In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 04-87V

(E-Filed: March 22, 2012)

BLAKE EDMONDS, a minor by his parents and guardians MARK EDMONDS and KIMBERLY KELLY,	**TO BE PUBLISHED**
Petitioners,	Interim Award of Attorneys' Fees and Costs; Omnibus Autism Proceeding (OAP); Motion to Withdraw as Counsel; Prolonged Proceedings; Undue Hardship
v.	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	
Respondent.	

Lawrence R. Cohan, Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley, P.C., Philadelphia, PA, for petitioners.

Voris E. Johnson, U.S. Department of Justice, Washington, D.C., for respondent.

INTERIM ATTORNEYS' FEES AND ATTORNEYS' COSTS DECISION[1]

CAMPBELL-SMITH, Chief Special Master

Pending before the undersigned is an application for an award of interim attorneys' fees and costs to which respondent objects. For the reasons more fully set forth below, the

[1] Because this unpublished decision contains a reasoned explanation for the action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims' website, 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)). In accordance with Vaccine Rule 18(b), petitioners have 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, the undersigned agrees that the identified material fits within this definition, the undersigned will delete such material from public access.

application is **GRANTED**.

On January 23, 2004, petitioners, on behalf of their son, Blake Edmonds ("Blake"), filed a claim for compensation pursuant to the National Vaccine Injury Compensation Program ("Vaccine Program" or "the Program").[2] 42 U.S.C. §§ 300aa-1 to -34 (2006). Petitioners filed the Short-Form Petition authorized by Autism General Order # 1,[3] thereby

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[2] The National Vaccine Injury Compensation Program ("Vaccine Program" or "the Program") is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. § 300aa-10 et seq. (2006) ("Vaccine Act" or "the Act"). All citations in this Decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

[3] Autism General Order #1 adopted the Master Autism Petition for Vaccine Compensation for use by petitioners filing claims intended to be part of the OAP. By electing to file a Short-Form Autism Petition for Vaccine Compensation petitioners alleged that:

> [a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccinee in question has developed a neurodevelopmental disorder, consisting of an Autism Spectrum Disorder or a similar disorder. This disorder was caused by a measles-mumps-rubella (MMR) vaccination; by the "thimerosal" ingredient in certain Diphtheria-Tetanus-Pertussis (DTP), Diphtheria-Tetanus-acellular Pertussis (DTaP), Hepatitis B, and Hemophilus Influenza Type B(HIB) vaccinations; or by some combination of the two . . . .
>
> The petition is being filed within three years after the first symptom of the disorder, or within three years after the first symptom of a vaccine-caused significant aggravation of the disorder. (If the vaccine-related death is alleged, the petition is being filed within two years after the date of death and no later than 48 months after onset of the injury from which death resulted.)

Autism General Order # 1 filed July 3, 2002, Exhibit A, Master Autism Petition for Vaccine Compensation at 2. Autism General Order #1 is published at 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002). Documents filed into the Omnibus Autism Proceeding are maintained by the clerk of this court in the file known as the "Autism Master File." An electronic version of the file is available on the court's website. Accompanying the electronic version of the file is a docket sheet that identifies all of the documents contained in the file. The complete text of most of the documents in the file is electronically accessible, with the exception of those few documents that must be withheld from the court's website due either to copyright considerations or to the privacy protection

joining the Omnibus Autism Proceeding ("OAP"). Short-Form Autism for Vaccine Compensation at 1. When filed, the short-form petition was not accompanied by any of the materials required to be filed with a petition for compensation under the Vaccine Act.[4]

Before addressing the development of the record in this case, a brief discussion of the OAP follows to provide context.

I. The Omnibus Autism Proceeding

This case is one of more than 5,600[5] filed claims in which petitioners have alleged that conditions known as autism or autism spectrum disorder ("ASD") were caused by one or more vaccinations. Because a detailed history of the controversy regarding vaccines and autism — as well as the history of the development of the OAP — has been set forth in the six entitlement decisions issued as test cases for the two theories of causation litigated in the OAP, it will not be repeated here.[6]

The Petitioners' Steering Committee ("PSC"), an organization formed by attorneys representing petitioners in the OAP, litigated the six test cases presenting two different theories on the causation of ASDs. The first theory involved allegations that the measles

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afforded under § 300aa-12(d)(4)(A) of the Act. To access the 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.

[4] In an effort to manage storage of the filed OAP cases, petitioners were encouraged to collect, but not file, all of the medical records relevant to their claims.

[5] See http://www.hrsa.gov/vaccinecompensation/statisticsreports.html#petitionsfiled (last visited March 22, 2012).

[6] Three special masters issued independent decisions in the OAP test cases; each Special Master issued a decision on a Theory One test case and a Theory Two test case. The Theory One OAP test cases were: Cedillo v. Sec'y of Health & Human Servs., No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Hazlehurst v. Sec'y of Health & Human Servs., No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); and Snyder v. Sec'y of Health & Human Servs., No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory Two OAP test cases were: Dwyer v. Sec'y of Health & Human Servs., No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); King v. Sec'y of Health & Human Servs., No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); and Mead v. Sec'y of Health & Human Servs., No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

component of the measles, mumps, rubella (MMR) vaccine, in combination with thimerosal-containing vaccines, could cause ASDs. That theory was presented in three separate Program test cases during several weeks of trial in 2007. The second theory involved allegations that the mercury component in thimerosal-containing vaccines could directly affect an infant's brain, and thereby substantially contribute to the development of an ASD. That theory was presented in three additional test cases over several weeks of trial in 2008.

Decisions in each of the three test cases pertaining to the PSC's first theory rejected petitioners' causation theory. Cedillo, 2009 WL 331968, aff'd, 89 Fed. Cl. 158 (2009), aff'd, 617 F.3d 1328 (Fed. Cir. 2010); Hazlehurst, 2009 WL 332306, aff'd, 88 Fed. Cl. 473 (2009), aff'd, 604 F.3d 1343 (Fed. Cir. 2010); Snyder, 2009 WL 332044, aff'd, 88 Fed. Cl. 706 (2009).[7] Decisions in each of the three test cases pertaining to the PSC's second theory also rejected petitioners' causation theory, and petitioners in each of the three test cases chose not to appeal. Dwyer, 2010 WL 892250; King, 2010 WL 892296; Mead, 2010 WL 892248. The proceedings in the six test cases have concluded. Petitioners remaining in the OAP are now deciding whether to pursue their claims with the submission of new evidence on causation, or to take action to exit the Program. See Autism Update filed Jan. 12, 2011.

