In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 98-916V

(Filed: March 11, 2009)

TO BE PUBLISHED[1]

THERESA CEDILLO and MICHAEL CEDILLO, as parents and natural guardians of Michelle Cedillo,	*	
Petitioners,	*	Vaccine Act Interim Costs; Fees for Omnibus Proceedings.
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

DECISION AWARDING INTERIM FEES

HASTINGS, ***Special Master***.

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), the petitioners seek, pursuant to 42 U.S.C. § 300aa-15(e), an interim award for attorneys' fees and costs incurred in the course of the petitioners' attempt to obtain Program compensation. After careful consideration, I have determined to grant the request in part at this time, for the reasons to be set forth below.

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[1]Because I have designated this document to be published, this document will be made available to the public unless a party files, within fourteen days, an objection to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." See 42 U.S.C. § 300aa-12(d)(4)(B) (2006); Vaccine Rule 18(b).

I

BACKGROUND

This case concerning Michelle Cedillo is one of more than 5,000 cases filed under the Program in which it has been alleged that a child's disorder known as "autism," or a similar disorder, was caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the 5,000 cases in this court, was set forth in my Decision filed in this case on February 12, 2009, and will not be repeated here. However, a very brief summary of that history follows.

A. The Omnibus Autism Proceeding

Beginning in 1998, certain theories became popular, suggesting that the measles-mumps-rubella ("MMR") vaccine, and/or a mercury-based preservative known as "thimerosal" contained in several childhood vaccinations, might be causing the neurodevelopmental disorder known as autism. The emergence of those theories led to a large number of claims filed under the Program, each alleging that an individual's autism, or a similar disorder, was caused by the MMR vaccine, by thimerosal-containing vaccines, or by both. To date, more than 5,000 such cases have been filed with this court, and most of them remain pending.

To deal with this group of cases involving a common factual issue--*i.e.*, whether these types of vaccinations can cause autism--the Office of Special Masters (OSM) devised special procedures. On July 3, 2002, the Chief Special Master, acting on behalf of the OSM, issued a document entitled the *Autism General Order #1,*[2] which set up a proceeding known as the Omnibus Autism Proceeding (hereinafter sometimes the "OAP"). In the OAP, a group of counsel selected from attorneys representing petitioners in the autism cases, known as the Petitioners' Steering Committee ("PSC"), was charged with obtaining and presenting evidence concerning the *general issue* of whether those vaccines can cause autism, and, if so, in what circumstances. The evidence obtained in that general inquiry was to be applied to the individual cases. *Autism General Order #1*, 2002 WL 31696785, at *3, 2002 U.S. Claims LEXIS 365, at *8.

Ultimately, the PSC elected to present two different theories concerning the causation of autism. The first theory alleged that the *measles* portion of the MMR vaccine can cause autism, in

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[2]The *Autism General Order #1* is published at 2002 WL 31696785, 2002 U.S. Claims LEXIS 365 (Fed. Cl. Spec. Mstr. July 3, 2002). I also note that the documents filed in the Omnibus Autism Proceeding are contained in a special file kept by the Clerk of this court, known as the "Autism Master File." An electronic version of that File is maintained on this court's website. This electronic version contains a "docket sheet" listing all of the items in the File, and also contains the complete text of most of the items in the File, with the exception of a few documents that are withheld from the website due to copyright considerations or due to 42 U.S.C. § 300aa-12(d)(4)(A). To access this electronic version of the Autism Master File, visit this court's website at www.uscfc.uscourts.gov. Select the "Vaccine Info" page, then the "Autism Proceeding" page.

situations in which thimerosal-containing vaccines previously weakened an infant's immune system. That theory was presented in three separate Program "test cases" during several weeks of trial in 2007. The second theory alleged that the mercury contained in the thimerosal-containing vaccines can *directly affect* an infant's brain, thereby causing autism. That theory was presented in three additional "test cases," during several weeks of trial in 2008.

On February 12, 2009, decisions were issued concerning the three "test cases" pertaining to the PSC's *first* theory. In each of those three decisions, the petitioners' causation theories were rejected. I issued the decision in this case, *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Patricia Campbell-Smith issued the decision in a second case, *Hazlehurst v. Secretary of HHS,* No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Denise Vowell issued the decision in the third case, *Snyder v. Secretary of HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009).

Decisions have not yet been issued in the test cases concerning the PSC's *second* theory. The parties are currently engaged in preparing post-hearing briefs concerning those cases.

B. The Request for "Interim" Fees in this Case

On August 19, 2008, the petitioners in this case filed their application for interim fees and costs in this case. Respondent filed a lengthy response on November 12, 2008, and the petitioners filed a lengthy reply on January 26, 2009.

