

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 04-1370V

Filed: March 29, 2012

(Reissued for Publication: December 18, 2012)

CHENG KU AND SHEN WANG, natural Parents and guardians ad litem for T.K., a minor,	*
Petitioners,	*
	*
v.	*
	*
SECRETARY OF HEALTH AND HUMAN SERVICES,	*
	*
	*
Respondent.	*

Thomas Gallagher, Somers Point, New Jersey, for petitioners.

Linda Renzi, U.S. Department of Justice, Washington, D.C., for respondent.

RULING DENYING PETITIONERS' MOTION FOR MOTHER'S LOST EARNINGS

HASTINGS, Special Master.

In this case under the National Vaccine Injury Compensation Program (hereinafter the "Program"¹), the respondent acknowledged that Petitioners' daughter, T.K., met the criteria of a "Table Injury" under the Vaccine Act on December 3, 2007. (Resp. Response filed on January 31, 2011.) Thus, the general issue is the *amount* of the award, and a specific issue in dispute is whether Petitioners are entitled to \$518,000 pursuant to § 300aa-15(a)(1)(B). Petitioners request such compensation for Petitioner Shen Wang's lost opportunity to earn income during the eight years that she cared for her vaccine-injured daughter. For the foregoing reasons, I must DENY Petitioners' motion.

¹ The statutory provisions governing the National Vaccine Injury Compensation Program are found in 42 U.S.C. § 300–10 *et seq.* (2006). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C.

I. BACKGROUND

In August of 2002, T.K. received a vaccine covered by the Vaccine Act, and thereafter T.K. suffered from unpredictable, frequent, and intractable seizures, with severe central nervous system dysfunction. (Pet. Brief at 1, filed on January 13, 2011.) Petitioners explained that the financial position of the family prevented T.K.’s parents from hiring someone to care for a child with T.K.’s overwhelming needs, thus causing Petitioner Shen Wang, T.K.’s mother, to leave her job and take on the role of full-time caregiver for T.K. (*Id.*) A summary of Petitioners’ argument is that petitioners would have been reimbursed by the Program if they had been able to hire a medical care professional, therefore Shen Wang should be reimbursed for the lost opportunity to earn income during the eight years she was compelled to forgo employment to care for T.K. (*See id.*)

However, Respondent is correct that this Court has already addressed whether a parent can collect “lost wages” damages or payment for taking care of that parent’s vaccine-injured child. Despite my great sympathy for T.K. and her family, I must DENY Petitioners’ motion.

II. ACTUAL UNREIMBURSABLE EXPENSES

A petitioner whose vaccination occurred after October 1, 1988, the “effective date” of the Program, may be entitled to compensation for “actual unreimbursable expenses.” (§ 300aa-15(a).) In this case, T.K. received the relevant vaccines on August 30, 2002, and therefore subsection (a) governs. Subsection (a) states:

Compensation awarded under the Progam to a petitioner under section 300aa-11 of this title for a vaccine-related injury or death associated with the administration of a vaccine after the effective date of this subpart shall include the following:

* * * *

(1)(B)² *Actual unreimbursable expenses incurred before the date of the judgment awarding such expenses which--*

(i) result from the vaccine-related injury for which the petitioner seeks compensation

(ii) *were incurred* by or on behalf of the person who suffered such injury, and

² Subpart (a)(1) of § 300aa-15 can be divided into two subparts, specifically (a)(1)(A) and (a)(1)(B). Subpart (a)(1)(A) is for expenses incurred “from the date of judgment,” while subpart (a)(1)(B) is for expenses incurred “before the date of judgment.” In the motion in question, Petitioners seek damages for the period prior to judgment, and thus § 300(a)(1)(B) governs.

(iii) were for diagnosis, medical or other remedial care, rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expense, and facilities determined to be reasonably necessary.

