

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-348 V

Filed: January 31, 2011

For Publication

ERIC SHAW FINET, a minor, by his *
Parents and natural guardians, *
SCOTT FINET and ANGELA FINET, *

Petitioners, *

v. * Attorneys' Fees and Costs;

guardianship fees

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Clifford J. Shoemaker, Vienna, VA, for petitioners.

Voris E. Johnson, Jr., Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING ATTORNEYS' FEES AND COSTS¹

Petitioners filed their Application for Attorneys' Fees and Costs on August 25, 2009. On October 23, 2009, Respondent filed her objections to Petitioners' application, specifically objecting to \$7,787.54 in costs claimed by Petitioners, the majority of which are costs associated with a guardianship established for Eric Finet. On October 30, 2009, Petitioners filed a response to respondent's objections. In this response, Petitioners requested a revised amount of \$60,799.32 in attorneys' fees, \$21,348.61 in attorneys' costs, and \$14,743.05 in petitioners' costs. On December 2, 2010, this case was reassigned from the retired Special Master Richard Abell to the undersigned.

¹ Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

1. Guardianship Expenses

Petitioners urge the Special Master to award fees and costs for the establishment of this guardianship trust, arguing that costs incurred in a guardianship proceeding for the benefit of the vaccine-injured individual are the direct result of Respondent's requirements. Respondent, on page 5, paragraph 15 of the stipulation filed on March 27, 2009 in the damages portion of the case, required Petitioners to establish and become guardians of the estate of Eric Finet within 90 days of the date of judgment as a condition of the stipulation. Stipulation, filed March 27, 2009 at p. 5.

Respondent contends that neither fees nor costs incurred in a guardianship proceeding are reimbursable as a matter of law, citing *Mol v. Secretary of HHS*, 50 Fed.Cl. 588, 591 (2001), and *Siegfried v. Secretary of HHS*, 19 Cl.Ct. 323, 325 (1990).

The issue of whether guardianship expenses are reimbursable has been the center of substantial debate. The judges and special masters who have found guardianship expenses not to be reimbursable have done so while relying on the premise that costs arising from a guardianship proceeding are not "incurred in any proceeding on [a Vaccine] petition" filed in the Court of Federal Claims. § 300aa-15(e)(1)(B); *Mol v. Secretary of HHS*, 50 Fed. Cl. 588, 591 (2001) (citing *Siegfried v. Secretary of HHS*, 19 Cl.Ct. 323, 325 (1990), and *Lemon v. Secretary of HHS*, 19 Cl.Ct. 621, 623 (1990)); see also *Zeman v. Secretary of HHS*, No. 92-0240V, 1994 WL 325425 (Fed. Cl. Spec. Mstr. 1994).

These decisions are not binding authority on special masters,² and while they constitute persuasive authority, the undersigned respectfully disagrees that the Respondent may require guardianship in order to receive an award but not pay for the costs of establishing a guardianship. Not only did Respondent require the establishment of a guardianship in the Stipulation, but this Court adopted the provisions of that Stipulation in issuing a damages award. The issuance of that award squarely placed the issue of guardianship, and the accompanying costs, within the purview of a proceeding on a vaccine petition.

The persuasiveness of decisions by the U.S. Court of Federal Claims judges makes discussion of the *Siegfried* and *Mol* Decisions advisable. In *Siegfried*, the court found that work done incidentally to a Vaccine Act petition in a probate court was not reimbursable because it was not a "proceeding under [the vaccine injury] petition." 19 Cl.Ct. 323, 325. The court stated that "[t]he Act does not provide attorney fee awards to cover the myriad legal implications of establishing or administering an estate. Rather the Act provides reasonable fee awards for work by petitioners' attorney during the pendency of a petition before a special master, the Claims

² See *Ceballos v. HHS*, 2004 WL 784910, at *22 (Fed. Cl. Spec. Mstr. 2004) (where a special master, ruling after *Mol*, found that costs associated with establishing a guardianship are compensable if ordered by the court as part of the process of providing compensation to a petitioner).

Court, the United States Court of Appeals for the Federal Circuit, or the Supreme Court.” *Id.* In *Siegfried*, the court identified an important distinction that should be respected: that is, compensation is unavailable for *myriad* legal implications unrelated to the vaccine petition. This case does not present *myriad* legal implications related to the administration of an estate. Costs in dispute here for Eric Finet’s guardianship relate only to Respondent’s demand which the undersigned adopted in her damages decision. Therefore, the distinction identified in *Siegfried* is inapplicable here.

In *Mol v. HHS*, the court decided against a broad “but for” test in determining what costs are reimbursable under a Vaccine Act petition, stating that: “[i]f the court interpreted the Act in such a way that fees incurred to establish guardianships were compensable, under the theory that they would not have been incurred but for the receipt of the vaccine award, any number of “but for” expenses would have to be compensable including a wide variety of probate matters.” *Mol v. Secretary of HHS*, 50 Fed.Cl. 588, 591 (2001).

Assuming *arguendo* that *Mol* was correct in determining that a “but-for” test is inadequate to address the issue of guardianship expenses, a “but for” test is not necessary here to award those expenses. Instead, a *sine qua non* analysis is all that is needed. If Respondent requires an essential prerequisite condition be fulfilled in order for an award to be made, awarding the fees and costs associated with fulfilling such a *sine qua non* is appropriate and reasonable. This very limited analysis respects the persuasive authority of *Mol* while similarly respecting equity, and the prevailing policy of generosity and preservation of the vaccine award in this case.

