

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

ILYA DOBRYDNEV, *
*
Petitioner, * No. 04-1593V
* Special Master Christian J. Moran
*
v. * Filed: September 23, 2013
*
SECRETARY OF HEALTH * Award of attorneys' fees and costs on an
AND HUMAN SERVICES, * interim basis; stipulation; award in the
* amount to which respondent did not
Respondent. * object.

Mark P. Friedlander, Jr., Friedlander, Friedlander & Earman, P.C., McLean, VA, for petitioner;
Heather L. Pearlman, United States Department of Justice, Washington, DC, for respondent.

DECISION AWARDING ATTORNEYS' FEES & COSTS ON AN INTERIM BASIS¹

Ilya Dobrydnev² alleged that a dose of the hepatitis B vaccine caused him to develop chronic fatigue syndrome. The Court of Federal Claims found that he was entitled to compensation. Dobrydneva IV, 98 Fed. Cl. 190 (2011).

On September 4, 2013, the Secretary filed a stipulation of facts concerning interim attorneys' fees and costs. According to the stipulation, petitioner provided the Secretary with a draft application for interim attorneys' fees and costs. After informal discussions, the parties agreed on fees and costs in the amount of \$396,274.95, which consists of all attorney and paralegal fees and costs incurred by petitioner and his counsel through May 31, 2013.

¹ The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa—12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

² Mr. Dobrydnev substituted as petitioner in place of his parents, Dr. Boris Dobrydnev and Dr. Yuliya Dobrydneva, when he reached the age of majority. Order, issued June 13, 2011. Because petitioner's mother was the lead petitioner prior to Mr. Dobrydnev's substitution, previous decisions are referred to as "Dobrydneva," reflecting the gender-dependent form of the Russian surname.

PROCEDURAL HISTORY

An abbreviated recitation of the procedural history begins with the filing of Ilya Dobrydnev's petition on October 25, 2004. Petitioner supported his claim with reports from Dr. David Bell and Dr. Nancy Kilimas. Following the Secretary's responsive expert report from Dr. Raoul Wientzen, petitioner filed an expert report from Dr. James Oleske on February 23, 2006. On April 28, 2006 and July 28, 2006, respectively, the Secretary filed a supplemental report from Dr. Wientzen and a report from Dr. Alan Brenner.

A hearing was held on April 25-26, 2007, to allow Dr. Bell, Dr. Oleske, Dr. Wientzen, and Dr. Brenner to explain their views. Dr. Dobrydneva, petitioner's mother, and Dr. Fink, his pediatrician, also testified at this hearing. On May 2, 2008, petitioner filed a motion requesting an interim award of attorneys' costs for work performed by Dr. Oleske.

Petitioner filed exhibits 1-19 on June 25, 2007. On August 22, 2007, petitioner filed a psychiatric report from Charles Parker, D.O. Nearly one year later, on August 1, 2008, this case was reassigned to the undersigned. On May 18, 2009, petitioner filed a post-hearing brief. On March 12, 2010, the undersigned issued a decision denying entitlement to compensation. Dobrydneva I, 2010 WL 2143481 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

On July 30, 2010, following petitioner's motion for review, the Court issued an order vacating the undersigned's March 12, 2010 decision and remanding with instructions to afford petitioner the opportunity to present additional evidence. Dobrydneva II, 94 Fed. Cl. 134 (2010). On August 10, 2010, the undersigned issued a decision awarding attorneys' costs for the work performed by Dr. Oleske.

Another hearing was held on September 29, 2010, during which Dr. Fink, Dr. Bell, and Dr. Oleske testified. Petitioner filed his post-hearing brief on October 22, 2010. On October 27, 2010, the undersigned issued a decision on remand, again denying entitlement to compensation. Dobrydneva III, 2010 WL 8106881 (Fed. Cl. Spec. Mstr. Oct. 27, 2010).

On April 22, 2011, following petitioner's second motion for review, the Court issued another order, this time reversing the undersigned's October 27, 2010 decision and finding Mr. Dobrydnev entitled to compensation. Dobrydneva IV, 98 Fed. Cl. 190. A damages order was issued on April 25, 2011. Between May 2011 and April 2013, status conferences regarding damages were held approximately every month. Even with the special master's participation, the process for quantifying damages was complicated.

Following a common practice in Vaccine Program cases, each party separately retained a life care planner to present information about Mr. Dobrydnev's future needs. Additionally, on January 9, 2012, petitioner filed a report from Dr. Michael Stutts, a neuropsychologist. Petitioner filed a life care plan from Ms. Lynne Trautwein on March 16, 2012. On June 21, 2012, petitioner filed an expert report from a clinical neuropsychologist, Dr. Gudrun Lange.

