

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-801 V
Filed: June 26, 2012
For Publication

NICOLE ELIZABETH DOW and PHILIP *
RYAN TUFTS, as Parents and Natural *
Guardians of ALEXIA GRACE TUFTS *

Petitioners, *

Attorneys' Fees & Costs Decision;
Guardianship Costs

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

Herbert L. Waichman, Port Washington, NY, for petitioners.
Julia W. McInerney, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING ATTORNEYS' FEES AND COSTS¹

On June 4, 2012, petitioners filed a Revised Application for Attorneys' Fees and Costs, requesting \$8,296.05 in attorneys' fees and \$988.30 in attorneys' costs. On June 21, 2012, the parties filed a Stipulation Regarding Attorneys' Fees and Costs.

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

In accordance with the General Order #9 requirement, in a communication with the undersigned's law clerk, petitioners state that they did not incur any costs to pursue their petition.

Petitioners initially filed an Application for Attorneys' Fees and Costs on October 24, 2011. At that time, however, petitioners had not established a guardianship in their local state court in Maine as required by the parties' stipulation. While working to finalize a guardianship, petitioners' counsel was incurring additional fees. The undersigned held a series of telephonic status conferences over the next several months. Finally, during a status conference held on April 17, 2012, petitioners' counsel reported that petitioners had obtained authority from the local probate court to act as guardians of Alexia's estate.

In accordance with the undersigned's April 17, 2012 Order, petitioners filed their supplemental fee application on June 4, 2012. The parties then filed a Stipulation Regarding Attorneys' Fees and Costs on June 21, 2012. In their revised fee application, petitioners requested an award totaling \$9,284.35 in fees and costs. According to the stipulation, respondent does not object to an award of \$6,726.67. Respondent does object, however, to the fees and costs incurred to obtain petitioners' guardianship in state court. Taking petitioners' initial request, \$9,284.35, less the amount of fees to which respondent does not object, \$6,726.67, the amount of guardianship fees and costs to which respondent does object equals \$2,557.68.

Section 300aa-15(e)(1) of the Vaccine Act provides that a special master shall award "reasonable attorneys' fees" and "other costs, incurred in any proceeding on such petition." In more recent cases, special masters have interpreted the Vaccine Act's fee provision to include reimbursement for fees and costs incurred obtaining a guardianship in state court when establishment of a guardianship is a condition of settlement and incorporated as part of a damages decision. See Lindsey ex rel. Lindsey v. Sec'y of HHS, 08-258V, 2011 WL 6046605, at *2 (Fed. Cl. Spec. Mstr. Nov. 15, 2011) (awarding costs for guardianship when it is a condition of receiving the stipulated award and explaining that special masters have used a "but for" test to analyze reimbursement of costs); Gruber ex rel. Gruber v. Sec'y of HHS, No. 00-749V, 2009 WL 2135739 (Fed. Cl. Spec. Mstr. June 24, 2009), *vacated on other grounds*, 91 Fed. Cl. 773 (2010); Ceballos ex rel. Ceballos v. Sec'y of HHS, No. 99-97V, 2004 WL 784910, at *18-23 (Fed. Cl. Spec. Mstr. Mar. 25, 2004) (finding guardianship costs reimbursable generally but not in that case because a guardianship was not required by or mentioned in the court's decision).

The undersigned agrees with the more recent decisions issued by special masters on the matter of guardianship: when the parties' stipulation requires establishment of a guardianship in state court as a condition of receipt of the damages award, the costs of establishing the guardianship are compensable under the Vaccine Act. See also Lilley ex rel. Lilley v. Sec'y of HHS, No. 09-31V, 2012 WL 1836323 (Fed. Cl. Spec. Mstr. Apr. 30, 2012); Melnikova ex rel. Yevstigneyev v. Sec'y of HHS, No. 09-322V, 2012 WL 1339606 (Fed. Cl. Spec. Mstr. Mar. 27, 2012); Haber ex rel. Haber v. Sec'y of HHS, No. 09-458V, 2011 WL 839111 (Fed. Cl. Spec. Mstr. Feb. 14, 2011); Cansler ex rel. Cansler v. Sec'y of HHS, No. 09-596V, 2011 WL 597791,

at *1–3 (Fed. Cl. Spec. Mstr. Feb. 2, 2011) (explaining that respondent required the establishment of a guardianship in the stipulation, the court then adopted the provision of the stipulation in the damages award, and the issuance of the award placed the issue of guardianship within the purview of a proceeding on a vaccine petition).

Pursuant to the stipulation memorializing the parties’ agreement, petitioners were required to become authorized to serve as guardians or conservators of Alexia’s estate to receive payment of their damages award. Damages Stip. ¶ 13. In the Decision Awarding Damages issued on March 24, 2011, the undersigned adopted the parties’ stipulation and awarded damages according to the stipulation’s terms, including the provision requiring the establishment of a guardianship. Thus, the costs incurred to establish the guardianship in state court are within a “proceeding” on the petition and reimbursable under section 300aa–15(e)(1).

Petitioners’ costs, including costs incurred to obtain a guardianship, must be “reasonable.” See Perreira ex rel. Perreira v. Sec’y of HHS, 27 Fed. Cl. 29, 34 (1992) (“The conjunction ‘and’ conjoins both ‘attorneys’ fees’ and ‘other costs’ and the word ‘reasonable’ necessarily modifies both. Not only must any request for reimbursement of attorneys’ fees be reasonable, so also must any request for reimbursement of costs.”). Here, petitioners incurred \$2,557.68 in fees and costs to obtain a guardianship. The undersigned finds this amount to be reasonable and consistent with awards for guardianship costs in past cases. See e.g., Amar ex rel. Amar v. Sec’y of HHS, No. 06–221V, 2011 WL 6077558, at *24 (Fed. Cl. Spec. Mstr. Nov. 10, 2011) (awarding \$3,520.50 for guardianship costs); Doe 21 ex rel. Doe v. Sec’y of HHS, No. 02–411V, 2011 WL 6941671, at *10 (Fed. Cl. Spec. Mstr. Oct. 26, 2011) (awarding \$3,590.00 for guardianship costs); Finet ex rel. Finet v. Sec’y of HHS, No. 03–348V, 2011 WL 597792, at *3 (Fed. Cl. Spec. Mstr. Jan. 31, 2011) (awarding \$7,440.00 for guardianship costs).

The undersigned finds the total amount requested by petitioners for attorneys’ fees and costs to be reasonable. Accordingly, the court awards **\$9,284.35**, representing reimbursement for attorneys’ fees and costs. The award shall be in the form of a check made payable joint to petitioners and Parker Waichman LLP in the amount of **\$9,284.35**.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

Dated: June 26, 2012

s/ Laura D. Millman
Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party’s filing a notice renouncing the right to seek review.