

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 10-377 V

December 16, 2011

To be Published

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LISA WOODS and JASON FORD,	*	
parents and natural guardians of	*	
CASON EUGENE FORD,	*	
	*	
Petitioners,	*	Attorneys' Fees and Costs;
	*	Interim Award
v.	*	
	*	
SECRETARY OF THE DEPARTMENT OF	*	
HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

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Lisa Woods and Jason Ford, McDonald, TN, for petitioners (pro se).  
Julia W. McInerny, Washington, DC, for respondent.

**MILLMAN, Special Master**

### **DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS<sup>1</sup>**

On June 18, 2010, petitioners filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10-34, alleging that flu vaccine that their son Cason Eugene Ford (hereinafter, Cason) received on October 22, 2009 caused his Guillain-Barré Syndrome (GBS) in January 2010. By April 6, 2010, Cason's gait was significantly better. Med. recs. at Ex. 4, p. 3.

In an Order filed July 21, 2011, the undersigned granted petitioners' unopposed motion for an enlargement of time to make a settlement demand by August 17, 2011. Petitioners did make a settlement demand on respondent.

On September 12, 2011, respondent's counsel communicated with the undersigned's law clerk to say that the parties were still negotiating a settlement, and requested a rescheduling of a

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<sup>1</sup> Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

telephonic status conference that was set for the next day, September 13, 2011. The undersigned granted respondent's oral motion on September 12, 2011, and rescheduled the telephonic status conference for October 5, 2011.

On October 4, 2011, petitioners' counsel filed a Motion for Leave to Withdraw as counsel, citing "irreconcilable differences between the undersigned attorney and the Petitioners." Mot. at p. 1. After alerting her clients to the proposed withdrawal motion, petitioners' counsel had not heard from either of them. On the same day as the filing of the Motion for Leave to Withdraw, October 4, 2011, petitioners filed an Application for Attorneys' Fees and Costs.

On October 5, 2011, the undersigned granted the Motion for Leave to Withdraw, making this case pro se and providing to petitioners a list of attorneys admitted to practice in the Vaccine Program.

On December 7, 2011, respondent filed her Opposition to Petitioners' Application for Attorneys' Fees and Costs.

On December 12, 2011, the undersigned held a telephonic status conference with one of petitioners, Lisa Woods, to be followed by another status conference on January 24, 2012. The undersigned has encouraged Ms. Woods to obtain another vaccine attorney.

In the Application for Attorneys' Fees and Costs, petitioners request \$14,530.50 in attorneys' fees and \$1,148.65 in attorneys' costs for a total of \$15,859.15. Petitioners' counsel at that time was unaware of petitioners having personally expended costs in the case, no doubt because petitioners failed to communicate with her after she alerted them to the pending Motion to Withdraw.

### **Awarding Attorneys' Fees and Costs**

The Federal Circuit in Avera v. Sec'y of HHS, 515 F.3d 1343 (Fed. Cir. 2008), described the parameters of awarding attorneys' fees and costs under the Vaccine Act:

Under the Vaccine Act, a special master who has awarded a petitioner "compensation" on a vaccine related claim "shall also award as part of such compensation an amount to cover . . . reasonable attorneys' fees." 42 U.S.C. § 300aa-15(e)(1). Even if a petitioner is not awarded "compensation," the special master "may award an amount of compensation to cover petitioner's reasonable attorneys' fees . . . if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petitioner was brought."

515 F.3d at 1347 (footnotes omitted). The Federal Circuit in Avera also stated, "There is nothing in the Vaccine Act that prohibits the award of interim fees." 515 F.3d at 1351. The Federal

Circuit continued, “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. at 1352.

