

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 11-59V

Filed: August 21, 2012

ROSEMARY TAYLOR and CLARA JEAN *
BERTINELLI, as personal representatives of *
the Estate of their Mother, MARY KEY, *

Petitioners, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

Isaiah R. Kalinowski, Maglio, Christopher & Toale, Sarasota, FL, for Petitioners;
Ryan D. Pyles, United States Dep't of Justice, Washington, D.C., for Respondent.

NOT TO BE PUBLISHED

Special Master Zane

Stipulation; attorneys' fees and costs

UNPUBLISHED DECISION ON ATTORNEYS' FEES AND COSTS¹

On August 17, 2012, the parties in the above-captioned case filed a Stipulation of Fact Concerning Final Attorneys' Fees and Costs (Stipulation) memorializing their agreement as to the appropriate amount of attorneys' fees and costs in this case. After informal discussions with Respondent, Petitioners request a total award of \$22,000.00. In accordance with General Order #9, Petitioners state that they have incurred no reimbursable costs. As explained below, the undersigned hereby awards the amount to which Respondent does not object.

On January 27, 2011, Mary Key filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986, as amended ("Vaccine Act"), alleging that she suffered from Guillain-Barre Syndrome (GBS) as a result of her receipt of an influenza ("flu")

¹The undersigned intends to post this decision on the website of the United States Court of Federal Claims, 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)). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire ruling will be available to the public. Id.

vaccination administered to her on November 28, 2009. Petition at 1. Ms. Key passed away on April 9, 2011. On June 16, 2011, the petition was amended to make Rosemary Taylor and Clara Jean Bertinelli, the daughters of Mary Key and the personal representatives of her estate, the Petitioners in this case. Petitioners did not file an expert report to establish causation. Thereafter, Petitioners moved for judgment on the record stating that they “likely will be unable to retain a persuasive expert witness to opine in support of vaccine causation of the injury alleged...” Petitioners’ Motion for Decision at 1, ¶¶ 2-3. On April 30, 2012, the undersigned granted this motion, denying compensation and dismissing the petition. *Decision*, dated April 30, 2012.

Despite the denial of compensation, Petitioners may still be awarded attorneys’ fees and costs, when their petition is brought in good faith and has a reasonable basis. *See* 42 U.S.C. §300aa- 15(e)(1). Here, at the outset of this case, Ms. Key appeared to have a reasonable basis for bringing the claim, and counsel spent time preparing the case, gathering medical records and filing affidavits. But, when counsel was unable to secure an expert that could support Petitioners’ claim for causation, it became evident to counsel that the case could not proceed. At that point, counsel for Petitioners took reasonable action by filing the motion for ruling on the record to get a quick resolution to the matter, thereby minimizing additional expenditure of resources and avoiding additional costs and expenses. In so doing, Petitioners’ counsel acted in good faith. Petitioners had a reasonable basis for proceeding in that manner. Respondent does not contend that Petitioners failed to satisfy these criteria. Thus, Petitioners are eligible for an award of attorneys’ fees and costs.

The parties have now stipulated that \$22,000.00 is a reasonable amount to be awarded for attorneys’ fees and costs. After reviewing the request, the court finds the stipulated amount of \$22,000.00, in attorneys’ fees and costs to be reasonable. Based on the request’s reasonableness and pursuant to Vaccine Rule 13, the undersigned **GRANTS** the parties’ requests as outlined in the Stipulation. The judgment shall reflect that Petitioners are awarded attorneys’ fees and costs as follows:

in a check made payable jointly to Petitioners (Rosemary Taylor and Clara Jean Bertinello, as personal representatives of the estate of their mother, Mary Key), and Petitioners’ counsel (Isaiah R. Kalinowski of Maglio, Christopher & Toale, PA) in the amount of \$22,000.00.

The Court thanks the parties for their cooperative efforts in resolving this matter. In the absence of a motion for review filed pursuant to RCFC, Appendix B, the Clerk is directed to enter judgment accordingly.²

IT IS SO ORDERED.

/s/ Daria J. Zane
Daria J. Zane
Special Master

² Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.