

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 09-150V
Filed: December 20, 2012**

VALERIE SOTO,
as parent and natural guardian of
Y.D., a minor,

Petitioner,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

Autism; Interim Attorneys' Fees
and Costs

Lorraine J. Mansfield, Esq., Las Vegas, NV, for petitioner.
Lisa Ann Watts, Esq., U.S. Dept. of Justice, Washington, DC, for respondent

DECISION on INTERIM ATTORNEY FEES and COSTS¹

Vowell, Special Master:

On March 10, 2009, Valerie Soto ["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 Y.D. was injured by a vaccine listed on the Vaccine Injury Table.

On November 22, 2011, petitioner filed a motion for interim attorneys' fees and costs. On December 21, 2011, the special master then assigned to this case issued a

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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, that satisfies the criteria in § 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. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

decision denying petitioner's motion on the basis that petitioner failed to show that an interim award was appropriate at that point in her case.

This case was reassigned to me on September 27, 2012. On December 3, 2012, petitioner again moved for interim attorneys' fees and costs [the "Application"]. On December 10, 2012, respondent filed her opposition to petitioner's motion for interim fees and costs ["Opposition"], arguing that an interim award is inappropriate at this time. Petitioner filed her reply to respondent's Opposition ["Reply"] on December 19, 2012.

For the reasons outline below, I find that an award of interim attorneys' fees and costs in the amount of \$27,449.92 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*, 675 F.3d 1358, 1362 (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 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.

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); see also *Heath v. Sec'y, HHS*, No. 08-85V, 2011 WL 4433646, at *2 (Fed. Cl. Spec. Mstr. Aug. 25, 2011); *Hamrick v. Sec'y, HHS*, No. 99-683V, 2007 WL 4793152, at

*3 (Fed. Cl. Spec. Mstr. Jan. 9, 2008); *Di Roma v. Sec’y, HHS*, No. 90-3277V, 1993 WL 496981, at *1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993); *Chronister v. Sec’y, HHS*, No. 89-41V, 1990 WL 293438, at *1 (Cl. Ct. Spec. Mstr. Dec. 4, 1990).

Reasonable basis is determined using an objective standard. Even if a reasonable basis for filing a petition exists, that basis may be lost as the case progresses and more information concerning the merits of the petition is obtained. See *Perreira*, 33 F.3d at 1377. As Special Master Moran noted in *Hamrick*, “[s]etting a relatively low standard for [finding] a reasonable basis in filing a petition (as opposed to prosecuting a petition) is supported by public policy and cases interpreting roughly analogous rules from civil litigation.” 2007 WL 4793152, at *5. *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.

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). Petitioner dutifully collected and filed her medical records, retained an expert to opine on her behalf, participated in a fact hearing, pursued additional testing, and actively sought a supplemental expert report before notifying the court on November 14, 2012, that she does not anticipate filing a supplemental report.

III. An Interim Award is Appropriate at the Time.

Respondent argues that an award of interim attorneys’ fees and costs is inappropriate at this time under *Avera*. Opposition at 4. Specifically, respondent argues that an interim award is inappropriate because petitioner has failed to show undue hardship and because the total fees and costs “generated since the denial of her first interim fee request are modest in comparison to other pending [Program] cases,” and do not include expert fees. *Id.*

This case is nearly four years old. See Reply at 2. Between February 27, 2009 and December 19, 2012, petitioner’s counsel, Lorraine Mansfield, performed numerous tasks on petitioner’s behalf. Application at 2-7. While part of this case’s duration can be attributed to delays at petitioner’s request, nothing in *Avera* requires the court to apportion fault in evaluating whether the proceedings have been protracted. Petitioner’s counsel has diligently represented petitioner throughout the pendency of this case. Further, she has done so without pay.

I find that the proceedings in this case have been protracted. In light of petitioner’s statement that no supplemental expert report is forthcoming, this case appears ready to proceed to its next phase. Additional delay, however, is likely. Moreover, it is difficult at present to determine how much time will be required to resolve the question of entitlement to compensation.

Under these circumstances, petitioner has established sufficient basis to warrant the award of fees and costs on an interim basis.³

IV. Conclusion.

I hold that petitioner is entitled to reasonable attorneys' fees and costs pursuant to § 15(b) and (e)(1), as I find the petition was brought in good faith and upon a reasonable basis, and the amounts requested are reasonable.

Although respondent has challenged the appropriateness of interim fees and costs at this juncture, she nonetheless concedes that "the amounts requested . . . are not *per se* unreasonable for proceedings on the petition to date." Opposition at 4. Accordingly, **I award a lump sum of \$27,449.92⁴ to be paid in the form of a check payable jointly to petitioner and petitioner's counsel, Lorraine J. Mansfield.⁵ The interim award shall be mailed directly to Lorraine J. Mansfield, at 6655 West Sahara Avenue, B-200, Las Vegas, Nevada 89146.**

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment accordingly.⁶

IT IS SO ORDERED.

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

³ 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).

⁴ This amount is intended to cover all legal expenses incurred by Ms. Mansfield 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).

⁵ In accordance with General Order #9, petitioner states that she has incurred no costs in pursuing her petition. Application at 8.

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).