

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**  
**No. 10-0870V**  
**Filed: June 25, 2012**

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Kyla Lily O'Brien, a minor, \*  
by her parents and natural guardians, \*  
ED O'BRIEN and \*  
SHANNON O'BRIEN \*  
\* Autism; Attorney Fees and Costs  
Petitioners, \*  
\*  
v. \*  
\*  
SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*  
\*  
Respondent. \*  
\*\*\*\*\*

**DECISION ON PETITIONERS' APPLICATION FOR LITIGATION COSTS<sup>1</sup>**

In this case under the National Vaccine Injury Compensation Program,<sup>2</sup> ("the Program"), I issued a Decision on November 23, 2011, denying entitlement to compensation and dismissing this case. Before the court now is petitioners' application for litigation costs. For the following reasons I deny petitioners' application for litigation costs.

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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), petitioners have 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

<sup>2</sup> The Program comprises 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. §§ 300aa-10 *et seq.* (hereinafter "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

## **A. BACKGROUND**

On December 17, 2010, petitioners filed a Petition for Vaccine Compensation in the Program, alleging that Kyla was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See §14.

On June 9, 2011, respondent filed a motion to dismiss petitioners' claim. On September 15, 2011, a status conference was held in which Shannon O'Brien participated, and we discussed a previously filed claim within the Program. This earlier claim, filed October 15, 2009, dealt with the same circumstances and alleged the same facts as the one before the court now.

In the earlier claim, before Special Master Millman, petitioners' counsel requested a ruling on the record. This request apparently occurred after a review of the medical records led petitioners' counsel to believe that she could not link the allegations to the vaccinations. Special Master Millman found that based on the record petitioners had failed to make a *prima facie* case, and as such the case was dismissed with prejudice on April 23, 2010.

On October 10, 2011, respondent filed in this case a Supplemental Motion to Dismiss which addressed the implications of petitioners' previous petition. However, before I ruled on that motion, a status conference was held on November 21, 2011, in which Shannon O'Brien asked that the case be dropped. Accordingly, I issued a Decision on November 23, 2011, dismissing petitioners' case.

Before her case was dismissed Mrs. O'Brien, on October 29, 2011, contacted my law clerk via e-mail asking how she could get back the money expended on this case. During the status conference held on November 21, 2011, Mrs. O'Brien requested that her e-mail be construed as an application for reimbursement of litigation costs. Respondent did not object to this procedure and on December 2, 2011, respondent filed a response to petitioners' application for litigation costs.

## **B. REASONABLE BASIS**

As one reason for opposing an award of petitioners' litigation costs, respondent argued that petitioners failed to establish that they had a "reasonable basis" for filing their second petition on behalf of Kyla. Petitioners did not file any response to respondent's argument. I find that I must agree with the respondent's argument. Given the fact that their prior petition was adjudicated against them, petitioners here failed to demonstrate that they had a "reasonable basis" for filing the second petition. Thus, unfortunately for petitioners, I cannot grant them an award of litigation costs.

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.**

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George L. Hastings, Jr.  
Special Master