In anticipation of the completion of the OAP test cases, in July of 2007, the court began to order the production of medical records in newly filed cases in the OAP. In 2008, the court began to order the production of medical records in cases already pending in the OAP. Phase One Orders were issued in cases where Short-Form Autism Petitions for Vaccine Compensation had been filed prior to July of 2007. Such orders directed petitioners, prior to filing their complete medical records, to file only those medical records spanning from the period of the vaccinee's birth through either (1) the date of petition filing or (2) the date of the vaccinee's initial diagnosis of autism spectrum disorder, whichever is later.[8] Petitioners were directed to file a Statement of Compliance with Phase One Medical Record Production after filing the records described in the Phase One Order. Such filing would have triggered a deadline for a responsive filing from respondent, requiring respondent to take a position on whether the claim was timely filed and otherwise appropriate to proceed within the OAP.[9]

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[7] Petitioners in Snyder did not appeal the decision of the U.S. Court of Federal Claims.

[8] The initial diagnosis of autism spectrum disorder may also include a speech or language delay related to an autism diagnosis, or any similar neurological disorder related to an autism diagnosis.

[9] The records described in the Phase One Order were filed to determine whether the claim had been filed within the Program's statute of limitations. If the filed records established

Since January 2011, over 3,200 cases in the OAP have been dismissed largely as a result of: (1) petitioners' election not to pursue the prosecution of their claims after review of the relevant law and facts; (2) the dismissal of claims not timely filed under the Program's statute of limitations; or (3) the dismissal of claims for failure to prosecute when petitioners did not respond to orders directing them to indicate how they wished to proceed.[10] In a substantial number of these claims, awards of attorneys' fees and costs have been made on applications for final fees and costs that were no longer contested after the parties worked cooperatively to resolve the fee disputes.

Recently, in a minority of pending claims, petitioners' counsel have begun to inform the court that an ethical conflict now prevents them from continuing to represent some petitioners who desire to prosecute their vaccine claims further in claims because counsel can find no reasonable basis for proceeding. During informal status conferences with the parties conducted as part of the ongoing process to move forward the outstanding OAP cases, the court has conveyed to petitioners' counsel that filing a motion to withdraw and an application for interim fees and costs is appropriate in such cases. In contrast, requests to withdraw because counsel is unable to locate a client have not been granted.[11] See Autism Update filed Jan. 12, 2011.

II. Development of the Record in this Case

A. The Records Filed To Date

Since filing their short-form petition, petitioners have produced a number of medical records as required by the Phase One Order issued on July 15, 2008. Petitioners were directed to file a Statement of Compliance with Phase One Medical Record Production after filing the records described in the Phase One Order.

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the timeliness of the claim, petitioners were directed by a Phase Two Order, to file the balance of the medical records required under Section 11 of the Vaccine Act.

[10] In January of 2011 there were approximately 4,700 OAP cases pending as "open" on the court's docket. See Autism Update filed Jan. 12, 2011. The court's electronic filing system indicates 1,506 OAP cases were pending as "open" on March 22, 2012. Once judgment on entitlement has been entered, a claim is no longer deemed "open" even if an application for attorneys' fees and costs is still pending before the court.

[11] Instead, in such circumstances, the court has issued show cause orders that frequently lead to dismissals for failure to prosecute.

To date, petitioners have not filed a statement indicating their compliance with the record production requirement in this case. Because petitioners have not completed the filling of the first ordered medical records, no determination regarding timeliness has been made.[12]

Nonetheless, the records filed to date are sufficient to inform the timeliness issue. A review of the medical records establishes that Blake was born on January 24, 2000. Pet'rs' Ex. 1 at 16. During an evaluation performed in August of 2002, when Blake was already two and a half years of age, Blake's parents provided a retrospective history indicating that Blake's development was progressing "well" until he was "about one year of age." See Pet'rs' Ex. 4 at 3. At approximately one year of age, according to Blake's parents later recollection, Blake "lost" words previously spoken and failed to acquire new words. Id. The contemporaneously recorded notes from Blake's well-child visit at one year of age on January 31, 2001 indicate, however, that Blake's mother reported he was "doing well." Pet'rs' Ex. 5 at 11. Blake's pediatric records show that he was assessed as "slow in language" at his 19 month well-child visit in August of 2001. Pet'rs' Ex. 5 at 10. Approximately, one year later, in August of 2002, Blake was diagnosed with "high functioning autism." Pet'rs' Ex. 4 at 3.

As was explained in the OAP test case, Hazlehurst:

> A diagnosis of autistic disorder is appropriate when there are "deficits in each of the three domains of early development," which include social interaction, communication, and behavior. Cedillo Ex. P at 8 (Dr. Fombonne's report) . . . . Deficits in the area of communication may present as "delay of spoken language, impairment of conversational skills, use of repetitive and idiosyncratic language, [and/or] lack of imaginative play." Cedillo Ex. P at 8 (Dr. Fombonne's report); Cedillo R's Trial Ex. 8 at 3 (Dr. Fombonne's trial slides).

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[12] The Vaccine Act provides that

> a vaccine set forth in the Vaccine Injury Table which is administered after October 1, 1988, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury . . . .

§16(a)(2).

Hazlehurst, 2009 WL 332306, at *22. Language delay is one of the early symptoms of autism.

