In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-799V

Filed: September 30, 2011

ABDULGHANI GITESATANI aka GHANI, ABDUL G., Petitioner, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	Attorneys' fees and costs; unavailability of petitioner; issuance of check in attorney's name alone

DECISION ON ATTORNEYS' FEES AND COSTS[1]

I. Factual and Procedural Background

On November 19, 2009, Abdulghani Gitesatani ("Petitioner") filed a petition under the National Childhood Vaccine Injury Act ("Vaccine Act" or "the statute"), 42 U.S.C. § 300aa-10 et seq. (2006). Petitioner alleged that a meningococcal vaccination he received on November 22, 2006, caused him to suffer from Guillain-Barré Syndrome (GBS).

At the time the Petitioner filed, Mr. Gitesatani's attorney, Randall B. Hamud, was not admitted to practice before the United States Court of Federal Claims. The attorney admission process was completed on December 1, 2009. In other words, this was Mr. Hamud's first appearance in a Vaccine Act case.

Over the course of the next year Petitioner filed medical records and the Secretary filed her Rule 4(c) Report. Petitioner filed an expert report in June 2010, and additional records in September 2010. Petitioner filed a statement of completion of filing of medical records on November 8, 2010.

A telephonic entitlement hearing was set for May 16, 2011. In accordance with the Prehearing Order, Petitioner submitted a Trial Brief on April 1, 2011. The Secretary also submitted her prehearing submissions on April 1, 2011.

[1] Because this decision contains a reasoned explanation for the action in this case, I intend to post it 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), Petitioner has 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 the published order.

On April 8, 2011, Counsel submitted a motion to withdraw as attorney for Petitioner. In a Declaration in support of his motion, counsel stated that he was compelled to withdraw because of a complete breakdown in communications with Petitioner and irreconcilable differences. "Petitioner has been in Afghanistan for several months (he left without my prior knowledge) and has not communicated with me directly or indirectly since his departure," counsel explained. Declaration of Randall B. Hamud In Support of Motion to Withdraw As Counsel of Record at 1-2. He stated that he had attempted unsuccessfully to communicate with Petitioner by mail and through Petitioner's daughter, who remained in the United States. Petitioner did not respond to these communications although, according to his daughter, he was aware of the contents of counsel's letters, which informed Petitioner of the upcoming hearing and of the need for his participation. Petitioner's daughter telephoned counsel to inform him that she had spoken to her father and "he had told her that he was never going to return to the United States." Id. at 2-3.

On April 11, 2011, I conducted a status conference with counsel for the parties to discuss the motion to withdraw. On April 12, 2011, I granted counsel's motion to withdraw and issued an Order to Show Cause why the Petition should not be summarily dismissed. Counsel served the order on Petitioner at his last known address. There was no response to the Order. On June 7, 2011, I dismissed the Petition for failure to prosecute. Judgment was entered on July 8, 2011.

Counsel for Petitioner thereafter filed for attorneys' fees and costs. Amended Substantial Compliance With General Order No. 9 at 1-2. After conferring with counsel for the Secretary, who objected to the amount sought, counsel acceded to the Secretary's objections and reduced his request for attorneys' fees to the sum of $21,500. Counsel sought reimbursement of costs in the amount of $1,728.59. Id. Counsel represented that he had paid 100% of the costs incurred.[2]

I conducted a telephonic status conference on July 27, 2011. During the status conference, the parties affirmed that the Secretary had no objection to the amounts sought by Petitioner. The parties pointed out, however, that a practical difficulty had arisen concerning payment. The Secretary would not authorize issuance of a check in counsel's name alone. Rather, consistent with her long-standing practice, the Secretary would direct payment by check made out in the names of both counsel and Petitioner. Since Petitioner was completely unavailable, counsel would be unable to cash the check.

I asked counsel for the Secretary to determine whether the Secretary would make an exception to her normal practice in these unusual circumstances. During a telephonic status conference on August 9, 2011, counsel for the Secretary informed me that the Secretary declined to make an exception. I informed the parties that I would order the Secretary to make the check payable to Mr. Hamud as the sole payee. The Secretary discussed the legal authority in support of her position but did not request additional briefing or a hearing.[3]

[2] Counsel represented that Petitioner remained in Afghanistan, was unreachable by phone or mail, and "unavailable to sign any documents pertinent to General Order No. 9 or any other matter herein." Amended Substantial Compliance at 2.