### **The Appropriateness of an Interim Award**

Notably, in respondent’s Opposition to Petitioners’ Application for Attorneys’ Fees and Costs, respondent does not object to the amounts petitioners request for attorneys’ fees and costs. Respondent’s objections are grounded solely on legal arguments, e.g., that interim fees are not appropriate before there is a ruling on entitlement or a petitioner has failed to establish entitlement to compensation, but brought the petition in good faith and there was a reasonable basis for the claim, citing 42 U.S.C. § 300aa-15(e)(1). Opp’n 2-3. Because the undersigned has not held petitioners are entitled to compensation or dismissed the case, respondent posits that an award of interim attorneys’ fees and costs is inappropriate. Opp’n 3. Respondent notes the undersigned has rejected this reasoning before in Soto v. Sec’y of HHS, No. 09-897V, 2011 WL 2269423 (Fed. Cl. Spec. Mstr. June 7, 2011), and Calise v. Sec’y of HHS, No. 08-865V, 2011 WL 2444810 (Fed. Cl. Spec. Mstr. June 11, 2011). Opp’n 3 n.3. Respondent might also have noted the undersigned rejected this reasoning in Gabrielle v. Sec’y of HHS, No. 07-304V, 2011 WL 2445941 (Fed. Cl. Spec. Mstr. May 26, 2011). All three cases concerned withdrawal of petitioners’ counsel prior to a determination of entitlement.

In Gabrielle, the undersigned stated:

Consistent with [Soto], the undersigned can find no reason to subject counsel in the Vaccine Program to delays in compensation for indefinite periods of time when their service to their client is at an end and they will not be filing future applications in this case. Paying attorneys when their service is complete is appropriate, [petitioner’s counsel’s] service is at an end, and an interim award is appropriate in this case.

2011 WL 2445941, at \*1; see also Soto, 2011 WL 2269423, at \*4; Calise, 2011 WL 2444810, at \*3.

Respondent denies the Federal Circuit’s holding in Shaw v. Sec’y of HHS, 609 F.3d 1372, 1376 (Fed. Cir. 2010) (petitioners are entitled to interim attorneys’ fees and costs before a determination of entitlement), has any precedential value because respondent did not have a “proper vehicle” in that case to challenge the interim fees language in the Federal Circuit’s decision in Avera. Opp’n 7 n.8. There could be no clearer statement than the Federal Circuit’s holding: “Deferring consideration of attorneys’ fees and costs until a decision on the merits is effectively a denial of interim fees.” 609 F.3d at 1376. The undersigned and respondent are bound by the holdings of the Federal Circuit.

Special Master Hastings rejected respondent’s argument on the inappropriateness of an interim award before a determination of entitlement in Crutchfield v. Sec’y of HHS, No. 09-39V,

2011 WL 3806351, at \*2 (Fed. Cl. Spec. Mstr. Aug. 4, 2011). Special Master Hastings specifically rejected respondent's argument that the Avera examples of when an interim attorneys' fees and costs award is appropriate "must be limited to the very narrow procedural and factual scenario at issue in that case." Id. (emphasis in original). Respondent makes the identical argument here. Opp'n 6. Special Master Hastings stated that the Avera court made "some brief comments concerning the *circumstances* under which interim award might be appropriate," and concluded, "Those comments do not imply in any way that interim fees are appropriate only after judgment 'on the merits' has occurred." 2011 WL 3806351, at \*3 (emphasis in original). Special Master Hastings then discussed Shaw:

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

2011 WL 3806351, at \*4 (footnote omitted). Special Master Hastings then cites 19 cases in which special masters have decided interim attorneys' fees and costs are appropriate when the special master has not yet determined entitlement. Id. When respondent decided two and one-half years after the decision in Avera to raise the legal argument she is pressing now, special masters rejected what Special Masters Hastings termed "respondent's current very narrow interpretation," citing eight cases. Id. at \*5. The undersigned's decisions in Soto, Calise, and Gabrielle were issued after this listing of eight cases as was Special Master Moran's decision in Pestka v. Sec'y of HHS, No. 06-708V, 2011 WL 4433634 (Fed. Cl. Spec. Mstr. Aug. 30, 2011). Adding these four cases to the decision in Crutchfield makes 13 decisions in which respondent has persistently and futilely argued its opposition to the award of interim attorneys' fees and costs in cases in which a determination of entitlement has not been made.

### **The McKellar Decision**

There is one difference in respondent's argument in this case: the Honorable Eric G. Bruggink's decision in McKellar v. Sec'y of HHS, No. 09-841V, \_\_\_ Fed. Cl. \_\_\_, 2011 WL 5925323 (Fed. Cl. Nov. 4, 2011), reversing Special Master Lord's award of interim attorneys' fees and costs to petitioner's counsel who withdrew, and remanding the case for Special Master Lord to determine whether or not there was a reasonable basis for petitioner to go forward. Opp'n 8, 10-11, 13. The undersigned prefaces a discussion of McKellar with the caveat that special masters are not bound by their own or other special masters' decisions, or those of the United States Court of Federal Claims, except in the same case. Hanlon v. Sec'y of HHS, 40 Fed. Cl. 625, 630 (1998).