This analysis also recognized that guardianship expenses, including both fees and costs, arise during the damages portion of a Vaccine Act case. They specifically arise from Respondent’s requirements in stipulations settling damages. The special master controls all of the proceedings on damages; however, not all of the “proceedings” necessarily occur before the special master. In fact, a broad variety of activities occurs as required components of establishing damages, such as consulting with life care planners, independent medical examinations, lost wages economist consultations, and third party mediation. Each of these activities occurs pursuant to the special master’s order or within the purview of her authority but none occurs directly before the special master.

Moreover, many of these activities occur due to the demands of the Respondent. They are routinely reimbursed without Respondent’s objection, as they are costs incurred on a Vaccine Act petition and as part of prosecuting the claim. The establishment of a guardianship trust, in this case, was also demanded by Respondent. Stipulation, p. 5.

Petitioners point to a growing line of cases finding that guardianship fees and costs are reimbursable. See *Thomas v. Secretary of HHS*, 1997 WL 74664 (Fed Cl. Spec. Mstr. 1997); *Velting v. Secretary of HHS*, 1996 WL 937626 (Fed Cl. Spec. Mstr. 1996). This trend has

continued since Petitioners' brief was filed. *See, e.g., Gruber v. Secretary of HHS*, 2009 WL 2135739 (Fed.Cl. Spec. Mstr. 2009), vacated on other grounds, 91 Fed.Cl. 773 (2010). In *Gruber*, Special Master Vowell quoted congressional history regarding the purpose of the Vaccine Act: “ ‘In adopting the Vaccine Act, Congress sought to ‘establish a Federal ‘no-fault’ compensation program under which awards can be made to vaccine-injured persons quickly, easily, and with certainty and generosity.’ H.R.Rep. No. 99-908, at 3 (2d Sess.1986), reprinted in 1986 U.S.C.C.A.N. 6334, 6343.” *Loving v. Secretary of HHS*, 86 Fed. Cl. 135, 141 (2009). Special Master Vowell went on to state that although the court did not directly address fees and costs in *Loving*, it stands to reason that “when the costs incurred are for the benefit of the vaccine-injured individual and the reason for incurring the cost is directly related to how the damage award is administered, common sense would suggest that reasonable guardianship costs are reimbursable, as no award on a petition will be paid by respondent until the guardianship is established.” *Gruber*, 2009 WL 2135739, fn. 17.

This trend of using common sense to award guardianship costs when they are mandated as a *sine qua non* of receiving a vaccine damages award should continue. Petitioners' request for \$7,440.00 in guardianship costs appears to be reasonable.

2. *Special Needs Evaluation*

Respondent also objects to a fee paid to “Dalton and Dalton” for a special needs evaluation, arguing that the fee was not paid for proceedings before the Court of Federal Claims. In Petitioners' Response to Respondent's Opposition to Petitioners' Application for Attorneys' Fees and Costs, filed October 30, 2009, Petitioners state that the bill was for legal counsel regarding Eric Finet's removal from Fairfax County Public Schools and his placement in a private school for the purposes of the damages proceedings in the Vaccine Court. Petitioners also state that the evaluation was required by the Respondent. Pet. Application, p. 25. This is substantiated by Respondent's amended life care plan, which mentions “to be discussed” in regards to Eric's attendance at a private school. The parties filed as docket number 103 a list of items in dispute, which included the sizable cost of enrolling Eric at the private River School. Petitioners had made the decision to move Eric from Fairfax County Public Schools and the county had opposed parents' unilateral decision. Therefore, the discussion, and involving outside counsel in determining how to proceed was contemplated in the life care plans, connected to the vaccine petition, and reasonable in amount. The undersigned finds that the \$282.50 fee paid to Dalton and Dalton for special needs evaluation is reasonable and proper.

3. *Books from Amazon.com and the Virginia Guardianship Association*

Petitioners request reimbursement for two books purchased from an online retailer,

Amazon.com that deal with special needs trusts, and two books purchased from the Virginia Guardianship Association on guardianship under Virginia state law. The two books on special needs trusts, which cost \$39.04, are not compensable because they do not relate to the administration of the vaccine award. As opposed to normal guardianship expenses, which arise due to Respondent's demands in a stipulation of damages during the damages phase of a case, these books relate to the creation of a trust that would happen after the award has already been distributed. Therefore, these costs are not compensable.

The books from the Virginia Guardianship Association, which cost \$26.00, apparently involve Petitioners' attempt to educate themselves on obtaining guardianship under Virginia State law. Parties do not get paid to educate themselves. Education is any party's own responsibility and expense.

Conclusion

Respondents did not object to the \$60,979.32 in attorneys' fees, or the \$21,348.61 in attorneys' costs. The undersigned finds these amounts to be reasonable.

Petitioner requested \$14,753.05, \$6,955.51 of which was not objected to by respondent. The undersigned finds \$7,440.00 in objected-to guardianship expenses incurred by petitioner to be reasonable, as well as the fee of \$282.50 paid to Dalton and Dalton. The undersigned does not find \$65.04 in costs for books to be reasonable. Therefore, the proper amount to be awarded is \$14,678.01.

I hereby award **\$82,327.93**, representing \$60,979.32 in attorneys' fees and \$21,348.61 in attorneys' costs, in the form of a check payable jointly to petitioners and petitioners' counsel, Clifford J. Shoemaker. I also award **\$14,678.01**, representing petitioners' costs, in the form of a check made payable solely to petitioners.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.³

IT IS SO ORDERED.

Dated: January 31, 2011

/s/ Laura D. Millman
Laura D. Millman
Special Master

³ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.