

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 06-808V

Filed: December 3, 2013

NOT TO BE PUBLISHED¹

ROBERT T. BEVILL, and JANICE BEVILL,
parents and natural guardians of CB, a minor,

Petitioners,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

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Vaccine Act Attorneys' Fees.
Reasonable Basis for Claim.

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS

HASTINGS, *Special Master.*

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

¹Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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), petitioner has 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, I agree that the identified material fits within this definition, I will delete such material from public access.

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

Petitioners, Robert and Janice Bevill, filed, *pro se*, a “Short-Form Autism Petition for Vaccine Compensation,” under the Program. Petitioners alleged that their daughter CB had developed autism resulting from the receipt of vaccines containing thimerosal. (*See* Petition (“Pet”) at 1.) The case was assigned to me on November 27, 2006. (Notice, ECF No.2.) On March 1, 2007, the Secretary of Health and Human Services (“Respondent”) filed a document (“Respondent’s Rule 4(c) Report”) opposing the petition for compensation. (Report, ECF No. 6.)

On May 20, 2009, Petitioners filed Exhibits A through D, and then filed a Statement of Completion. (Filing, ECF No. 11.) On July 23, 2009, Respondent filed a Motion to Dismiss, alleging that this case was filed more than 36 months after the first symptom or manifestation of onset of CB’s alleged vaccine injury. (*See* Motion, ECF No.12.) On July 27, 2012, the special master issued an Order deferring a ruling on Respondent’s Motion to Dismiss, and ordered Petitioners to file an expert report. (Order, ECF No. 21.)

On August 2, 2012, Petitioners moved to substitute Richard Gage as their counsel of record. (Motion, ECF No. 22.)

On July 23, 2013, Petitioners filed an application for interim attorneys’ fees and costs, seeking a total award of \$2,557.90. (Hereinafter “Pet. App.”) Respondent filed a “Response To Motion For Interim Attorneys’ Fees” on August 9, 2013 (hereinafter “Response”), and Petitioners filed a reply document on September 10, 2013 (hereinafter “Reply”). (ECF Nos. 46, 49.)

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. HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993); *see also Shaw v. 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. HHS*, 86 Fed. Cl. 201, at 215 (Fed. Cl. 2009); *Hensley v. Eckerhart*, 461 U.S. 424, at 437 (1983); *Rupert*

v. HHS, 52 Fed.Cl. 684, at 686 (2002); *Wilcox v. 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. 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. 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. 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. 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. HHS*, 609 F. 3d 1372, 1373-74 (2010).

III

RESPONDENT'S ARGUMENTS CONCERNING WHEN AN AWARD IS APPROPRIATE FOR INTERIM FEES AND COSTS

When Petitioners filed their application for fees and costs, the petition for compensation was pending. Therefore, the application was for "interim fees." (*See Avera v. HHS*, 515 F. 3d 1343, 1352 (2008).)

In this case, Respondent argues that Petitioners have filed nothing, with their attorneys' fees and costs application, which would justify the payment of an award for interim fees and costs. (Response, p. 2.) Specifically, Respondent argues that Petitioners have not requested any out-of-pocket costs nor have they demonstrated "undue hardship." (*Id.*) Respondent states that it is "[p]etitioners, and not their counsel, who must show an undue hardship to be eligible for interim fees under *Avera*." (*Id.*) Second, Respondent argues that Petitioners have not sought a "substantial" amount in fees and costs. Specifically, Respondent argues that Petitioners have not sought the reimbursement of expert costs, and the total award requested amounts to \$2,557.90, which is not substantial enough to justify an award in this case. (*Id.*, p.3.) Third, Respondent argues that Petitioners' counsel has only been participating in this case for one year, which is not a sufficient amount of time to justify an interim fees and costs award. (*Id.*)

Additionally, Respondent states that there is nothing in *Avera* or the Vaccine Act that "gives a special master authority to award interim fees based solely on the fact that a petitioner's counsel wishes to withdraw from representation." (*Id.*)

Accordingly, after careful consideration, I must reject all of Respondent's arguments.

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." (*Avera*, 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 the case to be appropriate for an interim award. I will not attempt to discuss the various circumstances of all those cases,³ but I conclude that in *this* case, contrary to

³ A partial list of cases awarding interim fees and costs is as follows: *Burgess v. HHS*, No. 07-258V, 2011 WL 159760, at *1 (Fed.Cl.Spec.Mstr. Jan. 3, 2011); *Crutchfield v. HHS*, No. 09-39V, 2011 WL 3806351 (Fed.Cl.Spec.Mstr. Aug. 4, 2011); *Dudash v. HHS*, No. 09-646V,

Respondent's arguments (Response, pp.1-3), the overall circumstances of the case *do* justify an interim award at this time.

One important factor supporting an award in this case is that Petitioners' counsel, Mr. Gage, has been working on this case in conjunction with two other cases involving two siblings of CB--that is, RB and VB. Further, in working on other similar Program cases in recent months, Mr. Gage has been of considerable assistance to both a number of Program petitioners and this court, by taking cases for *pro se* petitioners, and guiding such cases to a conclusion. This work has been helpful to both these petitioners and to the court. As he points out, Mr. Gage has been working on the three Bevill cases for more than a year, incurring staff and office expenses, without any payment for fees or costs. The total request for the three Bevill cases at the time that the interim fees petitions were filed was over \$9,000 dollars. (Reply, p. 2.) Thus, Mr. Gage's statements reflect the fact that he has performed a significant amount of work in these three cases and has expended a significant amount of time and money to facilitate their progression.

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

V

CONCLUSION

For the reasons set forth above, I award Petitioners \$2,557.90 in fees and costs for their application. The total awarded is \$2,557.90. The award shall be made in the form of a check payable jointly to Petitioners and Petitioners' counsel, Richard Gage.

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

2011 WL 1598836, at *1-2 (Fed.Cl.Spec.Mstr. Apr. 7, 2011); *Hammitt v. HHS*, No. 07-170V, 2011 WL 1827221, at *4 (Fed.Cl.Spec.Mstr. Apr. 7, 2011); *Hibbard v. HHS*, No. 07-446V, 2011 WL 1135894, at *1-3 (Fed.Cl.Spec.Mstr. Mar. 7, 2011); *Hirmiz v. HHS*, No. 06-371V, 2011 WL 2680721 (Fed. Cl. Spec. Mstr. June 13, 2011); *Holmes v. HHS*, No. 08-185V, 2011 WL 1043473, at *2-3 (Fed.Cl.Spec.Mstr. Feb. 28, 2011); *Paluck v. HHS*, No. 07-889V, 2011 WL 1515698, at *1-3 (Fed.Cl.Spec.Mstr. Mar. 30, 2011); *Whitener v. HHS*, No. 06-477V, 2011 WL 1467919, at *2-4 (Fed.Cl.Spec.Mstr. Mar. 25, 2011).