[3] I appreciated the parties' willingness to forego formal briefing and hearing on this issue. On September 9, 2011, counsel for Petitioner submitted a supplemental memorandum. I did not consider the Petitioner's supplemental memorandum in reaching my decision. The Secretary did not file a response or seek to file a response.

II. Discussion

A. Pertinent Statutory Provisions

Section 300aa-15 states in pertinent part:

> **(a) General rule**
>
> Compensation awarded under the Program 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 October 1, 1988, shall include the following[:] . . . [enumerated elements of compensation omitted].[4]
>
> **(b) Vaccines administered before effective date**
>
> Compensation awarded under the Program to a petitioner under section 300aa-11 of this title for a vaccine-related injury or death associated with the administration of a vaccine before October 1, 1988, may include the compensation described in paragraphs (1)(A) and (2) of subsection (a) of this section and may also include an amount, not to exceed a combined total of $30,000, for –
>
> **(1)** lost earnings (as provided in paragraph (3) of subsection (a) of this section),
>
> **(2)** pain and suffering (as provided in paragraph (4) of subsection (a) of this section), and
>
> **(3)** reasonable attorneys' and costs (as provided in subsection (e) of this section.
>
> . . . .
>
> **(e) Attorneys' fees**
>
> **(1)** In awarding compensation on a petition filed under section 300aa-11 of this title the special master or court shall also award as part of such compensation an amount to cover –
>
> (A) reasonable attorneys' fees, and
> (B) other costs,
>
> incurred in any proceeding on such petition.

B. Case Law

The Secretary relied on two cases, Heston v. Sec'y of Dep't of Health & Human Servs., 41 Fed. Cl. 41 (Fed. Cl. 1998), rev'g Heston v. Sec'y of Dep't of Health & Human Servs., No.

[4] Unlike section 15(b), regarding pre-1988 vaccinations, section 15(a), pertaining to post-1988 vaccinations, does not list attorneys' fees and costs as an element of compensation. Therefore, the only basis for awarding attorneys' fees and costs in a post-1988 vaccination case is under §300aa-15(e). As noted below, Section 15(e) does not contain the phrase "to a petitioner." Thus, there is even less reason to apply the limitation "to a petitioner" to awards of attorneys' fees and costs in post-1988 cases than in pre-1988 cases.

90-3318V, 1997 WL 702561 (Fed. Cl. Spec. Mstr. Oct. 3, 1997); and Newby v. Sec'y of Dep't of Health & Human Servs., 41 Fed Cl. 392 (Fed. Cl. 1998).

In Heston, petitioner Darcy Heston, mother and guardian of the vaccinee, hired an attorney, William Ronan, to file a petition under the Vaccine Act. "[F]or reasons not apparent from the record," Ms. Heston "ceased cooperating with Ronan." Heston, 41 Fed. Cl. at 42. The case was dismissed for failure to prosecute, with the special master explaining that "'Mr. Ronan was in a position where he could obtain from the petitioner neither her authority to voluntarily dismiss the case, nor her cooperation in attempting to prove the claim.'" Id. (quoting Heston, No. 90-3318V, 1997 WL 702561, at *2).

Mr. Ronan thereafter sought fees and costs, which were awarded. 41 Fed. Cl. at 42. The special master found, however, that it was "'extremely unlikely that if a check for attorneys' fees and costs were made out jointly to the petitioner . . . and Mr. Ronan, the petitioner would in fact endorse it so that Mr. Ronan could collect his rightful compensation and reimbursement for costs expended.'" Id. The special master, having considered extensively his authority to order that payment be made directly to Ronan, determined to do so. See Heston, No. 90-3318V, 1997 WL 702561.

The Court of Federal Claims remanded, holding that the specific provisions of Section 15(b), containing the mandate that compensation be paid "to a petitioner," trumped the more general language in Section 15(e), which did not specifically direct that attorneys' fees and costs be paid "to a petitioner." 41 Fed. Cl. at 44. In particular, the Court emphasized that section 15(b) applied because "the instant petition involve[d] [] a pre-Act vaccination[.]" Id. The Court held that because Section 15(e) "implements Section 15(b), which requires compensation 'to a petitioner,' a restatement of that requirement in Section 15(e) would not be necessary and indeed would be redundant." Id. at 45.