(§ 300aa-15(a) (emphasis added) (footnote added).) In this case, Petitioners seek compensation for Petitioner Shen Wang’s lost opportunity to earn wages, which they claim as “actual unreimbursable expenses” pursuant to §300aa-15(a)(1)(B). Therefore, this compensation sought by Petitioners must satisfy the three requirements of an “actual unreimbursable expense,” pursuant to parts (i), (ii), and (iii) of § 300aa-15(a)(1)(B).

In my view, Petitioners’ argument has much logical and intuitive appeal. However, I can find *no legal* justification to award the compensation sought by Petitioners. Thus, I must deny the relief requested, because the requested amount does not constitute an “actual unreimbursable expense.”

In 2010, a judge of this court ruled that: “[t]he wages a parent forgoes when he or she stays home to care for a child are not recoverable under the Vaccine Act because such damages are not ‘actual unreimbursable expenses.’” *McCollum v. HHS*, 91 Fed. Cl. 86, 91 (2010), *aff’d per curiam*, No. 2010-5092, 2011 WL 880822 (Fed. Cir. March 15, 2011) (unpublished opinion). In *McCollum*, the court reasoned, “[a]ssuming for present purposes that petitioners seek to compensate Mr. McCollum for his lost wages, then the special master was *correct to deny relief*.¹ (*Id.*, emphasis added.) In *McCollum*, the court adopted the conclusion and reasoning, as have other judges and special masters of this court, that a parent’s lost wages are not “actual unreimbursable expenses” because they do not qualify as an “expense,” as required by § 300aa-15(a)(1)(B). (*Id.* at 91 n.10). The loss of an opportunity to earn income is not an “expense” because an “expense is something paid out to attain a goal or accomplish a purpose.” (*Id.*)

The court in *McCollum* relied on the logic that while losing an opportunity is surely an economic detriment, it is not an “expense” because nothing has been “paid out.” (91 Fed. Cl. at 91 n.10.) The court concluded that “[t]o the extent that Mr. McCollum seeks to recover lost income resulting from leaving his job to care for Grant, the special master correctly denied relief.” (*Id.*)

Subsequently, the United States Court of Appeals for the Federal Circuit affirmed *McCollum*. The Federal Circuit explained that “[w]e have *carefully considered* the arguments made by the appellants but find *no error* in the *reasoning and decision* of the Court of Federal Claims.” *McCollum v. HHS*, 91 Fed. Cl. 86, 2011 WL 880822 (Fed. Cir. March 15, 2011) (per curiam) (unpublished) (emphasis added). Thus, the Federal Circuit found no error in the

reasoning of an opinion of this court holding that a parent of a vaccine-injured child is not entitled to lost wages as an “actual unreimbursable expense.”

The decision reached in *McCollum* was not novel, because judges and special masters have consistently ruled that a parent’s “lost wages”—forgone to care for a vaccine-injured child—are not “actual unreimbursable expenses.”

For example, in 2007, a special master of this court concluded that a parent’s lost wages forgone to care for a vaccine-injured child are not an “expense.” *Hocraffer v. HHS*, No. 99-533V, 2007 WL 914914, at *8 (Fed. Cl. Spec. Mstr. Feb. 28, 2007). Special Master Golkiewicz stated that “[p]etitioner’s request for her mother’s alleged lost wages is denied [because] there is no statutory support for awarding the lost wages * * *.” (*Id.* at *9.) In *Hocraffer*, the petitioner requested compensation for a mother’s lost wages forgone to care for her vaccine-injured child. (*Id.*) In denying such compensation, Special Master Golkiewicz reasoned that an expense is “something paid out to attain a goal or accomplish a purpose.” (*Id.* at *8.) Special Master Golkiewicz added that “[w]hile in losing the opportunity to earn wages the petitioner had certainly suffered an economic detriment, he did not ‘pay out’ anything, and therefore the lost wages did not qualify as an expense.” (*Id.*)

