

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-732V

Filed: February 15, 2011

NICHOLE SHOOK and ODLIN ODIGE, SR.,)	
as Parents and Natural Guardians of)	
ODLIN ODIGE, JR., Deceased,)	
)	NOT TO BE PUBLISHED
Petitioners,)	
)	
v.)	
)	
SECRETARY OF)	Attorneys' Fees and Costs;
HEALTH AND HUMAN SERVICES,)	Probate/Estate Costs.
)	
Respondent.)	
)	

Anne C. Toale, Maglio Christopher & Toale, P.A., Sarasota, Florida, for Petitioners;
Glenn A. MacLeod, United States Dep't of Justice, Washington, D.C., for Respondent.

DECISION¹

LORD, Chief Special Master.

I. Background and Procedure

On October 15, 2008, Petitioners Nichole Shook and Odlin Odige, Sr., filed a petition on behalf of the estate of their son, Odlin Odige, Jr. ("Odlin"), pursuant to the National Vaccine Injury Compensation Program (the "Program" or "Vaccine Act"). Petitioners claimed that Odlin's death on November 9, 2007, resulted from an adverse reaction to his receipt of the Diphtheria-Tetanus-acellular Pertussis ("DTaP"), Hepatitis B ("Hep B"), Inactivated Polio Vaccine ("IPV"), Haemophilus Influenza B ("Hib"), pneumococcal conjugate vaccine ("PCV") and rotavirus immunizations, which he received on November 7, 2007, at approximately four months of age. Petition at 1, 2, ¶8. The case was settled without the need for an evidentiary hearing and on July 13, 2010, I issued a decision awarding compensation. Petitioners accepted the judgment on July 20, 2010.

¹As provided by Vaccine Rule 18(b), each party has 14 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 a timely objection, the entire document will be made publicly available.

On December 17, 2010, Petitioners filed an application for attorneys' fees and costs. On January 19, 2011, Respondent filed her opposition. Respondent has no objection to an award of \$32,600.00 in attorneys' fees and costs incurred by Petitioners' counsel, Maglio, Christopher & Toale. The only item disputed by Respondent is Petitioners' request for reimbursement of the probate costs. Petitioners filed their reply on January 21, 2011. This attorneys' fee issue is now ripe for decision.

A. Respondent's Position

Respondent's only opposition to Petitioners' application is for the \$2,895.00 in costs associated with the establishment of the estate for Odlin. Respondent argues that these costs are not compensable because the Vaccine Act precludes compensation for services and expenses associated with establishing an estate. According to Respondent, these probate fees and costs "were not incurred in a proceeding on the Vaccine Act petition" and thus are not compensable.

B. Petitioners' Position

Petitioners argue that section 300aa-15(e)(1) of the Vaccine Act permits an award of attorneys' fees and costs "incurred in any proceeding on such petition" and that Respondent construes this section too narrowly to include only those fees and costs incurred in the Vaccine Program itself. Petitioners contend that the term "any proceeding" should be interpreted to include an estate proceeding commenced solely to administer the vaccine award.

Citing Gruber v. Sec'y of Health & Human Servs. No. 00-749V, 2009 WL 2135739 (Fed. Cl. Spec. Mstr. June 24, 2009), vacated on other grounds, 91 Fed. Cl. 773 (2010), Petitioners state that Respondent required Petitioners to be appointed personal representatives of Odlin's estate in order to receive the payment pursuant to the stipulation entered in this case. Petitioners cite to paragraph 11 of the Stipulation, which states:

11. Petitioners represent that they presently are, or within 90 days of the date of judgment will become, duly authorized to serve as conservators of Odlin's estate under the laws of the State of Florida.

According to Petitioners, because the stipulation requires an estate to receive the vaccine award, probate costs are incurred in proceeding on the petition and are compensable.

