

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 04-1370V

Filed: March 30, 2012

(Reissued for Publication: December 19, 2012)

CHENG KU and SHEN WANG, natural	*	
Parents and guardians ad litem for T.K.,	*	
a minor,	*	
	*	
Petitioners,	*	Past Expenses
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES,	*	
	*	
Respondent.	*	

Thomas Gallagher, Somers Point, New Jersey, for petitioners.
Linda Renzi, U.S. Department of Justice, Washington, D.C., for respondent.

RULING CONCERNING “PAST EXPENSES”

HASTINGS, *Special Master.*

In this case under the National Vaccine Injury Compensation Program (hereinafter the "Program"¹), Respondent has acknowledged that Petitioners' daughter, T.K., met the criteria for a "Table Injury" under the Vaccine Act. Thus, the remaining general issue is the *amount* of the award, and a specific issue in dispute, to be resolved in this Ruling, is whether Petitioners are entitled to certain amounts claimed as "past expenses" pursuant to § 300aa-15(a)(1)(B).

¹ The statutory provisions governing the National Vaccine Injury Compensation Program are found in 42 U.S.C. § 300-10 *et seq.* (2006). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C.

I

BACKGROUND

A. Facts

In August of 2002, T.K. received a vaccine covered by the Vaccine Act, and thereafter suffered from unpredictable, frequent, and intractable seizures, with severe central nervous system dysfunction and cognitive deficits. Since that vaccination, T.K. has needed vast amounts of medical care and other care related to her presumably vaccine-caused injury. Much of that care, however, has been provided by the family's health insurance. Petitioners seek compensation for certain expenses *not* covered by insurance.

B. Applicable statutory provision

A petitioner whose vaccination occurred after October 1, 1988, the "effective date" of the Program, may be entitled to compensation for "actual unreimbursable expenses." (§ 300aa-15(a).) In this case, T.K. received the relevant vaccine on August 30, 2002, and therefore subsection (a) governs. The pertinent part² of subsection (a) authorizes the Program to provide compensation for a vaccine-related injury, including:

(1)(B) *Actual unreimbursable expenses incurred before the date of the judgment awarding such expenses which--*

(i) result from the vaccine-related injury for which the petitioner seeks compensation,

(ii) were incurred by or on behalf of the person who suffered such injury, and

(iii) were for diagnosis, medical or other remedial care, rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expense, and facilities determined to be *reasonably necessary*.

² Subpart (a)(1) of § 300aa-15 can be divided into two subparts, specifically (a)(1)(A) and (a)(1)(B). Subpart (a)(1)(A) is for expenses incurred "from the date of judgment," while subpart (a)(1)(B) is for expenses incurred "before the date of judgment." In the motion in question, Petitioners seek damages for the period prior to judgment, and thus § 300(a)(1)(B) governs.

(§ 300aa-15(a) (emphasis added).)

C. Procedural history

Petitioners' have filed a massive amount of documents, which demonstrate expenditures on T.K.'s care during the period from 2002-2010. (See Exs. 23, 26-35, 43, 44A-B, 45A-D, 46, 48, 57.) Petitioners did not initially, however, file a document in which they *summarized* their claim for past unreimbursed expenses.

Respondent filed, on September 29, 2001, Ex. J, which sets forth Respondent's position on past unreimbursed expenses through 2010. Ex. J contains no narrative explanation for why certain items are rejected, but the reasons can be deduced from the 'notes' column.

On October 7, 2011, Petitioners filed Ex. 82, which was intended to summarize Petitioners' out-of-pocket expenses from 2002 to 2010. This document was Petitioners' response to Respondent's Ex. J.

Respondent's summary of Petitioners' claimed expenses in Ex. J (both those that are objected to, and those that are not, but not including litigation expenses) amounts to a total of \$86,196.

Petitioners' summary of unreimbursed expenses through 2010, listed at Ex. 82, p. 1, on the other hand, proposes \$82,495 of medical care and pharmaceutical expenses, plus \$4,024 for diapers at p. 2, totaling \$86,519. The comparison of these two totals in Ex. J and Ex. 82, thus, shows that they differ by only about \$323. Therefore, it appears that the parties have reached roughly similar totals for the *requested* past care expenses thru 2010.

However, respondent only accepts \$43,574 of the claimed \$86,000 as having been "reasonably necessary" for T.K.'s care, as required by the final words of § 300aa-15(a)(1)(B)(iii) set forth above. Respondent objects to the other \$42,622. (Respondent's concise summary in this regard is found in Ex. J, at the bottom of page 2.)

Respondent's objections are summarized in a chart presented in Ex. J, pp. 4-5. For some items, Respondent objects because *no receipts* were filed. For most items, however, Respondent's objection appears to be based on the ground that the expenditures were not "reasonably necessary" for T.K.'s care, because the expenditures were for non-traditional and/or non-proven alternative treatments, including: (a) chiropractic treatments performed by Dr. Klinghardt or others; (b) kidney drainage, herbal treatment, and "testing" by Dr. Klinghardt or others; (c) QEEG treatments by Dr. Thompson, along with related travel expenses; and (d) acupuncture treatments by Dr. Zhu and related expenses.

