IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 97-588V
Filed: March 28, 2012

KENDALL P. LUMSDEN, a minor, by his adoptive mother and natural guardian, CYNTHIA PETERS	*	
Petitioner,	*	Autism; Interim Attorney Fees and Costs
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Harry Potter, Esq., Boston, MA, for petitioner.
Clifford Shoemaker, Esq., Vienna, VA, formerly for petitioner.
Traci Patton, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS[1]

Vowell, Special Master:

On August 27, 1997, petitioner 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"], alleging that Kendall P. Lumsden ["Kenny"] was injured by a vaccine or vaccines listed on the Vaccine Injury Table.

[1] Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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] National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (1986). Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

On November 10, 2011, petitioner's current counsel, Conway, Homer & Chin-Caplan, PC, ["CHCC"] filed a motion for a decision adopting the parties' stipulation with respect to interim attorneys' fees and costs.[3] The motion indicated that while respondent did not object to the amount of attorneys fees and costs being sought by petitioner's counsel, respondent did oppose any award of interim attorneys fees and costs. CHCC Motion at 5. The motion also noted that petitioner's previous counsel, Shoemaker and Associates ["S&A"], incurred fees and costs and that an application for them would be filed "posthaste." *Id.* at 5 n.4. A motion for attorneys' fees and costs was filed on behalf of petitioner's previous counsel on November 21, 2011.

After being granted two extensions, respondent filed her objection to both motions on February 16, 2012. Petitioner's current counsel filed her reply, which included as an attachment a reply from petitioner's previous counsel, on February 27, 2012. For the reasons outlined below, I find that an award of interim attorneys' fees and costs in the amount of $24,744.20 is appropriate.

I. The Applicable Law.

Although the Vaccine Act itself is silent on the issue of interim awards of fees and costs, 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. § 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.

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. In *Avera*, the Federal Circuit noted 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 held 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.

[3] Although procedurally an interim fee request, the motion represents the final fees and costs request on behalf of the firm. On November 21, 2011, petitioner's counsel filed a motion to withdraw as attorney of record.

II. Good Faith and Reasonable Basis Exist.

As a participant in the Omnibus Autism Proceeding ["OAP"],[4] 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.[5] Thereafter, activity in this case has concerned whether there exists any alternative theory of recovery, followed by the CHCC motion to withdraw, activity which I find to have been undertaken in good faith and upon a reasonable basis.

III. An Interim Award is Appropriate at the Time.

As noted above, the Federal Circuit has indicated 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. Unless one reads this sentence as requiring *both* protracted proceedings *and* costly experts before interim fees are appropriate, it is difficult to conceive of a case in the Vaccine Program in which an award of interim fees on the basis of the length of the proceedings is more appropriate. This is the oldest case in the Vaccine Program, and has occupied that ignominious status for several years. Filed in 1997, this case is now fifteen years old. To maintain that proceedings have not been protracted in this particular case is absurd.

Granted, a substantial portion of those fifteen years can be attributed to delays at petitioner's request. *See*, *e.g.*, Order, filed Sept. 4, 1998, suspending proceedings for 180 days; Order, filed Mar. 27, 2002, deferring further submissions; Order, filed Aug. 30, 2002, transferring the case to the OAP. Once transferred to the OAP, this case, like the approximately 5000 other OAP cases, remained in a holding pattern until the petitioners' bar was ready to present their causation cases, those cases were tried, decisions issued, and appeals resolved. With the last of the appeals resolved in August, 2010, the court began ordering the remaining 4800 OAP petitioners to file an amended petition if they wished to continue to pursue their entitlement claims. In June, 2011, this petitioner was ordered to do so. More delays ensued, as petitioner requested additional time for medical testing premised on a theory of causation not litigated in the OAP test

[4] Order, filed Aug. 30, 2002, transferred this case to the OAP.