Petitioners filed their vaccine claim on January 23, 2004. The statute requires that petitioners file their claim within 36 months of the "first symptom or manifestation of onset or of the significant aggravation of such injury." §16(a)(2). The first contemporaneously recorded symptom of Blake's delay in language was made by Blake's pediatrician at his August 22, 2001 well-check visit at nineteen months of age. Petitioners' claim was filed 29 months later, well within 36 months of the noted delay in Blake's new language acquisition.[13]

Although other medical records remain to be filed in this case, the timeliness of the Edmonds' claim has been established sufficiently by the already filed medical records that do address the onset of Blake's autism. Even if the retrospectively reported symptoms of Blake's difficulty with language at age one were accepted as the first signs or symptoms of his autistic condition, the undersigned is satisfied that based on the records filed to date, the earliest symptoms of Blake's medical condition occurred within the statute of limitations.[14] Additionally, it is noted that respondent has not raised any opposition to the timely filing of petitioners' claim based on the records filed to date.

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[13] "There is little doubt that the decisional law in the vaccine area favors medical records created contemporaneously with the events they describe over subsequent recollections." Shapiro v. Sec'y of Health & Human Servs., 101 Fed. Cl. 532, 537 (2011) (citing Cucuras v. Sec'y of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993); Burns by Burns v. Sec'y of Health & Human Servs., 3 F.3d 415, 417 (Fed. Cir. 1993); and Grant v. Sec'y of Health & Human Servs., 956 F.2d 1144, 1147 (Fed. Cir. 1992)).

[14] Blake celebrated his first birthday on January 24, 2001. Even if the undersigned were to accept Blake's parents' recollection — during an office visit when Blake was two and a half years old — that his language regressed at one year of age (and not at 19 months as assessed by Blake's pediatrician) as the more accurate indication of the first sign or symptom of Blake's autism, petitioners' claim still was filed within the Act's statute of limitations. The undersigned recognizes that an onset date of approximately January 24, 2001 would present a very close call regarding the timely filing of the petition. However, if the undersigned were ruling on a motion to dismiss for untimely filing, the undersigned would be "obligated . . . to draw all reasonable inferences in plaintiff's favor." Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995); Ullman v. United States, 64 Fed. Cl. 557, 564 (2005). Such an inference supports a finding of timely filing in the instant case.

B. How Petitioners Intend to Proceed

On August 29, 2011, the undersigned ordered petitioners to inform the court if they intended to proceed with the prosecution of their claim, and if so, to file an amended petition within thirty days. Petitioners failed to respond to the August 29, 2011 Order, and the undersigned issued an order to show cause on October 24, 2011, directing petitioners again to indicate how they wished to proceed with their claim or risk dismissal for failure to prosecute.

By filing dated November 1, 2011, petitioners' counsel advised that petitioners intend to proceed with their claim. In that same filing, counsel moved to withdraw and requested an award of interim fees and costs.

III. Counsel's Motions to Withdraw and for Interim Fees and Costs

In response to the order to show cause, petitioners' counsel filed a combined motion to withdraw as attorney of record and a motion for interim attorneys' fees and costs on November 1, 2011 (Petitioners' Motion).

Petitioners' counsel is one of a group of attorneys who filed more than 22 cases in the OAP. Since the conclusion of the test cases, this group of attorneys has participated in an informal process with the court and respondent to identify which of their filed cases are expected to move forward and which are not. See Autism Update filed Jan. 12, 2011 at 5. As part of this informal process, counsel for the parties have conducted informal discussions in the cases not expected to move forward and in the cases in which counsel no longer intends to represent petitioners. These informal discussions have permitted the parties to reach agreement regarding the appropriate amount of fees and costs to be awarded in individual cases based on four defined categories reflecting different stages of case development. [15] See Pet'rs' Motion at 4.

[15] These categories were defined by the undersigned's colleagues as part of an ADR process involving the five law firms with the largest number of OAP claims. Pet'rs' Motion at 2-4. See Whiffen v. Sec'y of Health & Human Servs., No. 03-1223V, 2010 WL 5558348, at *5 (Fed. Cl. Spec. Mstr. Dec. 15, 2010); see also Autism Update filed January 11, 2011 at 2-3. The four identified categories reflect varied phases of case development, including: (1) cases with little more than a petition filed, (2) cases with Phase One records filed, (3) cases with complete medical records filed, and (4) cases with filed medical records and substantive briefing addressing the timeliness of the petition.

Here, the parties have stipulated to the category of case development into which the claim falls. The parties have also stipulated that the appropriate amount of fees and costs to be awarded, if an award were to be made at this time, is $7,075.00. Pet'rs' Motion at 4. Respondent does not oppose the amount of fees requested, but does oppose an "award . . . at this time." Id. (first emphasis in original) (second emphasis added).

Contained in the same filing with counsel's fee request is counsel's request to withdraw as counsel of record. Id. at 5. Counsel relates that while petitioners intend to continue to prosecute this claim, "there is no reasonable basis to proceed forward with the petitioner's [sic] case. To do so would, in counsel's view, be wasteful of Program resources." Id. Counsel indicates petitioners were sent a certified copy of the motion to withdraw, are aware of his motion to withdraw, and will move forward as pro se petitioners. Id. At the time of its filing, the motion to withdraw was not opposed by respondent.[16] Id.

Respondent responded to petitioners' motion on November 28, 2011, opposing the request for interim fees and costs on the grounds that prevailing case law limits the circumstances in which interim fees and costs are available. Respondent asserted those circumstances are not present here.

On December 2, 2011, the undersigned issued a short decision awarding interim fees and costs.

IV. Motion for Reconsideration

On December 15, 2011, respondent filed a motion for reconsideration ("Reconsideration Motion") of the undersigned's decision awarding interim fees and costs, raising additional points for consideration. The undersigned granted respondent's motion for reconsideration and withdrew the December 2, 2011 decision to allow for the full briefing and consideration of respondent's reconsideration motion. See Order filed December 16, 2011.

In the motion for reconsideration, respondent argues that interim fees and costs should not be awarded in this case for the following reasons: (1) the "primary factual predicate for the decision" — that petitioners' counsel's ability to recover fees and costs is made more difficult if interim fees and costs are not awarded at this time — is "mistaken;"

[16] Subsequent filings indicate a reversal in respondent's initial position of no opposition to counsel's motion to withdraw. See discussion infra at 20-22.

(2) the "Interim Fee Decision misapplies Avera;" and (3) "[r]espondent is prejudiced by this claim being allowed to proceed." Reconsideration Motion at 3-7.

