

**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 24, 2011
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	Attorneys' fees, interim award,
	*	judgment not necessary
Respondent.	*	

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

Stacy Heinzelman alleges that a flu vaccine caused her to suffer Guillain-Barré syndrome and seeks compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa—10 *et seq.* (2006). Whether she is actually entitled to compensation is pending before the Court of Federal Claims because respondent filed a motion for review of a December 11, 2008 ruling that found that Ms. Heinzelman was entitled to 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).

While this motion for review is pending, Ms. Heinzelman has sought, for a second time, an award of attorneys' fees and costs on an interim basis pursuant to Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008). Respondent has interposed several objections.² Respondent's primary argument is that the pertinent part of the Vaccine Act, 42 U.S.C. § 300aa—15(e)(1), does not authorize an award under the circumstances of this case, which respondent labels an award "pendent lite." Respondent contends that Ms. Heinzelman's case differs from Avera and, therefore, contends that Avera does not support an award of attorneys' fees and costs to Ms. Heinzelman now. Ms. Heinzelman counters that "Respondent's interpretation of Avera is flawed."

In short, the pending dispute concerns the extent of special masters' authority to award attorneys' fees and costs before the merits of the case are resolved with finality. On this point, Ms. Heinzelman's reliance on Avera is sound and respondent's attempt to limit Avera to its facts is not persuasive. As discussed below, Ms. Heinzelman has demonstrated that an award of attorneys' fees and costs is appropriate and, consequently, she is awarded **\$31,177.79** in attorneys' fees and costs.

² One preliminary issue is whether the Court or a special master should adjudicate Ms. Heinzelman's motion for attorneys' fees. This question originated because Ms. Heinzelman filed her pending motion for attorneys' fees a few hours after respondent filed her motion for review of the decision awarding Ms. Heinzelman compensation. Respondent argues that the Court lacks jurisdiction to act upon Ms. Heinzelman's motion because, pursuant to Vaccine Rule 34, special masters adjudicate motions for attorneys' fees initially, except in a circumstance not present here. Resp't Opp'n, filed Jan. 24, 2011, at 3-5.

How the filing of a motion for review affects the jurisdictional relationship between the Court and special masters has not been elucidated. In other contexts, the trial forum retains jurisdiction to act on ancillary matters, such as attorneys' fees, while the case is on appeal. Proctor & Gamble Co. v. Amway Corp., 280 F.3d 519, 524-25 (5th Cir. 2002). There is no need to explore any intricacies in this case because the Court has specifically directed the undersigned to address Ms. Heinzelman's motion for attorneys' fees. Order, filed Jan. 25, 2011. Thus, respondent's first reason for opposing Ms. Heinzelman's motion is no longer valid.

Whether Special Masters Are Authorized To Award Attorneys' Fees And Costs Before There Is a Judgment on the Merits of the Case?

The statute authorizing special masters to award attorneys' fees and costs to petitioners in the Vaccine Program differs from most federal statutes authorizing awards of attorneys' fees and costs in that the Vaccine Program provision does not require a petitioner to be a prevailing party. Avera, 515 F.3d at 1346. "If the judgment of the United States Court of Federal Claims . . . does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim." 42 U.S.C. § 300aa—15(e)(1).

The Secretary builds her argument upon the clause "the judgment of the United States Court of Federal Claims." Respondent argues that when entitlement is denied, this judgment is a "precondition to an award of fees and costs." Respondent further argues that without an amendment to the statute, special masters may not award attorneys' fees before an entry of judgment denying compensation. Resp't Opp'n, filed Jan. 24, 2011, at 5.

The problem with respondent's argument is that the Federal Circuit has already interpreted this statute, once in Avera and a second time in Shaw v. Sec'y of Health & Human Servs., 609 F.3d 1372 (Fed. Cir. 2010). Federal Circuit decisions are binding on special masters and it is the duty of special masters to follow those decisions. 42 U.S.C. § 300aa—12(f); see also Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1280 (Fed. Cir. 2005) (stating "[q]uestions of law regarding the interpretation or implementation of the Vaccine Act are matters for the courts"); cf. Coltec v. United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006). As explained below, Avera and Shaw support an award of attorneys' fees and costs in Ms. Heinzelman's case.

