In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-256V

Filed: September 28, 2011

Not to be Published

DAWN MORIARTY, parent of MATTHEW MORIARTY, a minor,	*	Autism; Interim Attorneys' Fees and Costs
Petitioner,	*	
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES	*	
Respondent.	*	

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS [1]

On February 5, 2003, petitioner filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ("the Program"),[2] alleging that Matthew was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

[1] Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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), a party has 14 days to identify and move to delete medical or other information, that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

[2] The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 *et seq.* (hereinafter "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

Petitioner's counsel filed a motion to withdraw as counsel in this case on August 19, 2011. Petitioner's counsel in the same motion moved for an award of interim attorneys' fees and costs adopting the parties' stipulation. The parties' stipulation indicates that the respondent does not oppose the amount of attorneys' fees and costs requested; however the stipulation indicates respondent does oppose an award of interim attorneys' fees and costs.

Respondent filed a Response to Petitioner's Motion for Interim Attorneys' Fees and Costs on September 19, 2011. Respondent argues 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 such time as an interim award is appropriate under *Avera v. Sec'y of HHS*, 515 F.3d. 1343 (Fed. Cir. 2008).

I find 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. Sec'y of HHS*, 515 F.3d. 1343; *see also* Vaccine Rule 13(b). As a participant in the OAP, I find that up to this point, 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).

Respondent, citing *Avera*, 515 F.3d at 1352, argues 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 1-2. Respondent argues the withdrawal of counsel does not fall into these limited circumstances. *Id.* I disagree.

Counsel has diligently represented petitioner for a number of years while this claim was pending in the court's Omnibus Autism Proceeding ("OAP"). At this time counsel reasonably avers his withdrawal is required. Petitioner may receive reasonable fees and costs under the Vaccine Act, and petitioner has chosen to continue this claim without the aid of her current counsel. The inability to pay counsel until the conclusion of this claim, or some other unknowable time, interferes with petitioner's decision to end her attorney-client relationship and still pursue this claim. This impedes the purpose of § 15(e) to encourage representation, particularly if petitioner secures new counsel. Further, it may be difficult for counsel to obtain attorneys' fees and costs once he is no longer counsel of record in this case and his attorney-client relationship with petitioner is terminated. Not allowing interim fees at this time would pose an undue hardship on petitioner and counsel alike. *See McKellar v. Sec'y of HHS*, 09-841V, 2011 WL 3425606, *1 (Fed. Cl. Spec. Mstr. June 3, 2011), *mot. rev. docketed* (Fed. Cl. July 5, 2011) (*citing Silver v. Sec'y of HHS*, No. 99-462V, 2009 WL 2950503, *9-10 (Fed. Cl. Spec. Mstr. Aug. 24, 2009)).

Accordingly, I hold 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 $ 5705.00 to be awarded to the law firm of Conway, Homer

& Chin-Caplan, P.C. and an additional $200.00 for work performed by Williams Kherkher. Respondent does not object to the *amount* of the fees and costs sought. [3]

The request for interim attorneys' fees and costs is 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 requested are reasonable and appropriate.

Pursuant to §15(e), I award a lump sum of $ 5905.00 [4] to be paid in the form of a check payable jointly to the petitioner and petitioner's counsel, Conway, Homer & Chin-Caplan, P.C.

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

[3] In lieu of filing a Vaccine General Order 9 statement, pursuant to the stipulation the firm agrees to reimburse petitioner any costs that petitioner personally incurred, up to the date of counsel's motion for interim fees, that are compensable under § 15(e)(1).

[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. Sec'y of 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).