Based on the phrase "to a petitioner" contained in Section 15(b), the Court rejected the special master's reasoning and precedents. Id. at 46, 48. The Court also raised several policy arguments, including the possibility of misuse of client funds, as reasons not to award fees and costs directly to an attorney. "[R]equiring direct payments to petitioners obliges counsel to secure their fees from their clients, and thus tends to increase the petitioners' level of control over payments that may properly be theirs." Id. at 46. The Court also noted a potential conflict of financial interest between petitioners and counsel whose fees were subject to the $30,000 cap in Section 15(b). Id. at 47. The Court explained:

> It is in the petitioner's financial interest to maximize the portion of the $30,000 allotted to lost earnings and pain and suffering while it is in counsel's financial interest to maximize the portion of recovery for attorneys' fees and costs. Requiring the special master to direct all payments to the petitioner generally would encourage counsel to keep the client apprised of the subtleties and details of the prosecution of the petition and to discuss directly and comprehensively with the client the proper allocation of the $30,000 available pursuant to Section 15(b).

Id. Additional reasons in support of the result in Heston:

-- "allowing direct payments to counsel could produce an incentive for counsel to reveal against the client's will certain information about the client that could place the client in an unsympathetic light." 41 Fed. Cl. at 47.

-- mandating that all payments be made directly to the petitioner potentially "could help the government assure that only proper payments are made. In some cases, the petitioner may have more information than the special master with respect to how much time and money counsel actually incurred . . . ." Id.

-- an attorney can enter into a "written fee agreement with the client pursuant to which the client must immediately turn over to counsel any attorneys' fees and related costs . . . ." Id. The Court added, "Such an agreement ordinarily would produce the appropriate payment forthwith, and if not, litigation costs to enforce the agreement likely would be low." Id.

-- the legislative history "supports the conclusion that Congress intended all elements of compensation, including attorneys' fees, to be paid to the petitioner." Id. at 48. The Court also cited the following passage from the "pertinent House Report []: '[C]ompensation would be paid to vaccine-injured persons for any unreimbursed past costs incurred and any projected future costs . . . Compensation would also cover payments for pain, suffering . . . and reasonable attorney fees.'" Id. (emphasis added to the original by the Heston Court).

Newby, like Heston, involved the administration of a vaccine before October 1, 1988, thus specifically calling into play the provisions of Section 15(b). Counsel for the petitioner in Newby "was no longer in contact with petitioner." Newby, 41 Fed. Cl. at 393 n.2. No explanation for the loss of contact appears in the Court's decision in Newby. The Court stated, "This case presents identical issues to those resolved in Heston," and tracked the reasoning of Heston precisely. Id. at 393-94.

C. Analysis

1. The Statute Permits Payment To The Absent Petitioner's Agent In These Circumstances.

The issue is whether attorneys' fees and costs properly payable to the petitioner may be paid to the petitioner's attorney when the petitioner is unavailable to receive them. The question is one of congressional intent. The answer to the question is not to be found in the plain words, as the statute does not address the circumstances directly. It speaks of paying compensation "to a petitioner" in section 300aa-15(a), but that section (unlike 15(b)), does not list attorneys' fees and costs among the elements of compensation. Section 300aa-15(e), which authorizes the awarding of attorneys' fees and costs, does not contain the language indicating payment "to a petitioner."

For the reasons discussed below, I conclude that awarding attorneys' fees and costs to the attorney when the petitioner is absent and unavailable inheres in the petitioner's right to compensation. Section 15(e) does not contain a requirement to pay attorneys' fees and costs "to a petitioner." Even if attorneys' fees and costs were deemed to constitute an element of compensation under section 15(a), paying that element of compensation to the attorney in the petitioner's absence would promote the congressional intent and comport with the statutory scheme.[5]

[5] In Heston, the issue was framed in terms of whether the special master had the authority to order payment to an attorney. Framing the issue in that way may be misleading, if there is an implication that a special master could order such payment without statutory authorization. Special masters derive their powers from the Vaccine Act. See Patton v. Sec'y of Dep't of Health & Human Servs., 25 F.3d 1021, 1027 (Fed. Cir. 1994), aff'g Patton V. Sec'y of Dep't of Health & Human Servs., 28 Fed. Cl. 532