Petitioners filed a response on January 13, 2012, arguing that: (1) interim fees are appropriate because counsel's ability to recover fees and costs at the conclusion of a case is hindered by the fact that petitioners will likely be proceeding with their claim as pro se litigants;[17] and (2) counsel is entitled to an interim fees and costs award "where proceedings have been protracted and counsel will suffer undue hardship in the absence of an award." Pet'rs' Response at 3-6. Respondent filed a reply on January 27, 2012 (Resp't's Reply).

Briefing is now complete, and the matter is ripe for a ruling.

V. Discussion

A. Legal Background

Under the Vaccine Program, petitioners may be awarded reasonable attorneys' fees and costs if they do not prevail on their claim, provided the petition was filed in good faith, had a reasonable basis and the requested fees are reasonable and appropriate.[18] §15(e)(1). The availability of reasonable fees and costs ensures the existence of a competent bar willing to represent those potentially injured by vaccinations. See Saunders v. Sec'y of Health & Human Servs., 25 F.3d 1031, 1035-36 (Fed. Cir. 1994).[19]

[17] Implicit in counsel's response is the recognition that once an attorney withdraws his representation of a vaccine injury claimant, it can be cumbersome, time consuming, and quite difficult, if not impossible, to recover attorneys' fees at the conclusion of the litigation. See discussion infra at 16-18.

[18] Vaccine Program petitioners are entitled to recover such reasonable fees and costs if they prevail on their claim. §15(e)(1).

[19] In Saunders, the Federal Circuit explained:

> A secondary purpose of the Act [to that of vaccine injury compensation] is to ensure that vaccine-injury claimants will have readily available a competent bar to prosecute their claims under the Act. This secondary purpose, which is effected by permitting the award of attorneys' fees and costs both to prevailing and non-prevailing claimants, is present regardless of whether or not a claimant receives compensation for his or her injury, and whether or not the claimant elects to accept the judgment under the Act.

In Avera v. Secretary of Health and Human Services, 515 F.3d 1343, 1352 (Fed. Cir. 2008), the United States Court of Appeals for the Federal Circuit explicitly recognized the availability of interim attorneys' fees and costs under the Vaccine Act. The Federal Circuit identified several factors to be considered when a determining whether an interim fee award might be appropriate: (1) whether the case involved protracted legal proceedings; (2) whether costly experts had been retained; and (3) whether petitioners had suffered undue hardship. Id.; see also Vaccine Rule 13(b). These factors are understood to be illustrative, but not exclusive, factors that mitigate in favor of an award of interim fees. See McKellar v. Sec'y of Health & Human Servs., 101 Fed. Cl. 297, 301 (2011) (finding that "some special showing is necessary to warrant interim fees, including but not limited to the delineated [Avera] factors . . . ."); see also Crutchfield v. Sec'y of Health & Human Servs., No. 09-39V, 2011 WL 3806351, at *7 (Fed. Cl. Spec. Mstr. Aug. 4, 2011) (citing multiple Program decisions that have found an award of interim fees and costs to be "a matter of discretion based upon all the circumstances of the case.") (emphasis in original).

In Shaw v. Secretary of Health & Human Services., 609 F.3d 1372, 1374-75 (Fed. Cir. 2010), the Federal Circuit again recognized that "the Vaccine Act permits [an] award of interim fees and costs," and held that such an award is reviewable by the United States Court of Federal Claims. As the Circuit Court observed in both Avera and Shaw, "[a] Special Master can often determine at an early stage of the proceedings whether a claim was brought in good faith and with a reasonable basis." Id. at 1375 (citing Avera, 515 F.3d at 1352).

In Avera, petitioners submitted an interim fee application while their appeal of the decision denying Program compensation was pending. Avera, 515 F.3d at 1346. In Shaw, the interim fee application and decision issued prior to a ruling on the merits of Mr. Shaw's case. Shaw, 609 F.3d at 1373. "[W]hen construed together" Avera and Shaw appear to "provide . . . that interim fees are permitted even before an entitlement decision." McKellar, 101 Fed. Cl. 297, 301-02; see also Crutchfield, 2011 WL 3806351, at *4-7 (citing numerous Program decisions awarding and/or indicating interim fees are permissible prior to the issuance of an entitlement decision in a case).

B. Respondent's Objections

Respondent argues that the undersigned misapplied the law under Avera in the withdrawn December 2, 2011 Decision, because interim attorneys' fees and costs are

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Id.

inappropriate at this time under the factors enumerated in Avera. Reconsideration Motion at 4-6. Respondent contends the "primary factual predicate" for awarding interim fees, specifically, the finding that hardship would result if petitioners' counsel were not awarded fees now, is an erroneous one. Id. at 3-4. Respondent asserts that petitioners' counsel will suffer no hardship if the award of interim fees and costs is deferred until the claim is resolved. Id. at 4-5. Rather, respondent posits, undue hardship inures to respondent if petitioners are allowed to proceed with their claim. Id. at 6-7.

The undersigned disagrees. But, before turning to an analysis of whether an interim fee award is appropriate in this case, the undersigned first observes that respondent's expressed objection here is consistent with a recent practice of objecting consistently and vigorously to interim fee awards. This practice has been addressed in several recent decisions. The reason for respondent's sudden and vehement opposition to the award of interim fees is not clearly understood. See Crutchfield, 2011 WL 3806351, *5 ("Respondent has not explained why Respondent apparently took a more liberal interpretation of Avera for some 2 ½ years, before adopting Respondent's current very narrow interpretation."); Nuttall v. Sec'y of Health & Human Servs., No. 07-810, 2011 WL 5926131, *1-2 (Fed. Cl. Spec. Mstr. Nov. 4, 2011) ("For some period of time, there was almost no litigation over the meaning of Avera. However, more recently, the Secretary has started to oppose interim awards, maintaining either that Avera was wrongly decided or that Avera should be limited to a narrow set of facts."); Woods v. Sec'y of Health & Human Servs., No. 10-377, 2011 WL 6957598, *3 (Fed. Cl. Spec. Mstr. Dec. 16, 2011), appeal docketed (Fed. Cl. Jan. 17, 2012) ("[R]espondent has persistently and futilely argued its opposition to the award of interim attorneys' fees and costs in cases in which a determination of entitlement has not been made.").

