

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 08-185V
Filed: February 28, 2011
Not to be Published**

JAMES HOLMES,	*	
	*	
Petitioner,	*	Interim Attorney Fees and Costs;
v.	*	<i>Avera</i>
	*	
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

Richard Gage, Esq., Cheyenne, Wyoming, for petitioner.
Ryan Pyles, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION AWARDING INTERIM FEES AND COSTS¹

Vowell, Special Master:

On March 18, 2008, Ms. Christina Loudermilk filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*² [the “Vaccine Act” or “Program”], on behalf of her then-minor son, James Holmes [“petitioner”]. On July 6, 2010, the petition was recaptioned upon oral motion as James had reached the age of majority. The case thereafter proceeded with James as the petitioner.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa.

The petition alleged that the tetanus and diphtheria ["Td"] vaccination James received on August 17, 2005, caused him to suffer two seizures on August 18, 2005, causing a subsequent seizure disorder (epilepsy) and unspecified neurological injuries.³ Petition, ¶¶ 2-4. An entitlement hearing was held June 30, 2010, and an entitlement decision is pending.

On January 25, 2011, petitioner filed an application for award of attorneys' fees and reimbursement of costs in the amount of \$61,523.82 ["Pet. Mot." or "petitioner's motion"]. While not styled as such, this application requests an interim fees and costs award pursuant to *Avera v. Sec'y, HHS*, 515 F.3d 1343 (Fed. Cir. 2008), because it requests an award prior to the entry of judgment on the merits. On February 11, 2011, respondent filed her opposition to petitioner's application for interim attorneys' fees and costs raising several objections ["Res. Opp."]. Petitioner filed her reply on February 11, 2011 as well.

On February 18, 2011, I met with the parties in an in-person status conference to discuss petitioner's motion.⁴ As discussed more fully below, I indicated my intent to grant petitioner's motion in part and allow the parties to reserve certain objections and arguments⁵ raised in the filings for the final award of fees and costs in this case. Counsel for both parties indicated they had no objection to this course of action. Accordingly, I **GRANT** petitioner's motion, in part, in the amount of \$50,000.

I. The Applicable Law.

It is now clear that interim fees and costs may be awarded in Vaccine Act cases. *Avera v. Sec'y, HHS*, 515 F.3d 1343, 1352 (Fed. Cir. 2008). Prevailing on the merits is not a requirement for any Program award for fees and costs, but unsuccessful litigants must demonstrate that their claim was brought in good faith, a subjective standard, and upon a reasonable basis, an objective standard. § 300aa-15(e)(1); *Perreira v. Sec'y, HHS*, No. 90-847V, 1992 WL 164436, at *1 (Cl. Ct. Spec. Mstr. June 12, 1992) (describing good faith as subjective and reasonable basis as objective), *aff'd*, 27 Fed. Cl. 29 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994). Thus, a Vaccine Act litigant seeking an award of fees and costs before entitlement to compensation is determined must, at a minimum, establish good faith and a reasonable basis for the claim. See *Avera*, 515 F.3d at 1352.

³ Although the petition does not specify the neurological injuries suffered, subsequent filings indicate that some cognitive problems may have resulted either from James' seizure disorder or the medications used to treat the disorder.

⁴ The attorneys for the parties in this case also represent parties in another case pending on my docket, in which we conducted a damages hearing on February 18-19, 2011, in Phoenix, Arizona. A break in those proceedings allowed us to conduct the status conference in the instant case.

⁵ In making the instant award I necessarily reject respondent's arguments on the appropriateness of any interim fees and costs award.

It is also clear that interim fees and costs need not be awarded in all circumstances, although the factors that delineate when an interim award is appropriate remain somewhat muddled. See *Shaw v. Sec’y, HHS*, 609 F.3d 1372, 1375 (Fed. Cir. 2010); *Avera*, 515 F.3d at 1352. The Federal Circuit has opined that “[i]nterim fees are particularly appropriate in cases where proceedings are protracted and costly experts must be retained.” *Avera*, 515 F.3d at 1352. It has also clarified that “[w]here the claimant establishes that the cost of litigation has imposed an undue hardship and that there exists a good faith basis for the claim, it is proper for the special master to award interim attorneys’ fees.” *Shaw*, 609 F.3d at 1375. Nonetheless, “[t]he special master may determine that she cannot assess the reasonableness of certain fee requests prior to considering the merits of the vaccine injury claim.” *Id.* at 1377.

II. Good Faith and Reasonable Basis Exist.

Respondent raises no objection regarding whether petitioner has demonstrated good faith and a reasonable basis for this case. I find that both exist at this time. Due to its subjective nature, the standard for good faith is very low. A petitioner is entitled to a presumption of good faith. *Grice v. Sec’y, HHS*, 36 Fed. Cl. 114, 121 (1996). I find that the petitioner has demonstrated good faith in filing this claim, and continues to demonstrate good faith presently. His filings make it clear that he believes he was injured by the Td vaccine.

