

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

STACEY HEINZELMAN,	*	
	*	No. 07-01V
Petitioner,	*	Judge Edward J. Damich
	*	Special Master Christian J. Moran
v.	*	
	*	Filed: March 13, 2012
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	Attorneys' fees, interim award
	*	pending appeal, <u>McKellar</u>
Respondent.	*	

Richard Gage, Richard Gage, PC, Cheyenne, WY, for petitioner;
Ryan D. Pyles, United States Dep't of Justice, Washington, DC, for respondent.

**DECISION DENYING ATTORNEYS' FEES
AND COSTS ON AN INTERIM BASIS¹**

Stacey Heinzelman received a judgment from the Court of Federal Claims that awarded her compensation on her claim that a flu vaccine caused her to suffer Guillain-Barré syndrome pursuant to the National Vaccine Injury Compensation

¹ Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

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 clearly be an unwarranted invasion of privacy. When such a decision is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

Program, 42 U.S.C. § 300aa—10 et seq. (2006). Opinion, filed June 24, 2011, 98 Fed. Cl. 808 (denying motion for review). The amount of compensation awarded in this judgment, however, is the subject of an appeal pending at the Federal Circuit.

Ms. Heinzelman is requesting an award of attorneys' fees and costs while her appeal is pending. Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), permits – in at least some circumstances – an award of attorneys' fees and costs on an interim basis. The primary disputed issue is whether Ms. Heinzelman has shown that an award of attorneys' fees and costs is appropriate. For the reasons explained below, she has not made that showing and her request for an award on an interim basis is denied.

PROCEDURAL BACKGROUND

Ms. Heinzelman filed her petition on January 3, 2007, and a hearing was held on April 28, 2008. A ruling finding that Ms. Heinzelman was entitled to compensation was issued on December 11, 2008. 2008 WL 5479123. The parties began the process for quantifying the amount of compensation to which Ms. Heinzelman was entitled.

During this process, Ms. Heinzelman filed a motion requesting an award of her attorneys' fees and costs on an interim basis pursuant to Avera. The parties reached a stipulation that was incorporated into an October 16, 2009 decision awarding Ms. Heinzelman \$29,000.00 attorneys' fees and \$38,544.36 costs. The total amount awarded was \$67,544.36. 2009 WL 3719215.

The parties eventually resolved all issues relating to damages, except one. The parties disputed whether Ms. Heinzelman's receipt of benefits through Social Security Disability Insurance (SSDI) should offset the amount of compensation available in the Vaccine Program. Resolution of this issue required briefing. A ruling in Ms. Heinzelman's favor was issued on May 18, 2010. 2010 WL 2342468. A decision awarding compensation was issued on December 7, 2010. 2010 WL 5475449.

Pursuant to Vaccine Rule 23, the Secretary filed a motion for review. The Secretary challenged both the entitlement ruling and the SSDI offset ruling. Resp't Mot. for Review, filed Jan. 6, 2011.

On the same day, Ms. Heinzelman filed a motion for a second award of attorneys' fees and costs. Although respondent opposed this motion, Ms. Heinzelman was awarded an additional \$31,177.79 in attorneys' fees and costs. 2011 WL 7463322 (Fed. Cl. Spec. Mstr. March 24, 2011).

On June 24, 2011, the Court denied the Secretary's motion for review. The Court upheld both the special master's rulings regarding entitlement and regarding the SSDI offset. 98 Fed. Cl. 808. Judgment entered in accord with the special master's December 7, 2010 decision.

The Secretary appealed the judgment to the Federal Circuit. In this appeal, the Secretary sought review of only the SSDI offset issue. The Secretary did not question the December 11, 2008 ruling finding Ms. Heinzelman is entitled to compensation.

On January 12, 2012, Ms. Heinzelman filed a motion requesting a third award of attorneys' fees and costs on an interim basis. Although this motion was directed to the presiding judge, the Court assigned this matter to the special master. Order, filed January 18, 2012.

The Secretary opposed Ms. Heinzelman's request. She argued that a third award of interim attorneys' fees is "inappropriate, because [Ms. Heinzelman] has not demonstrated any case-specific, compelling factors that might justify a third interim award." Resp't Opp'n at 1.² Ms. Heinzelman filed a reply and the matter is ready for adjudication.

