

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 06-831V

Filed: February 19, 2013

*****		NOT TO BE PUBLISHED
CAROL JAKES, Mother and next	*	
Friend of DREYTON JAKES,	*	<b>Special Master Zane</b>
	*	
Petitioner,	*	
	*	
v.	*	Interim attorneys' fees and costs;
	*	Withdrawal of counsel; Protracted
SECRETARY OF HEALTH	*	proceedings; Undue hardship
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

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*Andrew D. Downing*, Rhodes, Hieronymus, *et al*, Tulsa, OK, for Petitioner.  
*Linda S. Renzi*, United States Dep't of Justice, Washington, DC, for Respondent.

### **UNPUBLISHED DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS<sup>1</sup>**

Pending before the undersigned is Petitioner's former counsel's Interim Application for Fees and Costs, to which Respondent objects. As explained below, upon consideration of the record as a whole, the application is GRANTED.

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<sup>1</sup> Because this decision contains a reasoned explanation for the Special Master's action in this case, the Special Master intends to post it on the website of the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, § 205, 44 U.S.C. § 3501 (2006). All decisions of the Special Master will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. As provided by Vaccine Rule 18(b), each party has 14 days to file a motion requesting the redaction from this decision of any such alleged material. In the absence of a timely request, which includes a proposed redacted decision, the entire document will be made publicly available. If the Special Master, upon review, agrees that the identified material fits within the banned categories listed above, the Special Master shall delete such material from public access. 42 U.S.C. § 300aa-12 (d)(4); Vaccine Rule 18(b).

## I. BACKGROUND

### A. Initial Filing and Submission of Medical Records

On December 7, 2006, Carol Jakes (“Petitioner”), *pro se*, filed a petition for compensation on behalf of her son under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §300aa-10, *et seq.*, as amended (“Vaccine Act”).<sup>2</sup> Petitioner alleges her son suffered “neurological injuries” as a result of an influenza (“flu”) vaccination administered to him on December 12, 2003. Petition at 1. Petitioner claims that as a result of receiving the flu vaccine, her son suffered an acute disseminated encephalomyelitis with bilateral optic nerve involvement which resulted in neurological problems that have continued for years. Amended Petition, ¶¶ 5 and 6.

For the three and a half (3-1/2) years following the filing of the petition, Petitioner was *pro se*. During that time, Petitioner attempted to obtain and file the pertinent medical records and other documentation as required by the Vaccine Act. Unfortunately, despite her attempts, a number of her filings were rejected as defective. *See e.g.*, Docket Entries March 10-11, 2008. Indeed, at the time Respondent filed her Rule 4 report more than three years after the petition was filed, Petitioner still had not filed all the pertinent medical records. Respondent’s Rule 4 Report, March 22, 2010, fn. 1.

Eventually, Petitioner obtained legal representation. On June 1, 2010, Petitioner’s former counsel, Mr. Andrew Downing, entered his appearance and began the long and arduous task of collecting and filing outstanding, pertinent medical records. Obtaining these records was challenging due, in part, to the stringent requirements of the providers. Application for Interim Fees, ¶4. Additionally, prior to filing the records, Petitioner’s former counsel reviewed and analyzed every page. *Id.* Nearly 2,000 pages of records were filed. *Id.* It was not until July 2011, over a year after Petitioner’s former counsel entered his appearance, that Petitioner finished filing records and filed a statement of completion and an amended petition.<sup>3</sup>

Shortly thereafter, in a September 13, 2011 status conference, the parties jointly requested to stay proceedings to explore settlement. That request was granted. But, a few months later, in a December 2011 status report and at a January 2012 status conference Petitioner’s former counsel advised that he had difficulties maintaining contact with Petitioner, and, thus, he had determined that he must withdraw from the case.

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<sup>2</sup> Part 2 of the Vaccine Act established the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 through § 300aa-34 (2006) (“Vaccine Program”).

<sup>3</sup> The case was reassigned to undersigned on June 23, 2011.

**B. Petitioner's Former Counsel's Motion to Withdraw and Application for Interim Fees and Costs**

On January 23, 2012, Mr. Downing filed his Application to Withdraw as Attorney of Record for Petitioner (“Application to Withdraw”) and his Interim Application for Fees and Costs (“Application for Interim Fees”). In these filings, Mr. Downing reiterated his previously stated reason for withdrawing. Application for Interim Fees, ¶ 9. Counsel noted that at the time, although he had referred the case to two consulting experts, because he was seeking to withdraw, he had requested that those experts perform no further work. *Id.*, ¶ 10.<sup>4</sup>

On February 9, 2012, Respondent responded to the Application for Interim Fees (“Respondent’s Response to Application for Interim Fees”). Respondent argued that it appeared that Petitioner’s former counsel was seeking payment of fees solely due to his withdrawal and that withdrawal alone was not a reason for awarding fees on an interim basis. Respondent’s Response to Application for Interim Fees at 4.

On March 13, 2012 a status conference was held, in which Petitioner, her former counsel, