In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 11-362V

(Filed: February 4, 2013)

TO BE PUBLISHED[1]

JENNA BEAR, parent of McKenzie Bear, a minor, Petitioner, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	*	Vaccine Act Interim Fees and Costs.

DECISION AWARDING INTERIM FEES AND COSTS

HASTINGS, *Special Master*.

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), Jenna Bear ("Petitioner") seeks, pursuant to 42 U.S.C. § 300aa-15(e),[2] an "interim" award for attorneys' fees and litigation costs incurred in the course of Petitioner's attempt to obtain Program compensation. After careful consideration, I have determined to grant the request in part, for the reasons set forth below.

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[1]Because I have designated this document to be published, this document will be made available to the public unless petitioner files, within fourteen days, an objection to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." See 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

[2]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2006). Hereinafter, for ease of citation, all § references will be to 42 U.S.C. (2006).

I

PROCEDURAL BACKGROUND

The Petitioner, Jenna Bear, filed this petition on June 8, 2011, alleging that a vaccination injured her daughter. On November 28, 2011, the Secretary of Health and Human Services ("Respondent") filed a document opposing the petition for compensation.

On September 13, 2012, Petitioner filed an application for "interim" attorneys' fees and costs, seeking an award of $16,608.09. (Hereinafter "Pet. App.") Respondent filed an "Opposition" to Petitioner's application on October 31, 2012 (hereinafter "Opp."), and Petitioner filed a reply document on November 13, 2012 (hereinafter "Reply").

On November 20, 2012, Petitioner's counsel filed a Motion to Withdraw as Attorney of Record. (Hereinafter "Motion.") The Motion states that the Petitioner desires to proceed as a *pro se* petitioner in this matter. (Motion at 1.)

II

LEGAL STANDARD FOR AWARDING ATTORNEYS' FEES AND COSTS

A. In general

Special masters have the authority to award "reasonable" attorneys' fees and litigation costs in Vaccine Act cases. § 300aa-15(e)(1). This is true even when a petitioner is unsuccessful on the merits of the case, if the petition was filed in good faith and with a reasonable basis. (*Id.*) "The determination of the amount of reasonable attorneys' fees and costs is within the special master's discretion." *Saxton v. Sec'y of HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993); *see also Shaw v. Sec'y of HHS*, 609 F.3d 1372, 1377 (Fed. Cir. 2010).

Further, as to all aspects of a claim for attorneys' fees and costs, the burden is on the *petitioner* to demonstrate that the attorneys' fees claimed are "reasonable." *Sabella v. Sec'y of HHS*, 86 Fed. Cl. 201, at 215 (Fed. Cl. 2009); *Hensley v. Eckerhart*, 461 U.S. 424, at 437 (1983); *Rupert v. Sec'y of HHS*, 52 Fed.Cl. 684, at 686 (2002); *Wilcox v. Sec'y of HHS*, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). The petitioner's burden of proof to demonstrate "reasonableness" applies equally to *costs* as well as attorneys' fees. *Perreira v. Sec'y of HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd* 33 F.3d 1375 (Fed. Cir. 1994).

One test of the "reasonableness" of a fee or cost item is whether a hypothetical petitioner, who had to use his own resources to pay his attorney for Vaccine Act representation, would be willing to pay for such expenditure. *Riggins v. Sec'y of HHS*, No. 99-382V, 2009 WL 3319818, at *3 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009),

affirmed, 40 Fed. Appx. 479 (Fed. Cir. 2011); *Sabella v. Sec'y of HHS*, No. 02-1627V, 2008 WL 4426040, at *28 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff'd in part and rev'd in part*, 86 Fed. Cl. 201 (2009). In this regard, the United States Court of Appeals for the Federal Circuit has noted that--

> [i]n the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.

Saxton, 3 F.3d at 1521 (emphasis in original), quoting *Hensley*, 461 U.S. at 433-34. Therefore, in assessing the number of hours reasonably expended by an attorney, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434; see also *Riggins*, 2009 WL 3319818, at *4.