In McKellar, petitioner, initially pro se, claimed injuries from the receipt of Menactra, Varicella, DTaP, and human papillomavirus (Gardasil) vaccines. 2011 WL 5925323, at \*1. The injuries about which she complained were lip and tongue blisters, fever, difficulty swallowing, mouth pain, and swollen throat and mouth. Id. Subsequently, she had multiple intraoral ulcers,

swollen lips, and white patches on her tongue. Id. When she obtained counsel, counsel filed 400 pages of materials. Id. Intending to withdraw as counsel, petitioner's counsel applied for interim attorneys' fees and costs, which Special Master Lord granted. Id. On appeal, Judge Bruggink interpreted the Federal Circuit's decision in Avera to mean that only if petitioners demonstrate "some special showing," such as undue hardship, substantial fees, the employment of experts, and a long delay in the issuance of an award, are interim fee awards appropriate. Id. at \*4. Judge Bruggink stated, in response to respondent's objection that interim fee awards are appropriate only after entitlement is decided, "Under *Shaw*, . . . it is clear that the Act permits interim fees even before an entitlement decision." Id. at \*5 (footnote omitted). Judge Bruggink also stated, "*Shaw* is binding." Id. at \*5 n.7.

Judge Bruggink remanded the case to Special Master Lord because she stated in her decision that the medical evidence did not disclose any evidence of a valid claim and the claim was weak. This prompted respondent's assertion that an award of attorneys' fees would be improper because, in the event of dismissal, petitioner and her attorney might fail to satisfy the statutory requirement of proving a reasonable basis to proceed (whereas good faith is generally presumed). Id. at \*7. Judge Bruggink regarded the special master's statements as tantamount to a rejection of the claim on the merits. Id. Citing the Federal Circuit's decision in Perreira v. Sec'y of HHS, 33 F.3d 1375, 1376, 1377 (Fed. Cir. 1994), in which a reasonable basis to go forward terminated when the inadequacy of petitioner's expert's report became apparent, Judge Bruggink stated that unlike good faith, there is no presumption of a petitioner's reasonable basis to proceed. Id. at \*8. Juxtaposing the special master's regard of the petitioner's case as weak with her statement that petitioner has a reasonable basis to bring the claim, "notwithstanding the weakness of the claim," Judge Bruggink held that the special master had presumed a reasonable basis, which she may not do. Id. at \*9.

Judge Bruggink lists some situations in Avera in which interim fee awards would be appropriate as necessary prerequisites to an award. The undersigned respectfully disagrees with Judge Bruggink's interpretation that only if petitioners have protracted proceedings, employment of experts, and undue hardship are interim fee awards appropriate. The undersigned regards these situations as illustrative rather than exhaustive. See Crutchfield, 2011 WL 3806351, at \*5; Kirk v. Sec'y of HHS, No. 08-241V, 2009 WL775396, at \*1 (Fed. Cl. Spec. Mstr. Mar. 13, 2009) (Avera does not limit award of interim fees only to those situations it listed; awards are within the special master's discretion).

In Avera, the Federal Circuit notes that interim fee awards are appropriate for a policy reason as well, i.e., to satisfy "one of the underlying purposes of the Vaccine Act [which] was to ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims." Id. at 1352 (citation omitted). The Federal Circuit also notes that "delaying payments decreases the effective value of awards." Id.

In the instant action, petitioners' case on the merits is continuing unlike the situation in Avera in which petitioners' case was dismissed. Here, petitioners' attorney has withdrawn. The issuance of a minor amount of fees facilitates petitioners' attorney, who is a regular practitioner in

the vaccine bar, to continue to represent petitioners in this Program. This fulfills the Federal Circuit's concern in Avera that a competent bar be readily available to prosecute vaccine claims.

