

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

No. 99-0679V

Filed: June 25, 2012

Kevin O'Brien by his parents,
JAMES C. O'BRIEN, Sr., and
ELLEN O'BRIEN,

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Petitioners,

Autism; Attorney Fees and Costs

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

DECISION ON ATTORNEYS' FEES AND COSTS¹

Vowell, Special Master:

On August 6, 1999, petitioners filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*² [the "Vaccine Act" or "Program"], alleging that Kevin O'Brien ["Kevin"] was injured by a vaccine or vaccines listed on the Vaccine Injury Table.

I issued a decision denying entitlement and dismissing this case on September 28, 2012. On May 1, 2012, petitioners filed an application for attorneys' fees and costs, requesting \$8,326.30. Petitioners filed a supplemental application for attorneys' fees and costs, requesting an additional \$1,396.70, on May 29, 2012.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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), 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.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (1986). Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

I. Initial Application for Attorneys' Fees and Costs.

Petitioners filed an application for attorneys' fees and costs on May 1, 2012. The application requested \$7,720.30 for attorneys' fees, \$486.00 for attorneys' costs, and \$120.00 for petitioners' costs, for a total award of \$8,326.30.

On May 17, 2012, respondent filed her response to petitioners' application. Respondent argued that this case was untimely filed by almost two years, and that the untimely filing prohibited a finding that the case was filed upon a reasonable basis and thus prohibited an award of attorneys' fees and costs. Response at 2-3. In making her argument, respondent relied upon the filing date of August 6, 1999, Kevin's September 1994 developmental evaluations, which were scheduled due to his parent's concerns about his language development, and the Vaccine Act's thirty-six month statute of limitations period. Response at 1-2; § 300aa-16(a)(2).

Petitioners filed a reply brief on May 29, 2012. Petitioners noted that their initial petition alleged that Kevin had been injured by hepatitis B vaccines he received in 1992 and 1993. Reply at 2. Petitioners argued that the appropriate statute of limitations period was not the thirty-six month period found in § 16(a)(2), but instead the eight year look-back period established when the hepatitis B vaccine was added to the injury table. Reply at 2. This case was filed on the final day of the look-back period, and therefore timely-filed according to petitioners. *Id.* at 3.

Respondent filed a response to petitioners' reply brief on June 11, 2012. In her response, respondent withdrew her objection to petitioners' initial application for fees and costs and moved that attorneys' fees and costs in the amount of \$8,326.30 be awarded. Sur-reply at 1.

II. Supplemental Application for Attorneys' Fees and Costs.

Petitioners filed a supplemental application for attorneys' fees and costs on May 29, 2012. The supplemental application requested an additional \$1,396.70 in attorneys' fees for the time spent preparing the reply brief. Respondent did not formally object to the supplemental fee request, but noted in her June 11, 2012 response that "this matter could have been resolved informally and did not necessitate a separate filing nor the attorney hours to draft the response."

I agree with respondent that this matter should have been informally resolved. Additionally, I find the 2.9 hours billed to draft and the 1.2 hours billed to edit the reply, which was approximately two pages of double-spaced text, to be excessive. However, I also note that if respondent had applied the correct statute of limitations in the first instance the reply would not have been necessary. Considering those factors, I will award petitioners \$698.35, which represents half of the requested amount.

III. Conclusion.

I find that this petition was brought in good faith and that there existed a reasonable basis for the claim. Therefore, an award for fees and costs is appropriate, pursuant to 42 U.S.C. §§ 300aa-15(b) and (e)(1). **Accordingly, I hereby award the total \$9024.65³ as follows:**

- **a lump sum of \$8,904.65 in the form of a check payable jointly to petitioners and petitioners counsel of record, Ronald C. Homer, for petitioners' attorneys' fees and costs, and**
- **a lump sum of \$120.00 in the form of a check payable to petitioners, James C O'Brien, Sr., and Ellen O'Brien, for their personal 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. Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

IT IS SO ORDERED.

s/ Denise K. Vowell

Denise K. Vowell
Special Master

³ 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).