

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-1914V

(E-Filed: February 12, 2010)

DREW MORTON MACNEIR,)	
by his parents, LISA MACNEIR and)	TO BE PUBLISHED
GREGORY MACNEIR,)	
)	Interim Award of
Petitioners,)	Attorneys' Fees and Costs;
)	Reasonable Amount Requested
v.)	to which Respondent Does Not
)	Object
SECRETARY OF THE DEPARTMENT)	
OF HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	
)	

INTERIM ATTORNEYS' FEES AND ATTORNEYS' COSTS DECISION¹

CAMPBELL-SMITH, Special Master

On August 13, 2003, petitioners, on behalf of their son, Drew Morton MacNeir ("Drew"), filed a claim for compensation pursuant to the National Vaccine Injury

¹ Because this document contains a reasoned explanation for the action of the undersigned, the document shall post on the website of the United States Court of Federal Claims in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has fourteen days within which to request the redaction "of any information furnished by that party (1) that is 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." Rules of the United States Court of Federal Claims (RCFC), Appendix B, Vaccine Rule 18(b). In the absence of timely objection, the entire document will be made publicly available.

Compensation Program (Vaccine Program or Program).² 42 U.S.C. §§ 300aa-1 to -34 (2006). Petitioners alleged that Drew developed autism spectrum disorder as the result of an MMR vaccination and the receipt of vaccines containing thimerosal. The petition was filed as part of the Omnibus Autism Proceeding (“OAP”) and was filed as a Short Form Petition pursuant to Autism General Order # 1, which adopted the Master Autism Petition for Vaccine Compensation.³ Short Form Autism for Vaccine Compensation at 1. As a short form petition, it was not accompanied by any materials required to be filed with a petition for compensation under the Vaccine Act.

I. Background on the Development of the Record in this Case

Since the filing of the petition, petitioners have filed a quantum of medical records. Petitioners also have requested a total of four extensions of time to complete the filing of

² The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. § 300aa-10 et seq. (2006) (Vaccine Act or the Act). All citations in this Decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

³ By electing to file a Short-Form Autism Petition for Vaccine Compensation petitioners alleged that:

[a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccinee in question has developed a neurodevelopmental disorder, consisting of an Autism Spectrum Disorder or a similar disorder. This disorder was caused by a measles-mumps-rubella (MMR) vaccination; by the “thimerosal” ingredient in certain Diphtheria-Tetanus-Pertussis (DTP), Diphtheria-Tetanus-acellular Pertussis (DTaP), Hepatitis B, and Hemophilus Influenza Type B(HIB) vaccinations; or by some combination of the two....

The petition is being filed within three years after the first symptom of the disorder, or within three years after the first symptom a vaccine-caused significant aggravation of the disorder. (If the vaccine-related death is alleged, the petition is being filed within two years after the date of death and no later than 48 months after onset of the injury from which death resulted.)

Autism General Order # 1 filed July 3, 2002, Exhibit A, Master Autism Petition for Vaccine Compensation at 2.

the relevant medical records, as required by the Phase I Order issued on June 17, 2008.⁴ To date, petitioners have not filed a “Statement of Compliance with Phase One Medical Records Production.” Nor have petitioners completed the filing of medical records as required by Section 300aa-11(c)(2) of the Vaccine Act. Because the filing of the medical records is incomplete, respondent has not been required to file a “Statement Regarding whether the Claim should proceed in the OAP,” and has not addressed whether petitioners’ claim was timely filed. See June 17, 2008 Order at 5-6. Respondent has indicated, however, that although the filing of medical records is not complete in this case, it does appear from the records filed that petitioners’ claim was timely filed.

The undersigned observes that while a statement of completion regarding the filing of the medical records has not been filed yet, the records filed to date helpfully do inform the timeliness issue. A review of the medical records establishes that Drew was born on April 23, 2000. It appears from the medical records that Drew was first diagnosed with developmental delay (based apparently, on missed physical milestones) on October 30, 2000, when Drew was six months and one week old. See Ps’ Ex. 12B at 27-29. The first mention of developmental delay in the medical records occurs on October 24, 2000, at Drew’s six month well-child visit, six days before the date of diagnosis of the condition. Ps’ Ex. 13 at 11 (noting “developmental delay probably related to excessive joint flexibility.”) Drew’s diagnosis evolved over time and eventually was determined to include “a developmental disorder and cerebral palsy with some mental retardation and autism.” Ps’ Ex. 9 at 6. The undersigned observes that later-dated medical records indicate that the first symptoms of Drew’s developmental problems were evident at four months of age when Drew’s hypotonia initially was noted. See Ps’ Ex. 8 at 9, Ps’ Ex. 9 at 11. But the contemporaneous medical records from Drew’s well child visits through his first four months of life do not mention hypotonia but rather indicate that Drew’s development was normal with the exception of a notation that Drew had craniofacial

