OFFICE OF THE SPECIAL MASTERS

No. 90-1427V

(Filed: February 3, 1997)

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LOIS MACK, as Legal	*	
Representative of PENNY A. MACK,	*	
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Petitioners,	*	
	*	
vs.	*	PUBLISHED
	*	
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	
* *		

ORDER

On 25 September 1990, petitioner filed a claim on behalf of Penny Mack ("Penny") under the National Vaccine Injury Compensation Program (hereinafter "Vaccine Act" or the "Act").[(1)] Petitioner claimed that as the direct result of the administration of a DPT vaccination on 20 April 1978, Penny suffered a residual seizure disorder and an encephalopathy, as defined by the Vaccine Injury Table.

On 11 August 1995 the court issued an order finding that petitioner had submitted insufficient evidence to demonstrate that she had incurred the required $1,000 in unreimbursable expenses.[(2)] Petitioner was ordered to file additional evidence to support her claim. On 11 September 1995 petitioner filed a response to the order that was unsatisfactory. The court then issued an Order to Show Cause giving petitioner one last chance to present evidence in satisfaction of the $1,000 unreimbursable expense requirement before the case would be dismissed. Petitioner filed additional evidence on 27 November 1995 and 15 April 1996. Respondent filed a reply to petitioner's supplemental evidence on 25 April 1996.

After reviewing the entire record and respondent's objections, it became clear that the issue of whether all or part of Penny's medical care was funded by Medicaid was dispositive. On 1 November 1996 the court issued an order requiring petitioner to submit additional evidence on that issue. Petitioner

complied on 18 November 1996.

I.

The evidence regarding whether petitioner has incurred $1,000 in unreimbursable, injury-related expenses was presented by petitioner in a fragmented and practically incomprehensible manner. The court is well aware of the disheveled state of the available physical evidence in this case, and the fact that the issues surrounding Supplemental Security Income and Medicaid are novel and complex. Nevertheless, the duty of the attorney is to present his or her case in a clear and cogent manner. It is not the responsibility of the court to garner evidence and construct petitioner's argument.

Petitioner has the burden of proving that she incurred in excess of $1,000 in unreimbursable vaccine injury-related expenses. On its face, the evidence as presented in this case would not meet that burden because of the possibility of reimbursement of Penny's medical expenses through Medicaid.[(3)] Petitioner's additional filings were largely unhelpful in settling this issue. However, recognizing the potential mired in the Serbonian Bog of documents, receipts and affidavits, and mindful of the extreme nature of a dismissal, the court initiated extensive research so as to avoid leaving any stone unturned.

After an exhaustive review of the file, the court finds the following expenses to have been substantiated:

Item	Expense Incurred
Diapers[(4)]	$2,808.00
Travel Expenses[(5)]	$2,622.40
Pharmacy[(6)]	$613.15
Medical care[(7)]	$6,018.66
Total	$12,062.21

II.

In the published order of 11 August 1995, the court examined the effect the receipt of Supplemental Security Income (SSI) payments has on the calculation of unreimbursable expenses under §11(c)(1)(D)(i). The court held that petitioner had "incurred unreimbursable, injury related expenses only to the extent they exceed the full amount of SSI funds received prior to the filing of the instant petition, in addition to any other sources of payment or recompense for those expenses, such as Medicaid."[(8)] Accordingly, the court must subtract the total amount of SSI funds and any other reimbursements received, or receivable, by the Macks, from the total substantiated expenses listed, *supra*.

The Macks received $7,633.70 in SSI payments from 2 January 1979 to 1 January 1990.[(9)] Simple subtraction from the substantiated expenses ($12,062.21) leaves a total of $4,428.51 in unreimbursable expenses, which petitioner may apply toward the $1,000 expense requirement. As $4,428.51 in expenses

is obviously in excess of $1,000, petitioner would satisfy §11(c)(1)(D)(i) if this was the end of the analysis. However, that amount must be further reduced by any other Federal benefits received, or receivable, by the Macks for Penny's disability.

