

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 04-0223V
Filed: April 20, 2012**

LINDA TUTZA, Parent of PETER	*	
LEAL, a Minor,	*	
	*	
Petitioner,	*	Autism; Attorney Fees and
v.	*	Costs
	*	
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

DECISION ON ATTORNEY FEES AND COSTS¹

Vowell, Special Master:

In this case under the National Vaccine Injury Compensation Program,² I issued a decision denying entitlement and dismissing this case on July 27, 2011. On February 2, 2012, petitioner’s counsel, Paul S. Dannenberg [“Mr. Dannenberg”], filed an application for attorney fees and costs totaling \$12,648.74, and a motion for direct sole payment to petitioner’s counsel. In the motion, Mr. Dannenberg indicated that, despite numerous attempts, he was unable to contact petitioner and thus could not obtain a statement pursuant to General Order #9. Consequently, Mr. Dannenberg moved for payment to be directed to him rather than to petitioner.

On March 26, 2012, following informal discussions with respondent, Mr. Dannenberg filed an amended application for fees and costs and a renewed motion for direct sole payment to petitioner’s counsel. In the amended application, Mr. Dannenberg requested attorney fees and costs of \$9,292.22, and stated that

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims’ website, in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 The applicable statutory provisions defining the program are found at 42 U.S.C. § 300aa-10 *et. seq.* (2006). Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

respondent did not object to this amount. However, the parties were unable to agree on a method of payment.

Respondent filed a response to the amended application and the motion on March 27, 2012. In the response, respondent agreed to the amount of fees requested by Mr. Dannenberg, but contended that the special master lacks authority to award attorney fees and costs directly to petitioner's counsel. Mr. Dannenberg filed a reply on April 6, 2012, rejecting respondent's argument and asserting that a special master may issue a check payable solely to petitioner's counsel in petitioner's absence.

For the reasons stated herein, Mr. Dannenberg's motion for direct sole payment to petitioner's counsel is GRANTED. Accordingly, I hereby award the total of \$9,292.22 as a lump sum in the form of a check payable to Mr. Dannenberg.

A. The Motion for Direct Sole Payment to Petitioner's Counsel.

In her objection, respondent relies primarily on *Heston v. Sec'y, HHS*, 41 Fed. Cl. 41 (1998), in which the court stated that "the 'to a petitioner' language in Sections 15(a) and 15(b) would require that the petitioner receive the fee award." *Id.* at 43. However, section 15(e)—which governs the payment of attorney fees and costs—does not contain the "to a petitioner" language and, consequently, does not mandate that payment of attorney fees and costs be directed to the petitioner. Although the court in *Heston* held that the specific "to a petitioner" language contained in §§ 15(a)-(b) trumped the absence of the same phrase in § 15(e), *see id.* at 44-45, such a holding contradicts more recent statutory interpretation and frustrates Congress' purpose in enacting the Vaccine Act.³

In *Avera v. Sec'y, HHS*, 515 F.3d 1343 (Fed. Cir. 2008), the Federal Circuit instructed against the strict statutory construction used in *Heston*. *See id.* at 1351. Additionally, the court reaffirmed its decision in *Saunders v. Sec'y, HHS*, 25 F.3d 1031 (Fed. Cir. 1994), in which the court held that the Vaccine Act should be interpreted "in a way which is consistent with the intent of Congress." *See Avera*, 515 F.3d at 1351 (citing *Saunders*, 25 F.3d at 1036); *see generally Amendola v. Sec'y, HHS*, 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"). Permitting the payment of attorney fees and costs to petitioner's counsel in petitioner's absence promotes "the evident congressional purpose of awarding attorneys' fees and costs: to encourage practitioners to accept representation of vaccine injury cases." *Gitesatani v. Sec'y, HHS*, No. 09-799V, 2011 WL 5025006 at *6 (Fed. Cl. Spec. Mstr. Sept. 30, 2011). Therefore, directing payment solely to Mr. Dannenberg in this case is lawful. It

³ Moreover, *Heston* involved the administration of a vaccine prior to 1988, and was thus governed by § 15(b) of the Vaccine Act. Section 15(b) specifically lists attorney fees and costs as a component of petitioner's compensation. In contrast, the vaccine in this case was administered after 1988, and thus § 15(a) is controlling. Section 15(a) does not list attorney fees and costs as an element of petitioner's compensation and, consequently, the only basis for awarding attorney fees and costs is under § 15(e). Section 15(e) does not contain the phrase "to a petitioner." *See Gitesatani v. Sec'y, HHS*, No. 09-799V, 2011 WL 5025006 at *2 n.4, *4 (Fed. Cl. Spec. Mstr. Sept. 30, 2011).

is also appropriate, in that he is the real party in interest in the fees application, and his client, by failing to keep her attorney apprised of her location, has frustrated Mr. Dannenberg's ability to secure her endorsement on any check made payable jointly.

B. Petitioner's Application for Fees and Costs.

Following informal discussions, petitioner and respondent agreed to an award of fees and costs totaling \$9,292.22. I find that the 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 §§ 15(b) and (e)(1). Further, the proposed amount seems reasonable and appropriate. **Accordingly, I hereby award the total of \$9,292.22⁴ as a lump sum in the form of a check payable to petitioner's counsel of record, Paul S. Dannenberg, for petitioner's attorney fees and 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.⁵

IT IS SO ORDERED.

Denise K. Vowell
Special Master

⁴ This amount is intended to cover all legal expenses incurred in this matter. The 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).

⁵ 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).