

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

PETER NUTTALL and CHERIE NUTTALL,*
as legal representatives of their minor son *
NATHANIEL NUTTALL, *

Petitioners, *

No. 07-810V
Special Master Christian J.
Moran

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Filed: November 4, 2011

Respondent. *

Curtis R. Webb, Webb, Webb & Guerry, Twin Falls, ID, for petitioners;
Voris E. Johnson, Jr., United States Dep't of Justice, Washington, DC, 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

Mr. and Ms. Nuttall seek compensation pursuant to the National Childhood Vaccine Injury Compensation Program. See 42 U.S.C. § 300aa—10 et seq. (2006). The Nuttalls allege that a measles-mumps-rubella vaccine caused their son, Nathaniel, to develop Childhood Disintegrative Disorder. Childhood Disintegrative Disorder is one disease appearing on a spectrum of diseases including autism. Mead v. Sec'y of Health & Human Servs., No. 03-215V, 2010 WL 892248, at *18 (Fed. Cl. Spec. Mstr. March 12, 2010).

While the question of whether the Nuttalls are entitled to any compensation remains pending, they filed a motion requesting an award of attorneys' fees and costs on an interim basis. The Secretary opposes their motion. The Secretary argues that any award on an interim basis is not appropriate. The Secretary, however, has not lodged any specific objection to the amount of fees being sought.

On the first topic, whether it is appropriate to award attorneys' fees and costs on an interim basis, special masters have rejected respondent's argument. In accord with the analysis in those decisions, the Nuttalls are awarded the amount to which respondent has not objected.

PROCEDURAL HISTORY

The Nuttalls filed their petition and supporting evidence in November 2007. Due to inconsistencies between information in Nathaniel's medical records and assertions made in the Nuttalls' affidavits, a fact hearing was held in June 2008. Findings of fact were issued in March 2009. 2009 WL 773292. After the findings of fact were issued, the Nuttalls requested that their case be stayed pending the outcome of the cases exploring whether vaccines can cause autism. Order, filed April 20, 2009.

The next substantive action occurred on November 12, 2010, when the Nuttalls filed their pending motion for an award of attorneys' fees and costs on an interim basis. As discussed below, the Secretary opposed this motion.

The filing of the motion for attorneys' fees prompted an inquiry into the status of the Nuttalls' substantive claim, that vaccines caused Nathaniel's

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).

Childhood Disintegrative Disorder. For a time, it appeared that the Nuttalls were considering not pursuing this claim because of the outcome in the omnibus autism cases. See Pet'r Status Rep't, filed Dec. 16, 2010. Presently, the Nuttalls are attempting to support their claim by obtaining a report from Dr. Shuman.

ANALYSIS

Broadly speaking, there are two issues. The first is whether the Nuttalls 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 the Nuttalls 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). For some period of time, there was almost no litigation over the meaning of Avera.

However, more recently, the Secretary has started to oppose interim awards, maintaining either that Avera was wrongly decided or that Avera should be limited to a narrow set of facts.² The first decision of a special master to address the Secretary's position rejected it. Hibbard v. Sec'y of Health & Human Servs., No. 07-446, 2011 WL 1135894 (Fed. Cl. Spec. Mstr. March 7, 2011). Since that decision, other special masters have considered the Secretary's position and also found the Secretary's arguments to lack merit. See Hirmiz v. Sec'y of Health & Human Servs., No. 08-371, 2011 WL 2680721 (Fed. Cl. Spec. Mstr. June 13, 2011) (collecting cases).³

² This case is one of the earliest occasions in which the Secretary argued against an award of attorneys' fees and costs on an interim basis.

³ Although the Secretary did not file a motion for review in the cases cited in the text, the Secretary has sought review of another special master's decision awarding attorneys' fees and costs on an interim basis. McKellar v. Sec'y of Health & Human Servs., No. 09-841, 2011 WL 3425606 (Fed. Cl. Spec. Mstr. June 3, 2011), motion for review filed (July 5, 2011).

For the reasons set forth in those decisions, there is authority for special masters to award attorneys' fees and costs on an interim basis. A subsidiary question is whether an interim award should be made in the Nuttalls' 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, the Nuttalls must satisfy the standards for good faith and reasonable basis. See 42 U.S.C. § 300aa—15(e) (2006). Although the Secretary points out these criteria, the Secretary has not identified any specific deficiency in the Nuttalls' evidence. See Resp't Opp'n, filed Nov. 29, 2010, at 8-9. The evidence, considered as a whole, supports a finding that there was a reasonable basis for the Nuttalls' petition and a finding that the Nuttalls acted in good faith in filing their petition. Thus, the Nuttalls are eligible for an award of attorneys' fees and costs for work performed so far.

Another question is whether an award of attorneys' fees and costs should be made now, that is, on an interim basis. When the motion for attorneys' fees was filed, it seemed possible that the Nuttalls would decline to continue their substantive claim in light of the decisions from the omnibus autism proceeding. If this happened, then there would be little reason to award fees on an interim basis because the fees could be awarded on a final basis. However, the recent filings indicate that the Nuttalls may pursue this case further, delaying the complete resolution of the case.

Consequently, an interim award is appropriate. Once the Nuttalls satisfy the criteria for being eligible for an award of attorneys' fees and costs, they should not be forced to wait for the entitlement phase to conclude. The case has been pending for approximately four years, for reasons primarily attributable to the Nuttalls. Thus, the Nuttalls 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 Nuttalls requested \$35,588 in attorneys' fees and \$1,757.02 in attorneys' costs. The Nuttalls did not submit any statement that they incurred any costs personally. The Secretary did not object to any specific items. Resp't Opp'n at 9.

A review of the material indicates that the Nuttalls' request is reasonable. They are awarded the amount requested.

III. Conclusion

The petitioners are entitled to an award of interim attorneys' fees and costs. The special master determines that 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 filed under RCFC Appendix B, **the clerk of court shall enter judgment in petitioners' favor for \$37,445.02 in interim attorneys' fees and costs. This entire amount shall be payable to the petitioners and their law firm.** 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