

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

JODY NORDWALL *

as trustee for the next of kin of, *

MATEO TORI, deceased, *

Petitioner, *

*

v. *

SECRETARY OF HEALTH *

AND HUMAN SERVICES, *

Respondent. *

No. 05-123V
Judge Victor J. Wolski
Special Master Christian J. Moran

Filed: May 26, 2010

attorney's fees and costs, award in
the amount to which respondent has
not object, reasonable basis.

John F. McHugh, Law Office of John McHugh, New York, N.Y., for petitioner;
Michael P. Milmo, Esq., United States Dep't of Justice, Washington, D.C., for respondent.

PUBLISHED ATTORNEY'S FEES AND COSTS DECISION*

In her petition for compensation under the National Vaccine Injury Compensation Act, Jody Nordwall, alleged that the diphtheria, tetanus, and acellular pertussis (DTaP) vaccine caused the death of her son, Mateo "Mat" Tori, when he was approximately 10 weeks old. Ms. Nordwall did not establish that she was entitled to compensation and judgment was entered in favor of respondent.



* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it 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).

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 clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

Ms. Nordwall now seeks an award of her attorneys' fees and costs. This action is permitted because petitioners who are denied compensation still may be awarded attorneys' fees and costs. See 42 U.S.C. § 300aa-15(e). Ms. Nordwall has satisfied the appropriate standard and is awarded the amount of attorneys' fees and costs to which respondent has not objected.

I. Procedural History

Ms. Nordwall filed her petition for compensation (along with 15 medical exhibits) as a pro se litigant on January 18, 2005. On April 28, 2005, Ms. Nordwall's attorney entered a notice of appearance.

On March 16, 2006, Ms. Nordwall filed an expert report from a pathologist, Dr. John J. Shane, who opined that Mat's death was due to the DTaP vaccination. Respondent filed her Rule 4 report on May 19, 2006. Respondent also retained an expert to rebut Dr. Shane's opinion. The parties were offered an opportunity to settle the matter, but when those efforts failed, a hearing was held in Philadelphia, Pennsylvania on May 9, 2007. The parties' respective witnesses, as well as both of Mat's parents, testified at the hearing. A subsequent telephonic hearing was held on October 23, 2007, where the experts for both parties provided additional testimony.

The undersigned issued a decision on February 19, 2008, denying Ms. Nordwall's petition for compensation. Ms. Nordwall filed a motion for review, which was denied. Ms. Nordwall subsequently submitted a notice of appeal to the United States Court of Appeals for the Federal Circuit on October 17, 2008. Ms. Nordwall did not file a brief in support of her appeal and later moved the Court to voluntarily dismiss the appeal. On March 5, 2009, the Federal Circuit granted Ms. Nordwall's motion to withdraw her appeal.

Ms. Nordwall filed an application for her attorney's fees and costs on March 9, 2009, seeking approximately \$120,000 in attorneys' fees and approximately \$13,000 in costs. In response to an order filed by the undersigned on March 16, 2009, requesting that Ms. Nordwall supplement her request for attorney's fees and costs with additional information to allow a proper review, Ms. Nordwall filed an amended application on April 14, 2009. Ms. Nordwall requested that her attorney be compensated at \$350 or \$400 or \$450 per hour, depending upon when the work was performed. Respondent filed an objection to Ms. Nordwall's attorney fee application on July 22, 2009, objecting to the hourly rates requested by Ms. Nordwall's attorney, the number of hours expended by her attorney, and objecting to the reimbursement of some costs. Ms. Nordwall filed a reply to respondent's opposition on July 10, 2009.

On August 11, 2009, an order for briefs addressing Rodriguez v. Sec'y of Dep't of Health & Human Servs., No. 06-559V (Fed. Cl. Spec. Mstr. July 27, 2009) was issued. Rodriguez was relevant because it addressed one issue in dispute in this case – a reasonable hourly rate for Mr.

McHugh, who represented the petitioner in Rodriguez and Ms. Nordwall. The parties filed their briefs discussing Rodriguez on October 5, 2009.¹

In her October 5, 2010 brief addressing Rodriguez, Ms. Nordwall requested that “further action on this issue [the appropriate hourly rate for Mr. McHugh] be deferred until there is a final order in Rodriguez or any other case which settles the issue of forum rate.” Ms. Nordwall also suggested that the “uncontested amount” of her fee application be paid. Thus, discussions between Ms. Nordwall and respondent to determine an uncontested amount continued, which eventually led to an informal resolution of the entire fee application. On May 3, 2010, Ms. Nordwall filed a status report stating that the parties had identified an amount to be awarded to Ms. Nordwall for her attorney’s fees and costs to which respondent would not object.

Ms. Nordwall’s revised request seeks **\$82,500.00** in attorneys’ fees and costs. This figure includes Ms. Nordwall’s personal expenses in litigating this claim which amount to **\$6,620.39**. Respondent does not object to this amended request for attorneys’ fees and costs.

II. Analysis

Because Ms. Nordwall did not prevail upon her claim that the DTaP caused her son an injury, she is not entitled to an award of attorneys’ fees and costs by right. Instead, unsuccessful petitioners may be awarded attorneys’ fees and costs when a petition in good faith and there was a reasonable basis for the petition. See 42 U.S.C. § 300aa–15(e)(1).

Ms. Nordwall satisfies the standard for having a reasonable basis because initially appeared that she had a likelihood of prevailing on her claim that Mat suffered a Table injury. Ms. Nordwall claimed that Mat suffered an encephalopathy within 72 hours of receiving the DTaP vaccine. If Ms. Nordwall had established that Mat suffered this condition within the appropriate time, then she would not have been required to prove causation. Rather, causation would have been presumed. Cucuras v. Sec’y of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993). While the undersigned found that Mat’s condition did not meet the definition of “encephalopathy” as defined in the regulations, Ms. Nordwall’s argument suffices to meet the reasonable basis standard. In addition, Ms. Nordwall also proceeded on her causation in fact theory and presented an expert report from Dr. Shane in support of her claim. Although the undersigned found that Dr. Shane’s opinion was less persuasive than respondent’s expert’s contrary opinion, a reasonable basis still existed for Ms. Nordwall’s claim.

Because Ms. Nordwall satisfied her burden of showing that her petition was supported by a reasonable basis and was filed in good faith, Ms. Nordwall may be awarded a reasonable amount of attorneys’ fees and costs. After reviewing the request, the undersigned finds that the

¹ Rodriguez is one of the earliest decisions by special masters addressing how to determine an attorney’s reasonable hourly rate after Avera v. Sec’y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008).

requested amounts are reasonable. Thus, petitioner is awarded attorneys' fees and other litigation costs as follows:

- A. A lump sum payment of \$6,620.39, in the form of a check payable to petitioner only; and,**
- B. A lump sum of \$75,879.61, in the form of a check payable to petitioner and petitioner's counsel of record, John F. McHugh.**

The court thanks the parties for their cooperative efforts in resolving this matter.

The Clerk shall enter judgment accordingly.²

IT IS SO ORDERED.

Christian J. Moran
Special Master

² 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.