In 1993, Judge Harkins of this court concluded that loss of employment and lost overtime pay of a parent caring for a vaccine-injured child is not an “actual unreimbursable expense.” *Edgar v. HHS*, 26 Cl. Ct. 286, 288 (1992) *rev’d on other grounds*, 989 F.2d 473 (Fed. Cir. 1993). In *Edgar*, the parents challenged the special master’s decision not to award “past unreimbursed expenses related to the care and well being of the injured child.” (*Id.* at 295.) The challenged expenses included the father’s lost overtime pay and the mother’s lost employment. (*Id.*) The court characterized the claim as one for lost “opportunity cost,” and upheld the special master’s decision not to compensate the parents for their lost opportunity cost. (*Id.* at 295-96.)

In 1991, Special Master French determined that the lost wages that a parent forgoes to care for a vaccine-injured child do not constitute an “actual unreimbursable expense.” *Riley v. HHS*, No. 90-466V, 1991 WL 23583, at *5 n.7 (Cl. Ct. Spec. Mstr. June 21, 1991). In *Riley*, the petitioners sought compensation for the mother’s lost wages while caring for her vaccine-injured son. (*Id.* at *1.) The special master concluded that she could not award compensation for the mother’s lost wages, despite the mother’s belief that she had “no other choice but to forgo her legal career and devote herself to her son’s recovery.” (*Id.* at *5.) Special Master French acknowledged that the petitioner’s care was a “major contribution to her son’s * * * welfare,” but the special master did not find legal justification to categorize lost wages as an “incurred expense,” because loss of income is neither “an expense nor has it been incurred.” (*Id.*)

In this case, as in the cases described above, Petitioners may not receive compensation for the lost opportunity to earn income. The wages that Shen Wang has forgone to care for T.K. are not recoverable under the Program because such damages are not “actual unreimbursable expenses.” An expense, as discussed above, is something “paid out.” Although Shen Wang undoubtedly suffered an economic detriment, she has not “paid out” anything. Ultimately, Shen

Wang is situated similarly to Mr. McCollum. Thus, Shen Wang, like Mr. McCollum, cannot recover compensation for her lost wages as an “actual unreimbursable expense.”

To be sure, Petitioners have offered several appealing emotional arguments. By denying Petitioners’ motion, I do not intend to minimize the importance of Shen Wang’s care of T.K. I, like Special Master French in the *Riley* case, understand the important role that a parent’s care can play in the health and welfare of the child; nevertheless, I must conclude, in the same fashion as Special Master French, that such care is not an “incurred expense” under the Vaccine Act. In addition, Petitioners contend that Shen Wang was compelled to forgo work because she had no other choice. The dilemma is strikingly similar to *Riley*. In *Riley*, the petitioner believed that she had no other choice but to forgo her legal career and devote herself to her son’s recovery. (*Id.* at *5.) But regardless of the unfortunate situation in *Riley*, Special Master French concluded, she could note award compensation for the mother’s lost wages. (*Id.*) Likewise, in this case, because I cannot rule contrary to the Vaccine Act, I must deny compensation for Shen Wang’s lost opportunity to earn income. The Vaccine Act and the precedent cited above necessitate my denial of Petitioners’ motion.

III. CONCLUSION

Of course, I am extremely sympathetic to T.K. and her family. Further, Petitioners’ argument on this point is logical in a *general* sense. That is, Shen Wang has certainly suffered a very significant economic detriment, as a direct result of T.K.’s presumably vaccine-related injury. Intuitively, it would seem that full compensation for the family would include compensation for that economic loss to the family. However, such compensation simply is *not provided* by the specific provisions of Vaccine Act. Therefore, as a matter of law I cannot award

the particular amount claimed here, because the Vaccine Act and case precedent provide no basis to award such compensation. Thus, I must apply the law, and deny Petitioners' motion requesting "actual unreimbursable expenses" for the lost wages of Shen Wang.

s/ George L. Hastings, Jr.

George L. Hastings, Jr.

Special Master