That the congressional purpose is consistent with this conclusion appears most clearly in the statutory provisions permitting an award of attorneys' fees and costs to attorneys for petitioners, whether or not petitioners succeed in obtaining an award of compensation. In this respect, Congress created a unique scheme, designed to carry out the unique policy goals of the Vaccine Act. See 300aa-15(e) (permitting an award "if the special master or the court determines that the petition was brought in good faith and there was a reasonable basis for the claim"). Those goals include incentives to private counsel to accept representation in vaccine injury cases so that individuals injured by vaccines, who might otherwise be relegated to the tort system, can avail themselves of a specialized forum for obtaining relief. See Cloer v. Sec'y of Dep't of Health & Human Servs., ___ F.3d ___, 2011 WL 3374302, at *2 (Fed. Cir. Aug. 5, 2011) (en banc) (recognizing congressional concern "that the tort system was failing to adequately compensate persons injured from vaccinations"); Saunders v. Sec'y of Dep't of Health & Human Servs., 25 F.3d 1031, 1035 (Fed. Cir. 1994) (noting a "secondary purpose of the [Vaccine] Act[, which] is to ensure that vaccine-injury claimants will have readily available a competent bar to prosecute their claims under the Act."). Awarding attorneys' fees and costs to an absent petitioner through his attorney comports with that congressional purpose in this instance. See generally Amendola v. Sec'y of Dep't of Health & Human Servs., 989 F.2d 1180, 1184 (Fed. Cir. 1993) (recognizing the importance of the statutory framework in deciding whether an interpretation of the language "would make sense").

The Federal Circuit's recent decision in Avera v. Sec'y of Dep't of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008) supports this line of reasoning. In Avera, the Federal Circuit addressed the issue of "whether the appellants [petitioners] are entitled to an award of interim fees pending appeal." 515 F.3d at 1350. The Circuit held that petitioners have the right to interim payment of fees and authorized special masters, in their discretion, to award such fees. Id. at 1351.

Avera instructed against excessive literalism in interpreting the Vaccine Act's attorneys' fees provisions. In Avera, the Secretary argued that interim fees were not available before judgment, based on a strict construction of the statutory language. See 515 F.3d at 1350-51. The Circuit rejected the Secretary's argument, noting that the Secretary's "interpretation of subsection 300aa-15(f)(1)," had already been "directly rejected in Saunders v. Secretary of the Department of Health and Human Services, 25 F.3d 1031 (Fed. Cir. 1994)." Id. at 1351. The Circuit thus re-affirmed in Avera its decision in Saunders to interpret the Act "in a way which is consistent with the intent of Congress[.]" Avera, 515 F.3d at 1351 (citing and quoting Saunders). See Saunders, 25 F.3d at 1036, citing Hellebrand v. Sec'y of Dep't of Health & Human Servs., 999 F.2d 1565, 1570-71 (Fed. Cir. 1993).

The Circuit in Avera examined other fee-shifting statutes, "which are silent with respect to interim fees, [but] allow interim fees in appropriate circumstances." Id. at 1351. The Circuit relied on those other statutes to infer a right to interim fees under the Vaccine Act.

Explicitly laying emphasis on the fact that "one of the underlying purposes of the Vaccine Act was to ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims[,]" id. at 1352, the Circuit decided that interim fee awards are permitted under the Vaccine Act because denying such awards "would clearly make it more difficult for claimants to secure competent counsel because delaying payments decreases the effective

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(Fed. Cl. 1993). Special masters can take no action that is not permitted by the statute. The question is what does the statute permit?

value of awards." Id. In so stating, the Federal Circuit expressly recognized the practical implications of its holding on attorneys who represent petitioners in vaccine cases, and deliberately adopted a reading of the statute that would assist petitioners in retaining such attorneys.

2. Application of the Law In This Case.

For a variety of reasons, following Heston and Newby does not yield the correct result in the circumstances presented here.

(a) Significant developments in the law call into question the continuing validity of Heston and Newby. The Circuit's recent decision in Avera, in particular, militates against hypertechnical construction of the statute and in favor of an interpretation that promotes the underlying purpose of the provisions facilitating the award of attorneys' fees and costs, even where the petitioner does not prevail.

By construing the language in section 15(b) regarding payment "to a petitioner" to preclude payment to a petitioner's attorney pursuant to section 15(e), in which the language "to a petitioner" does not even appear, the ruling in Heston tends to undermine the evident congressional purpose of awarding attorneys' fees and costs: to encourage practitioners to accept representation in vaccine injury cases. "When the legislative purpose is incorporated in a complex piece of legislation, such as those establishing a major regulatory or entitlement program, the meaning of any particular phrase or provision cannot be securely known simply by taking the words out of context and treating them as self-evident." Amendola, 989 F.2d at 1182. Holding that, simply because section 15(b) says compensation shall be paid to the petitioner, attorneys' fees and costs cannot be paid to a petitioner's attorney in the petitioner's absence, falls into the error highlighted by the Federal Circuit in Amendola.