At the 28 April 1994 hearing, the issue of whether the Macks received Medicaid reimbursement for Penny's disability was raised.(10) If that is the case, and the Macks received $3,428.51 or more in Medicaid benefits for Penny's disability, petitioner would be unable to prove that she incurred in excess of $1,000 in unreimbursable vaccine-related expenses. The consequence of failure to meet the requirement of §11(c)(1)(D)(i) is dismissal. Thus, the remaining issues for the court to decide on the determination of whether petitioner has satisfied §11(c)(1)(D)(i) are: (1) Did the Macks receive Medicaid benefits on behalf of Penny? If so, (2) How much did they receive?

III.

Repeated attempts by petitioner to ascertain, from the Texas state authorities, the amount of Medicaid funds received by the Macks were unsuccessful. Thus, the court is limited to the record as it stands to determine the amount of Medicaid petitioner may have received. For this task, it is important to first determine how Medicaid pays medical bills. If the court can narrow the legal possibilities, a determination becomes more feasible as some factual scenarios can be eliminated. Does Medicaid make reimbursements directly to the provider or indirectly by reimbursing eligible individuals for payments made or expenses incurred? If the former, then petitioner need only prove that the provider was not reimbursed, nor able to be reimbursed, by Medicaid and the $1,000 requirement will be satisfied.(11) If the latter, the issue is much more problematical, because then the court would actually need to know how much the Macks received in reimbursement from Medicaid. This would be necessary in order to determine how much of the claimed medical expenses were unreimbursable. Petitioner has already demonstrated an inability to determine how much, if any, Medicaid funds were received by the Macks. If there is evidence that Medicaid funds were received, petitioner will have to prove that less than $3,428.51 was received.

A.
1.

Subchapter XIX of the Social Security Act, 42 U.S.C. §1302 (1935) created a Federal-State partnership in providing medical assistance to low-income families. Jointly financed by both Federal and State governments, "each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures," subject only to "broad Federal rules ."(12) One of the rules of significance here is that a State plan must:

(32) provide that no payment under the plan for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such care or service, under an assignment or power of attorney or otherwise; except that --

(A) in the case of any care or service provided by a physician, dentist, or other individual practitioner, such payment may be made (i) to the employer of such physician, dentist, or other practitioner if such physician, dentist, or practitioner is required as a condition of his employment to turn over his fee for such care or service to his employer, or (ii) (where the care or service was provided in a hospital, clinic, or other facility) to the facility in which the care or service was provided if there is a contractual

arrangement between such physician, dentist, or practitioner and such facility under which such facility submits the bill for such care or service . . . .[13]

The applicable regulation reiterates this requirement in simpler terms, merely stating that "[p]ayments for services are made directly by the State to the individuals or entities that furnish the services."[14] The complexity in the contorted language addressing whether payment may be made to someone other than the individual receiving services is really more apparent than real. In actuality, Congress only wished to obviate the "factoring" of accounts receivable from Medicaid.[15] "Factoring" is the practice of selling accounts receivable to an agency at a discount, which then collects the full face-amount due. Thus, federal regulations only prohibit financial middlemen who receive payment via the discounting of claims from receiving Medicaid funds, leaving the States to determine whether direct or indirect payment may be effected.

The Texas legislature delegated this issue to its Department of Health when it provided that:

(a) The department may prescribe a method of payment for medical assistance claims by establishing a direct vendor payment program that is administered by the department, or by an insurance plan, a hospital or medical service plan, or any other health service plan authorized to do business in the state, or by a combination of those plans.