⁴ Phase I Orders are issued in cases where Short-Form Autism Petitions for Vaccine Compensation were filed. Prior to the filing of complete medical records in a case, the order directs petitioners to file all medical records from the period of the vaccinee’s birth through either, whichever date is later, (1) the date of petition filing or (2) the date of the vaccinee’s initial diagnosis of autism, autism spectrum disorder, a speech or language delay related to an autism diagnosis, or any similar neurological disorder related to an autism diagnosis. The purpose of requiring this initial filing from petitioners is to determine whether the claim survives a statute of limitations challenge. Once it has been determined that a claim is timely filed, the case proceeds to the second phase of record production, which requires the filing of the complete medical records required under the Vaccine Act.

asymmetry.⁵ See Ps' Ex. 12B at 23-26 (well child visits at 2 weeks and four months indicate that Drew had craniofacial asymmetry).

Petitioners filed this claim on August 13, 2003. The filing of the claim occurred 34 months after Drew's first evaluation on October 30, 2000, for developmental delay based on his mother's observation of certain missed physical milestones. Drew was subsequently diagnosed with autism.

The statute requires that petitioners file their claim within 36 months of the "first symptom or manifestation of onset or of the significant aggravation of such injury." 42 U.S.C. §§ 300aa-16(a)(2). Here, petitioners filing of suit 34 months after concerns regarding Drew's development arose, falls within the 36 month statutory limitations period. Although other medical records remain to be filed in this case, the timeliness of the claim on Drew's behalf appears to be well established by the medical records already filed. Petitioners' counsel has indicated that the only outstanding medical records to be filed are from Drew's later treating neurologist, Dr. Tatyana Dubrovsky.⁶ And respondent has indicated that as presently informed by the filed medical records, she does not challenge the timeliness of the claim. Without reaching or deciding whether Drew's symptoms of developmental delay that occurred at four months were the first symptoms of his autistic condition, the undersigned is satisfied that the earliest noted symptoms of a medical problem occurred within the statute of limitations.

II. The Filed Interim Fee Petition

On November 11, 2009, petitioners filed an Application for Interim Fees and Costs ("Fee App."). Petitioner seeks interim fees and costs pursuant to 42 U.S.C. § 300aa-15(e) of the National Childhood Vaccine Injury Act of 1986, as amended (the Vaccine Act), and Rule 13 of the United States Court of Federal Claims Vaccine Rules, and further to the guidance provided in Avera v. Secretary of the Department of Health and Human Services, 515 F.3d 1343 (Fed. Cir. 2008). Based on the cited authority, petitioners

⁵ Craniofacial asymmetry is also called plagiocephaly. Positional plagiocephaly "is the term used to describe a flattened or misshapen head that may result from crowding within the womb or from an infant being placed in the same position (such as on the back) for long periods of time." See http://www.nichd.nih.gov/health/topics/positional_plagiocephaly.cfm.

⁶ See Unilateral Status Report dated 2/5/10 from petitioners' counsel stating that a conversation with Drew's mother on February 1, 2010, confirmed that Dr. Dubrovsky was a later-treating neurologist for Drew.

request interim attorneys' fees and costs in the amount of \$14,447.08. Fee App., Exhibit 2 at 8.

On November 30, 2009, respondent filed Respondent's Response and Objections to Petitioners' Application for Interim Fees and Expenses (R's Response). On December 14, 2009, petitioners' filed Petitioners' Reply to Respondent's Response and Objections to Petitioners' Application for Interim Fees and Expenses (Ps' Reply).

Two days after the filing of petitioners' reply, on December 16, 2009, the undersigned conducted a status conference noting that she was "inclined to entertain petitioners' request for interim fees over respondent's objection that an award of interim fees at this stage of the proceedings is premature." See December 17, 2009 Order (12/17/09 Order) at 1. During the status conference, the parties indicated the possibility of resolving the interim fee request. See 12/17/09 Order at 2. The undersigned directed the parties to file a joint status report regarding their progress in negotiating petitioners' interim fee request. See id.

