

Petitioner's counsel filed a Status Report in this case on March 6, 2012, indicating that petitioner's counsel has informed petitioner that counsel does not intend to proceed further with the entitlement portion of this case. That status report also notes that petitioner intends proceed with this case, *pro se*.

Petitioner filed an Interim Application for final attorney's fees and costs, on February 29, 2012. Respondent filed a Response to petitioner's motion for interim fees and costs on May 4, 2012. Petitioner filed a Reply on May 17, 2012. Respondent argues that an award of interim attorneys' fees and costs is inappropriate at this time, and urges the court to deny petitioners' motion until the case is concluded, or at such time as an interim award is appropriate under *Avera v. HHS*, 515 F.3d 1343 (Fed. Cir. 2008). Respondent, citing *Avera*, 515 F.3d at 1352, also argues that interim attorneys' fees and costs are available in only limited circumstances under *Avera*, as follows: "protracted proceedings, significant expert costs, or where petitioner had suffered undue hardship." Respondent's Response at 1. Respondent contends that the withdrawal of counsel does not fall into these limited circumstances. *Id.*

I recognize that the withdrawal of counsel alone may not always provide sufficient justification for an award of interim attorneys' fees. See *McKellar v. HHS*, 101 Fed. Cl. 297, 301-3 (Fed. Cl. 2011). However, in this case, I find that the overall circumstances of the case justify the issuance of an interim award. I find that the issues presented in the instant case are virtually identical to the issues presented in a recent interim fee decision awarding fees and costs in another claim pending in the Omnibus Autism Proceeding ("OAP"). *Edmonds v. HHS*, No. 04-87V, 2012 WL 1229149 (Fed. Cl. Spec. Mstr. Mar. 22, 2012). As such, I adopt and incorporate the reasoning expressed in *Edmonds* in the instant decision. See also, *Hiland v. HHS*, No. 10-491V, 2012 WL 542683, at *7 (Fed. Cl. Spec. Mstr. Jan. 31, 2012)(awarding interim fees when counsel withdrew); *Lumsden v. HHS*, No. 97-588V, 2012 WL 1450520, at *4 (Fed. Cl. Spec. Mstr. Mar. 28, 2012)(same).

I find that an award of interim attorneys' fees and costs is appropriate in this case. Interim attorneys' fees and costs are explicitly authorized by the binding precedent of the United States Court of Appeals for the Federal Circuit. *Avera v. HHS*, 515 F.3d 1343; *Shaw v. HHS*, 609 F.3d 1372, 1374 (Fed. Cir. 2010) ("the Vaccine Act permits [an] award of interim fees and costs"); *Cloer v. HHS*, 675 F.3d 1358, 1361-62 (Fed. Cir. 2012) ("Congress made clear that denying interim attorneys' fees under the Vaccine Act is contrary to an underlying purpose of the Vaccine Act."). See also Vaccine Rule 13(b).

As one of the special masters who presided over the Omnibus Autism Proceeding (OAP), I find that, at least up to this point in time, petitioner had a good faith belief in and a reasonable basis for this claim. See *Avera*, 515 F.3d at 1352 (requiring such a determination before an award of interim fees is permissible). As discussed in *Edmonds*:

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.

Edmonds, 2012 WL 1229149, at *8 (citing *Kirk v. HHS*, No. 08-241V, 2009 WL 775396, at *1 (Fed. Cl. Spec. Mstr. Mar. 13, 2009)). As a reasonable basis was found in each of the OAP test cases, it follows that petitioner in the instant case likewise had a reasonable basis, at least until the resolution of the test cases.³

Counsel has diligently represented petitioner for a number of years while this claim was pending in the court's protracted OAP proceedings. See *Edmonds*, 2012 WL 1229149, at *8-9 (discussing the protracted nature of the OAP, as well as the litigation costs borne by counsel with cases in the OAP). At this time counsel avers that he does not intend to proceed. Petitioner has chosen to continue this claim without the aid of her current counsel, and it is therefore likely that subsequent proceedings in this case will be further protracted.

The impending dissolution of the attorney-client relationship will impede the ability of counsel to obtain payment of fees and costs at the conclusion of this case. *Edmonds*, 2012 WL 1229149, at *9-10 (discussing the hardships that a former counsel confronts while attempting to be reimbursed for reasonable fees and costs at the conclusion of a case). The purpose of § 15(e) is to encourage representation of vaccine-injured persons, a purpose that may be thwarted if counsel are caught in a dilemma between an ethically-required withdrawal of representation and the need to remain counsel of record in order to obtain fees and costs. *Id.* at *11. Accordingly, not allowing interim fees at this time would pose an undue hardship on petitioner and counsel alike.

Due to the protracted history of this claim, the apparent conflict of interest necessitating counsel's withdrawal from representation, the time required to resolve the pending claim, and the hardship presented if petitioner's counsel is not awarded fees and costs at this time, I am persuaded that an interim fee award is appropriate.

Accordingly, I hold that petitioner is entitled to reasonable interim attorneys' fees and costs pursuant to §§ 15(b) and (e)(1) and under *Avera*. Petitioner seeks attorneys' fees and costs in the amount of \$14,333.99 – representing attorneys' fees of \$13,351.40, attorneys' costs of \$732.59, and petitioner's own costs of \$250.00. Respondent does not object to the *amount* of the fees and costs sought.

The request for interim attorneys' fees and costs is hereby granted. Petitioner is awarded reasonable interim attorneys' fees and costs pursuant to §§ 15(b) and (e)(1), as I find that the petition was brought in good faith and upon a reasonable basis, and the amounts

³ The OAP test case decisions are *Cedillo v. HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Hazlehurst v. HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Snyder v. HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Dwyer v. HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

requested are reasonable and appropriate. Accordingly, I hereby award the following attorneys' fees and costs pursuant to 42 U.S.C. § 300aa-15(b) and (e)(1):

- a lump sum of \$14,083.99, in the form of a check payable jointly to petitioner and petitioner's counsel, Ronald C. Homer, on account of services performed by counsel's law firm.⁴
- a lump sum of \$250.00, in the form of a check payable to Holly Austin, which represents petitioner's own litigation expenses in this case.

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.⁵

IT IS SO ORDERED.

/s/ George L. Hastings, Jr.
George L. Hastings, Jr.
Special Master

⁴ This amount is intended to cover all legal expenses incurred in this matter. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, § 15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. *See generally Beck v. HHS*, 924 F.2d 1029 (Fed. Cir.1991).

⁵ Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. *See Vaccine Rule 11(a)*.