(b) The department may use any fiscal intermediary, method of payment, or combination of methods it finds most satisfactory and economical. The department may make whatever changes it finds necessary from time to time to administer the program in an economical and equitable manner consistent with simplicity of administration and the best interest of the recipients of medical assistance.[16]

The Department responded by instituting a direct vendor payment system, under which "[t]he health insuring agent makes payments to eligible providers on behalf of eligible recipients for authorized benefits as defined in this chapter."[17] In fact, "[p]ayment for medical care and services cannot be made to any recipient [of health services]."[18] Once care providers seek Medicaid reimbursement, they are then prohibited, except in narrow circumstances not applicable here, from charging the recipient for any services rendered that fall within the scope of allowable Medicaid treatments.[19] Therefore, according to Texas law, the Macks could not have received any funds directly from Medicaid.

2.

To resolve any perceived conflicts between the evidence in this matter and the laws of Texas, the genesis of the contention that the Macks received Medicaid must be revisited. During cross-examination of Mrs. Mack at the 28 April 1994 hearing, the following exchange took place:

Miss Kroop: Now, at some point, Penny had Medicaid. Do you remember when that was?

Mrs. Mack: She had Medicaid, yes.

Miss Kroop: Did she have it all the time since she was one or two?

Mrs. Mack: Yes.

The Court: When did she first start to have Medicaid? When did any government start to pay for her doctors' bills?

Mrs. Mack: When the checks started.

Tr. at 130-31. This testimony is an apparent admission of receipt of Medicaid funds. In contrast, during direct examination, the following exchange took place:

Ms. Robertson: There was a question about, I think at some point time, you received Medicaid? Is that right?

Mrs. Mack: With Penny?

Ms. Robertson: No, just if you had access to Medicaid?

Mrs. Mack: Not with Penny.

Tr. at 71. This testimony is clearly a denial that Medicaid was received on behalf of Penny.

When Mrs. Mack stated that Medicaid assistance began "when the checks started," she was obviously mistaken and referring to another program, quite possibly SSI.[(20)] Unless there was some as yet undiscovered bureaucratic snafu, the result of which was the windfall receipt of Medicaid funds by the Macks, they simply could not have received such funds under the laws of Texas. The court found the Macks to be honest, forthright, credible witnesses. It is the court's impression, after observing their demeanor, presentment and comportment, that the Macks were telling truth. There were many instances during the hearing, however, where they became confused as to what was being asked. It was painfully obvious that they were not erudite with respect to federal entitlement programs. The confusion raised by questions of SSI, Medicaid and Medicare is evident from the transcript. After reviewing the record, the court is convinced that Mrs. Mack was referring to the SSI payments that commenced in early 1979 when she answered questions about Medicaid. That is the only logical conclusion, given the law in Texas at the apposite time. By a preponderance of the evidence, the court finds that petitioner did not directly receive any reimbursement from Medicaid for Penny's allegedly vaccine-related injuries.

B.

While petitioner has cleared one major hurdle, a few obstacles remain. This court has held that it is eligibility for reimbursement, not reimbursement-in-fact, that controls the determination of whether the claimed expenses qualify towards the $1,000 requirement. In other words, if the expenses were subject to reimbursement, but the subject failed to pursue those available funds, the expenses do not qualify as unreimbursable.[(21)] If that is the case, then Penny's medical expenses that were Medicaid reimbursable, to the extent of available reimbursement, must be subtracted from petitioner's substantiated medical expenses.

To determine whether Penny's medical expenses were Medicaid reimbursable, two questions must be answered: (1) Was the type of medical care given to Penny Medicaid eligible? and (2) Were the services provided by Dr. Hawthorn Medicaid reimbursable? Affirmative answers to both these questions would render Penny's medical expenses reimbursable and thus not applicable to the $1,000 threshold.

1.