In their application, the petitioners sought a total of $2,180,885.29 for interim fees and costs. This total reflected the fact that this case was, as explained above, the initial "test case" in the OAP. Because this was a "test case," in which the petitioners sought to present *all* of the "general causation" evidence concerning the theories (1) that the MMR vaccine can cause autism and (2) that thimerosal-containing vaccines can cause immune system dysfunction, petitioners have requested fees and costs for seven different law firms that participated in the development and presentation of the evidence, while six different expert witnesses prepared expert reports and testified at length during the evidentiary hearing.

On November 18, 2008, I issued an interim costs award in this case reflecting the Cedillo family's out-of-pocket expenses, which primarily consisted of the family's costs to attend the evidentiary hearing. Neither party objected to that interim award.

II

DISCUSSION

An interim award of fees and costs is permissible, if appropriate under the particular circumstances, in a Program case. *Avera v. Secretary of HHS*, 515 F.3d 1343 (Fed. Cir. 2008). I find that the circumstances are appropriate for such an interim award at this time in this case. While in

the vast majority of Program cases, only *one* award for *interim* fees and costs, if any, would be appropriate, the extremely unusual circumstances of this case justify more than one interim award.

In addition, I conclude that the petitioners filed this petition in good faith, and with a reasonable basis for the claim, so that an award is appropriate pursuant to 42 U.S.C. § 300aa-15(e)(1).

Further, after reviewing the entire record of this case and the Omnibus Autism Proceeding in general, I conclude that the amounts set forth herein are reasonable and appropriate compensation for the services provided by the three law firms receiving an interim award of fees and costs in this Decision. The Conway, Homer & Chin-Caplan ("CHC") firm did the principal work in preparing and presenting the petitioners' evidence, over a period of years, while the other two firms also performed important work in the case.

Finally, I note also that respondent has requested that I state in writing my reasoning, previously stated orally during an unrecorded status conference, concerning one argument raised in respondent's response filed on November 12, 2008. In his response, respondent argued (pp. 12-16) that it is impossible, at this time, to determine whether an attorneys' fees and costs award of the magnitude sought by petitioners in this single case is reasonable, because it is unknown how many, if any, other claims pending in the Program will be "resolved" by the entitlement ruling in this case. Respondent argues that if the entitlement decision in this case determines the outcome of this case alone, then petitioners' interim fees and costs request of $2,180,885.29 is *per se* unreasonable if incurred solely for one petition.

I do not find merit in this argument of the respondent. I conclude that the presentation of the PSC's first general theory of vaccine causation, presented in the *Cedillo* case and in the two other "first theory" test cases, was undoubtably a crucial and huge step toward resolving the pending autism cases. The petitioners have now presented their evidence, and received rulings, concerning one of the PSC's two general theories of vaccine causation. All of the petitioners with pending claims can now study those rulings, and consider their impact upon the viability of the pending cases. Relatively soon, there will also be rulings concerning the PSC's *second* general theory of causation, and the remaining petitioners will be able to study those rulings as well. It is true, of course, that until the rulings of the special masters in the "second theory" test cases are issued, and until any *appeals* concerning any of the six test case rulings are resolved, no one can know *exactly how* those test case rulings will affect the resolution of the pending petitions. But, based upon both my experience in prior "omnibus proceedings" under the Program (see *Cedillo*, 2009 WL 331968, at *12), and my understanding of the issues involved in these autism cases, I am confident that the massive efforts made by the petitioners' counsel and experts, the respondent's counsel and experts, and the special masters, in presenting and resolving this *Cedillo* case and the other autism test cases, will ultimately, after the resolution of all appeals, prove to be *very fruitful* in leading to the ultimate resolution of most, if not all, of the pending autism petitions.

In short, I *reject* the respondent's argument that I cannot determine at this time whether the amount of interim fees and costs sought by petitioners in this case is reasonable. I conclude that I am, in fact, in a very good position to evaluate, at this time, the reasonableness of the interim fees and costs request.

III

ADDITIONAL COMMENTS

I am aware that the amount that I award in this Decision is startlingly large, far higher than I have ever previously awarded in a Program case. I take very seriously my duty and responsibility, in all Program cases, to award Program funds only in *reasonable and appropriate* amounts. Accordingly, a few additional comments are appropriate.

As noted above, after my own careful review of the record, I conclude that the amounts awarded are reasonable and appropriate under all the circumstances. There is ample justification for the high amounts involved. First, the amount awarded for the work performed and costs incurred by the CHC firm represents compensation for *years* of work performed by multiple lawyers and other employees of that firm, along with the reimbursement of substantial costs that the law firm incurred on behalf of the Cedillo family.

