

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

JENNIFER HIBBARD,	*	
	*	No. 07-446V
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	Filed: March 7, 2011
	*	
SECRETARY OF HEALTH	*	Attorneys fees before judgment on
AND HUMAN SERVICES,	*	the merits, interim fees, <u>Avera</u>
	*	
Respondent.	*	
	*	

Ronald C. Homer, Esq., Conway, Homer & Chin-Caplan, P.C., Boston, MA, for petitioner,
Glenn A. MacLeod, Esq., U.S. Dep't of Justice, Washington, D.C., for respondent.

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

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).

Jennifer Hibbard received a flu vaccine in 2003, and she claims that the flu vaccine caused a neurological problem known as dysautonomia. She seeks compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-1 et seq. (2006). The evidentiary development of Ms. Hibbard’s case, including the testimony from expert witnesses at two hearings, is complete. The parties have also filed their briefs after the hearing. Ms. Hibbard’s claim for compensation is fully ready for adjudication.

After Ms. Hibbard filed her final brief on the merits of her claim, she filed a motion requesting an award of attorneys’ fees and costs. She characterizes such an award as one on an interim basis and argues that Avera v. Sec’y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), authorizes this award.

In opposition, respondent argues 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. Hibbard’s case differs from Avera and, therefore, contends that Avera does not support an award of attorneys’ fees and costs to Ms. Hibbard now.

In short, the pending dispute concerns the extent of special masters’ authority to award attorneys’ fees and costs before resolving the merits of the case. On this point, Ms. Hibbard’s reliance on Avera is sound and respondent’s attempt to limit Avera to its facts is not persuasive. As discussed below, Ms. Hibbard has demonstrated that an award of attorneys’ fees and costs is appropriate and, consequently, she is awarded \$130,500 in attorneys’ fees and costs.

Whether Special Masters Are Authorized To Award Attorneys’ Fees And Costs Before Resolving the Merits of a 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 Nov. 10, 2010, at 3.²

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. Hibbard’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

² Respondent acknowledges that if Ms. Hibbard were entitled to compensation, then the statute mandates a payment of attorneys’ fees and costs. Because Ms. Hibbard’s claim for compensation has not been adjudicated, the parties’ analysis has focused on the portion of the statute authorizing an award of attorneys’ fees to unsuccessful petitioners. This decision’s discussion about petitioners who do not receive compensation should not be construed as indicating that Ms. Hibbard will not receive compensation.

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 fees 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 on all fours with Ms. Hibbard’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 award Ms. Hibbard attorneys' fees even though a decision on her claim for compensation remains pending.

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

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).

³ To be consistent with the arguments presented in Ms. Hibbard'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 Ms. Hibbard goes so far as to say that respondent's argument is "unethical" and "may be sanctionable under Rule 11 of the U.S. Court of Federal Claims." Pet'r Reply at 10 & n.8. The undersigned does not agree with this characterization. Although respondent's arguments here are not persuasive, there is at least some basis for respondent's argument.

Here, respondent argues that a decision regarding good faith and reasonable basis would be “premature.” Resp’t Opp’n at 9.

This argument is mistaken. The issue of reasonable basis is as developed as it is ever going to be. Ms. Hibbard filed her medical records, reports from a neurologist (Dr. Morgan), and the literature on which Dr. Morgan relied in forming his opinion. Respondent filed reports from another neurologist (Dr. Chaudry) and the literature on which Dr. Chaudry relied. Dr. Morgan and Dr. Chaudry testified at a hearing, which lasted two days. No additional evidence is anticipated to be introduced.

Other than describing a determination about the good faith and reasonable basis of Ms. Hibbard’s petition as premature, respondent presents no other argument regarding these criteria. For example, respondent does not contend that Dr. Morgan’s opinion was so drastically inconsistent with established medical standards that the opinion was unreasonable. See Resp’t Opp’n at 7-9. Ms. Hibbard’s case satisfies the good faith and reasonable basis standard.