The first question is answered in the affirmative. The Texas Code broadly defines Medicaid eligible services as:

authorized benefits as defined in this chapter when the items of service are medically necessary for diagnosis or treatment, or both, of illness or injury, or when such items of service are appropriately authorized for prevention of the occurrence of a medical condition, and are prescribed by a physician or doctor, as appropriate to the particular benefits, in accordance with the utilization review provisions of this chapter.(22)

Authorized physician services include:

those reasonable and medically necessary services that are provided by or under the personal supervision of a physician and that are within the scope of practice of medicine or osteopathy as defined by state law.(23)

All of the services Dr. Hawthorn provided for Penny's allegedly vaccine-related injury would appear to fall within this definition. For petitioner to prove otherwise would be a formidable task. She would have to itemize the care provided and submit evidence as to the non-eligibility of each proffered item. The items would then have to be placed in one of three categories: (1) vaccine-related, Medicaid *in*eligible care; (2) vaccine-related, Medicaid eligible care; and (3) non-vaccine-related care. Only items of care that fall in the first category would be counted toward the $1,000 requirement. However, petitioner has submitted all the evidence available and undoubtedly could not submit an accurate breakdown of exactly what services were performed by Dr. Hawthorn over the period in question. Thus, petitioner cannot prove that any vaccine-related expenses were not Medicaid eligible.(24) Due to the lack of contrary evidence, the court must find, based on the liberal definition of Medicaid eligibility in Texas, that all of Penny's vaccine-related expenses were Medicaid eligible.

2.

The second question is answered in the negative. The issue is whether Dr. Hawthorn could get Medicaid reimbursement from the State of Texas for care given to Texas Residents (the Macks), while his medical practice was located in Louisiana.(25)

The law on this issue offers little guidance. At all relevant times, the federal government has mandated that states must:

provide for inclusion, to the extent required by regulations prescribed by the Secretary, of provisions (conforming to such regulations) with respect to the furnishing of medical assistance under the plan to individuals who are residents of the State but are absent therefrom.(26)

In enforcing this element of the Social Security Act, the Secretary required the State of Texas to "provide medicaid to eligible residents of the State."(27) Eligible residents of the State include those who

for certain enumerated reasons receive medical care in a state other than the one of residence. In such situations the

State plan must provide that the State will furnish Medicaid to a recipient who is a resident of the State while that recipient is in another State, to the same extent that Medicaid is furnished to residents in the State, when --

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(4) It is general practice for recipients in a particular locality to use medical resources in another State. (28)

During direct examination, the following exchange took place on the issue of Medicaid reimbursement for Dr. Hawthorn.

Ms. Robertson: I want to make a clarification on this. Did you ever try to pay Dr. Hawthorn? Did they try to work with you to get your payments through Medicaid?

Mrs. Mack: Oh, yes.

Ms. Robertson: What happened?

Mrs. Mack: This was later. Medicaid would not pay anything.

Ms. Robertson: And you live in --

Mrs. Mack: Texas.

Ms. Robertson: And Dr. Hawthorn's office is in Louisiana, and what did they tell you?

Mrs. Mack: They told me that they had tried to get Texas to pay and he tried it, but he said they just would not pay.

Ms. Robertson: So, the last time you took Penny over to his office, what did they tell you about paying?

Mrs. Mack: I would have to pay cash upon each visit because he said he could not use Medicaid anymore. They wasn't even going to try anymore because Medicaid just would not pay.

The Court: They would not pay Dr. Hawthorn?

Mrs. Mack: Dr. Hawthorn.

The Court: Because he was in Louisiana?

Mrs. Mack: Um-huh.(29)

These statements make it clear that petitioner and Dr. Hawthorn attempted to have Penny's medical expenses covered by Medicaid in Texas, which is the Mack's state of domicile. This attempt was not successful,(30) and as a result the Macks had to pay in cash. Even if it were shown that Dr. Hawthorn

could have been reimbursed by Medicaid, the fact remains that the Macks paid cash for Penny's bills after they were told by Dr. Hawthorn that Medicaid would not cover them. The court cannot impose a duty on petitioners to investigate whether their physician is mistaken about their Medicaid eligibility. Reasonable reliance on the physician's assertions in such an instance is sufficient.

