

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

ESFANDIAR SANTINI and LAURIE	*	
OMIDVAR, legal representatives of a	*	No. 06-725V
minor child, AYDIEN CLIFF OMIDVAR,	*	Special Master Christian J. Moran
	*	
Petitioners,	*	
	*	Filed: May 24, 2013
v.	*	
	*	Attorneys' fees and costs on an interim
SECRETARY OF THE DEPARTMENT	*	basis; stipulation regarding interim
OF HEALTH AND HUMAN SERVICES,	*	attorneys' fees and costs; award in the
	*	amount to which respondent has not
Respondent.	*	objected

Curtis R. Webb, Twin Falls, ID, for Petitioner;
Linda S. Renzi, United States Department of Justice, Washington, D.C., for Respondent.

UNPUBLISHED DECISION ON INTERIM FEES AND COSTS¹

Petitioners, Mr. Santini and Ms. Omidvar, seek compensation pursuant to the National Childhood Vaccine Injury Compensation Program. See 42 U.S.C. § 300aa—10 et seq. (2006). They allege that the diphtheria, tetanus, acellular pertussis (“DTaP”) vaccine Aydien Omidvar (“Aydien”) received on November 7, 2003, significantly aggravated his pre-existing susceptibility to seizures, resulting in mental and physical disabilities.

While the question of whether petitioners are entitled to any compensation remains pending, they filed a motion requesting an award of attorneys' fees and costs on an interim basis. Pet'r Appl'n, filed Apr. 10, 2013. The Secretary did not file a formal response.

In regard to the amount of attorneys' fees and costs, the parties have compromised. Petitioners have agreed to reduce the amount requested and the Secretary has not objected to the lower amount.

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.

PROCEDURAL HISTORY

An abbreviated recitation of the procedural history begins with the filing of Mr. Santini and Ms. Omidvar's petition on October 20, 2006. The petition was accompanied by several sets of records and affidavits from petitioners (Exhibits 1-18). On November 2, 2006, petitioners' previous attorney, Andrew Dodd, substituted in as counsel of record. On the same date, petitioners filed an amended petition.

The Secretary filed her report pursuant to Vaccine Rule 4 on January 18, 2007, and indicated that petitioners were not entitled to compensation. Following the submission of her report, the Secretary presented a report from Dr. Max Wiznitzer (Exhibit A) on February 26, 2007. Thereafter, on April 7, 2008, the Secretary submitted a report from Dr. Gerald Raymond (Exhibit I). On July 2, 2008, the Secretary submitted a supplemental report from Dr. Raymond (Exhibit K).

On March 25, 2009, following the death of petitioners' counsel, Mr. Dodd, Curtis Webb, substituted in as counsel of record. On May 9, 2012, this case was reassigned to the undersigned special master. Thereafter, on August 30, 2012, petitioners were ordered to file outstanding medical records and an expert report.

During a status conference held on December 17, 2012, and as reflected in an order of the same date, a hearing was scheduled in this case for June 5-7, 2013.

Petitioners filed several sets of medical records on January 3, 2013. On January 4, 2013, petitioners filed the report of Dr. Corbier (Exhibit 50). The Secretary filed a responsive report from Dr. Raymond (Exhibit S) on February 22, 2013, and a responsive report from Dr. Wiznitzer (Exhibit U) on March 22, 2013.

On April 10, 2013, petitioners filed an application for interim attorneys' fees on behalf of their previous attorney, Mr. Dodd, and their current attorney, Mr. Webb, requesting fees and costs incurred in this matter through March 31, 2013. In their application, petitioners acknowledged that this case is in its seventh year of proceedings, that their former attorney, Mr. Dodd, passed away in January, 2009, that they have incurred costs for the services of Dr. Corbier, and that they will incur additional costs to present their case at the June, 2013 hearing. Pet'r Appl'n at 4.

On April 17, 2013, petitioners filed a supplemental report from Dr. Corbier. In anticipation of the June hearing, petitioners and the Secretary filed their prehearing briefs on April 22, 2013, and May 8, 2013, respectively.

Following an extension of time to file her response to petitioners' application for attorneys' fees and costs, the Secretary filed a stipulation regarding interim fees and costs on May 22, 2013. In the stipulation, she indicates that she raised objections to petitioners' application, that petitioners subsequently amended their request, and that the Secretary does not object to the amended request. Further, the stipulation notes that, pursuant to General Order #9, petitioners have personally incurred \$500.00 in costs in pursuit of their claim.

ANALYSIS

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

I. Should Petitioners 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 in other cases that the circumstances in which Avera permits an award of attorneys' fees and costs on an interim basis are relatively narrow, 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).

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, petitioners must satisfy the standards for good faith and reasonable basis. See 42 U.S.C. § 300aa—15(e) (2006). The submission of an expert report fulfills the reasonable basis standard in this case.

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 the Avera factors).

Petitioners satisfy these factors. The case has been pending for over six-and-a-half years, with some delay due to the death of petitioners' previous attorney. Additionally, petitioners have retained an expert whose invoices, as of March 31, 2013, exceed \$5,000. Finally, petitioners have personally incurred costs. Although these costs are not extraordinary, there seems to be little reason to force petitioners to wait for reimbursement of these costs. Equally so, there seems to be little reason to force Mr. Dodd's estate to wait for payment of his attorneys' fees and costs. Consequently, petitioners 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. For Mr. Dodd, petitioners' previous attorney, the Secretary agreed not to object to an award for \$32,384.21 in attorneys' fees costs. For Mr. Webb, the Secretary agreed not to object to a total

award of \$42,213.11 for attorneys' fees and costs. For petitioners, the Secretary agreed not to object to an award of \$500.00 for personal litigation costs incurred.

A review of the material indicates that the components of petitioners' request are reasonable. They are awarded the amount to which the Secretary has not objected.

III. Conclusion

Petitioners are entitled to an award of interim attorneys' fees and costs in the amount requested in the stipulation filed on May 22, 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 petitioners' favor for the following amounts:**

- A. A lump sum of 32,384.21 in the form of a check payable jointly to petitioners and Dicky Dodd, personal representative of the estate of Andrew Dodd, for attorneys' fees and costs available under 42 U.S.C. §300aa-15(e); and**
- B. A lump sum of 42,213.11 in the form of a check payable jointly to petitioners and petitioners' counsel of record, Curtis R. Webb, for attorneys' fees and costs available under 42 U.S.C. §300aa-15(e); and**
- C. A lump sum of \$500.00 in the form of a check payable solely to petitioners, Esfandiar Santini and Laurie Omidvar, representing compensation for out-of-pocket litigation expenses incurred in pursuit of petitioners' claim, and identified in compliance with General Order #9.**

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