

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

No. 05-774V

Filed: January 30, 2012

(Not for Publication)

CYNTHIA BYRD, guardian ad litem for, *
Kristopher Byrd, a minor, *

Petitioner, *

v. *

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

Respondent. *

Autism; Attorneys' Fees and Costs

DECISION AWARDING ATTORNEYS' FEES AND COSTS¹

On July 22, 2005, petitioner filed a Short-Form Autism Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ("the Program"),² on behalf of her minor child, Kristopher Byrd ("Kristopher"), which adopted the Master Autism Petition for Vaccine Compensation. I issued a decision denying entitlement and dismissing this case on January 9, 2012. Judgment was entered on January 11, 2012.

On January 5, 2012, petitioner filed an opposed motion for an award of attorneys' fees and costs in this case. Respondent agrees that this case was timely filed and has

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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), a party has 14 days to identify and move to delete medical or other information, that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

² 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.

no objection to the amount in fees and costs requested. However, respondent objects to the award of fees and costs in this case because “the records provided do not support a finding that this case involves an autism spectrum disorder.” Petitioners’ (sic) Motion for Attorneys’ Fees and Costs at 2.

Petitioner followed a standard format in submitting her application for fees and costs in this case, stating clearly respondent’s basis for objection. Respondent’s Statement Regarding Jurisdiction and Appropriateness of Proceeding Within The Omnibus Autism Proceeding [“OAP”], filed on February 26, 2009, sets forth that basis. In summary, although several of the filed medical records reflect behavioral symptoms consistent with an autism spectrum disorder such as severely delayed expressive and receptive language,³ echolalia, and intense anger in response to frustration (see Pet. Ex. 5A, pp. 13, 17) and his speech pathologist found both expressive and receptive language delays and reported that he “may be autistic” (see Pet. Exs. 7A, pp. 4-7; 7B, p. 53), there is no diagnosis of an autism spectrum disorder. Instead, Kristopher was diagnosed with developmental delay and behavioral issues by a state agency providing early intervention services. Pet. Ex. 5A, p. 60.

I have several reasons for rejecting respondent’s position under the facts of this case. First, Autism General Order #1⁴ did not require a diagnosis of an autism spectrum disorder in order for a vaccine injury claim to be placed in the OAP. It was styled “In Re: Claims for Vaccine Injuries Resulting in Autism Spectrum Disorder *or a Similar Neurodevelopmental Disorder*” (emphasis added). At several points in the Order itself, language inclusive of “similar” disorders may be found.⁵ The Master Autism Petition⁶ indicated that any petitioner filing a short-form petition was representing that “the vaccinee in question has developed a neurodevelopmental disorder, consisting of

³ Other records indicated that Kristopher’s receptive language was “ok.” See, e.g., Petitioner’s Exhibit [“Pet. Ex.”] 5A, p. 20. This same record indicated he had “much jargon” and that his expressive language did not meet the age norm of being 75% understandable. *Id.* Some records attributed behavioral difficulties to a parental failure to impose discipline. See, e.g., Pet. Ex. 5A, pp. 55-56.

⁴ The text of Autism General Order #1 can be found at <http://www.uscfc.uscourts.gov/sites/default/files/autism/Autism+General+Order1.pdf> [“Autism Gen. Order #1”], 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002).

⁵ See, e.g., Autism General Order #1 at *1 (“Specifically, it has been alleged that cases of autism, *or neurodevelopmental disorders similar to autism*, may be caused by”); *id.* at *2 (“whether the vaccinations in question can cause autism *and/or similar disorders*...”); *id.* at *4 (discussing the Master Autism Petition for Vaccine Compensation [“Master Autism Petition”] and indicating that it “sets forth the general allegation that a vaccinee’s autistic disorder *or similar disorder* was caused by one or more of the MMR and thimerosal-containing vaccinations.”); *id.* at *6 (discussing “opting in” to the OAP for “Program claims involving an autistic *or autistic-like disorder*”) (emphasis added).

⁶ The Master Autism Petition was included in Autism General Order #1 as Exhibit A.

an Autism Spectrum Disorder or a similar disorder.” Master Autism Petition, ¶ 3 (footnote omitted).

Second, Kristopher had several symptoms consistent with an autism spectrum disorder, including language delay, echolalia, a plateau or regression in his development, being a picky eater, and onset at around 18 months of age. See Pet. Ex. 5, pp. 13, 17, 39-40; *Dwyer v. Sec’y, HHS*, No. 03-1202V, 2010 WL 892250, *32 (Fed. Cl. Spec. Mstr. Mar. 12, 2010) (noting parents typically recognize developmental problems associated with autism spectrum disorders at 18-24 months); *id* at *260 (discussing the expert testimony of Dr. Bennett Levnethal that children with autism tend to be picky eaters as early as four to nine months). Although Kristopher apparently made eye contact and was affectionate with his parents and others, and lack of eye contact and poor social interactions are often found in those with autism spectrum disorders, the absence of any particular symptom does not rule out an autism diagnosis. See *White v. Sec’y, HHS*, 04-337V, 2011 WL 6176064, at *9 (Fed. Cl. Spec. Mstr. Nov. 22, 2011).