The argument that Dr. Hawthorn could not get Medicaid assistance for the Macks is bolstered by his affidavit of 5 April 1994. Dr. Hawthorn affirmed that Mrs. Mack had "customarily paid cash for her bills until June of [1994] when she qualified for Medicare."(31) If the bills were Medicaid reimbursable, Dr. Hawthorn would have been paid through that program and not by Mrs. Mack. The court has no reason to suspect that the Macks were actually Medicaid eligible, but that Dr. Hawthorn decided instead to have them pay cash in violation of the law.(32) The court finds that Dr. Hawthorn's expenses incurred in providing care for Penny were not Medicaid reimbursable in the State of Texas.

IV.

In sum, by a preponderance of the evidence, petitioner did not receive funds directly from Medicaid and Penny Mack's vaccine-related medical expenses attributable to Dr. Hawthorn's care were not Medicaid reimbursable. There is no evidence that Penny's vaccine-related medical expenses were reimbursable, at the time they were incurred, by any program other than the SSI payments considered, *supra*. Petitioner has substantiated $4,428.51 in unreimbursable, vaccine injury-related expenses incurred prior to the filing of this petition. The court will make no additional adjustments to that total. The court finds that petitioner has satisfied her burden of proving she incurred in excess of $1,000 in unreimbursable expenses related to the alleged vaccine injury.

Petitioner is ordered to contact my law clerk, *posthaste*, to schedule a status conference to be held no later than 30 after the filing of this order.

IT IS SO ORDERED.

Richard B. Abell

Special Master

1. The statutory provisions governing the Vaccine Act are found at 42 U.S.C.A. § 300aa-1 *et. seq.* (West 1991 & Supp. 1996). Hereinafter, for ease of citation, all references will be to the relevant subsection of 42 U.S.C.A. § 300aa.

2. Section 11(c)(1)(D)(i). *See Mack v. Secretary of HHS*, No. 90-1427V, Published Order (Fed. Cl. Spec. Mstr. Aug. 11, 1995). A person may file a petition for compensation under the Vaccine Act if that person meets the requirements of 11(c)(1). Section 11(c)(1)(D)(i) requires that the person who suffered the allegedly vaccine-related injury "incurred unreimbursable expenses due in whole or in part" to the injury "in an amount greater than $1,000." The $1,000 requirement is the portcullis to the Vaccine Program. It must be satisfied before a case can proceed to a determination on the merits.

3. *See Mack v. Secretary of HHS, No. 90-1427V, Published Order (Fed. Cl. Spec. Mstr. Aug. 11, 1995).*

4. P. Ex. 47.

5. P. Ex. 16. A petitioner may include, for the purposes of §11(c)(1)(D)(i), travel expenses incurred as a result of the alleged vaccine-related injury. *Mathisen v. Secretary of HHS*, No. 92-703V, Published Order (Fed. Cl. Spec. Mstr. May 2, 1994). In this matter, petitioner submitted various receipts for gas and maintenance for their vehicle. Rather than try to reconstruct actual expenses, which are usually undocumentable and supported only by faded memories, this court employs the standard mileage allowance that is deductible as a business expense under the Internal Revenue Code. *Id*. For the time period in question, an average rate of 22 cents per mile is reasonable.

Petitioner reported she and Penny traveled, at a minimum, approximately 80 miles per month for vaccine-related medical appointments. Thus, to arrive at the unreimbursable expense incurred for the purposes of §11(c)(1)(D)(i), the court multiplied the number of months from the date of Penny's alleged injury up to the filing date (149), by 80 miles per month, by 22 cents per mile. The product of this equation was $2,622.40.