In addition, the law firm reasonably spent so many hours on this case because the amount of existing scientific evidence relevant to the causation issues involved in this case, evidence which this law firm was obligated to consider and analyze in prosecuting this case, was absolutely *massive*. The amount of existing evidence relevant to this case far exceeded the amount of evidence relevant to any prior causation issue in the history of the Program. As I noted in my Decision filed in this case on February 12, 2009, the record of this case contains about 7,700 pages of Michelle Cedillo's medical records alone. The parties filed a total of 50 expert reports in the three test cases. During the evidentiary hearings, 16 expert witnesses testified in *Cedillo*, four in *Hazlehurst,* and eight in *Snyder*. The hearing transcripts totaled 2,917 pages in *Cedillo*, 1,049 pages in *Snyder*, and 570 *Hazlehurst*. The parties filed six post-hearing briefs in this *Cedillo* case alone, totaling 462 pages. In addition, in the three cases combined the parties filed a total of 939 different medical journal articles, medical textbook excerpts, or other items of medical literature, with the total number of pages of those 939 documents running well into the tens of thousands of pages. In short, this extremely large amount of relevant evidence, which the CHC firm was required to analyze, justifies the amount of time spent by the firm on the case.

Further, the *extreme complexity* of the material involved here is an important factor as well. The causation issues involved many different subspecialties of biology and medicine, including neurology, gastroenterology, virology, immunology, molecular biology, toxicology, genetics, and epidemiology. Obviously, it took much time for the lawyers involved in this case to familiarize themselves with so many varied and complex areas of medicine and science.

One must consider, as well, the *extreme importance* of this case as a "test case." Petitioners' counsel well knew that the outcome of this case would have significance for not only the Cedillo family, but also for 5,000 other families with pending Program petitions involving autism.

In light of all those factors, I find that the CHC firm acted reasonably in expending a very large amount of time, and substantial costs, in prosecuting this case.

Finally, I note that it may strike some as incongruous that while the petitioners in this case were unsuccessful in their quest for compensation, their attorneys will receive a substantial sum. In my view, however, it is important to realize that in the final analysis, the award for fees and costs issued in this case, as is true of fees/costs awards in all Vaccine Act cases, will strongly benefit many *future* Program petitioners.

Simply put, the *ultimate purpose* of Program fees and costs awards is *not* to benefit the *attorneys* involved, but to ensure that Vaccine Act petitioners will have *adequate access* to competent counsel. Access to counsel is crucial in enabling Program petitioners to prosecute their claims successfully, and in ensuring an adequate *level* of compensation in successful cases. Attorneys will agree to represent Program petitioners, however, only if they are ensured an adequate recompense for their time. Accordingly, when attorneys spend a reasonable amount of time and costs in representing Program petitioners, such attorneys must be fairly compensated for their expenditures, in order to encourage attorneys to participate in future Vaccine Act cases.

In addition, in my view it is very important, for the families that have brought Program claims involving autistic children to this court, that the petitioners have had their chance to present their evidence concerning their theories about the causation of autism, and to get rulings from special masters concerning those theories. That evidence did not ultimately persuade the special masters who heard the "first theory" test cases, but it is important that the theories were *presented and considered*. In other words, it is important that the autism petitioners have had their "day in court," or at least the first of their "days in court." And it was the CHC firm that stepped forward to shoulder most of the burden of assembling and presenting the evidence in the first of those test cases. It is appropriate, therefore, that the firm is reasonably compensated for the time and expense spent in shouldering that heavy burden.

Accordingly, under all of the circumstances here, I conclude that it is appropriate for me to reasonably compensate the CHC firm for the work performed by the firm in this case. I believe that doing so will benefit *future* Vaccine Act petitioners, by making it clear that counsel who provide solid assistance to such petitioners will be reasonably compensated for their work.

IV

CONCLUSION

For the reasons set forth above, I hereby make an "interim" award of fees and costs in this case, pursuant to 42 U.S.C. § 300aa-15(e), in the total amount of $1,452,806.11. I make this award after the parties engaged in lengthy discussions about petitioners' interim fees and costs application, and communicated the results of those discussions to the court.

The law firm of Conway, Homer & Chin-Caplan has agreed to reduce its interim attorneys' fees and costs request to $1,362,906.11. Respondent has indicated that he will not object to this amount. The law firm of Yen, Pilch, Komadina & Flemming has agreed to reduce its fees and costs request to $14,900 ($13,500 in fees and $1,400 in costs), to which respondent will not object. The law firm of Williams, Love, O'Leary & Powers has agreed to reduce its interim attorneys fees and costs request to $75,000 ($65,000 in fees and $10,000 in costs). Respondent has indicated that he will not object.[3] I find those amounts to be reasonable and appropriate.

I also note that the amounts awarded to the three law firms in this Decision reflect *all* of the fees and costs incurred by these law firms in this *Cedillo* case, through July 2008.

Further, I note that respondent's counsel has reported that due to the unique posture of this case, respondent will not object to the issuance of two different "interim" awards concerning the pending request--one award pertaining to the three above-mentioned law firms, and a second award, to be made at a later date, pertaining to the other law firms. In addition, petitioners' counsel has reported that petitioners withdraw their related motion filed on November 26, 2008.

In the absence of a timely motion for review of this Decision, the Clerk of this court shall enter judgment accordingly.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master

[3]It is clear that counsel for the two parties put a great amount of effort into resolving this request for interim fees. I thank them very much for their efforts and their reasonableness.