C. Analysis

1. The Requirements of Good Faith and Reasonable Basis

A determination of whether a fee award, interim or final, is appropriate must begin with an assessment of whether the case was brought in good faith and with a reasonable basis, as required by the Act. See §15(e)(1). Good faith requires only a subjective belief that a vaccine claim exists. A presumption of good faith is afforded petitioners in Vaccine Program cases. See Grice v. Sec'y of Health & Human Servs., 36 Fed. Cl. 114, 121 (1996). Respondent has not challenged that presumption here, and the undersigned is satisfied that the petitioners filed this claim earnestly believing that their son suffered a vaccine-related injury.

What constitutes a reasonable basis is not defined statutorily. But Program case law does provide a measure of guidance. "In contrast to the subjective standard afforded

the 'good faith' requirement, the 'reasonable basis' requirement is 'objective, looking not at the likelihood of success [of a claim] but more to the feasibility of the claim.'" Turner v. Sec'y of Health & Human Servs., No. 99-544V, 2007 WL 4410030, at *6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) (citing DiRoma, 1993 WL 496981, at *1). "[T]he Vaccine Act expressly contemplates that counsel may file a claim on grounds that are reasonable but ultimately are determined not to merit Program compensation." Id. (citing §15(e)(1)). "[S]pecial [M]asters have historically been quite generous in finding a reasonable basis for petitions." Turpin v. Sec'y of Health & Human Servs., No. 99-564V, 2005 WL 1026714, at *2 (Fed. Cl. Spec. Mstr. Feb. 10, 2005.)

It is not uncommon in vaccine proceedings for a claim to be filed initially without any evidence bearing on the feasibility of the claim. The later introduction of medical records or medical opinion can demonstrate that a reasonable basis existed at the time of filing. Turner, 2007 WL 4410030, at *8 (citing Turpin, 2005 WL 1026714, at *2). The factual bases for the claim, the available medical support, and whether petitioners have satisfied the Act's threshold requirements are all factors to be considered when making a reasonable basis assessment.[20] DiRoma, 1993 WL 496981, at *1.

A determination of reasonableness is appropriate at the various stages of the proceeding, and such determination is informed by looking to the totality of the circumstances. McKellar,101 Fed. Cl. at 303. Although a claim may have had a reasonable basis at the time of its filing, the reasonableness of further pursuing the claim may come into question when new evidence becomes available or the lack of supporting evidence becomes apparent. Perreira v. Sec'y of Health & Human Servs., 27 Fed. Cl. 29, 33 (1992), aff'd, 33 F.3d 1375 (Fed. Cir. 1994).

This claim appears to have been filed within the Act's statute of limitations, and it meets the other threshold requirements for bringing a claim under the Act.[21] See supra at 6-7. Moreover, because petitioners sought compensation for a diagnosed ASD, believed

[20] The other threshold requirements pertinent to this case include receipt of a vaccination covered by the Act, no prior filed civil suit, and an injury lasting more than six months. §11 .

[21] The Federal Circuit recently held in en banc decision that the Vaccine Act's statute of limitations is not jurisdictional. Cloer v. Sec'y of Health & Human Servs., 654 F.3d 1322, 1341 n.9 (Fed Cir. 2011), petition for cert. filed, 80 BNA USLW 3403 (U.S. Dec. 29, 2011) (No. 11-832, 11A403). However, the undersigned notes that respondent maintains that timely filing of a petition is a condition precedent to the award of any fees and costs in Act, this issue is presently pending in an interim fee application filed directly to the circuit court in the Cloer case.

to have been caused by certain covered vaccines, see Pet'rs' Ex. 4 at 3, the claim was properly included in the OAP during the prehearing development and litigation of the OAP test cases. See Autism General Order #1.

In the OAP test cases, petitioners ultimately did not prevail on their claims. However, numerous affidavits, medical opinions, scientific articles, and hearing transcripts were filed in support of the cases. That evidence is sufficient to support a finding that the basis for bringing the OAP test cases was reasonable. Because the premise for the OAP test cases was reasonable, it necessarily follows that petitioners in this case reasonably participated in the OAP and, at the conclusion of the test cases, reasonably evaluated with counsel the likelihood of their success in further pursuing their claim. The undersigned finds that the basis for filing and maintaining this claim has been reasonable up to this point in the litigation.[22] See Kirk v. Sec'y of Health & Human Servs., No. 08-241V, 2009 WL 775396, *1 (Fed. Cl. Spec. Mstr. Mar. 13, 2009) ("If there is a reasonable basis underlying the autism test cases, it follows that there is a reasonable basis for other cases filed in the OAP.").

Respondent does not question either the reasonableness of proceeding on this claim during the time period for which counsel seeks fees and costs or the reasonableness of the requested amount of fees and costs. Nor does respondent challenge petitioners' good faith in bringing the claim. Respondent's interposed objection is based solely on the interim nature of the request for fees.

2. Appropriateness of an Interim Fee Award

Avera counsels that interim fees may be awarded and are "particularly appropriate" in cases involving: protracted proceedings, significant expert costs, or where petitioner has suffered undue hardship. Avera, 515 F.3d at 1352. As further elucidated by Judge Bruggink in McKellar: "some special showing is necessary to warrant interim fees, including but not limited to the delineated (Avera) factors . . . ." McKellar, 101 Fed. Cl. at 301. No expert costs are at issue here, but the protractedness of the proceedings, the issue of undue hardship, and the particular circumstances of the case militate in favor of an

[22] The undersigned declines to make a finding on whether petitioners have a reasonable basis to proceed further at this time. But, the undersigned does note that based on counsel's representations, there does not appear to be a reasonable basis for moving forward with this claim. See infra at 19. Thus, the likelihood of petitioners' successfully retaining new counsel is greatly diminished. Accordingly, although counsel has requested an interim award of fees, this sum seems likely to be the only attorneys' fees award in this case.

interim fee award.