In Avera, the special master found that the petitioners were not entitled to compensation and judgment entered. Avera, 515 F.3d at 1345; Avera v. Sec'y of Health & Human Servs., No. 04-1385V, 2005 WL 6117662 (Fed. Cl. Spec. Mstr. Dec. 21, 2005). The petitioners sought an award of attorneys' fees and costs, and their amended application sought an award at hourly rates for their attorney as set by the Laffey matrix. The special master denied petitioners' request at this rate. Avera, 515 F.3d at 1346; Avera v. Sec'y of Health & Human Servs., No. 04-1385V, 2006 WL 5618158 (Fed. Cl. Spec. Mstr. Aug. 29, 2006).

Petitioners filed a motion for review at the Court of Federal Claims. While at the Court of Federal Claims, the petitioners requested that the Court enter “interim payment of the amount approved by the Special Master.” Avera v. Sec’y of Health & Human Servs., 75 Fed. Cl. 400, 401 (2007). The Court denied the request for an interim award. Id. at 407; see also Avera, 515 F.3d at 1347.

Petitioners appealed to the Federal Circuit. On the issue of interim fees, the respondent argued that the “text of the Vaccine Act prohibits a special master or court from granting an award of interim fees.” Avera, 515 F.3d at 1350, citing respondent’s brief. The basis for respondent’s argument was sections 15(f)(1) and 21(a). The Federal Circuit rejected this argument as inconsistent with its previous decision in Saunders v. Sec’y of Health & Human Servs., 25 F.3d 1031 (Fed. Cir. 1994). The Federal Circuit stated that “There is nothing in the Vaccine Act that prohibits the award of interim fees.” Avera, 515 F.3d at 1351. After surveying cases interpreting other fee-shifting statutes, the Federal Circuit stated that “the special master and the Court of Federal Claims erred in holding that an interim fee award is not permissible. The statute permits such awards.” Id. at 1352.

However, the Federal Circuit found that an award of interim fees was not appropriate under the circumstances in which the “appellants only sought interim fees pending appeal,” among other factors. Consequently, the Federal Circuit “affirm[ed] the judgment (but not the reasoning) of the Court of Federal Claims that held that petitioner was not entitled to an award of interim fees.” Id.

After Avera, there was at least some question about the import of the decision. For example, because the Federal Circuit affirmed the judgment of the Court of Federal Claims, the respondent prevailed and, therefore, may have lacked the right to seek further review of the Federal Circuit’s decision. It was suggested that Avera’s discussion of the availability of interim fees was dicta. Franklin v. Sec’y of Health & Human Servs., No. 99-855V, 2009 WL 2524492, at *9 n. 17 (Fed. Cl. Spec. Mstr. July 28, 2009).

Any confusion about Avera was dispelled by the subsequent decision in Shaw, whose early procedural history is similar to Ms. Heinzelman’s case. Before there was a judgment on petitioner’s claim for compensation, the petitioner filed a motion for attorneys’ fees. Respondent’s primary objection was that the amount requested was excessive. The special master awarded a portion of the attorneys’ fees requested and deferred resolution of the remaining amount requested. Shaw v.

Sec'y of Health & Human Servs., No. 01-707, 2009 WL 1010058 (Fed. Cl. Spec. Mstr. March 27, 2009).

Arguing that the amount of compensation awarded in the March 27, 2009 decision was not reasonable, the petitioner filed a motion for review. Respondent's position at the Court is not clear.³ The Court held that it lacked jurisdiction to consider the interim award of attorneys' fees and costs because such an award was not final. Shaw v. Sec'y of Health & Human Servs., 88 Fed. Cl. 463, 465 (2009).

The petitioner filed an appeal with the Federal Circuit, arguing that the Court of Federal Claims erred in finding that it lacked jurisdiction to consider the motion for review that had challenged the award of only a portion of attorneys' fees and costs on an interim basis. Shaw, therefore, presented the Federal Circuit with an opportunity to examine its decision in Avera. Shaw stated "In Avera, we held that the Vaccine Act permits the award of interim fees and costs, rejecting the government's argument that a fee award is only permissible after judgment under § 300aa-15." Shaw, 609 F.3d at 1374.⁴

This language resolves respondent's argument here. The Federal Circuit has rejected the argument that the respondent presents – that an award of attorneys' fees is permitted only after a judgment.⁵ Consequently, there is authorization to

³ To be consistent with the arguments presented in Ms. Heinzelman's case, respondent should have argued in Shaw that the special master exceeded her authority in awarding the portion of attorneys' fees and costs that she did award.

⁴ Shaw also held that the Court of Federal Claims possessed the jurisdiction to entertain the petitioner's motion for review.

⁵ Respondent also cites Martin v. Sec'y of Health & Human Servs., 62 F.3d 1403, 1405-06 (Fed. Cir. 1995), as supporting her argument because in that case, the Federal Circuit stated that "the special master's (or the court's) discretion [to award fees and costs] is not unfettered; there must first be a judgment 'on such a petition.'" Martin does not control the outcome of Ms. Heinzelman's motion because whether a judgment on compensation is required for an award of attorneys' fees was not squarely presented in Martin. Rather, Martin held that the Office of Special Masters lacked the authority to award attorneys' fees and costs when the Office of Special Masters lacked jurisdiction to entertain the petitioners' underlying claim for compensation. In this circumstance, the language quoted by

award Ms. Heinzelman attorneys' fees even though her claim for compensation remains subject to a motion for review.

Whether Ms. Heinzelman's Case Satisfies the Requirements for An Award of Attorneys' Fees and Costs

There is no doubt that Ms. Heinzelman will be entitled to an award of attorneys' fees and costs at some time. If the December 11, 2008 ruling is affirmed on appeal such that Ms. Heinzelman is awarded compensation, then she is entitled to compensation as a matter of right. U.S.C. § 300aa—15(e)(1). Alternatively, even if the December 11, 2008 ruling were overturned on appeal such that she is not entitled to compensation, Ms. Heinzelman would still be eligible for an award of attorneys' fees. Petitioners who have not been awarded compensation may be entitled to an award of attorneys' fees and costs when "the petition was brought in good faith and there was a reasonable basis for the claim." 42 U.S.C. § 300aa—15(e)(1). Here, respondent does not argue that Ms. Heinzelman fails to fulfill either of these two factors. Such an argument would appear to be foreclosed by the December 11, 2008 ruling finding that Ms. Heinzelman was entitled to compensation. Thus, at a minimum, Ms. Heinzelman's case satisfies the good faith and reasonable basis standard.

Whether Ms. Heinzelman Should Be Awarded Attorneys' Fees and Costs as a Matter of Discretion

Respondent contends that even if an award of attorneys' fees and costs before a judgment on entitlement were permitted, Avera "made it clear that interim fee awards should be the rare exception, and not the rule." In support of this argument, respondent notes that the Federal Circuit affirmed the underlying judgment that did not award interim attorneys' fees because Avera did not involve protracted proceedings, costly experts had not been retained, and the petitioner did not suffer an undue hardship. Resp't Opp'n at 9-11. Respondent's argument is essentially that Avera announced a set of criteria that a petitioner must establish as a prerequisite for an award of attorneys' fees before judgment. Without satisfying all those criteria, a petitioner cannot be awarded attorneys' fees and costs before judgment. See Resp't Opp'n at 10 (stating "Petitioner here has similarly failed to

respondent is dicta. See Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1282 (Fed. Cir. 2002); see also Brecht v. Abrahamson, 507 U.S. 619, 631 (1993). Therefore, the binding Federal Circuit precedents are Avera and Shaw.

demonstrate the necessary circumstances to justify a second interim award .”). The specific gap identified by respondent is a lack of showing that Ms. Heinzelman, and not her counsel, has suffered “actual hardship.”

