable compensation for the vaccine injury Grant experienced, agreed to the terms of the distribution of that compensation, and now want more power than the trust agreements into which they freely entered give them. Grant's medical condition is not an extraordinary circumstance. He receives numerous therapies and has a medical administrator advising the trustee of the funds used to pay for his medical needs.

Nothing prevents petitioners from moving to a warmer climate. To say that there are changed circumstances which now require them to have two homes, one in NY and one in Florida, is not persuasive. It did not persuade the guardian ad litem or Judge Pagones. It does not persuade the undersigned.

The argument that Mr. McCollum needs to be paid the difference between what he would have earned had he stayed at IBM versus what he would be paid on early retirement is specious. The filings show that Mr. McCollum did not wait for a court ruling in order to take early retirement from IBM. He switched to working for a local college. This leads the undersigned to suspect that more than ministering to Grant as a second home health aide was a motive for Mr. McCollum's taking early retirement. The undersigned notes that in the medical administrator's and guardian ad litem's rejections of all of petitioners' requests, these requests included Grant's having a second home health aide, whether it would be Mr. McCollum or someone else.

An examination of the Federal Circuit's ruling in Neher might give petitioners some perspective about how this issue concerning post-judgment modification is resolved. In Neher,

the chief special master awarded $100,000 in a lump sum in addition to a lifetime annuity which would cover all anticipated costs. The reason for the extra lump sum was to cover any fluctuations in future due to inflation or relatively minor changes in service needs. 984 F.2d at 1197. Respondent appealed and the part of the decision granting the $100,000 lump sum was reversed by the Court of Federal Claims. Petitioners filed a motion for reconsideration which the Claims Court denied. They appealed that ruling and the Federal Circuit affirmed the reversal. The Vaccine Act at § 300aa-15(d)(2) prohibits awarding compensation for anything "other than the health, education, or welfare of the person who suffered the vaccine related injury with respect to which the compensation is paid." 984 F.2d at 1198. The Federal Circuit found the chief special master's award duplicative and unauthorized because the annuity already encompassed projections of future inflation. 984 F.2d at 1199. Moreover, a lump sum award to encompass changes in service needs runs contrary to the determination of the reasonably projected future expenses encompassed within the annuity awarded. *Id.* The lump sum could only be for "possible expenses that cannot be reasonably projected," and, as such, the lump sum award was inconsistent with the Vaccine Act requirement that compensable expenses be reasonably projected. *Id.*

As to petitioners' claim that the lump sum award was consistent with congressional intent that awards be generous, the Federal Circuit stated that broad congressional intent "cannot override an express requirement of the statute." *Id.* Moreover, the 1987 amendment to prohibit post-judgment modification of awards further "suggests congressional intent to limit vaccine petitioners' entitlement to compensation to costs than can be reasonably anticipated at the time of the award." 984 F.2d at 1200.

Consequently, petitioners' motions herein for modification of the judgment and to reopen the case are DENIED.

IT IS SO ORDERED.

July 27, 2009
DATE

s/Laura D. Millman
Laura D. Millman
Special Master