

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

E-filed: March 2, 2012

No. 07-0058V

* * * * *

ADAM SUCHER and ELIZABETH
 SUCHER, parents of EVELYN SUCHER,
 a minor,

Petitioners,

v.

SECRETARY OF HEALTH AND
 HUMAN SERVICES,

Respondent.

* * * * *

PUBLISHED

Proffer on Award of Compensation
 Required Petitioners to Establish a
 Conservatorship; Cost of Surety Bond
 Required by State Law for Appointment
 of Conservator Reimbursable

Ronald Homer, Boston, MA, for petitioners.

Michael Milmo, Washington, DC, for respondent.

**RULING REGARDING REIMBURSABILITY
 OF SURETY BOND COST¹**

This ruling addresses the legal issue of whether the cost of a surety bond required for the appointment of a conservator² to oversee the estate for Evelyn Sucher

¹ Because this decision contains a reasoned explanation for the undersigned’s action in this case, 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 a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or 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 For the purposes of this Ruling, the terms conservatorship and guardianship are

is a reimbursable cost under the National Vaccine Injury Compensation Program (Program), 42 U.S.C. § 300aa-10, *et seq.*³

Claim Background and Procedural History

On January 24, 2007, Adam and Elizabeth Sucher filed a petition (Pet.) for compensation under the Vaccine Program on behalf of their daughter, Evelyn. In their original petition, the Suchers alleged that, as a result of a Diphtheria-Tetanus-acellular Pertussis (DTaP) vaccination administered on February 11, 2004, Evelyn “suffered the onset of a seizure disorder.” Pet. at 1. On June 5, 2007, petitioners filed an amended petition (Am. Pet.) alleging that as a result of a DTaP vaccine on December 1, 2003, Evelyn suffered “seizures, an encephalopathy, and neurological sequela.” Amended Pet. at 1. On March 15, 2010, the then-presiding special master issued a ruling on entitlement concluding that petitioners were entitled to compensation for Evelyn’s injuries.

On July 11, 2011, respondent filed a proffer on award of compensation.⁴ Resp’t’s Proffer. The proffer detailed the amounts of compensation for the respective components of Evelyn’s damages, to include the identified life care items, lost future earnings, pain and suffering, past unreimbursable expenses, and a Medicaid lien. Id. The lump sum to be awarded to petitioners totaled \$1,029,338.02. This sum included a payment of \$961,504.20 to petitioners as guardians/conservators of Evelyn’s estate. It did not include the amount necessary to purchase the annuity contract described in Section II.C. of the proffer. See Resp’t’s Proffer at 3-6.

As set forth in the proffer, payment of the award was conditioned upon certain action by petitioners: “No payments shall be made until petitioners provide

used interchangeably.

³ National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

⁴ Resolution of a vaccine claim through a proffer is appropriate when the parties agree to the amount of damages as a factual matter. Their agreement is then memorialized in a decision by the special master accepting the proffer. A proffer is different from a stipulation, which is used to resolve the issues of damages by compromising on an amount less than petitioner initially proposed. See Report from the Department of Justice, ADVISORY COMM’N ON CHILDHOOD VACCINES, Sept. 1, 2011 Meeting Minutes, 3 (report by Vincent J. Matanoski, J.D.), available at <http://www.hrsa.gov/vaccinecompensation/accvminutes090111.pdf>.

respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Evelyn Sucher's estate." Resp't's Proffer at 3. On July 15, 2011, the undersigned issued a decision awarding damages, adopting the terms of respondent's proffer. Final judgment entered on August 5, 2011.

On December 2, 2011, petitioners filed a motion for the cost of surety bond (Pet'rs' Mot.), asking the undersigned to find that the cost of the surety bond required for the appointment of a conservator for Evelyn's estate, a cost totaling \$11,788.00, is a reimbursable one under Section 15(e) of the Vaccine Act. See Pet'rs' Mot. at 1-2.

During a status conference held on December 7, 2011 to address petitioners' motion, the undersigned afforded the parties an opportunity to brief the issue. See Order, Dec. 21, 2011. The parties completed briefing on January 30, 2012.

On February 1, 2012, petitioners filed an application for final attorneys' fees and costs (Pet'rs' Fee Application) in the amount of \$103,656.65. The application includes the cost of the surety bond at issue here.⁵

The Applicable Law

The Vaccine Act provides that a special master may award compensation to petitioners to reimburse "reasonable attorneys' fees, and other costs, incurred in any proceeding on such petition . . ." 42 U.S.C. § 300aa-15(e)(1)(A)-(B) (emphasis added). Respondent frequently has taken the position that costs incurred by petitioners after entry of judgment awarding damages are not compensable under the Vaccine Act because petitioners' post-judgment actions do not constitute proceeding "on" a vaccine claim as contemplated by Section 15(e)(1). Rejecting respondent's position, special masters repeatedly have found conservatorship expenses to be compensable when, as in this case, respondent has made establishment of a conservatorship a condition of the stipulated or proffered award of damages. Thomas v. Sec'y of Health & Human Servs., No. 92-46V, 1997 WL 74664 (Fed. Cl. Spec. Mstr. Feb. 3, 1997) (observing that "for years [this court] has . . . compensated such costs utilizing a "but for" test); Gruber v. Sec'y of Health & Human Servs., No. 00-749V, 2009 WL 2135739 (Fed. Cl. Spec. Mstr. June 24, 2009) (holding that where respondent requires petitioners to establish a conservatorship as a condition of settlement, those funds are reimbursable), vacated on other grounds, 91 Fed. Cl. 773 (2010); accord, Haber v. Sec'y of Health & Human Servs., No. 09-458V, 2011 WL 839111 (Fed. Cl. Spec. Mstr. Feb. 14, 2011); Cansler v. Sec'y of Health & Human Servs., No. 09-596V, 2011 WL 597791 (Fed. Cl. Spec. Mstr. Feb. 2, 2011); Velting v.