Whether Ms. Hibbard Should Be Awarded Attorneys’ Fees and Costs as a Matter of Discretion

Although special masters are authorized to award attorneys’ fees without first issuing a decision as to whether a petitioner is entitled to compensation and although Ms. Hibbard has been found to have a reasonable basis for her petition, Ms. Hibbard is not entitled as a matter of right to an award at this time. Instead, special masters have discretion to award attorneys’ fees. Saxton v. Sec’y of Health & Human Servs., 3 F.3d 1517, 1520 (Fed. Cir. 1993). Traditionally, special masters have exercised their discretion to award attorneys’ fees because doing so promotes a “secondary purpose of the [Vaccine] Act[, which] is 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; accord Morse v. Sec’y of Health & Human Servs., 93 Fed. Cl. 780, 791 (2010).

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 6. 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 Resp. at 7 (stating "Petitioner here has similarly failed to demonstrate the necessary circumstances to justify an interim award of fees and costs"). The specific gap identified by respondent is a lack of showing that Ms. Hibbard, and not her counsel, has suffered "actual hardship."

In contrast, Ms. Hibbard maintains that she has suffered an actual hardship. However, she does not explain clearly the hardship that she – as opposed to her attorney – has endured. The closest point is that Ms. Hibbard states that her law firm has told her that "additional fees and costs to litigate my case will be costly, but that payment will enable the firm to continue to effectively and efficiently prosecute my case." Exhibit 60 (Ms. Hibbard's affidavit, dated Dec. 10, 2010, ¶ 3), cited in Pet'r Reply at 16.

Ms. Hibbard'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

Ms. Hibbard's case has lasted nearly four years, although some of this time is attributable to Ms. Hibbard. Ms. Hibbard filed her case on June 28, 2007, but no medical records accompanied the petition as required by section 11(c) of the statute. Ms. Hibbard filed a collection of medical records on January 17, 2008, which is 203 days after the petition was filed. Ms. Hibbard filed the report of Dr. Morgan, who provided the first statement that the flu vaccine caused her dysautonomia, on September 26, 2008. This filing essentially perfected Ms. Hibbard'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. Hibbard submitted Dr. Morgan's report 456 days after the petition.

After Dr. Morgan's report, responsibility for the pace of adjudication was shared among Ms. Hibbard, respondent, and the undersigned special master. Respondent presented the report from Dr. Chaudry on December 1, 2008 (66 days after Dr. Morgan's report). Both Dr. Morgan and Dr. Chaudry filed supplemental reports before the hearing.

The first day of the hearing was August 12, 2009, which is within one year of when Ms. Hibbard filed Dr. Morgan's initial report. The hearing did not conclude on August 12, 2009, although the parties had anticipated that one day would be sufficient for the testimony of Dr. Morgan and Dr. Chaudry. The hearing concluded on February 23, 2010. Both parties filed briefs after the hearing and the briefing process extended until September 21, 2010. The case remains submitted for adjudication.⁶

This history shows that Ms. Hibbard's attorneys have been working on her case for approximately three and a half years. Dr. Morgan first worked on Ms. Hibbard's case approximately a year and a half ago. Neither the law firm nor Dr. Morgan has been paid for their work. The duration of proceedings suggests that both should be paid sooner rather than later.

- Costly experts

Dr. Morgan has submitted invoices that total more than \$40,000. Pet'r Appl'n, tab B at 22-23, 39, 42. This amount qualifies as being costly.

⁶ This pace of proceedings is relatively common in the Vaccine Program especially in cases in which petitioners seek compensation for an injury not listed in the Vaccine Injury Table. Often, petitioners file their off-Table cases without medical records and without the statement of an expert to support their claim for compensation. Consequently, some amount of time (approximately 15 months in Ms. Hibbard's case) must be spent developing the case in a way that, arguably, should have been done before the petition was filed. Ms. Hibbard's case is also representative of the typical pace after petitioners have perfected their claims. Ms. Hibbard's case leaves the most commonly followed path when her case required a second day of hearing, although second hearings are not rare.

- 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 7 (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. Hibbard's attorneys have worked on Ms. Hibbard's case for many years. There seems to be no reason to delay paying them for work performed years ago.

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 6, 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, after the parties disputed whether Ms. Hibbard was entitled to any award now, the parties were encouraged to attempt to resolve any differences regarding the amount. Order, filed January 7, 2011. In negotiations after this order, Ms. Hibbard reduced the amount of attorneys' fees and costs that she was seeking to \$130,500.00, and respondent has interposed no objection. This amount is reasonable.

Conclusion

Ms. Hibbard is awarded **\$130,500.00 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. Hibbard and her attorney jointly.

IT IS SO ORDERED.

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