II. Analysis

In earlier cases, special masters who have found that guardianship and estate type expenses are not reimbursable have done so on the premise that the expenses were not "incurred in any proceeding on [a Vaccine] petition" filed in the Court of Federal Claims. § 300aa-15(e)(1)(B); see Barnes v. Sec'y of Health & Human Servs., No. 90-1510V, 1992 WL 1858708 (Cl. Ct. Sp. Mstr. July 16, 1992); Curtis v. Sec'y of Health & Human Servs., No. 90-1500V, 1993 WL 42853 (Cl. Ct. Sp. Mstr. Dec. 3, 1993); Widdoss v. Sec'y of Health & Human Servs., No. 90-486V, 1992 WL 80809 (Cl. Ct. Sp. Mstr. March 31, 1992).

The Court of Federal Claims, in revisiting this issue, held that only work done “during the pendency of a petition before a special master” or the court is compensable and “state court proceedings were not part of the prosecution on the vaccine petition.” Mol v. Sec’y of Health & Human Servs., 50 Fed. Cl. 588, 591 (2001) (citing Siegfried v. Sec’y of Health & Human Servs., 19 Cl.Ct. 323, 325 (1990)).

More recent decisions by this court have awarded guardianship and estate type costs using a “but for” test, i.e., “[t]hat is, the only reason these costs were incurred [was] to comply with respondent’s demand to set up an estate to receive the money, by the court’s demand that a conservatorship be set up to protect the funds from dissipation, or by the terms in a settlement stipulation which require as a condition of settlement that a conservatorship be set up...” Thomas v. Sec’y of Health & Human Services, No. 92-46V, 1997 WL 74664, at *3 (Fed. Cl. Spec. Mstr. Feb. 3, 1997) (conservatorship); Gruber v. Sec’y of Health & Human Servs., No. 00-749V, 2009 WL 2135739, at *10 (Fed. Cl. Spec. Mstr. June 24, 2009); Hill v. Sec’y of Health & Human Servs., No. 03-619V, 2007 WL 5160382, at *2-3 (Fed. Cl. Spec. Mstr. July 19, 2007); but see Ceballos v. Sec’y of Health & Human Servs., No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004) (costs associated with establishing a guardianship were not awarded because the guardianship was established for Petitioners’ own purpose and not at the order of the court or request of Respondent).

I also recently awarded costs for establishing a guardianship in Burgess v. Sec’y of Health & Human Servs., No. 07-258V (Fed. Cl. Spec. Mstr. Jan. 3, 2011). In this case, Petitioners created the estate for the same purpose as the Petitioner in Burgess – to receive the vaccine award in a method and manner approved by Respondent and the court.

The stipulation entered into by the parties does assume that Petitioners have or will establish an estate for receipt of the vaccine award. This is a condition of payment of the Vaccine Award that was stipulated to by both Petitioners and Respondent and approved by this court. This is an important distinction that was discussed by Special Master Golkiewicz in Ceballos, 2004 WL 784910 at *19-20. In addition, a review of the billing records shows that the probate costs were incurred from May 2010 to early July 2010, while this case was pending and before judgment was entered. Pet’r Application for Attorneys’ Fees and Costs, Ex. 3 at 5; (Dkt entry 44 – Judgment entered on 7/20/2010). For these reasons, I find that these probate costs were incurred in a “proceeding on the petition” and are therefore compensable.

Thus, Petitioners are awarded the probate costs, in full, of \$2,895.00 for establishing the estate of Odlin Odige, Jr.

III. Conclusion

After a review of Petitioners’ fee application and Respondent’s objections, Petitioners are awarded \$35,495.00 in attorneys’ fees and costs. This amount includes the \$2,895.00 incurred in establishing the estate of Odlin Odige, Jr.

The judgment shall reflect that Petitioners are awarded attorneys' fees and costs in a check made payable jointly to Petitioners and Petitioners' counsel, Anne C. Toale, of Maglio Christopher & Toale, P.A., in the amount of \$35,495.00.

In the absence of a motion for review filed pursuant to RCFC, Appendix B, the Clerk is directed to enter judgment accordingly.²

IT IS SO ORDERED.

S/ Dee Lord

Dee Lord
Chief Special Master

² Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.