[5] The OAP theory 1 test cases were *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), and *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The OAP theory 2 test cases were *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), and *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

cases.[6] The results of this testing have not yet been filed.[7]

However, nothing in *Avera* requires the court to apportion "fault" in evaluating whether the proceedings have been protracted. The OAP was created to deal efficiently and fairly with an unprecedented number of cases[8] that threatened to overwhelm the bench and bar alike. *See generally* Autism Gen. Order #1, 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002). While it is certainly possible that this case could have been litigated outside the OAP, as some autism cases were, petitioner's request to join the OAP permitted the court and respondent to devote resources to cases outside the OAP as well as to the consolidated discovery and hearing processes within the OAP. I also note that the years during which this petition sat dormant in the OAP allowed respondent to reap benefits from the advancements in scientific understanding of autism spectrum disorders and the wealth of research effectively refuting the MMR causation hypothesis.[9]

Volumes of documents have been filed in this case, most in the first three years after the petition was filed. The billing records from the law firm that originally represented petitioner, S&A, reflect an extensive review of these voluminous medical records, as well as referral of the case to two potential experts for evaluation or expert

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[6] Petitioner's original theory was that the measles, mumps, and rubella ["MMR"] vaccine was causal. Petition at 1-2. This theory was litigated in the Theory 1 test cases and decided adversely to petitioners. See *supra* note 5. Although petitioner is not bound by the results in the test cases, proceeding on the same theory without new evidence is extremely unlikely to produce a different outcome. OAP petitioners have been advised that there may be no reasonable basis to proceed on one of the rejected theories of causation, in the absence of new evidence.

[7] According to Petitioner's Exhibit ["Pet. Ex."] 89, mitochondrial DNA sequencing was ordered on August 18, 2011.

[8] The exact number of cases in the OAP since its inception in 2002 is difficult to determine. The best estimate available is that, excluding duplicate petitions, about 5100 cases were in the OAP over the last 10 years. *Snyder*, 2009 WL 332044 at *4 n.12. Although respondent opposed some aspects of the OAP at the time it was created, the omnibus proceeding has proven cost effective and efficient. The test cases produced comprehensive decisions on the theories presented, and to the extent they were appealed, the decisions have withstood appellate scrutiny. Between the time appellate review of the test cases was completed and the date of this decision, over 3000 (of the remaining 4800) cases have been dismissed, most either voluntarily or as a result of a failure to prosecute.

[9] *See Snyder*, 2009 WL 332044 at *137-147 ("Section VII. Analysis of Evidence Regarding MMR Causation of Autism"). Since the Theory 1 test case decisions were issued, the medical journal that published the research paper that launched the MMR-autistic entercolitis theory withdrew the paper from publication, and two of the paper's authors have lost their medical licenses in the wake of evidence of misconduct connected with the research upon which the theory was based. R. Horton, *A Statement by the Editors of The Lancet,* LANCET 363(9411): 820-821 (2004); UK General Medical Council, *Determination on Serious Professional Misconduct and Sanction regarding Andrew Wakefield* (May 24, 2010), available at http://www.gmc-uk.org/Wakefield_SPM_and_SANCTION.pdf_32595267.pdf; UK General Medical Council, *Determination on Serious Professional Misconduct and Sanction regarding Simon Murch* (May 24, 2010), available at http://www.gmc-uk.org/Professor_MURCH_determination.pdf_32597633.pdf.

opinion. S&A Motion, Tab A at 1-8. For reasons not readily apparent in the record, an attorney from a second law firm, CHCC, of Boston, MA, entered an appearance in this case in 2009, replacing S&A. Since activation of this case in 2011 as a part of the court's effort to resolve the remaining OAP cases, petitioner has filed one additional medical record documenting medical and genetic testing pertaining to what appears to be her new theory of causation.

Petitioner's current counsel now seeks to withdraw from representation. It appears that petitioner, Cynthia Peters, wishes to continue to pursue Kenny's claim, but her current attorney does not believe he can continue to represent her because he does not believe there is a reasonable basis to continue the case. CHCC Motion to Withdraw as Attorney of Record, filed November 21, 2012, at 1. In seeking to withdraw, petitioner's counsel has attempted to strike a balance between his duty to his client and his obligations as an officer of the court. It is well established that an attorney may not file or continue to pursue a case when there is no reasonable basis for doing so.[10] In a separate order I will grant petitioner's request to withdraw.

Counsel's desire to withdraw may not, standing alone, mandate the award of fees and costs on an interim basis. *McKellar v. Sec'y, HHS*, 101 Fed. Cl. 297, 302 (2011). However the pending termination of the attorney-client relationship is not the only factor present here. I find that the proceedings in this case have been protracted. Additional delay is likely, but it is impossible at present to determine how much time will yet be required to resolve question of entitlement to compensation. Other than the one medical record filed as Pet. Ex. 89, the last medical record pertaining to Kenny was filed November 1, 2000. Given respondent's understandable interest in having all available medical records filed before entitlement is determined,[11] and the need for petitioner to obtain an expert opinion supporting her case, some additional period of delay is likely,