B. "Interim" fees and costs

In *Avera v. Sec'y of HHS*, 515 F. 3d 1343, 1352 (2008), the U.S. Court of Appeals for the Federal Circuit indicated that an award of "interim" fees and costs--that is, an award *prior* to the entry of a final judgment on the initial question of whether the petitioner is entitled to compensation for the alleged vaccine injury--can be appropriate in Vaccine Act cases. The *Avera* court did not specify in what *particular* circumstances such an award might appropriately be issued, but the court made it clear that such "interim" awards *can* be appropriate. The Federal Circuit gave the same indication again in *Shaw v. Sec'y of HHS*, 609 F. 3d 1372, 1373-74 (2010).

III

RESPONDENT'S *LEGAL ARGUMENT* CONCERNING WHEN AN AWARD IS APPROPRIATE FOR INTERIM FEES AND COSTS

In *Avera v. Sec'y of HHS*, 515 F. 3d 1343, 1352 (2008), the U.S. Court of Appeals for the Federal Circuit indicated that an award of "interim fees"--that is, an award of fees *prior* to the entry of a final judgment on account of the alleged vaccine injury--can be appropriate in Vaccine Act cases. However, the *Avera* court did not specify in what *particular* circumstances such an award might appropriately be issued. In this case, Respondent first raises a *legal argument* that an "interim" award is appropriate only in a very narrow set of circumstances--*i.e.*, either after an award of compensation resulting from the alleged vaccine injury has been made to the petitioners, or after a judgment denying such compensation has been entered by the court. (Opp. at 2-4.)

After consideration, I must reject Respondent's legal argument.

A. The Avera decision does not support Respondent's argument

Respondent's legal argument is based on the procedural history of the *Avera* case itself. In *Avera*, the special master determined that the petitioners were not entitled to compensation for the injury to their son, and the petitioners did not seek review of that special master's decision, so that judgment was entered denying compensation. (515 F. 3d at 1345.) The petitioners then sought an award of attorneys' fees, but the parties disagreed concerning the proper *amount* of such fees. The petitioners asked the special master to grant an "interim" award for the undisputed portion, while litigation could continue concerning the contested portion. The special master declined, concluding that the statute did not permit awards of "interim" fees, but authorized only a single award at the conclusion of the case. (*Id.* at 1346.)

On appeal, the Federal Circuit concluded that the special master "erred in holding that an interim fee award is not permissible. The statute permits such awards." (*Id.* at 1352.) Nevertheless, the court determined that in the particular circumstance of that case, an award of interim fees was not justified. (*Id.*)

Thus, it is true that, as Respondent notes here, in *Avera* a judgment denying compensation for the injury had already been entered at the time when the application for "interim" fees was made. However, a review of the Federal Circuit's *Avera* opinion does not support Respondent's argument that an award of interim fees must be confined to the unusual procedural circumstances of *Avera*. To the contrary, the language of the *Avera* court was broad and unequivocal. The court stated that the special master "erred in holding that an interim fee award is not permissible. The statute permits such awards." (515 F. 3d at 1352.) Moreover, the court, in explaining its reasoning, noted that among various fee-shifting federal statutes, proceedings under the Vaccine Act were *particularly* appropriate for interim fee awards, because under the Vaccine Act a petitioner may obtain a fee award whether or not he obtains compensation on the merits, if the petition was at least brought in good faith and with a reasonable basis. (*Id.*) The court noted that 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.*) This last sentence strongly implies that the Federal Circuit envisioned situations in which an award of interim fees could be made "at an early stage of the proceedings"-- *i.e.*, certainly prior to the entry of judgment "on the merits."

Further, the *Avera* court also provided some brief comments concerning the *circumstances* under which interim award might be appropriate, stating that interim fees "are particularly appropriate in cases where proceedings are protracted and costly experts must be retained." (*Id.*) Those comments do not imply in any way that interim fees are appropriate only after judgment "on the merits" has occurred.