a. Protracted Proceedings

Counsel's firm has represented petitioners for the eight years that the claim has been pending as part of the OAP. The undersigned previously has found an award of interim fees and costs to be appropriate in a non-test OAP case, MacNeir v. Secretary of Health and Human Services, No. 03-1914V, 2010 WL 891145, at *4 (Fed. Cl. Spec. Mstr. Feb. 12, 2010) based on the protractedness of the autism proceedings. In that case, the undersigned found:

> The cases contemplated in the Avera decision seem to be the typical cases encountered in vaccine litigation; that is, cases that stand alone and proceed on an individual course. In contradistinction to typical vaccine litigation, the cases in the Omnibus Autism Proceeding, such as the instant case, have developed more slowly in a calculated effort to avoid incurring costly and potentially unnecessary expenses during the conduct of test case proceedings intended to provide guidance for more than 4500 pending autism claims before the Office of Special Masters. Counsel handling OAP claims have been encouraged to collect, among others, those medical records that establish that the vaccinee has received the vaccinations at issue and that the vaccinee has received a diagnosis of an autism spectrum disorder. These records not only assist petitioners in the prosecution of their vaccine claims but they also speak to the statute of limitations issue. Not requiring petitioners to retain costly experts during the pendency of the test case proceedings on petitioners' general causation theories reflects a considered effort to contain OAP litigation costs at this stage of the proceedings. Nonetheless, for counsel handling a significant number of OAP claims,[23] the litigation costs have mounted, some of which costs might have been borne by petitioners . . . . It is thus the view of the undersigned that the considerations outlined in Avera, which seem intended to relieve counsel and parties of the expensive burden associated with lengthy litigation, may have application in this case where counsel has filed a substantial collection of medical records, has exercised appropriate diligence in pursuing the clients' claim, and yet has displayed judgment in containing litigation costs.

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[23] A review of the court's electronic filing system indicates that until last year, the Edmonds' counsel of record's firm had over 30 autism cases pending in the Vaccine Program's OAP.

Id. at 3 (citing 12/17/09 Order at 2-3) (footnote added).[24] The reasoning informing the undersigned's decision in the MacNeir case is applicable in this case. The protractedness of this case's involvement in the OAP militates in favor of an interim fee award.

b. Undue Hardship

In the view of the undersigned, both petitioners' counsel and petitioners alike will have incurred an undue hardship, within the meaning of Avera, if counsel is forced to wait until petitioners' claim is resolved. While respondent is correct that in some cases, Program counsel have been able to collect fees at the conclusion of a case from which they have withdrawn as counsel, Reconsideration Motion at 3-4, there is a hardship created nonetheless for petitioners and counsel when an award of fees for counsel must be deferred until the end of the proceeding and counsel is limited ethically from any further participation in the proceeding. As one special master observed in another vaccine case when evaluating an interim request for attorneys' fees: "It cannot be seriously argued that in essence loaning cases thousands of dollars for years is not a hardship. It is clearly incorrect to suggest that it is not an undue hardship for a small firm to loan thousands of dollars for years." Kirk, 2009 WL 775396, *2.

The practice of requiring counsel, who is compelled ethically to withdraw from representing petitioners, to wait until final resolution of the claim for an award of fees could prove to be a disincentive to representing Program petitioners. Such an impact would be counter to Program purposes. As the Federal Circuit discussed in Avera, one "purpose[] of the Vaccine Act [is] to ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims." Avera, 515 F.3d at 1352. The appellate court expressed an awareness that "[d]enying interim fee awards would clearly make it more difficult for claimants to secure competent counsel because delaying payments decreases the effective value of awards." Id.

To obtain fees and costs (interim or final) incurred on a claim from which counsel has withdrawn, petitioners' counsel must either: (1) have had the foresight to file an interim application for fees and costs before being permitted to withdraw, as in the instant claim; or (2) counsel must continue to track the progress of a claim in which he no longer has any involvement and then rely upon either his former clients, if proceeding as pro se petitioners, or subsequent counsel, to assert his fee request at the appropriate time. See Vaccine Rule 14(b)(3) ("All filings must signed in the attorney of record's name."); see also Vaccine Rule 15 ("No person may intervene in a vaccine injury compensation

[24] The undersigned awarded $12,062.00 in interim attorneys' fees and costs in MacNeir, 2010 WL 891145, at *4. Respondent did not seek reconsideration or review of that decision.

proceeding."); see also Silver v. Sec'y of Health & Human Servs., No. 99-462V, 2009 WL 2950503 (Fed. Cl. Spec. Mstr. Aug. 24, 2009) (order denying petitioner's former counsel's motion to intervene for the purpose of seeking attorneys' fees and costs). Because counsel already has filed his application for fees and costs here, respondent argues there is no further impediment to counsel's recovery of his fees and costs at the conclusion of petitioners' case. Reconsideration Motion at 3-5. The undersigned disagrees.

Program awards for attorneys' fees and costs are payable to petitioners and counsel jointly. See Heston v. Sec'y of Health & Human Servs., 41 Fed. Cl. 41, 48 (1998) (concluding "that the special master erred as a matter of law when he determined that he had the authority to issue compensation covering attorneys' fees and costs directly to counsel"); Newby v. Sec'y of Health & Human Servs., 41 Fed. Cl. 392, 394 (1998) ("[S]ection 15(e) requires that the special master award attorneys' fees and costs directly to petitioner."). But see Gitesatani v. Sec'y of Health & Human Servs., No. 09-799V, 2011 WL 5025006, at *7-8 (Fed. Cl. Spec. Mstr. Sept. 30, 2011) (directing payment of petitioner's attorneys' fees and costs directly to petitioner's counsel alone where petitioner is not available to receive it). Customarily, such awards are mailed directly to counsel of record. If counsel were to be awarded fees at the conclusion of the case, counsel must rely upon petitioners, his former clients, to endorse and forward the award check. As a practical matter, this arrangement works a hardship on counsel who must rely on former clients to forward counsel's fees. The arrangement also works a hardship for petitioners who must forward the check to former counsel.[25] Even though awards of fees and costs typically are made by a check issued jointly to petitioners and petitioners' counsel, this arrangement becomes particularly problematic when counsel has withdrawn from a case. Petitioners might be loath to endorse and forward a check at some later time to former counsel who withdrew from representing them after relating the candid view that petitioners' claim lacked the merit to go forward.