[10] Under the Rule 11 of both the Federal Rules of Civil Procedure and the Rules of the Court of Federal Claims, counsel can face sanctions for filing pleadings in which they lack a basis in fact and law. The ABA Model Rules of Professional Conduct ["MRPC"] and Massachusetts Rules of Professional Conduct ["Mass RPC"] notes that an attorney must withdraw if continued representation of the client would "result in violation of the rules of professional conduct or other law." MRPC 1.16(a); Mass RPC 1.16(a). Additionally, the MRPC indicates that an attorney may elect to withdraw from a case if counsel and client have a fundamental disagreement. MRPC 1.16(b)(4); *See* Mass RPC 1.16(b). *See also Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. United States,* 16 Cl. Ct. 158, 165 (1989) (discussing that Claims Court Rule 11 is a continuing obligation and prohibits counsel from continuing proceedings when they lack a reasonable basis to do so); *Jessup v. Sec'y, HHS*, 26 Cl.Ct. 350, 352 (1992) (noting that U.S. Claims Court Rule 11 imposed an obligation on counsel to inquire into the facts and law before filing suit and suggesting that Vaccine Act petitioners' counsel have a similar obligation).

[11] In a recent case, the entitlement phase of a case was reopened, when, during the damages phase of the case, it was learned that petitioner had been diagnosed years earlier with a genetic disorder that could fully account for his seizure disorder. *Deribeaux v. Sec'y, HHS*, No. 05-306V, 2011 WL 6935504 (Fed. Cl. Spec. Mstr. Dec. 9, 2011). Although this information was in petitioners' possession at the time of the entitlement hearing, they did not file the medical records pertaining to this diagnosis because petitioners did not believe they had a duty to update the record after filing the initial petition. *Id.* at *2.

particularly if petitioner remains pro se.[12] In my experience, it takes a pro se petitioner longer than an attorney to obtain and file medical records, and, to date very few pro se OAP petitioners have succeeded in finding a physician willing to opine in favor of vaccine causation. Thus, if petitioner continues to pursue Kenny's case for compensation, a substantial period of delay may ensue before resolution of the entitlement claim.

Under these circumstances, petitioner has established a sufficient basis to warrant the award of fees and costs on an interim basis.[13] Petitioner's counsel has represented that this interim application for fees and costs represents the final application he will file for his fees and costs in this case. It likewise appears that petitioner's former counsel has included all of his previously incurred fees and costs. Thus, this application probably represents the only application for fees that will be filed.

IV. Determining the Amount of Fees and Costs to be Awarded.

A. Fees and Costs for CHCC.

Although respondent has challenged whether fees and costs may be awarded on an interim basis in this case, the parties have agreed on the amount of fees and costs incurred by CHCC. I adopt the parties' agreement, and award $3,780.00.

B. Fees and Costs for S&A.

In contrast, respondent challenges both the availability of an award on an interim basis and the amounts claimed by S&A. Respondent objects to some of the claimed fees and costs, asserting that they are "excessive, unreasonable, or unjustified." Response at 9.

Specifically, respondent identified seven billing entries for attorney Gaida Anis

[12] Few pro se litigants in the OAP have succeeded in finding counsel. Only a handful of the many attorneys who represent petitioners in Vaccine Act cases are accepting autism cases, and some of those are simply reviewing the case file to determine if any alternate theories of causation or injury are suggested by the medical records. Likewise, very few members of the petitioners' bar are actually pursuing alternative theories of causation.

[13] The convention in the Vaccine Program is to refer to requests for fees and costs as petitioners' requests or applications, even though the vast majority of these requests primarily involve their attorneys' fees and only modest amounts of the awards go directly to petitioners themselves. The Vaccine Act's § 15 has been interpreted as requiring the payment to be made to petitioners, even though the attorney is legally entitled to the funds, and the attorneys are the real parties in interest in most fees and costs petitions. *Heston v. Sec'y, HHS,* 41 Fed. Cl. 41 (1998); *Newby v. Sec'y, HHS,* 41 Fed. Cl. 392 (1998). In one recent case, however, a special master ordered that the check be made payable to the attorney alone, as the petitioner could not be located. *Gitesatani v. Sec'y, HHS,* No. 09-799, 2011 WL 5025006 (Fed. Cl. Spec. Mstr. Sept. 30, 2011) (noting that *Heston* and *Newby* involved pre-1988 vaccinations and thus a different section of the Vaccine Act applied to their attorney fees).

and questioned if S&A has previously received compensation for the work; six hours billed for a short trip to a copy center;[14] and payment to two doctors whose exact role in the case is unexplained. Response at 9-10.