There is very little evidence in the record upon which to resolve this dispute. The evidentiary hearing held in this case on October 12-13, 2011, focused on the issue of the needed *future* care of T.K., rather than the "past expenses" dispute. Nor have the parties filed any *briefs* concerning the issue of past expenses. However, during an unrecorded telephonic status

conference held on March 20, 2012, counsel for both parties indicated that they did not desire to present any further evidence or argument concerning the past expenses issue, choosing to rely upon my discretion in interpreting the summaries contained at Ex. J and Ex. 82, respectively. The parties requested that I rule on the past expenses issue based upon the written record. Accordingly, I will do so below.

II

DISCUSSION

A. Amounts unopposed by respondent

First, I will allow the amounts to which Respondent did not object in Ex. J.

In this regard, I note, that the amounts allowed by Respondent indicate a very sincere effort to be reasonable. I point, for example, to the issue of the diapers expense. Expenses for diapers are documented with receipts for the year 2008 (\$824), while expenses for years 2004-2007 are merely extrapolated at \$800 per year, without receipts. (Ex. 43, p. 2.) Diaper expenses for the years 2009 and 2010 are well-documented in Exs. 48 and 57. Respondent accepts all of these expenses without quibbling about the documentation. This seems quite reasonable, to the credit of Respondent's counsel.

B. Amounts not demonstrated to be "reasonably necessary"

As to the amounts to which Respondent objects, Respondent's objections seem to be well-based. As explained above, for the most part, Respondent's objection seems to be based on the ground that the expenditures were not "reasonably necessary" for T.K.'s care, because the expenditures were for non-traditional and/or non-proven alternative treatments, including (a) chiropractic treatments performed by Dr. Klinghardt or others; (b) kidney drainage, herbal treatment, and "testing" by Dr. Klinghardt or others; (c) QEEG treatments by Dr. Thompson, along with related travel expenses; and (d) acupuncture treatments by Dr. Zhu and related expenses. I agree with Respondent that Petitioners have not met *their burden* of demonstrating that such expenditures were "reasonably necessary."

For example, as to the past QEEG treatments of T.K., I note that the issue of the reasonability of Petitioners' requests for *future* QEEG treatments was explored during the evidentiary hearing in this case held on October 12-13, 2011. In my Ruling issued on February 9, 2012, I concluded (see p. 9) that the evidence did *not* support Petitioners' claim that the Program should supply funds for future QEEG treatments. As I noted there, Respondent's neurologist, Dr. Lubens, persuasively explained that the medical studies concerning QEEG treatment have *not* supported its efficacy. (Tr. 436-37.) Further, Petitioners' own neurologist, Dr. Vlcek, declined to vouch for the proposal, acknowledging that he knows of no evidence supporting the effectiveness of QEEG, and that he does not use the procedure in his treatment of his patients. (Tr. 157-59.) Accordingly, I cannot conclude that the amounts expended on *past* QEEG treatments were "reasonably necessary" for T.K.'s care.

Similarly, I decline to award compensation for the *other* past expenses of T.K.'s non-traditional/alternative treatments listed above, because Petitioners have failed to show that such expenditures were "reasonably necessary." I note that Petitioners' own neurologist Dr. Vlcek also declined to vouch for the efficacy of these *other* non-traditional treatments. (Tr. 156-57.)

C. Claims not supported by receipts

Next, I consider the claimed past expenses of Petitioners that Respondent rejected as not documented by receipts. My analysis of Ex. J, pp. 4-5, indicates that the amount rejected on this ground totaled \$8,958. It may be that upon an intense item-by-item analysis of these amounts, receipts might be discovered or identified, or adequate evidence for the expenditures could be provided by testimony of T.K.'s parents even without receipts. However, it is *Petitioners'* *burden* to adequately demonstrate entitlement to these amounts, and they have failed to do so.³

D. 2011 expenses

Petitioners also filed (on September 28, 2011) Ex. 76, which was entitled "Petitioners' 2011 Out of Pocket Expenses." However, an examination of the expenses listed in Ex. 76 indicates that the amounts claimed therein were all for *litigation expenses*, rather than amounts for care of T.K. that would fit within the requirements of § 300aa-15(a)(1)(B). In fact, I have already granted compensation for many of those claimed litigation expenses in my Decision Awarding Interim Costs, filed on December 22, 2011.

Accordingly, none of the expenses claimed at Ex. 76 are appropriately compensated in this Ruling.

To be sure, it seems unlikely that the Petitioners did not expend *any* amounts on unreimbursed expenses relating to T.K.'s care during the entire year 2011 and the first quarter of 2012. However, I cannot award amounts without some request, explanation, or documentation by Petitioners. I will make one slight addition to the award, however. As noted above (p. 4), Respondent did not object to compensation for diapers for the years 2009 and 2010, in the total amount of \$1031. I will award half of \$1031, or \$515, for the year 2011, plus another \$129 (25% of the 2011 amount) for the first quarter of 2012.

³ Further, I agree with the apparent conclusion of Petitioners that at this time it would *not* make sense to further delay the large Program award, which Petitioners are about to receive in this case, in order to further litigate the issue of a small amount of past expenses denied because of a lack of receipts.

III

SUMMARY AND CONCLUSION

For the reasons set forth above, I conclude that Petitioners are entitled to “past expenses” in the total amount of \$44,218. That amount consists of the \$43,574 conceded by Respondent, plus the \$644 amount awarded for 2011-12 above.

s/ George L. Hastings, Jr.
George L. Hastings, Jr.
Special Master