While fees are awarded to "petitioner" in vaccine cases, the attorney representing the petitioner is the real party in interest. The purpose underlying section 15(e) of the Vaccine Act — to encourage representation of vaccine-injured persons — is not well-served if Program practice evolves to compel counsel to choose between requesting an ethically-required withdrawal of representation and remaining as counsel of record until the conclusion of a claim to facilitate the recovery of any award of fees and costs. Avera, 515 F.3d at 1352 (citing Saunders, 25 F.3d at 1035) ("[O]ne of the underlying purposes of the Vaccine Act was to ensure that vaccine injury claimants have readily available a

[25] The undersigned understands that some counsel who routinely practice in the Vaccine Program overcome this hardship by including a provision in their representation agreements with petitioners that allows counsel to negotiate award checks on behalf of petitioners.

competent bar to prosecute their claims.). The undersigned declines to participate in creating any circumstance that might encourage counsel to make an unsound choice.

An additional consideration in this case is the impact of counsel's withdrawal on the motion for interim fees. Evaluating an interim request for fees and costs from withdrawing counsel at the time of withdrawal, in appropriate cases, would appear to be a reasonable undertaking because the court, respondent, and petitioner's counsel are — at that time — most familiar with the efforts made by counsel on petitioner's behalf.[26] This reasoning was applied by another special master who recently awarded interim fees and costs to withdrawing counsel over the objection of the respondent:

> [I]t does not serve the Vaccine Act's purpose to ensure a readily available and competent bar for vaccine injury claimants if counsel must wait for indefinite periods of time to receive their fees. Staying a decision on a fully-briefed interim fee motion until an unknown time in the future when entitlement is resolved accomplishes the opposite result. This practice deters counsel from taking difficult cases, and worse, encourages attorneys who should withdraw to stay on a case because of their concern over payment of fees. As the undersigned has found before, "[p]aying attorneys when their service is complete is appropriate."

Hiland v. Sec'y of Health & Human Servs., No. 10-491V, 2012 WL 542683, at *7 (Fed. Cl. Spec. Mstr. Jan. 31, 2011) (citations omitted) appeal docketed (Fed. Cl. Mar. 1, 2012); see also Kirk, 2009 WL 775396, at *2 ("[T]he general principle underlying an award of interim fees was clear: avoid working a substantial financial hardship on petitioners and their counsel and thereby ensure 'that vaccine injury claimants have readily available a competent bar to prosecute their claims.'" (citing to Avera, 515 F.3d at 1352)). The undersigned is similarly persuaded here that delaying payment of counsel's fees and costs forces petitioners and petitioners' counsel alike to suffer undue hardship within the meaning of Avera.[27] The undersigned finds the undue hardship factor to militate in favor of an interim award.

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[26] Appropriate cases would include those claims which were filed in good faith and with a reasonable basis and in which a "special showing" has been made consistent with the Avera factors. See McKellar, 101 Fed. Cl. at 301.

[27] The undersigned acknowledges that Avera speaks directly to the hardship already suffered (due to incurred expert costs) while the instant case considers the prospective hardship to petitioners and counsel in evaluating the appropriateness of an interim award of fees.

c. The Circumstances of this Case Create the Special Showing Contemplated in McKellar

i. Petitioners' Counsel's Motion to Withdraw

An additional factor to consider in this case is petitioners' counsel's motion to withdraw. It is the undersigned's view that based, on the facts of this case, this factor provides additional support for an award for interim attorneys' fees and costs. To be sure, the withdrawal of counsel alone may not always provide sufficient justification for an award of interim fees. See McKellar, 101 Fed. Cl. at 302. But, it is a relevant factor to take into consideration when determining whether or not an interim fee award might be appropriate.

Petitioners' counsel has been candid with both the court and his clients about the merits of the instant case.[28] Counsel has advised that based on his careful review of the file, there is no longer a reasonable basis to support the continued prosecution of this claim. Pet'rs' Motion at 5; Pet'rs' Response at 2. Petitioners, however, have declined to dismiss their claim and have expressed a desire to proceed. Counsel's determination that the claim lacks a reasonable basis for going forward impairs his ability to continue his representation of petitioners. See RCFC Rule 11(b). Because counsel's position is now in conflict with his clients, counsel is compelled to move to withdraw his representation. Pet'rs' Motion at 5; Pet'rs' Response at 2. Once counsel's motion to withdraw is granted, petitioners — who are fully apprised of the questionable merits of their claim — will be afforded a modest period of time to prosecute their claim notwithstanding the dubious merits of their claim. The time required to resolve petitioners' claim cannot be predicted with any certainty even though, as presently advised, petitioners' claim is highly unlikely to be successful.

The undersigned intends to grant petitioners' counsel's motion to withdraw once the ruling on this motion for interim fees is final. By courtesy copy of this decision,[29] petitioners are put on notice that once counsel's motion to withdraw is granted, they will be

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[28] The undersigned notes that petitioners' counsel's withdrawal may, in fact, represent an economy to the Program, as counsel is moving to withdraw rather than exerting years of effort and expense on a claim that, in his view, no longer has a reasonable basis. See e.g., Browning v. Sec'y of Health & Human Servs., No. 02-929V, 2010 WL 3943556, at *1 (Fed. Cl. Spec. Mstr. Sept. 27, 2010) (concluding that "counsel persisted in incurring fees . . . long after it was apparent that the evidence would not sustain [p]etitioner's claim").