STANDARDS FOR AWARDING ATTORNEYS' FEES AND COSTS ON AN INTERIM BASIS

There is no question that Ms. Heinzelman is entitled to an award of attorneys' fees and costs. Given that the Secretary is not challenging the December 11, 2008 entitlement ruling at the Federal Circuit, Ms. Heinzelman will receive some amount of compensation. A petitioner who receives compensation is entitled to a reasonable amount of attorneys' fees. 42 U.S.C. § 300aa—15(e)(1) .

² In many cases, the Secretary has argued that special masters may not award attorneys' fees on an interim basis when there has not been a judgment awarding or denying petitioners compensation on the underlying merits. The Secretary has not advanced that argument because there is a judgment here.

The question is when should those attorneys' fees be awarded --- now or at the end of the case?

Special masters have discretion in deciding whether and when to award attorneys' fees and costs on an interim basis. See Dougherty v. Sec'y of Health & Human Servs., No. 09-799V, 2011 WL 5357816, at *2 and *17 (Fed. Cl. Spec. Mstr. Oct. 14, 2011) (indicating that the special master waited for resolution of Federal Circuit appeals rather than award fees on an interim basis); Friedman v. Sec'y of Health & Human Servs., No. 02-1467V, 2009 WL 4975267, at *16 (Fed. Cl. Spec. Mstr. Dec. 4, 2009) (citing cases from outside the Vaccine Program), motion for review denied, 94 Fed. Cl. 323, 334 (2010) (affirming denial of award of interim fees and stating “[t]he decision to award interim fees is discretionary”).

Analysis of when special masters should award attorneys' fees on an interim basis begins with Avera, because until that case, special masters did not award attorneys' fees on an interim basis. Marty and Kellie Avera initially requested that their attorney (Mr. Moxley) be compensated at a rate of \$200 per hour. The initial fee petition, which the Averas filed on February 27, 2006, sought a total award of \$12,073.77. The Averas subsequently amended their fee application, requesting that Mr. Moxley be compensated at \$574-\$598 per hour in accord with the Laffey matrix. The special master found the amended fee application was not in accord with law and awarded the amount originally sought. Avera v. Sec'y of Health & Human Servs., No. 04-1385, 2006 WL 5618158 (Fed. Cl. Spec. Mstr. Aug. 29, 2006).

The Averas filed a motion for review. In conjunction with an argument that the special master compensated Mr. Moxley at an hourly rate that was too low, the Averas requested that the Court order an “interim payment of the amount approved by the Special Master.” 75 Fed. Cl. 400, 401 (2007). The Court held that the Vaccine Act did not authorize special masters to award attorneys' fees before the decision on the merits. Id. at 405. The Court also ruled that the special master was correct in rejecting the contention that Mr. Moxley should be compensated at rates set in the Laffey matrix. Thus, the Court in an Opinion and Order, filed on Feb. 7, 2007, directed that judgment be entered in the Averas' favor in the amount of \$12,073.77.

The Averas filed an appeal. With respect to the reasonable rate of compensation, the Federal Circuit upheld the special master's conclusion. Thus, the Federal Circuit affirmed the judgment of the Court. 515 F.3d at 1352.

The Federal Circuit also commented upon the availability of interim fees. The Federal Circuit stated “[t]he statute permits such awards.”³ The Federal Circuit also determined whether the Averages were entitled to an interim award and found that the Averages were “not entitled to an award of interim fees.” The reasons for this conclusion included: that the case was not protracted because the Averages made a request for interim fees only pending appeals, the Averages had not retained costly experts, the Averages had not suffered undue hardship, and the amount of fees was not substantial. Id.

