

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 04-258V

Filed: October 5, 2011

Not to be Published

EVA J. COIRO-LORUSSO and NICOLA LORUSSO, as parents and natural guardians of UMBERTO LORUSSO, a minor,

Petitioners,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES

Respondent.

Autism; Interim Attorneys' Fees and Costs

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS ¹

On February 27, 2004, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ("the Program"),² alleging that Umberto was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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.

Petitioners' counsel filed a motion to withdraw as counsel in this case on September 8, 2011. Petitioners' counsel in the same motion moved for an award of interim attorneys' fees and costs.

Respondent filed a Response to Petitioners' Motion for Interim Attorneys' Fees and Costs on September 26, 2011. 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). Respondent's Response further indicates that the respondent does not oppose the amount of attorneys' fees and costs requested, if the special master finds that an interim award is appropriate in this case.

I find 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 OAP, I find that up to this point, petitioners 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).

Respondent, citing *Avera*, 515 F.3d at 1352, argues 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 the withdrawal of counsel does not fall into these limited circumstances. *Id.* I disagree.

Counsel has diligently represented petitioners for a number of years while this claim was pending in the court's Omnibus Autism Proceeding ("OAP"). At this time counsel reasonably avers his withdrawal is required. Petitioners may receive reasonable fees and costs under the Vaccine Act, and petitioners have chosen to continue this claim without the aid of their current counsel. The inability to pay counsel until the conclusion of this claim, or some other unknowable time, interferes with petitioners' decision to end their attorney-client relationship and still pursue this claim. This impedes the purpose of § 15(e) to encourage representation, particularly if petitioners secure new counsel. Further, it may be difficult for counsel to obtain attorneys' fees and costs once he is no longer counsel of record in this case and his attorney-client relationship with petitioner is terminated. Not allowing interim fees at this time would pose an undue hardship on petitioners and counsel alike. See *McKellar v. Sec'y of HHS*, 09-841V, 2011 WL 3425606, *1 (Fed. Cl. Spec. Mstr. June 3, 2011), *mot. rev. docketed* (Fed. Cl. July 5, 2011) (*citing Silver v. Sec'y of HHS*, No. 99-462V, 2009 WL 2950503, *9-10 (Fed. Cl. Spec. Mstr. Aug. 24, 2009)).

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 \$ 6,467.46 to be awarded to the law firm of Nance,

Cacciatore, Hamilton, Barger, Nance, and Cacciatore. Respondent does not object to the *amount* of the fees and costs sought.³

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 \$6, 467.46⁴ to be paid in the form of a check payable jointly to the petitioners and petitioners' counsel, Nance, Cacciatore, Hamilton, Barger, Nance, and Cacciatore.

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.⁵

IT IS SO ORDERED.

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

³ In lieu of filing a Vaccine General Order 9 statement, counsel filed a statement on October 3, 2011 indicating that counsel's firm agrees to reimburse petitioners any costs that petitioners personally incurred, up to the date of counsel's motion for interim fees, that are compensable under § 15(e)(1).

⁴ 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).

⁵ 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).