

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

No. 06-663V
Filed: March 23, 2012
Unpublished

BRIDGETTE BIGBEE and ROYCE	*	
CARTER as Representatives of the Estate	*	
of KALEAF CARTER Deceased,	*	
	*	
Petitioners,	*	Interim attorneys' fees and costs
	*	
v.	*	
	*	
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

Richard Gage, Richard Gage, P.C., Cheyenne, WY, for Petitioners.
Julia Wernett McInerney, U.S. Department of Justice, Washington, D.C., for Respondent.

INTERIM ATTORNEY'S FEES AND COSTS DECISION¹

GOLKIEWICZ, Special Master.

A Hearing in this case was held on November 11 and 12, 2010, wherein fact and expert testimony was taken. Thereafter, additional evidence and post-Hearing Briefs were filed, ultimately completing the record on May 9, 2011. In the midst of post-Hearing proceedings, petitioners filed a Motion for Interim Attorney Fees and Costs.² On February 4, 2011,

¹ The undersigned intends to post this decision on the website for the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). **As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing. Further, consistent with the statutory requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.**

² Petitioners' request contains little in the way of legal argument and requests \$67,968.88 in fees and costs. Petitioners' Application for Award of Attorneys' Fees and Reimbursement of Costs, filed Dec. 22, 2010.

respondent filed her response, objecting on several grounds to an interim award.³ Petitioners file a reply on February 11, 2011.

The authorization of interim fees under the Vaccine Act was discussed twice by the Federal Circuit. Avera, 515 F.3d 1343; Shaw v. Sec’y of the Dept. of Health & Human Servs., 609 F.3d 1372 (Fed. Cir. 2010); see also McKellar v. Sec’y of the Dept. of Health & Human Servs., No. 09-841V, slip op. (Fed. Cl. Nov. 4, 2011)(“Avera and Shaw, when construed together, provide that interim fees are allowed under the Act, and more specifically, that interim fees are permitted even before an entitlement decision is made.”). Even if a Petition is denied, or when the request for fees is interim, an award of fees is discretionary and it must be investigated whether the Petition was brought in good faith and upon a reasonable basis. See 42 U.S.C. § 300aa-15(e)(2). As set out in Avera, the Federal Circuit discussed other considerations for interim fees and costs awards, which include whether proceedings are protracted, whether costly experts have been retained, or whether undue hardship exists. Avera, 515 F.3d at 1352. As interpreted in McKellar, “we view Avera to mean that some special showing is necessary to warrant interim fees, including but not limited to the delineated factors of protracted proceedings, costly experts, or undue hardship. If mere good faith and reasonable basis were all that is necessary, the Avera factors become superfluous and interim fees would be the norm.” McKellar, No. 09-841V, slip op. at 7. As Judge Bruggink found, “there is not a presumption of entitlement to interim fees.” Id. Petitioners bear the burden of proving undue hardship and thus entitlement to interim fees. See id.

Upon review of the record and petitioners’ request, the undersigned agrees with respondent that an award of interim fees and costs is not warranted at this juncture. The Decision in this case was filed on March 22, 2012. Therefore, this case is ripe for petitioners’ request for a final award of attorneys’ fees and costs. **Petitioners’ Motion for Interim Attorneys’ Fees and Costs is denied.** The Clerk of the Court is directed to enter judgment accordingly.⁴

IT IS SO ORDERED.

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
Special Master

³ Respondent challenges the request based on: the procedural posture of the case and a rather narrow reading of the Circuit’s Avera decision, petitioners’ failure; in respondent’s view, to establish good faith and a reasonable basis for the claim; and several unreasonable or unnecessary items of compensation that are requested by petitioners. Respondent’s Opposition to Petitioners’ Application for an Award of Attorneys’ Fees and Costs, filed Feb. 4, 2011.

⁴ This document constitutes a final “decision” in this case pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of the Court shall enter judgment in accord with this decision.