

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

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MONA PORTER,

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Petitioner,

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No. 99-639V

Special Master Christian J. Moran

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v.

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Filed: November 3, 2009

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SECRETARY OF HEALTH  
AND HUMAN SERVICES,

\*

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attorneys' fees and costs, interim  
award after finding of entitlement

Respondent.

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on a motion for review, award  
based upon the amount to which  
respondent has not objected

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*Ronald C. Homer and Sylvia Chin-Caplan*, Conway, Homer & Chin-Caplan, P.C., Boston,  
Massachusetts for petitioner;

*Althea Davis and Rebecca Trinrud*, Department of Justice, Washington, D.C. for respondent.

**UNPUBLISHED DECISION AWARDING  
ATTORNEYS' FEES ON AN INTERIM BASIS\***

Mona Porter filed a petition seeking compensation under the National Vaccine Injury Compensation Program. 42 U.S.C. §§ 300aa-1 *et seq.* Ms. Porter claimed that the hepatitis B vaccine, which she received in three doses between 1992 and 1993, caused her to suffer autoimmune hepatitis.

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\* Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of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 or designated substantive order 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 banned 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).

A judge of the United States Court of Federal Claims found that Ms. Porter was entitled to compensation and remanded the case to determine the amount of compensation. This process is underway.

Ms. Porter seeks an interim award of her attorneys' fees and costs. She is awarded the amount to which respondent has not objected.

## **I. Procedural History**

Ms. Porter filed her petition on August 4, 1999. For various reasons, she did not offer a report of a doctor, Joseph Bellanti, until May 26, 2006. Exhibit 59.

On September 11, 2008, the undersigned issued a decision, finding that Ms. Porter had failed to meet her burden of proof with respect to any of the three elements required by Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Decision, 2008 WL 4483740, at \*31.

Ms. Porter filed a motion for review of this decision on October 14, 2008. It was assigned to the Honorable Nancy B. Firestone. Judge Firestone stated that "the court finds that the special master erroneously used his assessment of Dr. Bellanti's credibility – an assessment that should be reserved for 'assessing the candor of a fact witness' – as a basis for rejecting Dr. Bellanti's expert testimony regarding causation, in violation of Andreu."

As authorized by 42 U.S.C. § 300aa-12(e)(2)(B), Judge Firestone found the facts for Ms. Porter's case. Judge Firestone's findings led to the conclusion that Ms. Porter was entitled to compensation. Rotoli v. Sec'y of Health & Human Servs., \_\_\_ Fed. Cl. \_\_\_, 2009 WL 2868840, at \*21-24 (Fed. Cl. 2009). Thus, Judge Firestone remanded the case to determine damages. Rotoli, 2009 WL 2868840, at \*29.

After the case was remanded, an informal and unrecorded status conference was held to discuss both the process for determining the damages to which Ms. Porter is entitled and Ms. Porter's request for an interim award of attorneys' fees and costs. Respondent was instructed to file a status report regarding whether an award of attorneys' fees and costs was appropriate at this time. Respondent filed this status report on October 13, 2009. Another status conference, which was recorded, was held on October 20, 2009. Ms. Porter requested, again, that she be given an award of attorneys' fees and costs on an interim basis.

## **II. Analysis**

Ms. Porter's motion presents two distinct questions. First, whether she is entitled to an award of attorneys' fees and costs on an interim basis. If so, the second question is the quantum to which she is entitled.

**A. Whether an Award on an Interim Basis is Appropriate?**

Petitioners in the Vaccine Program who receive compensation are entitled to an award for their attorneys' fees and costs. According to Judge Firestone's opinion, Ms. Porter is entitled to compensation. Thus, by simple syllogism, Ms. Porter is entitled to an award of attorneys' fees and costs.

Ms. Porter has requested that she be given an award of attorneys' fees and costs, now, rather than wait until the conclusion of the case. In Avera, the Federal Circuit indicated, in dicta, that attorneys' fees and costs are available on an interim basis.<sup>1</sup>

Whether attorneys' fees and costs should be awarded on an interim basis is a matter of discretion. Avera does not require an interim award in every case. For example, Avera actually affirmed the denial of interim attorneys' fees and costs because, in part, "there was only a short delay in the award pending the appeal." Avera, 515 F.3d at 1352. Other courts have recognized that trial courts have discretion to award attorneys' fees and costs on an interim basis. Dubuc v. Green Oak Tp., 312 F.3d 736, 744 (6th Cir. 2002); Sunrise Development, Inc. v. Town of Huntington, New York, 62 F.Supp.2d 762, 779 (E.D.N.Y.1999).

Here, an award of attorneys' fees and costs on an interim basis is appropriate. Ms. Porter's case almost certainly will continue for at least a few more months.<sup>2</sup> In theory, Ms. Porter's case could continue for a longer amount of time because after the damages are determined, the respondent could exercise her right to appeal Judge Firestone's decision. See 42 U.S.C. § 300aa-12(f). Respondent is quite clear that the time for deciding whether to appeal Judge Firestone's decision has not yet begun to run and that no decision about whether the respondent will appeal (or will not appeal) has been made. Resp't Status Rep't, filed Oct. 13, 2009, at 5.

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<sup>1</sup> The comments about when interim fees are available are dicta because the actual holding of Avera was to affirm the denial of attorneys' fees and costs on interim basis. See 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).

<sup>2</sup> Although Judge Firestone's order required the undersigned to complete remand proceedings within 90 days, see 42 U.S.C. § 300aa-12(e)(2); the parties have explained that they anticipate returning to Judge Firestone to seek additional time to complete the process for determining damages. Additional time is needed because the process of preparing a life care plan almost always requires more than 90 days.

Furthermore, Ms. Porter explained that an interim award of attorneys' fees and costs will provide funds useful to determining damages. This factor, too, points in favor of an award of attorneys' fees and costs on an interim basis.<sup>3</sup>

Consequently, Ms. Porter will be awarded her attorneys' fees and costs on an interim basis.<sup>4</sup> The remaining issue is the amount of the award.

### **B. Amount of Attorneys' Fees and Costs**

Like other litigation allowing a shift in attorneys' fees and costs, awards for attorneys' fees and costs in the Vaccine Program must be "reasonable." 42 U.S.C. § 300aa-15(e)(1) (2006).

Ms. Porter's amended motion for attorneys' fees and costs sought \$68,404.17. Respondent did not object to this request.

Ms. Porter's requested amounts are reasonable. Thus, she is awarded the amount requested.

### **III. Summary**

Petitioner is 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 petitioner's favor for **\$68,404.17** in interim attorneys' fees and costs. Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

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<sup>3</sup> Although an award of attorneys' fees and costs on an interim basis helps petitioners complete their presentation of damages, such an award is not essential. The conclusion that an interim award is not essential follows from the numerous cases before Avera, in which petitioners completed the process of determining damages without an award of attorneys' fees and costs on an interim basis.

<sup>4</sup> In the October 21, 2009 status conference, Ms. Porter also sought an assurance about how the undersigned would view the question of her entitlement to attorneys' fees and costs under a different set of facts. Any attempt by the undersigned to speculate how the undersigned would evaluate a future request for attorneys' fees and costs based upon an undetermined record would be pointless.

IT IS SO ORDERED.

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