[29] Counsel is ordered to furnish petitioners with a courtesy copy of this ruling.

given a firm deadline by which to show cause why the claim should not be dismissed.[30] In response to this show cause order, petitioners shall identify their theory regarding how Blake's vaccinations caused his autism spectrum disorder and identify what evidence, including any expert opinion, supports that theory. To prevail on their claim, petitioners must present a theory that has not been considered and rejected already or alternatively, petitioners must present previously unconsidered evidence on a prior theory. The theory must be persuasive and scientifically reliable. If petitioners fail to comply with the established deadlines for filings or fail to file sufficient evidence to establish vaccine causation, their claim will be dismissed for either failure to prosecute or failure to prove entitlement to Program compensation.

ii. The Alleged Prejudice to Respondent

Emerging as an accompanying objection to respondent's opposition to the award of interim fees and costs is respondent's implicit objection to petitioners' counsel's request to withdraw as attorney of record.[31] Reconsideration Motion at 6-7; Resp't's Reply at 3-4. Respondent did not object initially to petitioners' counsel's request to withdraw as attorney of record. Pet'rs' Motion at 5; Reconsideration Motion at 2. However, in the reply brief, respondent urged the undersigned to require from petitioners' counsel more information about the theory of causation on which petitioners intend to move forward, before ruling on the motion to withdraw. Resp't's Reply at 3-4. The undersigned declines to do so because such action would appear to contravene RCFC 11. Rule 11 provides that by filing a document or advocating a position, counsel certifies that to the best of his knowledge, "the claims, defenses, and other legal contentions are warranted by existing law, or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[32] RCFC 11(b)(2). See also Assiniboine & Sioux Tribes of Fort

[30] Petitioners should expect an order to issue from the undersigned.

[31] The undersigned has yet to rule on petitioners' motion to withdraw and notes that a motion for reconsideration of an interim fee decision is not the appropriate filing in which to first raise such concerns. Nonetheless, as the undersigned intends to grant petitioners' counsel request to withdraw once the interim fee matter is concluded in this case, the undersigned will address respondent's implied objection to the pending motion to withdraw.

[32] Although the United States Court of Federal Claims no longer explicitly incorporates the ABA Model Rules of Professional Conduct, the rules continue to provide guidance regarding counsel's ethical obligations to the court: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact

Peck Indian Reservation v. United States, 16 Cl. Ct. 158, 165 (1989) (discussing that RCFC Rule 11 is a continuing obligation and prohibits counsel from continuing to litigate when they lack a reasonable basis for doing so). The undersigned is satisfied on the record before her that counsel has fulfilled his professional responsibility and need furnish no further information.

Respondent asserts that petitioners have had an ample opportunity to prosecute their claim and any continued prosecution of this claim would create an undue hardship for the court and the Secretary of the Department of Health and Human Services. The undersigned infers from respondent's briefing that respondent desires a summary conclusion of this proceeding because the claim appears very unlikely to succeed. It appears to be respondent's view that any other course of action would unduly burden respondent with litigation lacking in merit. See Reconsideration Motion at 7.

The undersigned agrees that with the aid of counsel, petitioners have been afforded a generous opportunity to file evidence that would be supportive of their claim. Unable to do so, counsel has responded to the undersigned's order to show cause by indicating that he does not believe this claim has a reasonable basis for going forward and he must withdraw as counsel. The request by counsel to withdraw, however, does not require petitioners to forfeit their claim, does not effect termination of petitioners' claim, and does not preclude petitioners from being afforded a modest period of time to offer a new or modified theory of causation. See discussion supra at 19-20. While counsel's request to withdraw strongly communicates to petitioners that they are very unlikely to prevail, it does not decide the question of entitlement.

Petitioners have indicated they wish to go forward with their claim. Counsel has indicated that based on the outcome of the test cases, "the medical theory for [the] Edmonds' case" has been already considered and rejected. Pet'rs' Response at 2. Because the conflict of interest between petitioners and counsel is clear, counsel can no longer continue to represent petitioners in this matter. Nor are petitioners well-served by

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for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." ABA Model R. Prof. Conduct 3.1 (2010). An action is deemed frivolous "if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." Id. at comment [2].

The Model Rules further provide: "A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law." ABA Model R. Prof. Conduct 1.16, Comment [2].

counsel who ethically cannot represent their interests any longer. Counsel has provided notice to his clients of his intent to withdraw and has served his clients with a copy of his motion for interim attorneys' fees and the motion to withdraw as required by this court's rules. RCFC 83.1(c)(5). Counsel has satisfied his obligations to the tribunal and, to the best of the undersigned's knowledge, to his clients. Petitioners will now be afforded a modest but reasonable opportunity to move forward with their claim.

Respondent argues that allowing petitioners to proceed with the prosecution of their claim creates an undue burden for both respondent and the court. Id. The undersigned is not so convinced. While this course of proceeding may inconvenience respondent, it does not rise to the level of prejudicing respondent.[33]

VI. CONCLUSION

Due to the protracted history of this claim, the presented conflict of interest necessitating counsel's withdrawal from representation, the time required to resolve the pending claim, and the hardship presented if petitioners' counsel is not awarded fees at this time, the undersigned is persuaded that an interim fee award is appropriate. Petitioners' request is reasonable, and respondent does not object to the amount requested. Accordingly, the undersigned **GRANTS** the request for interim fees and costs.

Pursuant to §15(e), the undersigned awards a lump sum of $7,075.00 to be paid in the form of a check payable jointly to the petitioners and petitioners' counsel, Lawrence R. Cohan.[34] Counsel shall provide a courtesy copy of this decision to petitioners.

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[33] Respondent claims that "having to continue to devote limited resources to claims that even petitioners' own counsel concede have no reasonable basis" is an undue burden and thus prejudicial. Reconsideration Motion at 7. But to date, the requirements of respondent to defend this claim have been quite circumscribed. Respondent's efforts have been limited to opposing petitioners' motion for interim attorneys' fees and costs and counsel's motion to withdraw. Prior to filing these objections, respondent filed only a brief Rule 4 report on April 20, 2004. Of note, it is respondent's opposition to the pending motions that risks prolonging the resolution of this claim because the undersigned cannot order petitioners to present their theory of causation until petitioners' counsel is permitted to withdraw.

[34] Attorneys' fees and costs awards may be made payable to petitioners and their counsel of record or to petitioners and their counsel of record's law firm. The instant award is made payable to petitioners and petitioners' counsel Lawrence Cohan, consistent with prior OAP fees and costs awards issued in Mr. Cohan's cases.

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Chief Special Master