

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
No. 09-0738V
(Not to be published)

*
Nevaeh Kenney, by his *
parents ANGIE and JUSTIN KENNEY, *
*
 Petitioners, *
*
 v. *
*
SECRETARY OF HEALTH AND *
HUMAN SERVICES, *
*
 Respondent. *

Filed: October 24, 2012

Decision on Attorney’s
Fees and Costs

DECISION¹ (ATTORNEY FEES AND COSTS)

In this case under the National Vaccine Injury Compensation Program,² Special Master Lord issued a decision on March, 8 2012. On September 10, 2012, the case was reassigned to myself. On August 10, 2012, petitioners filed an application for attorneys’ fees and costs. Petitioners requested a total payment of \$61,995.34, pursuant to 42 U.S.C. § 300aa-15(e).

¹ The undersigned intends 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)). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire” decision will be available to the public. Id.

² The applicable statutory provisions defining the program are found at 42 U.S.C. § 300aa-10 *et seq.* (2006).

On August 29, 2012, respondent filed a response to petitioners' application for attorneys' fees and costs. Respondent noted that petitioners had requested \$42,696.40 in attorneys' fees and \$19,018.16 in their attorneys' costs, including \$6,214.00 in guardianship costs. (Resp. at 1, ECF No. 54.) Respondent noted that following informal discussions between the parties, petitioners agreed to reduce their request for attorneys' fees and attorneys' costs (not including guardianship costs) to \$40,561.58 in fees and \$12,804.16, in costs, for a total of \$53,365.74. (*Id.*) However, their agreement did not include guardianship costs. (*Id.*) Respondent made no objection to the amended request in that regard nor to petitioners' personal costs of \$280.78. Respondent continued to oppose payment of the guardianship costs of \$6,214.00. (*Id.*)

On September 7, 2012, petitioners filed a reply to the respondent's response to petitioners' application for attorneys' fees and costs. Petitioners argued that because the appointment of a guardian of Nevaeh's estate is required for the sole purpose of the Vaccine Program award, the associated fees and costs are properly reimbursable. (Reply, ECF No. 55.) Petitioners also noted that, in the Stipulation filed on February 16, 2012, the respondent had conditioned the payment of the original award on petitioners obtaining a guardianship. (Stipulation at 3, ECF No. 47.)

A. Guardianship expenses

In virtually all Vaccine Act cases in which substantial awards are made on behalf of a minor, the minor's parents and/or others are formally appointed by a local court as the guardians or conservators of the minor. This ensures that the award is subject to continued court supervision by a local court. In this case, on May 22, 2012, petitioners filed Exhibit 29 into the

record of this case, indicating that on May 9, 2009, petitioners were appointed by a local court as co-guardians of Nevaeh's person and of her estate. In their costs application, they seek compensation for attorneys' fees incurred in the course of obtaining that appointment.

B. Legal Issue

The legal issue involved here--*i.e.*, whether the costs of such guardianship proceedings are properly compensable in a Vaccine Act costs award--has been repeatedly litigated. As respondent notes, some opinions have answered that question in the negative. *E.g.*, *Mol v. HHS*, 50 Fed. Cl. 588, 591 (2001); *Siegfried v. HHS*, 19 Cl. Ct. 323, 325 (1990). However, other opinions have reached the opposite conclusion, allowing awards to compensate the fees and costs of creating a guardianship or conservatorship. *See, e.g.*, *Velting v. HHS*, 1996 WL 937626 (Fed. Cl. Spec. Mstr. Sept. 24, 1996)(awarding payment for expenses incurred to establish a conservatorship for the purpose of managing a Vaccine Act award); *Hill v. HHS*, 2007 WL 5160382 (Fed. Cl. Spec. Mstr. July 19, 2007) (allowing payment for establishing a guardianship in order to satisfy a requirement of respondent's proffer); *Haber v. HHS*, 2011 WL 839111 (Fed. Cl. Spec. Mstr. Feb. 14, 2011) (awarding expenses for establishment of a guardianship when it was required by respondent for the payment of a Vaccine Act award); *Cansler v. HHS*, 2011 WL 597791 (Fed. Cl. Spec. Mstr. Feb. 2, 2011) (awarding expenses for establishment of a guardianship trust that was required by respondent for the payment of a Vaccine Act award); *Lindsey v. HHS*, 2011 WL 6046605 (Fed. Cl. Spec. Mstr. Nov. 15, 2011) (awarding payment of guardianship expenses required by respondent in order to allow a Vaccine Act award); *Finet v. HHS*, 2011 WL 597792 (Fed. Cl. Spec. Mstr. Jan 31, 2011) (awarding guardianship costs that were mandated as a condition for receiving a Vaccine Act award);

Amar v. HHS, 2011 WL 6077558 (Fed. Cl. Spec. Mstr. Nov. 10, 2011) (awarding costs for setting up a guardianship that was required as a condition of the parties' stipulation); *Thomas v. HHS*, 1997 WL 74664, (Fed. Cl. Spec. Mstr. Feb. 3, 1997) (awarding expenses related to establishing a conservatorship); see also *Capriola v. HHS*, No. 08–835V, slip op. (Fed. Cl. Spec. Mstr. Apr. 29, 2010)(awarding costs for establishment of an estate when probate was initiated solely for handling the Vaccine Act award); *Gruber v. HHS*, 2009 WL 2135739 (Fed. Cl. Spec. Mstr. June 24, 2009), vacated 91 Fed. Cl. 993, 2010 WL 966640 (Fed. Cl.2010) (remanding the case for further proceedings but not reversing the special master's grant of fees for petitioner's probate attorney); *Shook v. HHS*, 2011 WL 845910 (Fed. Cl. Spec. Mstr. Feb. 15, 2011) (allowing payment for establishment of an estate that was required by the parties' stipulation); *Burgess v. HHS*, No. 07- 258V, slip op. (Fed. Cl. Spec. Mstr. Mar. 29, 2011); *Sampt v. HHS*, 2011 WL 1629661 (allowing payment of the costs of probate proceedings required by the court).

I find the interpretation of the law on this point set forth in the *latter* group of cases to be substantially more persuasive. For the reasons detailed in my *Velting* opinion and in the other opinions cited above, I conclude that where, as here, it is necessary to set up a legal guardianship or conservatorship before the Vaccine Act award can be paid, the expenses of setting up such a guardianship or conservatorship are appropriately awarded as part of a Vaccine Act fees/costs award.

C. Award in this case

I find that this petition was brought in good faith and that there existed a reasonable basis for the claim. Therefore, an award for fees and costs is appropriate, pursuant to 42 U.S.C. § 300aa-15(b) and (e)(1). As to the amount of the award, the amounts unopposed by respondent

seem reasonable and appropriate. (Resp. at 1, ECF No. 54.) In addition, the amount sought for the establishment of the guardianship, \$6,214.00, also seems reasonable. **Accordingly, I hereby award the total \$59,579.74, as a lump sum in the form of a check payable jointly to petitioners and petitioners' counsel, Ronald C. Homer.**

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.

IT IS SO ORDERED

/s/ George L. Hastings, Jr.
George L. Hastings, Jr.
Special Master