B. The Shaw decision

The Federal Circuit again addressed the topic of "interim" fees in *Shaw v. Sec'y of HHS*, 609 F. 3d 1372 (2010). In that case, the special master had not yet ruled upon the issue of whether the petitioner was entitled to compensation for his injury, when the petitioner sought an interim fee award. (*Id.* at 1373.) The special master granted an award, but in a lesser amount than the petitioner had sought, and the petitioner sought review by a judge of this court. (*Id.* at 1373-74.) The judge ruled that she lacked jurisdiction to review an interim fee award. (*Id.* at 1374.) The petitioner appealed to the Federal Circuit, and that court determined that the Court of Federal Claims judge *did* have jurisdiction to review the special master's ruling concerning the request for interim fees.

In so ruling, the *Shaw* opinion stated unequivocally that the *Avera* court had rejected "the government's argument that a fee award *is only permissible after judgment* under §300aa-15." (*Id.* at 1374, emphasis added.) Thus, the *Shaw* court *explicitly interpreted* the *Avera* court to have rejected the very argument that Respondent raises here, that a fee award "is only permissible after judgment." (*Id.*)

Moreover, the entire *Shaw* opinion strongly implies that an interim award, prior to a decision or judgment on the merits of the petition, *is not* forbidden by the statute. For example, the *Shaw* court quoted the *Avera* court's reasoning as to why interim fee awards were even more logical in Vaccine Act cases than under other federal fee-shifting statutes. (*Id.* at 1374-75.) And this reasoning, endorsed by the Federal Circuit in both *Avera* and *Shaw*, would be *thwarted* were I to adopt the legal argument raised by Respondent in this case.

In short, the *Shaw* opinion, as well as the *Avera* opinion, mandates that I reject the legal argument raised by Respondent in this case.[3]

C. Interim fee rulings since Avera

In the period since the Federal Circuit's issuance of *Avera* in February of 2008, many decisions of *special masters* have granted interim fees in cases where judgment concerning the merits had not yet been entered. *See, e.g.*, *Bowman v. Sec'y of HHS*, No. 06-394V, 2008 WL 2397494 (Fed.Cl.Spec.Mstr. May 22, 2008); *Broekelschen v. Sec'y of HHS*, No. 07-137V, 2008 WL 5456319 (Fed.Cl.Spec.Mstr. Dec. 17, 2008); *Butland v. Sec'y of HHS*, No. 07-111V, 2009 WL 2981981 (Fed.Cl.Spec.Mstr. Aug. 28, 2009); *Cedillo v. Sec'y of HHS*, No. 98-916V, 2009 WL 811449 (Fed.Cl.Spec.Mstr. Mar. 11, 2009); *Crutchfield v. Sec'y of HHS*, No.09-39V, 2011 WL 3806351 (Fed. Cl.Spec.Mstr. Aug. 4, 2011); *Davis v. Sec'y of HHS*, No. 07-451V, 2010 WL

[3]Respondent's brief seems to suggest that *Avera* was contrary to the statute and thus was wrongly decided. But the rulings of the Federal Circuit concerning legal issues are *binding* on this Court. Any argument that the *Avera* and *Shaw* courts misinterpreted the statute must be made to the Federal Circuit, not this court.