(b) Heston and Newby were decided under section 15(b), which pertains to cases involving pre-1988 vaccinations. This is not such a case; the vaccination at issue was administered on November 22, 2008. The Court's rationale in Heston regarding the potential conflict of interest arising from the $30,000 cap on awards in section 15(b) is irrelevant. There is no such cap on awards under the operative provisions in this case. See §300aa-15(a).

(c) Other aspects of the Heston decision also are inapplicable to the case before me. Significantly, although experienced practitioners in the Vaccine Program sometimes protect themselves by entering into written fee agreements, and even require their clients to execute powers of attorney so that the attorneys actually can cash the checks for fees and costs, counsel in this case did not enter into such an agreement. Counsel in this case was a first-time participant in the Vaccine Program. The Vaccine Program does not warn practitioners of this particular "trap for the unwary." A first-time participant in the Program should not have to learn this lesson "the hard way." Issuing a check that cannot be cashed does not benefit the Program or effectuate congressional intent. All the parties agree that the amounts requested by counsel should be paid; the problem is simply a technicality – how to get the money owed by the Program to counsel for Petitioner.

(d) There are other significant factual distinctions between this case and Heston. Here the client is not merely uncooperative but absent, residing permanently in a foreign country. Counsel does not have the option suggested by the Court in Heston of going into court ("litigation costs . . . likely would be low") to enforce a written agreement, even if one existed. Heston, 41 Fed. Cl. at 47. Through no fault of his own, counsel cannot obtain legal redress for

the wrong that is done by refusing to pay him the amounts he has earned. Providing a remedy in these circumstances is particularly appropriate because the Vaccine Act seeks to establish a less costly, less formal environment in which to adjudicate claims. See H.R. REP. No. 99-908 at 6-7 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6347-48. The Vaccine Act seeks to promote the availability of competent legal services to injured claimants, win or lose, so long as their claims are brought in good faith and have a reasonable basis. That policy requires that payment be made to counsel in this case.[6]

Through no fault of his own, counsel cannot obtain the signature of petitioner on any check that is issued for reimbursement of fees and costs. There is no dispute that counsel has earned the amounts for which he should be compensated. He has paid out of pocket costs in amounts that are unchallenged. He is a first-time practitioner who would understandably be discouraged from participating in the Program were he not to receive the reimbursement authorized by the statute.

Making out a check to counsel alone in these circumstances does not defeat the principle that the payment of attorneys' fees and costs constitutes an element of petitioner's compensation. The payment belongs to Petitioner, but he is not available to receive it. His agent, who represented him in these proceedings, is available. It seems a very modest accommodation to facilitate payment to Petitioner in such a case by paying his agent, and it does no harm to the statutory scheme.

In recent years, the Federal Circuit has evinced a willingness to construe the term "compensation" in light of the statutory purposes, rather than to insist on a literal, narrow interpretation of isolated provisions. This has created some practical difficulties but has resulted, at least in the view of the Circuit, in closer adherence to the congressional intent. In ordering payment to counsel alone in this instance, I follow the Federal Circuit's direction in Avera, which holds that the Vaccine Act's provisions regarding attorneys' fees and costs shall be construed in a manner consistent with the underlying statutory purposes.

IV. CONCLUSION

The Secretary shall direct that a check be made out to Randall B. Hamud, Esq., in the amount of $23,228.59, representing $21,500.00 in attorneys' fees and $1,728.59 in costs incurred in this case.

IT IS SO ORDERED.

Dee Lord
Special Master

[6] I respectfully disagree that refusing to pay attorneys in a case like this one "help[s] the government assure that only proper payments are made." Heston, 41 Fed. Cl. at 47. In practice, the task of providing such assurance ultimately falls on the special master. Cf. Saxton v. Sec'y of Dep't of Health & Human Servs., 3 F.3d 1517, 1520 (Fed. Cir. 1993) ("The determination of the amount of reasonable attorneys' fees is within the special master's discretion."); see also Shaw v. Sec'y of Dep't of Health & Human Servs., 609 F.3d 1372, 1377 (Fed. Cir. 2010). Petitioner in this case certainly is not in a position to provide useful information concerning the proper amount of attorneys' fees and costs. I also find unpersuasive in the present context the argument that "allowing direct payments to counsel could produce an incentive for counsel to reveal . . . certain information . . . that could place the client in an unsympathetic light." 41 Fed. Cl. at 47. I find no evidence of such a proclivity in Mr. Hamud's conduct.