6. P. Exs. 46, 54.

7. P. Exs. 41, 44, 48. *See also* P. Ex. 28. Petitioner estimated that she spent an average of $881 per year on Penny's vaccine-related medical expenses from 1978 until the filing of the petition. P.Ex. 41. Dr. Hawthorn, Penny's treating physician during this time, affirmed that the Macks spent approximately $488 per year on Penny's vaccine-related medical expenses. P.Ex. 48. The court is persuaded by Dr. Hawthorn's sworn affidavit. Thus, to arrive at an amount of unreimbursable vaccine-related medical expenses incurred between the date of the alleged injury, 20 April 1978, and the date of filing, 25 September 1990, the court added $488 for each whole year and a prorated amount for the years 1978 and 1990. The sum total was $6,018.66 in medical expenses.

8. *Mack v. Secretary of HHS*, No. 90-1427V, Published Order at 6 (Fed. Cl. Spec. Mstr. Aug. 11, 1995).

9. P.Ex. 50. The 1 January 1990 SSI payment was the last received before the filing date of 25 September 1990.

10. *See* discussion, *infra*, page 7.

11. If it is proven that Penny's medical expenses were not reimbursable by Medicaid, no further deductions will be made to the substantiated expenses and petitioner will have satisfied the $1,000 requirement.

12. 42 C.F.R. §430.0 (1996).

13. Social Security Amendments of 1972, Pub. L. 92-603 §236(b)(3)) (1972) (codified at 42 U.S.C. §1396a(a)(32).

14. 53 Fed. Reg. 36571 (1988) (codified at 42 C.F.R. §430.0 (1996)).

15. *See Missionary Baptist Foundation of America, Inc. v. Wilson, 796 F.2d 752, 757 n.6 (5th Cir. 1986).*

16. Tex. Hum. Res. Code Ann. §32.029 (1990 & Supp. 1996).

17. Tex. Admin. Code tit. 25, §29.1101(a) (West 1996).

18. Tex. Admin. Code tit. 25, §29.1101(b) (West 1996).

19. *Id.*

20. P.Ex. 50. At the hearing, the court asked Mrs. Mack when Penny started receiving money from social security. Mrs. Mack stated: "The exact time I don't remember, but it must have been somewhere about one or two-year-old, I guess." Tr. at 64.

21. *See Hayes v. Secretary of HHS, No. 93-287V (Fed. Cl. Spec. Mstr. Aug. 15, 1994).*

22. Tex. Admin. Code tit. 25, §29.1101 (West 1996).

23. Tex. Admin. Code tit. 25, §29.502 (West 1996).

24. The court cannot imagine, given the broad definition in the Texas Code, that any type of vaccine-related expense would be Medicaid *in*eligible.

25. Dr. Hawthorn's office was located in Shreveport, Louisiana. The Macks resided approximately 23 miles east of Carthage, Texas and one mile west of the Louisiana border.

26. Social Security Amendments of 1965, Pub. L. 89-97, §1902(a)(16) (1965) (codified at 42 U.S.C. 1396a(a)(16) (1994)).

27. 43 Fed. Reg. 45204, 45210 (Sep. 29, 1978) (codified as amended by 49 F.R. 13531 (Apr. 5, 1984) (cross-referencing regulation governing provision of out-of-state Medicaid coverage) at 42 C.F.R. §435.403 (1996)).

28. 43 Fed. Reg. 45188, 45189 (Sep. 29, 1978) (codified as amended at 42 C.F.R. §431.52(b) (1996)). The amended prefatory paragraph now reads:

A State plan must provide that the State will pay for services furnished in another State to the same extent that it would pay for services furnished within its boundaries if the services are furnished to a recipient who is a resident of the State, and any of the following conditions is met:

42 C.F.R. §431.52(b) (1996).

29. Tr. at 71-72.

30. From the record, it appears that Medicaid was not available from the State of Texas due to Dr. Hawthorn's Louisiana situs.

31. P.Exs. 44, 48.

32. The court will not consider a debate on whether the Macks should have used a physician in Texas that would have been Medicaid eligible. The court will not question the sincere attempts of concerned parents in their quest for the finest medical care available for their child. *See* Tr. at 80.