I also find that petitioner has demonstrated a reasonable basis for this case through the present date. *Perreira* establishes that whether a reasonable basis for pursuing a petition exists can change over time. See 33 F.3d 1375, 1377 (Fed. Cir. 1994). *Shaw* teaches that if reasonable basis and good faith are demonstrated at the time of the interim award request, an award may be granted. See 609 F.3d at 1375. Petitioner’s expert opinion is sufficient to demonstrate a reasonable basis for this case.

III. An Interim Award is Appropriate at the Time.

As I noted above, a special master need not award interim fees and costs in every case. Indeed, the Federal Circuit concluded that *Avera* itself was not an appropriate case for an interim fees award. 515 F.3d at 1352. I find that the instant case, however, is appropriate for an interim award. In doing so I necessarily reject respondent’s objections that (i) the Vaccine Act does not authorize interim awards, and (ii) that *Avera* should be interpreted narrowly to deny an interim award in this case. See Res. Opp. at 2-6.

Were I writing on a clean slate, I would adopt respondent’s reasoning and deny petitioner’s request for interim fees and costs. Respondent’s arguments track the plain language of the statute. As respondent notes, the repeated efforts in Congress to amend the statute to permit interim fees suggests that at least some members of Congress did not think the Act encompassed an interim award. Res. Opp. at 2-3 and n.2. However, the Federal Circuit’s decision in *Avera* made it clear that interim fees and

costs awards are permitted under the Vaccine Act. The panel's decision is binding precedent. See *Burgess v. Sec'y, HHS*, No. 07-258V, 2011 WL 159760, at *1 (Fed. Cl. Spec. Mstr. Jan. 3, 2011) (citing § 300aa-12(f) and *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1353 (Fed. Cir. 2006)).

Respondent's point that *Avera* was a case in which judgment on the merits had been rendered is correct (see Res. Opp. at 4); given that procedural posture, one could certainly argue that *Avera* must be limited to its facts. However, the panel that decided *Avera* did not limit interim fee awards to *Avera's* facts (see 515 F.3d at 1352), and cases like *Shaw* demonstrate that cases that do not fit *Avera's* facts may still be appropriate for interim awards (see 609 F.3d 1372).⁶

I hold that this case is appropriate for an interim award because the proceedings are protracted, petitioner obtained the services of a costly expert, and the amount is an undue hardship for petitioner to bear. This case has been pending for nearly three years, and while petitioner bears responsibility for some of that delay (see Res. Opp. at 7), he has done all he can to prosecute this case up to the present time. He now awaits my decision on entitlement. In prosecuting this case petitioner and his counsel obtained the services of a costly expert, Dr. Marcel Kinsbourne, and paid the costs to send Dr. Kinsbourne, petitioner's mother, and petitioner's attorney to the entitlement hearing in New York, New York. See Pet. Mot. at 20. I note that half of petitioner's request, \$30,761.32, is for litigation costs.⁷ See Pet. Mot. at 5. Respondent has raised no objection to petitioner's request for costs. See Res. Opp. at 9. This substantial sum was reasonably incurred given the course of this case, and adequately documented in petitioner's motion.

I reserve ruling on respondent's other objections pertaining to Mr. Gage's hourly rate and his practice of grouping multiple tasks into a single billing entry (see Res. Opp. at 8-9), and I reserve ruling on whether petitioner shall be awarded the remaining \$11,523.82 requested in petitioner's motion. The parties' arguments on these issues are preserved; I will address them in a final decision on fees and costs, should that prove necessary.⁸

⁶ In *Shaw* the issue before the Federal Circuit was only the reviewability of an interim fees and costs award under § 300aa-12(e). See 609 F.3d at 1374. The interim fees and costs at issue were requested and awarded after an entitlement hearing but prior to the issuance of a decision on entitlement. *Id.* at 1373. While this timing was not directly in issue before the Circuit, it demonstrates that *Avera* has not been limited to its facts with respect to this issue, and the Federal Circuit, at the very least, considers it an open question. The Court of Federal Claims has yet to rule on remand in *Shaw*.

⁷ Petitioner did not file a statement pursuant to General Order #9 with his motion, and all of the enumerated costs are requested on behalf of petitioner's attorney. I will grant petitioner's motion in part without that statement, but petitioner is warned that I will not issue a final award of attorney fees and costs in this case without that statement.

⁸ The parties will be given an opportunity to informally resolve these issues, and any others, once petitioner files a final application for fees and costs.

Given my experience in the Program, I am confident that petitioner is due at least a sum of \$50,000 for his fees and costs incurred through January 25, 2011. See *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (explaining special masters may use their prior experience in reviewing fee applications). Attorney fees in Program cases are governed by the lodestar method, a result of multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate. *Avera*, 515 F.3d at 1347-48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). Even with respondent's objections in mind, the resultant award would be at least \$50,000.

IV. Conclusion.

Petitioner's motion is GRANTED in part, and I hereby award a lump sum of \$50,000.00 in the form of a check payable jointly to petitioner, James Holmes, and his counsel of record, Richard Gage, for petitioner's interim attorney fees and costs. 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.⁹

IT IS SO ORDERED.

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

⁹ 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).