It is clear that some short-form petitions were filed in cases where there was little, if any, indication that the vaccinee actually had an autism spectrum disorder or something sufficiently similar to make the filing of the short-form petition done in good faith or upon a reasonable basis. In such cases, the “parking” of a petition within the OAP is likely to work to petitioners’ disadvantage, as records demonstrating either a reasonable basis or some alternate theory of causation may now be unavailable, due to petitioner’s action. Respondent has filed pleadings indicating that a case was improperly included in the OAP in only a very small number of cases to date. As medical records are filed in the remaining OAP cases, more such cases may be identified, but the percentage of such cases will likely remain small. Similarly, there have been requests to move cases without an autism or similar neurodevelopmental disorder diagnosis into the OAP— requests which have been opposed by respondent and denied by special masters. See, e.g., *Carrington v. Sec’y, HHS*, 99-495V, 2007 WL 1342149 (Fed. Cl. Spec. Mstr. Apr. 19, 2007).

Although Kristopher did not have an autism *diagnosis* at the time this case was filed, he did display a neurodevelopmental disorder in the form of speech delay and some autistic-like behaviors sufficient to make filing a short-form petition and thereby opting into the OAP reasonable. Autism General Order #1 did not require a diagnosis on the autism spectrum; it merely required that the symptoms be similar to those displayed by children on the autism spectrum.

Moreover, the test for determining whether attorney fees and costs may be paid to an unsuccessful petitioner is simply whether a claim was filed in good faith and upon a reasonable basis. See § 15(e)(1). Petitioner’s claim that Kristopher displayed symptoms of speech delay, eczema, and alopecia shortly after a vaccination is well-documented in the medical records. While such documentation is insufficient to establish causation, it is sufficient under the facts and circumstances of this case to demonstrate both good faith and a reasonable basis for filing a vaccine injury claim.

Respondent's position that this claim should not have been a part of the OAP is not unreasonable, and had causation been found in the OAP test cases, respondent might well have been successful in an argument that the results were inapplicable to this case. That does not, however, mean that fees and costs are not recoverable.

Petitioner has established that Kristopher received a vaccine covered by the Vaccine Act, that the case was timely filed, and that petitioner filed the petition in good faith and upon a reasonable basis. Under these circumstances, pursuant to §§ 15(b) and (e)(1), petitioner is entitled to reasonable attorneys' fees and costs.⁷ Petitioner seeks attorneys' fees of \$5,500 and costs of \$402.08 for a total request of \$5902.08.⁸ Respondent has reviewed the motion and does not object to the amount requested.

I find that this petition was brought in good faith and upon a reasonable basis. Therefore, an award for fees and costs is appropriate, pursuant to §§ 15(b) and (e)(1). Further, the proposed amount seems reasonable and appropriate. **Accordingly, I hereby award the total \$5902.08⁹ as follows:**

- **a lump sum of \$5652.08 in the form of a check payable jointly to petitioner, Cynthia Byrd, and petitioner counsel, Gallagher and Gallagher Law Firm LLC, for petitioner's attorney fees and costs, and**
- **a lump sum of \$250.00 in the form of a check payable to petitioner, Cynthia Byrd, for her personal litigation costs.**

⁷ If respondent has any reasons other than the allegation that the case was improperly included in the OAP for asserting that fees and costs may not be paid, she failed to raise them in a response to the fees and costs application. Nevertheless, I will entertain a motion for reconsideration based on substantive arguments not already raised in this case. See Vaccine Rule 10(e). In this regard, I have considered and rejected respondent's position that the "short-form" petition was not authorized by the Vaccine Act. I have also considered that the amount of fees and costs to which respondent has agreed were negotiated in the context of an alternative disputes resolution process based on negotiations between representatives of the petitioners' bar and the respondent in OAP cases. Nevertheless, having examined the docket entries in this case, and based on my knowledge of fees and costs paid in the program in cases similarly developed and dismissed, the amount requested is entirely reasonable, whether an OAP case or otherwise.

⁸ The motion notes that the amount of costs requested include the filing fee, and petitioner's statement pursuant to General Order 9, filed January 30, 2012, indicates she paid the filing fee, but otherwise has no personal litigation costs.

⁹ This amount is intended to cover all legal expenses incurred in this matter. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. See *generally Beck v. Sec'y, HHS*, 924 F.2d 1029 (Fed. Cir.1991).

In the absence of a timely-filed motion for review or reconsideration, 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.¹⁰

IT IS SO ORDERED.

s/ Denise K. Vowell

Denise K. Vowell

Special Master

¹⁰ Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. See Vaccine Rule 11(a).