

appeal docketed, No. 2011-5109 (Fed. Cir. Sept. 12, 2011).² Petitioners' appeal is currently pending at the Federal Circuit.

On July 15, 2010, during petitioners' Motion for Review petitioners filed an Application for Interim Attorney's Fees and Costs requesting a total of \$157,873.86. P Application for Interim Award of Attorneys' Fees and Reimbursement of Costs, filed July 25, 2010. This application for interim fees and costs took place during petitioners' Motion for Review before the Court of Federal Claims. Following the parties' briefing, the undersigned awarded petitioners attorneys' fees and costs in the amount of \$131,614.84. Decision on Petitioners' Motion for Interim Attorney's Fees and Costs, No. 04-1041V, 2010 WL 3790297 (Fed. Cl. Spec. Mstr. Sept. 8, 2010). Petitioners' award of interim fees and costs was less than the amount requested due to: an excessive number of vague attorney billing entries, a reduction in the expert's claimed rate and hours, a mistaken double entry in costs, and a reduction of one travel item. Id. at 6-12.

On September 21, 2011, petitioners filed their second Application for Award of Interim Attorneys' Fees and Reimbursement of Costs. P Application for Award of Interim Attorneys' Fees and Reimbursement of Costs, filed Sept. 21, 2011 (hereinafter "Second Interim Application" or "P Second App.>"). Petitioners' Motion for Review was denied and they filed an appeal with the Federal Circuit. In this second request, petitioners request \$41,645.45 in attorneys' fees and costs. Id. The filing includes the Application, a breakdown of fees and costs, a brief attorney affidavit and the accounting of attorney hours and costs. P Second App., attached Tabs A, B, C. Petitioners provide no argumentation regarding the appropriateness of a second interim fees and costs award.

Respondent filed her opposition on October 5, 2011. R Response in Opposition to Petitioners' Second Application for Interim Award of Attorneys' Fees and Reimbursement of Costs, filed Oct. 5, 2011 (hereinafter "Opposition" or "R Opp.>"). Citing Avera v. Sec'y of the Dept. of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), respondent opposed a second award of interim fees and costs. Id. at 1. In the event that the undersigned awards a second interim award, respondent also objects to portions of the time and costs requested as excessive. Id. No response was filed or requested by petitioners.

Respondent directs the court's attention to the factors discussed in Avera, by which an interim award of attorneys' fees and costs may be made. "These factors include whether the case had involved protracted proceedings, whether costly experts were obtained, and whether the petitioner had suffered undue hardship." R Opp. at 2 (citing Avera, 515 F.3d at 1352). Respondent's overall opposition states, "[p]etitioners here have similarly failed to demonstrate the necessary circumstances to justify a second interim award. Petitioners have offered no explanation addressing either undue hardship or protracted proceedings, nor could they make such a showing." R Opp. at 2. Respondent further argues that, "considering the factors identified in Avera that would support an award of interim fees, it seems clear that interim fee awards would be the exception, rather than the rule." Id. at 2-3 (citing Avera, 515 F.3d at 1352).

² The undersigned's first decision denying compensation was issued on April 15, 2010. Decision, No. 04-1041V, 2010 WL 1848220 (Fed. Cl. Spec. Mstr. Apr. 15, 2010). Petitioners filed a Motion for Review, which was granted on October 28, 2010. Order Granting Motion for Review, No. 04-1041V, 95 Fed. Cl. Oct. 28, 2010).

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 must be brought in good faith and upon reasonable basis. See 42 U.S.C. § 300aa-15(e)(2). The undersigned does not doubt the good faith in this case. Further, as was found in the first interim award, there is clearly reasonable basis for this case. Seizure disorders have a long history of compensation under the Program, and the questions of whether the SCN1A gene mutation was a factor unrelated is a question of first impression. Respondent does not contest the good faith or reasonable basis of this Petition.

Upon review of the record and petitioners’ second request, the undersigned agrees with respondent that a second award of interim fees and costs is not warranted at this juncture, particularly in light of petitioners’ prior award of interim fees and the general lack of evidence or argument regarding the Federal Circuit’s considerations discussed in Avera. Notably, petitioners’ first Application for Interim Award did not put forth evidence or argument to address the considerations in Avera; however, those factors were apparent given the amount of time that had passed in this case, the import and complexity of the subject matter, and the costs that were incurred. The undersigned found the Avera considerations were tacit at that point in the litigation. However, like petitioners in Avera, petitioners here “only sought interim fees pending appeal, and made no showing that would justify an award of interim fees during that pendency” and no demonstration of “undue hardship” was made. 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. Petitioners failed that showing.

Petitioners’ Second Interim Application for attorney fees and costs is denied.³ The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

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

³ Because the undersigned finds petitioners’ have not evidenced the appropriateness of second interim award at this time, respondent’s objections to specific hours and costs will not be addressed herein. See Opposition at pp. 3-5.