1252737 (Fed.Cl.Spec.Mstr. Mar. 10, 2010); *Delmonte v. Sec'y of HHS*, No. 01-14V, 2010 WL 3430815 (Fed.Cl.Spec.Mstr. July 27, 2010); *Franklin v. Sec'y of HHS*, No. 99-855V, 2009 WL 2524492 (Fed.Cl.Spec.Mstr. July 28, 2009); *Hager v. Sec'y of HHS*, No. 01-307V, 2009 WL 4030940 (Fed.Cl.Spec.Mstr. Nov. 3, 2009); *Hall v. Sec'y of HHS*, No. 02-1052V, 2009 WL 3094881 (Fed.Cl.Spec.Mstr. July 28, 2009); *Kirk v. Sec'y of HHS*, No. 08-241V, 2009 WL 973158 (Fed.Cl.Spec.Mstr. Mar. 17, 2009); *MacNeir v. Sec'y of HHS*, No. 03-1914V, 2010 WL 891145 (Fed.Cl.Spec.Mstr. Feb. 12, 2010); *Masias v. Sec'y of HHS*, No. 99-697V, 2009 WL 899703 (Fed.Cl.Spec.Mstr. Mar. 12, 2009); *Mojabi v. Sec'y of HHS*, No. 06-227V, 2009 WL 4884473 (Fed.Cl.Spec.Mstr. Nov. 23, 2009); *Mueller v. Sec'y of HHS*, No. 06-775V, 2009 WL 1631615 (Fed.Cl.Spec.Mstr. May 14, 2009); *Nance v. Sec'y of HHS*, No. 06-730V, 2010 WL 2541727 (Fed.Cl.Spec.Mstr. May 26, 2010); *Parsons v. Sec'y of HHS*, No. 08-447V, 2010 WL 3069334 (Fed.Cl.Spec.Mstr. July 13, 2010); *Porter v. Sec'y of HHS*, No. 99-639V, 2009 WL 4034795 (Fed.Cl.Spec.Mstr. Nov. 3, 2009); *Rotoli v. Sec'y of HHS*, No. 99-644V, 2009 WL 4034800 (Fed.Cl.Spec.Mstr. Nov. 3, 2009); *Stone v. Sec'y of HHS*, No. 90-1041V, 2010 WL 3790297 (Fed.Cl.Spec.Mstr. Sept. 9, 2010).

It is notable that in all of the opinions cited in the previous paragraph that were issued during 2008, 2009, and 2010, there was no indication that Respondent ever raised the legal issue raised in this case. As far as I can tell, only in the latter part of 2010 did Respondent begin to raise this argument in Vaccine Act cases. 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.

In any event, when Respondent has raised this legal argument in recent years, the argument has been *uniformly rejected* by judges and special masters who have addressed the argument while considering motions for interim fees. First, a number of *judges* of this court have written opinions indicating that interim awards, prior to the entry of judgment, are permissible pursuant to *Avera*. See *Avila v. Sec'y of HHS*, 90 Fed.Cl. 590, 597-99 (2009) (acknowledging that interim fees are authorized under *Avera*, but denying fees in that case); *Doe/11 v. Sec'y of HHS*, 89 Fed.Cl. 661, 666-67 (2009); *Dobrydneva v. Sec'y of HHS*, 94 Fed.Cl. 134, 148 (2010); *Friedman v. Sec'y of HHS*, 94 Fed.Cl. 323, 334 (2010) (acknowledging that the award of interim fees is authorized, but discretionary, and affirming special master's denial of such fees in that case); *Warfle v. Sec'y of HHS*, 92 Fed.Cl. 361, 363 (2010).

Further, Respondent's legal argument has been addressed and rejected in the following opinions of special masters: *Burgess v. Sec'y of HHS*, No. 07-258V, 2011 WL 159760, at *1 (Fed.Cl.Spec.Mstr. Jan. 3, 2011); *Crutchfield v. Sec'y of HHS,* No. 09-39V, 2011 WL 3806351 (Fed.Cl.Spec.Mstr. Aug. 4, 2011); *Dudash v. Sec'y of HHS*, No. 09-646V, 2011 WL 1598836, at *1-2 (Fed.Cl.Spec.Mstr. Apr. 7, 2011); *Hammitt v. Sec'y of HHS*, No. 07-170V, 2011 WL 1827221, at *4 (Fed.Cl.Spec.Mstr. Apr. 7, 2011); *Hibbard v. Sec'y of HHS*, No. 07-446V, 2011 WL 1135894, at *1-3 (Fed.Cl.Spec.Mstr. Mar. 7, 2011); *Hirmiz v. Sec'y of HHS*, No. 06-371V, 2011 WL 2680721 (Fed. Cl. Spec. Mstr. June 13, 2011); *Holmes v. Sec'y of HHS*, No. 08-185V, 2011 WL 1043473, at *2-3 (Fed.Cl.Spec.Mstr. Feb. 28, 2011); *Paluck v. Sec'y of HHS*, No.