In contrast, Ms. Heinzelman maintains that the Federal Circuit did not create any requirements that petitioners must satisfy before being entitled to an award of attorneys’ fees and costs on an interim basis. Further, Ms. Heinzelman argues that she satisfies these criteria (or factors), although Ms. Heinzelman’s argument suffers from a lack of development. For example, Ms. Heinzelman has not presented an affidavit that supports her claim that she suffered undue hardship. Pet’r Reply at 2.

Ms. Heinzelman’s hardship (or the lack thereof) has been overemphasized. Respondent’s argument seems to elevate petitioner’s hardship to an absolute necessity. However, neither Avera nor any other appellate authority has characterized the various facts mentioned in Avera as essential requirements. Instead, the overall tone of Avera suggests that “protracted proceedings,” “costly experts,” and “undue hardship” are factors that should be considered and weighed when evaluating a request for attorneys’ fees before judgment.

Here, the factors weigh in favor of an award of attorneys’ fees before a judgment.

- Protracted Proceedings

The duration of proceedings favors an award of attorneys’ fees and costs now. Ms. Heinzelman filed her case on January 3, 2007, with two medical records. She spent some time gathering additional medical records. Ms. Heinzelman also filed the report of Dr. Marcel Kinsbourne, who supported the claim that the flu vaccine caused her Guillain-Barré syndrome, on September 20, 2007. This filing essentially perfected Ms. Heinzelman’s case. See Simanski v. Sec’y of Health & Human Servs., No. 03-103V, 2010 WL 5648874, *16-17 (Fed. Cl. Dec. 15, 2010) (discussing perfecting a claim in the Vaccine Program), appeal docketed, No. 2011-5050 (Fed. Cir. Feb. 14, 2011). Ms. Heinzelman submitted Dr. Kinsbourne’s report 260 days after the petition.

After Dr.Kinsbourne’s report, respondent presented the report from Dr. Gerald Winkler on December 13, 2007 (84 days after Dr. Morgan’s report). The parties, then, attempted to settle the case based upon the costs and risks of continued litigation.

When these efforts were not successful, a hearing was held on April 28, 2008. The parties were permitted to file briefs after the hearing and a ruling finding that Ms. Heinzelman was entitled to compensation was issued on December 11, 2008.

The finding that Ms. Heinzelman was entitled to compensation necessitated an exploration of the amount of compensation to which Ms. Heinzelman was due. Both parties retained life care planners to assist with providing information about the medical treatment that Ms. Heinzelman is reasonably anticipated to require in the future. This process, which involves discussions with Ms. Heinzelman's treating doctors, tends to take at least one year. The attorneys for the parties prefer this process because it almost always produces an agreement about the compensation to which a petitioner is entitled. In Ms. Heinzelman's case, this process succeeded in part because the parties eventually agreed to an amount of compensation for Ms. Heinzelman's future medical care. See Proffer, filed December 6, 2010.

However, the parties did not agree about a separate item of compensation, the amount of lost wages to which Ms. Heinzelman is entitled. Specifically, the parties disputed whether benefits available through Social Security Disability Insurance should reduce the amount of compensation. The parties were ordered to file briefs on this novel issue and an order in Ms. Heinzelman's favor was issued on May 18, 2010.⁶

Meanwhile, on September 16, 2009, Ms. Heinzelman filed her first motion for an interim award of attorneys' fees and costs. Ms. Heinzelman requested that her attorney, Mr. Richard Gage, be compensated at hourly rates set forth in the Laffey matrix.⁷ The costs incurred by Mr. Gage's law firm included expenses for Dr. Kinsbourne and ReEntry Rehabilitation Services, which employed the life care planner retained by Ms. Heinzelman. The parties filed a stipulation in which certain requests were compromised to avoid a dispute and in which the parties

⁶ The pending motion for review also challenges this order.

⁷ Subsequently, Mr. Gage was not awarded these rates in Hall v. Sec'y of Health & Human Servs., No. 02-1052V, 2009 WL 3423036, at *26 (Fed. Cl. Spec. Mstr. Oct. 6, 2009). This decision was affirmed, 93 Fed. Cl. 239 (2010), and is presently pending further review at the Federal Circuit, No. 2010-5126.

reserved arguments about Mr. Gage's hourly rate "at the conclusion of the case." Stipulation, filed Oct. 7, 2009, at 2.