Most of respondent's objections have been rendered moot by the February 27, 2012 reply filed by petitioner's former counsel. In his reply, petitioner's former counsel conceded a billing error in connection with the copy center trip, withdrew his request for payments for the two physicians who reviewed the case, and agreed to reduce the amount claimed for work performed by Ms. Anis.[15]

I have carefully reviewed the billing records, the docket entries, and respondent's specific objections. With regard to Ms. Anis' billing, my review of the billing records from S&A reflects considerably more than $640.00, the amount conceded by S&A, in attorney fees billed by Ms. Anis that appear to be attributable to general causation matters, rather than case specific efforts. The S&A firm was compensated for general causation work in the OAP in *Cedillo*,[16] and thus general causation efforts should not be billed in individual cases. I find that $1088.00 of time billed by Ms. Anis represents time spent on general causation matters, rather than case specific matters.[17] With this additional reduction, I award $20,964.20.

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[14] This trip would be in the nature of a secretarial or administrative tasks, and thus part of the firm's overhead costs. It is therefore not compensable. *See, e.g. ,Macrelli v. Sec'y, HHS,* No. 98–103V, 2002 WL 229811, at *7 (Fed. Cl. Spec. Mstr. Jan. 30, 2002) (stating that "time spent performing secretarial tasks is to be subsumed in the overhead costs of practicing law and is not reimbursable"); *Isom v. Sec'y, HHS,* No. 94–770V, 2001 WL 101459, at *2 (Fed. Cl. Spec. Mstr. Jan. 17, 2001) (agreeing with respondent that tasks such as filing and photocopying are subsumed under overhead expenses). *See also Whitener v. Sec'y, HHS,* No. 06-477V, 2011 WL 1467919, at *8 (Fed. Cl. Spec. Mstr. Mar. 25, 2011); *Lamar v. Sec'y, HHS,* No. 99–584V, 2008 WL 3845157, at *15 (both noting that overhead costs are not compensable).

[15] There appear to be calculation errors in the revised amount Mr. Shoemaker seeks in interim fees and costs. His initial application sought $21,557.50 in fees and $2,781.70 in costs, for a total award of $24,339.20. S&A Motion at 2; S&A Motion, Tab A at 10-11. The concessions in his reply brief total $2,927, which would result in a reduction of the total sought from $24,339.20 to $21,412.20. However, the reply brief states that S&A is reducing its request "from $24,972.20 to $22,052.20." S&A Reply at ¶5. This statement includes a different amount for the initial request ($24,972.20 compared with $24,339.20) and a different reduction ($2,920 compared with $2,927). Because there is no documentary support for the higher initial request amount or the higher reduction amount I will disregard S&A Reply ¶5, and base my award of attorney fees and costs on an initial request for $24,339.20 with a conceded reduction of $2,927.

[16] Fees were awarded in an unpublished decision "Decision Awarding Interim Fees." *Cedillo v. Sec'y, HHS,* No. 98-916, (Fed. Cl. Spec. Mstr. filed Nov. 29, 2010). In accordance with the E-Government Act of 2002, the decision is available at http://www.uscfc.uscourts.gov/sites/default/files/Hastings.Cedillo Interim Fees [Shoemaker].pdf

[17] This amount is inclusive of the $640.00 that petitioner's former counsel agreed to remove from his application for fees and costs for Ms. Anis' time. It includes preparation for and attendance at meetings in Boston and Houston with experts, reviewing research, and reviewing an IOM report, involving some, but not all, time entries from September 10, 2001 through February 4, 2002. S&A Motion, Tab A at 2-3.

V. Conclusion

Petitioner has demonstrated that an interim award is appropriate in this case. I hereby award the total **$24,744.20** issued as follows:

1. a sum of **$3,780.00**, in the form of a check payable jointly to petitioner, Cynthia Peters, and petitioner's current counsel, Conway, Homer & Chin-Caplan, PC, for attorney fees and costs.

2. a sum of **$20,964.20**, in the form of a check payable jointly to petitioner, Cynthia Peters, and petitioner's former counsel, Shoemaker & Associates, for attorney fees and costs.

The interim award checks shall be mailed directly to petitioner's current counsel, Conway, Homer & Chin-Caplan, PC, located at 16 Shawmut Street, Boston, MA 02116.

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