07-889V, 2011 WL 1515698, at *1-3 (Fed.Cl.Spec.Mstr. Mar. 30, 2011); *Whitener v. Sec'y of HHS*, No. 06-477V, 2011 WL 1467919, at *2-4 (Fed.Cl.Spec.Mstr. Mar. 25, 2011).

Those rulings, thus, offer support for the legal conclusion that I have reached in this case.

IV

THE CIRCUMSTANCES OF THIS CASE JUSTIFY AN INTERIM AWARD OF FEES AND COSTS

The *Avera* court did not provide a detailed set of guidelines concerning *in what situations* an award of interim fees is warranted in a Vaccine Act case. The court did afford some guidance, noting that "[i]nterim fees are particularly appropriate in cases where proceedings are protracted and costly experts must be retained," and indicating that interim fees would be appropriate in order to avoid "undue hardship." (515 F. 3d at 1352.) But it appears to me that the *Avera* court's quoted statements were designed merely to give *examples* and *general guidance* concerning when interim fees and costs might be awarded, leaving the special masters broad *discretion* to consider many factors in considering whether an interim award is appropriate in a particular case.

As set forth above, since *Avera* there have been a considerable number of cases, in which interim fees have been awarded. In each such case, a special master and/or a judge found the circumstances of each case to be appropriate for an interim award. I will not attempt to discuss the various circumstances of all those cases, but I conclude that in *this* case, contrary to Respondent's argument (Opp. at 4-7), the overall circumstances of the case *do* justify an interim award at this time.

It may be true, as Respondent argues, that the mere fact that counsel desires to withdraw from the case does not *by itself* justify an interim award of fees and costs. *McKellar v. HHS*, 101 Fed. Cl. 297, 302 (2011.) However, another judge found in *Woods v. HHS*, that the fact that counsel is withdrawing *can be one* important factor, supporting an interim award. *Woods v. HHS*, 105 Fed. Cl. 148, 154 (2012.)

Another factor supporting an award in this case is that the petition " has been pending more than 19 months, and that petitioner's counsel has actually been working on the case for nearly four years." (Reply at 11-12.)

As has been recognized, after withdrawing from a case, it may be difficult for former counsel to receive a fees award, and, in such circumstances, special masters have often found it reasonable to make such interim awards. (*See e.g., Burgess v. HHS*, No. 07-258V, 2011 WL

159760, at 1 (Fed.Cl.Spec.Mstr. Jan. 3, 2011); *Soto v. HHS*, No. 09-897V, 2011 WL 2269423 (Fed.Cl.Spec.Mstr. June 7, 2011).)

Given the overall circumstances here, I find that an interim award is appropriate at this time.

V

AMOUNT OF THE AWARD

Respondent argues that the number of attorney law clerk hours billed by Petitioner's counsel is unreasonable. (Opp. at 7-10.) Petitioner's counsel disagrees. (Reply at 12-14.) In recent years, one special master has found that the procedures utilized by the law firm in question in similar situations can result in unreasonably high bills. (*See Soto v. HHS*, No. 09-897V, 2011 WL 2269423 (Fed.Cl.Spec.Mstr. June 7, 2011.))

In this case, after reviewing the file, it appears to me that the number of hours billed is slightly high, given the work performed. I will reduce the amount claimed *for fees* by 10 percent, or $1,546.00.

VI

SUMMARY AND CONCLUSION

Accordingly, for the reasons set forth above, I hereby award Petitioner the amount of $15,062.09 ($13,918.80 for fees and $1,143.29 for costs), on account of fees and costs incurred by the current counsel. The award shall be made in the form of a check payable jointly to Petitioner and Petitioner's counsel.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master