A decision adopting the parties' stipulation regarding interim attorneys' fees and costs was issued on October 16, 2009. A judgment in accord with this decision was issued on October 29, 2009.

The October 16, 2009 decision weakens, but does not eliminate, Ms. Heinzelman's claim for a second interim award of attorneys' fees and costs. After this decision, Mr. Gage has continued to represent Ms. Heinzelman. He has worked on her case, most notably on the SSDI offset issue. Importantly, the respondent's motion for review further extends the proceedings. If the government had not filed a motion for review, then judgment would have entered and Ms. Heinzelman's application for attorneys' fees would be a final fee application. Payment of Ms. Heinzelman's attorneys' fees should not be delayed because of the government's appeal.

- Costly experts

Because Ms. Heinzelman has already been awarded some compensation for work performed by experts, her pending request is for a relatively small amount. Ms. Heinzelman seeks approximately \$14,000 as costs for experts with almost all of this amount being for the company providing life care planning, ReEntry Rehabilitation Services. Pet'r Appl'n, tab A.

- Undue Hardship

Respondent argues that the only hardship that matters is a hardship incurred by a petitioner and not the petitioner's attorney. See Resp't Opp'n at 10 (stating "As the party seeking compensation under the Act, petitioner, and not her counsel must show an undue hardship in order for interim fees to be available under Avera."). This argument overlooks other Federal Circuit decisions that promote awards of attorneys' fees as a way "to ensure that vaccine-injury claimants will have readily available a competent bar to prosecute their claims under the Act." Saunders, 25 F.3d at 1035.

Ms. Heinzelman's attorney has worked on Ms. Heinzelman's case for more than a year since the last award of interim attorneys' fees. There seems to be no reason to delay paying him for this work.

In sum, the factors identified in Avera weigh in favor of awarding attorneys' fees before judgment. The simplest explanation might be that money today is better than money tomorrow. Although respondent argues that awards of attorneys' fees before judgment should be reserved for "the rare exception, and not the rule," Resp't Opp'n at 9, the converse is more likely to be true. 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, regardless of whether there is a judgment on the merits.

What is a Reasonable Amount of Attorneys' Fees and Costs?

Because an award of attorneys' fees and costs is appropriate, the remaining question is how much should be awarded. The statute limits any award to a "reasonable" amount. 42 U.S.C. § 300aa—15.

Here, Ms. Heinzelman seeks an award of \$17,228 in attorneys' fees for Mr. Gage. Mr. Gage's invoice requests compensation at an hourly rate of \$240 in 2009 and \$250 in 2010. Respondent has objected to compensating Mr. Gage at a rate of \$250 because Ms. Heinzelman did not submit any evidence supporting an increase from \$240. Respondent also objects to some entries because the entries lump together several discrete tasks.

Respondent's objections are not persuasive. The increase from \$240 to \$250 is reasonable. It is an increase of approximately four percent. Additionally, a review of Mr. Gage's time records shows that except for entries relating to legal research and writing, the entries are for less than two hours. The entries explain Mr. Gage's activities adequately. Thus, there is no reason to deduct time from Mr. Gage's invoice.

In addition to her attorneys' fees, Ms. Heinzelman seeks an award of \$13,949.79 in attorneys' costs. Respondent has not interposed any objection to the requested costs. They are accepted as reasonable.

Conclusion

Ms. Heinzelman is awarded **\$31,177.79 in attorneys' fees and costs**. There is no just reason to delay the entry of judgment on interim attorneys' fees and costs. Therefore, in the absence of a motion for review, the Clerk's Office is instructed to enter judgment in accord with this decision. A check in this amount shall be made payable to Ms. Heinzelman and her attorney jointly. The Clerk's Office is also instructed to provide a copy of this decision to the presiding judge.

IT IS SO ORDERED.

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