Special masters have considered these factors in deciding whether to award attorneys’ fees and costs on an interim basis. See Crutchfield v. Sec’y of Health & Human Servs., No. 09-39V, 2011 WL 3806351, at *6-7 (Fed. Cl. Spec. Mstr. Aug. 4, 2011); Whitener v. Sec’y of Health & Human Servs., No. 06-477V, 2011 WL 1467919, at *5 (Fed. Cl. Spec. Mstr. Mar. 25, 2011). The Second Interim Fees Decision in this case reflects this analysis. The Second Interim Fees Decision concluded that “Appellate authorities have not directed special masters to award interim fees only in exceptional cases. Absent some guidance on this point, the better practice is to pay qualified petitioners for their attorneys’ fees when practical.” 2011 WL 7463322, at *6. As noted previously, the Second Interim Fees Decision awarded Ms. Heinzelman \$31,177.79.

Special masters received additional guidance about when to award attorneys’ fees on an interim basis in McKellar v. Sec’y of Health & Human Servs., 101 Fed. Cl. 297 (2011).⁴ The Court stated that Avera “suggests that there is not a presumption of entitlement to interim fees” because of the Federal Circuit’s discussion of various factors. McKellar also stated that “[W]e view Avera to mean that some special showing is necessary to warrant interim fees, including but not limited to the delineated factors of protracted proceedings, costly experts, or undue hardship. If mere good faith and reasonable basis were all that is necessary, the Avera factors become superfluous and interim fees would be the norm.” 101 Fed. Cl. at 300-01.

³ Shaw v. Sec’y of Health & Human Servs., 609 F.3d 1372, 1374 (Fed. Cir. 2010), confirmed that Avera “held that the Vaccine Act permits the award of interim fees and costs.”

⁴ Strictly speaking, McKellar constitutes binding precedent only in the context of a remand. Hanlon v. Sec’y of Health & Human Servs., 40 Fed. Cl. 625, 630 (1993), aff’d, 191 F.3d 1344 (Fed. Cir. 1999).

DO THE AVERA FACTORS WEIGH IN FAVOR OF AWARDING MS. HEINZELMAN ATTORNEYS' FEES ON AN INTERIM BASIS?

In light of McKellar, Ms. Heinzelman bears the burden of establishing a “special showing” to justify an award on an interim basis. Ms. Heinzelman may meet this standard in a variety of ways but any analysis should start with the factors indentified in Avera.

- **Protracted Proceedings**

“Interim fees are particularly appropriate in cases where proceedings are protracted.” Avera, 515 F.3d at 1352. The Federal Circuit ruled that the Averas’ case presented “only a short delay in the award pending the appeal.”

The context of this statement was a case in which the Averas first requested attorneys’ fees on February 27, 2006, and the Court of Federal Claims entered judgment awarding attorneys’ fees on February 7, 2007. The Federal Circuit issued Avera on February 6, 2008, almost exactly one year after the judgment, and nearly two years after the initial application.

For Ms. Heinzelman, the two previous decisions awarding attorneys’ fees on an interim basis ameliorate the duration of the proceedings. The Second Interim Fees Decision reset the amount owed to Ms. Heinzelman in attorneys’ fees to zero. The Second Interim Fees Decision was issued on March 24, 2011, slightly less than one year ago, making Ms. Heinzelman’s case roughly equivalent to the Averas’ case.

One difference between Ms. Heinzelman’s case and Avera is the reason for the protracted proceedings. Here, the Secretary has extended the duration of Ms. Heinzelman’s case by filing a motion for review and a Federal Circuit appeal.

- **Costly Experts**

Although Ms. Heinzelman retained experts, the two previous interim decisions awarding attorneys’ fees and costs have compensated her for retaining them. Her presently pending fee application does not include a request for retaining any experts.

- **Amount of Fees**

The Federal Circuit, in Avera, considered that the “amount of fees was not substantial.” 515 F.3d at 1352. This statement was made in the context of a fee request for approximately \$13,000.

Here, the amount claimed is in the same ballpark. Ms. Heinzelman has requested \$28,802.99. Pet’r Appl’n, filed Jan. 12, 2012, tab A. Although this amount is more than the amount at issue in Avera, Ms. Heinzelman has received \$98,722.15 in attorneys’ fees and costs already. If it is assumed that Ms. Heinzelman’s pending request is entirely reasonable, then she has received approximately 75 percent of her attorneys’ fees and costs already. The two previous interim fee awards place Ms. Heinzelman in a relatively better position than the Averas, who had not received any award of attorneys’ fees and costs when the Federal Circuit was considering whether they were entitled to an award of interim fees.