Respondent cites Special Master Golkiewicz's decision in Snyder v. Sec'y of HHS, No. 04-1041 (Fed. Cl. Spec. Mstr. Nov. 14, 2011), which is unpublished, but this case is actually Stone, not Snyder. Opp'n 8. Special Master Golkiewicz dismissed the case in chief on April 15, 2010, which went up to the United States Court of Federal Claims on appeal, which granted the motion for review on October 28, 2010. He dismissed again on January 20, 2011, and the case went up on appeal again. This time, the judge affirmed the dismissal on May 19, 2011. Slip op. at 1. The case is now pending before the Federal Circuit. Slip op. at 2. Special Master Golkiewicz had previously awarded interim attorneys' fees and costs in Stone on September 9, 2010 while the case was on review before the Court of Federal Claims, awarding \$131,614.84 in attorneys' fees and costs. Petitioners filed a second Application for Award of Interim Attorneys' Fees and Reimbursement of Costs on September 21, 2011, requesting \$41,645.45 in additional attorneys' fees and costs without making any argument about the appropriateness of an award at this juncture. Id. at 2. Special Master Golkiewicz denied petitioners' second application for interim attorneys' fees and costs based on his prior award to them of interim attorneys' fees and costs and in the absence of any argument in petitioners' application. Slip op. at 3. Relying on Judge Bruggink's decision in McKellar, Special Master Golkiewicz held that petitioners had failed to make a special showing to warrant interim fees. Petitioners failed in satisfying their burden to prove entitlement of interim fees. Id.

The undersigned distinguishes the instant action from the circumstances in Stone. In Stone, petitioners have largely been made whole with a prior interim award of over \$131,000, whereas they sought just \$45,000 in a second application. In the instant action, petitioners have received no attorneys' fees and costs and their counsel has withdrawn. The undersigned notes in Stone that Special Master Golkiewicz commented that in their first application for interim fees and costs, petitioners also did not make any arguments in justification of their application, but he assumed because of the protracted proceedings that they merited an interim award. Id. Petitioners' counsel in the instant action is also silent as to the merits of petitioners' application. For the practical reality that there is no necessity for counsel to wait until the end of the litigation, whenever that may occur, and to maintain support of petitioners' bar, a rather small award of \$15,859.15 is warranted, particularly in light of respondent's not contesting the amount sought, but merely arguing that an award is inappropriate on legal grounds.

The instant action has lasted one and one-half years to date and there is no certain end because petitioners are seeking new counsel and are at present pro se. It is unknowable whether this case will proceed to settlement or be litigated and ultimately decided on entitlement, and if petitioners prevail, on damages. This is justification for an award of interim attorneys' fees and costs at the present time.

### **Reasonable Basis to Proceed**

Respondent's final argument against an interim award of attorneys' fees and costs in the instant action is that petitioners have failed to show a reasonable basis to proceed. Opp'n 11-14. Respondent does not contest petitioners' good faith. Opp'n 13 n.10.

The term "reasonable basis" is not defined in the Vaccine Act. The case law, however, offers interpretive guidance. "[T]he 'reasonable basis' requirement 'is objective, looking not at the likelihood of success of a claim but more to the feasibility of the claim.'" Turner v. Sec'y of HHS, No. 99-544V, 2007 WL 4410030, at \*6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007). A petitioner does not need to establish causation to show a claim has a reasonable basis. Stevens v. Sec'y of HHS, No. 90-221V, 1992 WL 159520, at \*3 (Fed. Cl. Spec. Mstr. June 9, 1992). Historically, special masters have been "quite generous in finding a reasonable basis for petitioners." Turner, 2007 WL 4410030, at \*8 (quoting Turpin v. Sec'y of HHS, No. 99-564V, 2005 WL 1026714, at \*2 (Fed. Cl. Spec. Mstr. Feb. 10, 2005)).

The evidence of petitioners' reasonable basis to proceed in the instant action is that the parties were engaged in settlement negotiations. These negotiations prompted respondent to request a rescheduling of a telephonic status conference so that the negotiations could continue. The settlement negotiations terminated when petitioners' counsel withdrew. Had respondent considered that this flu vaccine/GBS case had no merit, respondent would not have been willing to pay damages of any amount to petitioners. The undersigned holds there was a reasonable basis to proceed in this case.

### CONCLUSION

An interim award of attorneys' fees and costs is appropriate in this case. The undersigned awards petitioners interim attorneys' fees and costs in the following amount:

**\$15,859.15**, representing \$14,530.50 in attorneys' fees and \$1,148.65 in attorneys' costs. The award shall be in the form of a check made jointly payable to petitioners and the law firm of Maglio, Christopher & Toale, PA.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.<sup>2</sup>

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
Laura D. Millman  
Special Master

<sup>2</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.