A hearing on damages was held on August 20, 2012. On September 4, 2012, petitioner filed another report from Dr. Lange. A supplemental damages hearing to take the testimony of Dr. Lange was held on October 25, 2012.

On October 31, 2012, petitioner filed an application for interim attorneys' costs for the work performed by Dr. Stutts and Dr. Lange. On December 5, 2012, the undersigned issued a decision awarding interim attorneys' costs in the amount requested.

On December 7, 2012, petitioner filed a brief on the issue of entitlement. Petitioner filed an amended life care plan on December 27, 2012, and a report from vocational expert Kathryn Reid on March 4, 2013. Petitioner filed another report from Ms. Trautwein on March 26, 2013. On April 3, 2013, petitioner filed a supplemental brief in support of his claim for pain, suffering, and emotional distress damages.

On April 19, 2013, the undersigned issued a ruling regarding damages. A decision awarding damages was issued on April 26, 2013. Judgment entered on May 30, 2013. On July 29, 2013, the Secretary filed an appeal of the Court's final judgment with the Federal Circuit.

On September 4, 2013, the Secretary filed a stipulation of facts concerning interim attorneys' fees and costs.

ANALYSIS

Broadly speaking, there are two issues. The first is whether Mr. Dobrydnev should receive any attorneys' fees and costs at this time. The second question is assuming that some award is appropriate, what is a reasonable amount.

I. Should Mr. Dobrydnev Be Awarded Attorneys' Fees and Costs on an Interim Basis?

In Avera v. Sec'y of Health & Human Servs., the Federal Circuit stated that awards of attorneys' fees and costs on an interim basis are permitted in the Vaccine Program. 515 F.3d 1343, 1352 (Fed. Cir. 2008). Although the Secretary has argued that the circumstances in which Avera permits an award of attorneys' fees and costs on an interim basis are relatively narrow in other cases, the undersigned has disagreed with this argument. See, e.g., Nuttall v. Sec'y of Health & Human Servs., No. 07-810V, 2011 WL 5926131, at *2 (Fed. Cl. Spec. Mstr. Nov. 4, 2011) (citing cases). Here, the Secretary has stipulated to an award of interim attorneys' fees and costs.

A subsidiary question is whether an interim award should be made in this case, which is a matter of discretion. This question turns on the circumstances of this case.

To be eligible for any award of attorneys' fees and costs, Mr. Dobrydnev must satisfy the standards for good faith and reasonable basis. See 42 U.S.C. § 300aa—15(e) (2012). Because petitioner received compensation, he is entitled to an award of attorneys' fees and costs. 42 U.S.C. § 300aa—15(e).

Another question is whether an award of attorneys' fees and costs should be made now, that is, on an interim basis. This issue involves consideration of various factors, including protracted proceedings, costly experts, and undue hardship. Avera, 515 F.3d at 1351-52; McKellar v. Sec'y of Health & Human Servs., 101 Fed. Cl. 297, 300-01 (2011) (discussing Avera factors).

Mr. Dobrydnev satisfies these factors. The case has been pending for nearly nine years, with the question of entitlement at issue for over six years. Additionally, Mr. Dobrydnev has retained several experts whose invoices exceed \$40,000.00. Considering the protracted nature of this case, and the Secretary's recent appeal, there seems to be little reason to force Mr. Dobrydnev to wait for reimbursement of attorneys' fees and costs. Consequently, Mr. Dobrydnev will be awarded some amount of attorneys' fees and costs on an interim basis.

II. What Is A Reasonable Amount of Attorneys' Fees and Costs?

The second issue is determining a reasonable amount for attorneys' fees and costs. The Secretary agreed not to object to an award for \$396,274.95 in attorneys' fees and costs. A review of the material indicates that the components of Mr. Dobrydnev's request are reasonable. He is awarded the amount to which the Secretary has not objected.

CONCLUSION

Mr. Dobrydnev is entitled to an interim award of attorneys' fees and costs, as contained in the stipulation filed September 4, 2013. The special master determines that there is no just reason to delay the entry of judgment on these interim attorneys' fees and costs.

Therefore, in the absence of a motion for review filed under RCFC Appendix B, **the Clerk shall enter judgment in petitioner's favor for \$396,274.95 in interim attorneys' fees and costs.** This amount shall be paid as a lump sum in the form of a check payable to petitioner and petitioner's attorney, Mark P. Friedlander, Jr., for attorneys' fees and costs available under 42 U.S.C. § 300aa—15(e). Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

IT IS SO ORDERED.

s/ Christian J. Moran
Christian J. Moran
Special Master