

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

No. 09-896V

Filed: September 24, 2012

(Not to be Published)

MICHAEL RAMSEY, parent of *
NATHAN RAMSEY, a minor, *

Petitioner, *

v. *

Attorneys' Fees and Costs;
Guardianship Costs

SECRETARY OF HEALTH AND *
HUMAN SERVICES *

Respondent. *

Ronald Craig Homer, Esq., Boston, MA, for petitioner.

Alexis B. Babcock, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION AWARDING ATTORNEYS' FEES AND COSTS¹

Vowell, Special Master:

On December 30, 2009, petitioner filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*² [the "Vaccine Act" or "Program"], alleging that Nathan Ramsey ["Nathan"] was injured by a vaccine or vaccines listed on the Vaccine Injury Table. Special Master Lord issued a decision on October 31, 2011, which adopted the parties' joint stipulation settling this case. On September 10, 2012, this case was reassigned to me.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to delete medical or other information, that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (1986). Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

Before this case was assigned to me, petitioner's counsel, Conway, Homer & Chin-Caplan ["CHCC"], filed a motion for attorneys' fees and costs, along with a General Order #9 statement. CHCC requested \$38,282.57 in attorneys' fees and costs, with a portion of the total for reimbursing guardianship costs. Petitioner's Motion, filed Apr. 25, 2012, at Tab B. In her response, respondent indicated that, the parties have agreed to attorneys' fees and costs in the amount of \$32,459.57, excluding guardianship costs. Response, filed May 9, 2012, at 1. Respondent opposes petitioner's request for guardianship costs, maintaining that guardianship costs are not compensable under the Vaccine Act. *Id.* at 1-2. Petitioner filed his reply to respondent's response on May 21, 2012.

For the reasons outlined below, I find that an award of attorneys' fees and costs in the amount of \$36,987.57, including guardianship costs in the amount of \$4,528.00, is appropriate.

I. Guardianship Costs.

On October 31, 2011, respondent filed a joint stipulation in this case. In preparing the joint stipulation, petitioner represented that he was, or soon would become, duly authorized to serve as guardian of Nathan's estate under Texas law. Stipulation, ¶ 13. Respondent stated, however, that "[n]o payments pursuant to this Stipulation shall be made until petitioner provides the Secretary with documentation establishing his appointment as guardian/conservator of Nathan's estate." *Id.* On February 8, 2012, petitioner filed his Letters of Guardianship from the Harris County Clerk certifying petitioner as Nathan's duly appointed guardian.

In his application for guardianship costs, petitioner's counsel asserted that he paid \$4,528.00 for petitioner to obtain appointment by a Texas probate court as guardian of Nathan's estate.³

In her opposition to petitioner's request for reimbursement of guardianship costs, respondent argues that "the Vaccine Act precludes compensation to petitioners for services and expenses associated with establishing a guardianship." Response at 2. While respondent cites a series of decisions⁴ from the Court of Federal Claims to support her position, she concedes that these decisions are not binding on special masters. Response at 2-3. Respondent recognizes the prior holding of Special Master Golkiewicz that "costs associated with establishing a guardianship are compensable if ordered by the court as part of the process of providing compensation to a petitioner."

³ The original invoice for these fees appears at Petitioner's Motion, Tab B at 13-15. According to this bill, \$1,703.00 represents the court filing fee, daily court review, a bond premium, and an attorney ad litem fee. The remainder of the \$4,528.00 bill represents \$2,825.00 in legal fees involving client contact, drafting documents, and court interactions associated with establishing the guardianship.

⁴ *Siegfried v. Sec'y, HHS*, 19 Cl. Ct. 323 (1990); *Lemon v. Sec'y, HHS*, 19 Cl. Ct. 621 (1990); *Mol v. Sec'y, HHS*, 50 Fed. Cl. 588 (2001).

Id. at 3 (citing *Ceballos v. Sec’y, HHS*, 2004 WL 784910, at *22 (Fed. Cl. Spec. Mstr. Mar. 25, 2004)). Likewise, respondent recognizes my own prior holding that “costs associated with establishing a guardianship are compensable if respondent or the court requires the creation of a guardianship as a condition precedent to payment of a damages award.” Response at 3 (citing *Gruber v. Sec’y, HHS*, 2009 WL 2135739, at *11(Fed. Cl. Spec. Mstr. June 24, 2009)).

Despite recognizing these decisions, respondent argues that the issue in the instant case “is not whether the costs incurred were a prerequisite to obtaining an award of compensation, but whether the costs claimed were incurred ‘during the pendency of a petition *before a special master, the Claims Court, the United States Court of Appeals for the Federal Circuit, or the Supreme Court.*” Response at 3 (quoting *Siegfried*, 19 Cl. Ct. at 325).

