

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

No. 02-1354V

Filed: January 17, 2012
(Not to be Published)

KERRY COOPER and	*	
STEVEN COOPER,	*	
Individually and as Next Friends of,	*	
Aidan Scott Cooper, a minor,	*	Autism; Interim Attorneys' Fees and
	*	Costs
Petitioners,	*	
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES	*	
	*	
Respondent.	*	

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS¹

On October 8, 2002, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ("the Program"),² alleging that Aidan Scott Cooper was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

Petitioners' counsel filed a motion to withdraw as counsel in this case on December 19, 2011. Petitioners' counsel in the same motion moved for an award of interim attorneys' fees and costs adopting the parties' stipulation. The parties' stipulation indicates that the respondent does not oppose the amount of attorneys' fees

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to delete medical or other information, that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

² The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 *et seq.* (hereinafter "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

and costs requested; however the stipulation indicates respondent does oppose an award of interim attorneys' fees and costs.

Respondent filed a Response to Petitioner's Motion for Interim Attorneys' Fees and Costs on January 4, 2012. Respondent argues an award of interim attorneys' fees and costs is inappropriate at this time and urges the court to deny petitioners' motion until the case is concluded or such time as an interim award is appropriate under *Avera v. Sec'y of HHS*, 515 F.3d. 1343 (Fed. Cir. 2008).

I find that an award of interim attorneys' fees and costs is appropriate in this case. Interim attorneys' fees and costs are explicitly authorized by the binding precedent of the United States Court of Appeals for the Federal Circuit. *Avera v. Sec'y of HHS*, 515 F.3d. 1343; see also Vaccine Rule 13(b). As a participant in the Omnibus Autism Proceeding (OAP), I find that up to this point, petitioner had a good faith belief in and a reasonable basis for this claim. See *Avera*, 515 F.3d at 1352 (requiring such a determination before an award of interim fees is permissible). As a reasonable basis was found in each of the OAP test cases, it follows that petitioner in the instant case likewise had a reasonable basis at least until the resolution of the test cases.³

Respondent, citing *Avera*, 515 F.3d at 1352, argues that interim attorneys' fees and costs are available in only limited circumstances under *Avera* as follows: "protracted proceedings, significant expert costs, or where petitioner had suffered undue hardship." Respondent's Response at 1-2. Respondent argues that the withdrawal of counsel does not fall into these limited circumstances. *Id.* I disagree in the instant case, but recognize that the withdrawal of counsel alone may not always provide sufficient justification for an award of interim attorneys' fees. See *McKellar v. Sec'y of HHS*, 09-841, --- Fed. Cl. ---, 2011 WL 5925323, at *6 (Nov. 4, 2011).

As counsel has diligently represented petitioner for a number of years while this claim was pending in the court's OAP the proceedings have been protracted. At this time counsel avers that his withdrawal is required. Petitioners have chosen to continue this claim without the aid of their current counsel and it is therefore likely subsequent proceedings in this case will be further protracted. The necessary dissolution of the attorney-client relationship at this time will impede the ability of counsel to obtain payment of fees and costs at the conclusion of this case, as counsel will have to rely on *pro se* petitioners to assert that claim in a timely fashion at the conclusion of the case. Practically speaking, former counsel may be denied intervention in a case to obtain fees and costs. *Silver v. Sec'y of HHS*, No. 99-462V, 2009 WL 2950503, *9-10 (Fed. Cl. Spec. Mstr. Aug. 24, 2009). The purpose of § 15(e) is to encourage representation of vaccine-injured persons, a purpose that may be thwarted if counsel are caught in a dilemma between an ethically-required withdrawal of representation and the need to

³ The OAP test cases are *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Hazlehurst v. Sec'y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec'y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

remain counsel of record in order to obtain fees and costs. Accordingly, not allowing interim fees at this time would pose an undue hardship on petitioners and counsel alike.

Accordingly, I hold petitioners are entitled to reasonable interim attorneys' fees and costs pursuant to §§ 15(b) and (e)(1) and under *Avera*. Petitioners seek attorneys' fees and costs in the amount of \$4,210.00. Respondent does not object to the *amount* of the fees and costs sought.⁴

The request for interim attorneys' fees and costs is granted. Petitioners are awarded reasonable interim attorneys' fees and costs pursuant to §§ 15(b) and (e)(1), as I find that the petition was brought in good faith and upon a reasonable basis, and the amounts requested are reasonable and appropriate.

Pursuant to §15(e), I award a lump sum of \$4,210.00⁵ to be paid in the form of a check payable jointly to the petitioners and petitioners' counsel, Michael Gallagher.

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.⁶

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master

⁴ In lieu of filing a Vaccine General Order 9 statement, pursuant to the stipulation the firm agrees to reimburse petitioner any costs that petitioner personally incurred that are compensable under § 15(e)(1).

⁵ This amount is intended to cover all legal expenses incurred in this matter. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, § 15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. See *generally Beck v. Sec'y of HHS*, 924 F.2d 1029 (Fed. Cir.1991).

⁶ Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. See Vaccine Rule 11(a).