On January 15, 2010, respondent's counsel filed Respondent's Status Report and Stipulation for Interim Fees and Expenses (R's Status Report and Stipulation). Respondent maintained her earlier raised objection that interim fees are not appropriate in this case under Avera v. Sec'y of Health and Human Servs., 515 F.3d 1343, 1352 (Fed. Cir. 2008), a decision which identified several factors that the Federal Circuit considered relevant to a determination of whether an interim fee award might be appropriate. These factors include whether the case had involved protracted legal proceedings, whether costly experts had been retained, or whether petitioners had suffered undue hardship. Id. at 1352. Respondent argued that because these conditions have not been met in this case, an interim award at this time would be premature. Respondent requested that the undersigned articulate her reasoning for finding that an interim fee award is reasonable in this case.

The undersigned directs respondent's attention back to her December 17, 2009 Order, which issued following her conduct of the December 16, 2009 status conference. In that Order, the undersigned explicated more fully why she finds that interim fees are appropriate in this case under Avera, stating:

The cases contemplated in the Avera decision seem to be the typical cases encountered in vaccine litigation; that is, cases that stand alone and proceed on an individual course. In contradistinction to typical vaccine litigation, the cases in the Omnibus Autism Proceeding, such as the instant case, have developed more slowly in a calculated effort to avoid incurring

costly and potentially unnecessary expenses during the conduct of test case proceedings intended to provide guidance for more than 4500 pending autism claims before the Office of Special Masters. Counsel handling OAP claims have been encouraged to collect, among others, those medical records that establish that the vaccinee has received the vaccinations at issue and that the vaccinee has received a diagnosis of an autism spectrum disorder. These records not only assist petitioners in the prosecution of their vaccine claims but they also speak to the statute of limitations issue. Not requiring petitioners to retain costly experts during the pendency of the test case proceedings on petitioners' general causation theories reflects a considered effort to contain OAP litigation costs at this stage of the proceedings. Nonetheless, for counsel handling a significant number of OAP claims,⁷ the litigation costs have mounted, some of which costs might have been borne by petitioners. These costs mount as three decisions have issued on petitioners' first theory of general causation, and decisions are pending on petitioners' second theory of general causation. It is thus the view of the undersigned that the considerations outlined in Avera, which seem intended to relieve counsel and parties of the expensive burden associated with lengthy litigation, may have application in this case where counsel has filed a substantial collection of medical records, has exercised appropriate diligence in pursuing the clients' claim, and yet has displayed judgment in containing litigation costs.

12/17/09 Order at 2-3. It is in this context that the undersigned views an interim attorneys' fees and costs award as appropriate in this case. Accordingly, the undersigned strongly encouraged the parties to negotiate some quantum of reasonable fees and costs, to which respondent did not object, for award to petitioners' counsel. See id. at 3.

As expressed in the filed status report and stipulation, respondent's counsel maintains her client's position that an interim fee award in this case is premature and does not comport with the guidelines set forth in Avera. With this objection preserved for the record, respondent has no objection to an interim award of attorneys' fees and costs in the requested amount of \$12,062.00.⁸ R's Status Report and Stipulation at 3. Pursuant to

⁷ A review of the electronic filing system indicates that Mr. McLaren, petitioners' counsel of record in this case, currently has fourteen autism cases pending in the Vaccine Program.

⁸ Respondent's filing reflects that during informal discussions regarding petitioners' interim fee petition, respondent "raised objections to certain items in petitioners' draft

General Order No. 9, petitioners aver that they have no reimbursable costs that were incurred in pursuit of their claim. Id. at 3. Based on the reasonableness of petitioners' request, and based on respondent's counsel's lack of objection to petitioners' counsel's amended interim fees request, the undersigned **GRANTS** the attorneys' interim fees and costs, as outlined in respondent's stipulation.

It is the opinion of the undersigned that the circumstances of this case are appropriate for an interim award of petitioners' counsel's fees and costs of \$12,062.00, for all such costs incurred through August 29, 2009. The undersigned determines that there is no just reason to delay the entry of judgment on an award of interim attorneys' fees and costs. Therefore, in the absence of a motion for review filed under Appendix B of the Rules of the United States Court of Federal Claims, the Clerk of the Court shall enter judgment in petitioners' favor for \$12,062.00, in interim attorneys' fees and costs. Under Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

IT IS SO ORDERED.

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

application.” R’s Status Report and Stipulation at 3. Based on these discussions, petitioners’ amended their interim fee application to request reimbursement for attorneys’ fees and costs in the amount of \$12,062.00. See id.