⁵ In addition to the cost of the surety bond itself, petitioners also seek fees for the services of the guardianship attorney in the fee application.

Sec’y of Health & Human Servs., No. 90-1432, 1996 WL 937626 (Fed. Cl. Spec. Mstr. Sept. 24, 1996).

When expenses—such as the costs associated with establishing a conservatorship to comply with the conditions of the proffer—are found to have been appropriately incurred, the source of recovery of such expenses is limited. These expenses cannot be borne out of a Program award of damages because the Federal Circuit has held that “[b]ased on the structure of the Vaccine Act and Congress’ overall purpose in creating the Vaccine Program, . . . money awarded under the Vaccine Act as victim compensation may only be used to pay for the injury-related expenses upon which it was calculated.”⁶ Beck v. Sec’y of Health & Human Servs., 924 F.2d 1029, 1035 (Fed. Cir. 1991) (emphasis added). Thus, any recovery of such expenses, if appropriate, must come as a reasonably incurred and thus, reimbursable cost under Section 15(e)(1) of the Act.

Conservatorship expenses are not reimbursable, however, in those circumstances in which: (1) the expenses were incurred not at respondent’s insistence as a condition of settlement, but rather at petitioners’ own election, (see e.g. Ceballos v. Sec’y of Health & Human Servs., No. 99-97V, 2004 WL 784910, *22 (Fed. Cl. Spec. Mstr. Mar. 25, 2004) (holding that the costs associated with setup of a guardianship for petitioners’ own purposes are not reimbursable)); or (2) are unrelated to the vaccine proceeding. See e.g., Siegfried v. Sec’y, HHS, No. 88-68V, 19 Cl. Ct. 323, 324 (1990) (holding that “the Vaccine Act does not provide attorney fee awards to cover the myriad legal implications of establishing or administering an estate”). In such circumstances, the incurred expenses cannot be charged as Vaccine Program costs.

Analysis and Discussion

Petitioners, who are residents of Massachusetts, argue that payment of a surety bond is required by Massachusetts state law before they can establish the required conservatorship. Petitioners assert that they are financially unable to pay the cost of the surety bond and would be forced to take money from Evelyn’s Program award if this expenditure is found not to be a compensable cost.

Respondent filed a response (Resp’t’s Resp.) to petitioners’ motion on January 23, 2012, in which respondent maintains the position that the cost of the surety bond is not an expense incurred “on” a vaccine petition. 42 U.S.C. § 300aa-15(e)(1)(B).

⁶ The undersigned notes that opinions of the United States Court of Appeals for the Federal Circuit are binding on the Office of Special Masters. See Snyder v. Sec’y of Health & Human Servs., 88 Fed. Cl. 706, 719 n.23 (Fed. Cl. 2009).

See Resp't's Resp. at 1. Respondent contends that as an expense incurred outside of the vaccine proceeding, it is not compensable. Id.

Petitioners here are required to set up a conservatorship for Evelyn as a condition precedent to obtaining the Program award. The language of the proffer is clear and emphatic: "No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Evelyn Sucher's estate." Resp't's Proffer at 3 (emphasis added).

To comply with this particular term of the proffer, petitioners turned to their state's probate code to establish a conservatorship. The Massachusetts Uniform Probate Code requires newly appointed conservators to furnish a surety bond.⁷ MASS. GEN. LAWS ch. 190B, art. V, § 5-410(a).

Because each State's law may differ in this regard, conservatorship requirements must be evaluated on a case-by-case basis. Here, the need to establish a conservatorship was occasioned by the terms of the proffer on the damages award. But for the need to establish a conservatorship to receive the Program award on Evelyn's behalf, petitioners would not have incurred the additional cost of the surety bond. In the view of the undersigned, petitioners' efforts to comply with the terms of the proffer, as required by respondent, involved incurring certain costs to resolve their vaccine claim and thus, the incurred costs were part of petitioners' final action pertaining to the petition. A different outcome might be appropriate, however, if the surety bond were required due to questions about petitioners' particular trustworthiness.

The cost of the surety bond was incurred necessarily to comply with the requirement that petitioners establish a conservatorship. Accordingly, the undersigned finds, on the facts of this case, the cost of the surety bond to be reimbursable under the Program.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Chief Special Master

⁷ The court may waive the requirement of sureties "for good cause shown by the conservator." MASS. GEN. LAWS ch. 190B, art. V, § 5-410(a). However, the undersigned could find no case law identifying what is legally necessary for conservators to show "good cause."