Respondent’s argument is not new. Respondent has previously objected to an application for guardianship costs on the basis that “fees and other costs incurred to establish or administer an estate are ‘not part of the prosecution of the vaccine petition,’ and so are not compensable under the Vaccine Act.” *Gruber*, Respondent’s Response, filed Feb. 2, 2009, at 15 (quoting *Mol*, 50 Fed. Cl. at 591). Here, as was the case in *Gruber*, respondent required petitioner to establish guardianship even though he was already Nathan’s “legal representative.”⁵ See §§ 11(b)(1)(A) & 33(2); see also *Gruber* Stipulation, filed Dec. 3, 2008, at ¶ 12.

Section 15(e)(1) permits the award of attorney fees and costs “incurred in any proceeding on such petition,” referring to the petition for compensation. Some special masters and judges have interpreted the “any proceeding” language to exclude costs associated with litigation in other fora. See, e.g., *Mol*, 50 Fed. Cl. at 591; *Siegfried*, 19 Cl.Ct. at 325 (disallowing coverage of the costs of establishing or administering an estate); *Lemon*, 19 Cl. Ct. at 623 (compensation for estate expenses were denied). However, more recent decisions by this court have clarified that guardianship costs are compensable under the Act and have therefore awarded them to petitioners. *Ceballos*, 2004 WL 784910, at *22–23; see also *Velting v. Sec’y, HHS*, No. 90–1432V, 1996 WL 937626, at *2–3 (Fed. Cl. Spec. Mstr. Sep. 24, 1996) (finding that, in the situation where

⁵ I have no objection to respondent imposing this requirement, which works to protect the interest of a vaccine-injured minor (or other person under legal disability) by imposing some measure of court oversight to protect a damage award designed to benefit the minor. The requirement is a sensible one; respondent’s approach to reimbursing this necessary and required cost is not, particularly when the Act’s intent that compensation for the injured person be generous is considered. As the court noted in *Loving*: “In adopting the Vaccine Act, Congress sought to ‘establish a Federal ‘no-fault’ compensation program under which awards can be made to vaccine-injured persons quickly, easily, and with certainty and generosity.” *Loving v. Sec’y, HHS*, 86 Fed. Cl. 135, 141 (Fed.Cir.2009) (quoting H.R.Rep. No. 99–908, at 3 (2d Sess.1986), reprinted in 1986 U.S.C.C.A.N. 6334, 6343). Although there is no similar admonishment regarding awards of fees and costs, when the costs incurred are for the benefit of the vaccine-injured individual and the reason for incurring the cost is directly related to how the damage award is administered, common sense would suggest that reasonable guardianship costs are reimbursable, as no award on a petition will be paid by respondent until the guardianship is established.

a conservatorship was set up specifically to handle a Program award, compensation is authorized by the statute); *Hill v. Sec'y, HHS*, No. 03–619V, (unpublished) slip op. at 3–4 (Fed. Cl. Spec. Mstr. Jul. 19, 2007).⁶

Notwithstanding the language in *Mol*, which, as respondent acknowledges, is persuasive but not binding authority, I conclude that when respondent or the court requires the creation of a guardianship as a condition precedent to payment of a damages award, the reasonable costs of establishing that guardianship are compensable as “costs incurred in any proceeding on such petition.”

II. Conclusion.

I hold petitioner is entitled to reasonable attorneys’ fees and costs pursuant to §§ 15(b) and (e)(1), as I find that the petition was brought in good faith and upon a reasonable basis.

Pursuant to § 15(e), I award a lump sum of \$36,987.57⁷ to be paid in the form of a check payable jointly to the petitioner and petitioner’s counsel, Conway, Homer & Chin-Caplan, P.C.

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.⁸

IT IS SO ORDERED.

s/Denise K. Vowell

Denise K. Vowell
Special Master

⁶ I recognize that my own decisions and those of other special masters are not binding on this case. See *Hanlon v. Sec’y, HHS*, 40 Fed. Cl. 625, 630 (1998). Respondent, however, has failed to present an argument that persuasively undercuts the reasoning applied in previous Program cases, notably *Ceballos* and *Gruber*.

⁷ This amount is intended to cover all legal expenses incurred by CHCC in this matter. This award encompasses all charges by the attorney against a client, “advanced costs” as well as fees for legal services rendered. Furthermore, § 15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. See generally *Beck v. Sec’y, HHS*, 924 F.2d 1029 (Fed. Cir.1991).

⁸ Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.