- **Undue Hardship**

Ms. Heinzelman’s arguments regarding undue hardship rest upon the forthcoming oral argument at the Federal Circuit.⁵ Ms. Heinzelman wants her attorney (Mr. Gage) to attend the oral argument. Ms. Heinzelman points out that funding Mr. Gage’s travel is challenging because she is not working due to her vaccine-related injury and her family is “having a difficult time getting by financially.” Pet’r Decl., filed Feb. 7, 2012; accord Pet’r Reply at 3. Additionally, Mr. Gage states that his “law office has been able to run over the last couple of years, in no small degree, because of the payment of interim fees made by the Office of Special Masters.” Pet’r Reply at 2.

Neither Ms. Heinzelman nor Mr. Gage asserts that an award of interim fees is essential to Mr. Gage’s travel for the Federal Circuit argument. It is easy to understand that an award of interim fees would make Mr. Gage’s travel easier. But, facilitating counsel’s work cannot be the only reason to award attorneys’ fees

⁵ A notice on the Federal Circuit’s website indicates that the Federal Circuit will conduct oral argument on Friday, April 6, 2012.

on an interim basis because if this were true, then “interim fees would be the norm.” McKellar, 101 Fed. Cl. at 301.⁶

- **Summary**

Twice, Ms. Heinzelman has received an award of attorneys’ fees on an interim basis. Ms. Heinzelman’s pending request for a third award presents different circumstances.

First, to this special master, the paradigm for evaluating requests for attorneys’ fees on an interim basis has been revised. While the Second Interim Fees Decision reasoned that attorneys’ fees should be paid as soon as “practical,” McKellar has directed special masters not to presume that interim fees are always available. See Stone v. Sec’y of Health & Human Servs., No. 04-1041V, 2011 WL 7068955 (Fed. Cl. Spec. Mstr. Nov. 14, 2011) (denying a request for a second interim award of attorneys’ fees and citing McKellar).

Second, the facts incident to Ms. Heinzelman’s third request are different from the facts around her second request. Ms. Heinzelman’s two previous awards of attorneys’ fees on an interim basis weigh strongly against a third award. The combined effect of these two awards makes Ms. Heinzelman’s present situation much like the Averages’ claim for interim fees. Both the Averages and Ms. Heinzelman had their attorneys’ fees delayed only while the case was pending on appeal to the Federal Circuit. The Averages and Ms. Heinzelman requested less than \$30,000 in attorneys’ fees. Neither the Averages nor Ms. Heinzelman requested a payment for experts.

The primary difference between Avera and Ms. Heinzelman’s pending request is the identity of the appellant at the Federal Circuit. The Averages prolonged their case by appealing. In contrast, Ms. Heinzelman did not go to the Federal Circuit voluntarily. The Secretary brought her there. The Secretary’s

⁶ Additionally, Mr. Gage’s costs for traveling to the oral argument would be minimized with the use of videoconferencing. It appears that the Federal Circuit provides some opportunity for participating in argument by videoconference. See Fed. Cir. R. 54(a)(3)(J) (“The court may charge and collect a fee of \$200 per remote location for counsel’s requested use of videoconferencing equipment in connection with each oral argument.”).

filing of the appeal certainly is a factor that supports an award of attorneys' fees on an interim basis. However, this factor is outweighed by other factors.

CONCLUSION

Ms. Heinzelman's request for a third award of attorneys' fees on an interim basis is denied because she has not established special circumstances needed for such an award. She may include the amounts requested in this motion when she seeks an award of attorneys' fees at the conclusion of the case. The Clerk's Office is directed to provide this decision to the presiding judge pursuant to Vaccine Rule 28.1. The Clerk's Office is also instructed to enter judgment in accord with this decision unless a motion for review is filed. See Shaw, 609 F.3d at 1378 (holding that decisions regarding interim fees are reviewable at the Court of Federal Claims).

IT IS SO ORDERED.

S/ Christian J. Moran
Christian J. Moran
Special Master