In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 02-0160V

Filed: December 19, 2012

(Not to be Published)

* *		
JACKSON RUBIN, by his Mother and Next Friend, BETH ROSENBERG,	*	
Petitioner,	*	
v.	*	Autism; Interim Attorneys' Fees and Costs
SECRETARY OF HEALTH AND HUMAN SERVICES	*	
Respondent.	*	
* *		

Ronald C. Homer, Esq., Boston, MA, for petitioner.
Chrysovalantis P. Kefalas, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS[1]

Vowell, Special Master:

On March 1, 2002, petitioner filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*[2] [the "Vaccine

[1] Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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

Act" or "Program"], alleging that Jackson Rubin ["Jackson"] was injured by a vaccine or vaccines listed on the Vaccine Injury Table.

On November 20, 2012, petitioner's counsel, Ronald C. Homer, filed a motion seeking attorneys' fees and costs.[3] Although the motion did not specify why petitioner was requesting interim fees and costs, petitioner's counsel informed respondent's counsel and me that he intended to file a motion to withdraw as attorney of record. Petitioner's counsel filed his motion to withdraw on December 11, 2012.

On December 6, 2012, respondent filed her response to petitioner's motion for interim attorneys' fees and costs. Respondent argues that an award of interim fees and costs is not appropriate in this case but does not dispute the amount requested by petitioner. Response at 1.

On December 11, 2012, petitioner filed a reply, arguing that "an award is appropriate at this stage of [the] case." Reply at 6. Petitioner asserts that "[p]ayment of interim fees and costs is clearly recognized by the Federal Circuit and is in accordance with § 15(e) of the Vaccine Act." *Id.* at 5.

For the reasons outlined below, I find that an award of interim attorneys' fees and costs in the amount of $12,862.12 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); *Cloer v. Sec'y, HHS,* --- F.3d ---, 2012 WL 1202044, at *3 (Fed. Cir. 2012). 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

[3] Although procedurally an interim fee request, petitioner's counsel indicates the motion represents the final application for fees and costs for his firm, Conway, Homer & Chin-Caplan, P.C. *See* Motion at 1 n.1.

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.

II. Good Faith and Reasonable Basis Exist.

The Omnibus Autism Proceeding ["OAP"] was created to deal efficiently and fairly with an unprecedented number of cases 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). By filing a short form petition, petitioner opted to participate in the OAP. *Id*. at *6.

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.[4] Thereafter, activity in this case has concerned determining whether petitioner wishes to continue to pursue her claim, followed by Mr. Homer's 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.

Respondent argues an award of interim attorneys' fees and costs is inappropriate at this time and urges the court to deny petitioner's motion until the case is concluded or such time as an interim award is appropriate under *Avera*. Resp. Op. at 1. Specifically, respondent argues that interim attorneys' fees and costs are available in only the following limited circumstances: "protracted proceedings, significant expert costs, or where petitioner had suffered undue hardship." *Id.* at 1-2.; *citing Avera*, 515 F.3d at 1352. Respondent argues that such circumstances are not present in this case and the withdrawal of counsel does not fall into these limited circumstances. *Id.* at 2. 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, HHS,* 101 Fed. Cl. 297, 301 (2011) (finding that "some special showing is necessary to warrant interim fees, including but not limited to the delineated [*Avera*]

[4] 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).

factors . . . ."); *McKellar v. Sec'y, HHS*, Order Granting Motion for Review and Denying Interim Attorneys' Fees and Costs, May 3, 2012, ECF No. 53 (rejecting the "notion that withdrawing counsel is a sufficient basis for awarding interim fees").

This case is now over 9 years old. Like the thousands of other OAP cases, it 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 November 2012, petitioner was ordered to do so. Counsel now explains that he is unable to prosecute this case, based on the lack of a reasonable basis to proceed. Petitioner, however, seeks to proceed *pro se*.

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 that threatened to overwhelm the bench and bar alike. *See generally* Autism Gen. Order #1, 2002 WL 31696785. While it is certainly possible that this case could have been litigated outside the OAP, as some autism cases were, petitioner's participation in 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.

Mr. Homer has diligently represented petitioner for a number of years while this claim was pending in the court's protracted OAP proceedings, and now seeks to withdraw from representation. It appears that petitioner wishes to continue to pursue Jackson's claim, but her current counsel does not believe he can continue to represent her because he does not believe there is a reasonable basis to continue the case. Pet. Motion, filed Dec. 11, 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 he believes there is no reasonable basis for doing so.[5] In a separate order I will grant Mr. Homer's request to withdraw as counsel.

Counsel's desire to withdraw may not, standing alone, mandate the award of fees and costs on an interim basis. *McKellar,* 101 Fed. Cl. at 302. 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

[5] *Lumsden v. Sec'y, HHS*, No. 97-588, 2012 WL 1450520,*4 (Fed. Cl. Spec. Mstr. Mar. 28, 2012); *see also Edmonds v. Sec'y, HHS*, No. 04-87V, 2012 WL 1229149, *11-12 (Fed. Cl. Spec. Mstr. Mar. 22, 2012) (discussing the constraints placed on counsel from continuing representation in these circumstances).

question of entitlement to compensation. Given respondent's understandable interest in having all available medical records filed before entitlement is determined,[6] and the need for petitioner to obtain an expert opinion supporting her case, some additional period of delay is very likely, particularly if petitioner remains pro se.[7] In my experience, it takes pro se petitioners 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 Jackson'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.[8] 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.

IV. Conclusion

I hold petitioner is entitled to reasonable 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.

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[6] 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.

[7] 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.

[8] The convention in the Vaccine Program is to refer to requests for fees and costs as petitioner's 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 petitioner, 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).

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 Conway, Homer & Chin-Caplan, P.C. **I adopt the parties' agreement, and pursuant to § 15(e), I award a lump sum of $12,862.12[9] to be paid in the form of a check payable jointly to the petitioner and petitioner's counsel, Conway, Homer & Chin-Caplan, P.C. The interim award check shall be mailed directly to Conway, Homer & Chin-Caplan, P.C., 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

[9] 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, HHS,* 924 F.2d 1029 (Fed. Cir. 1991).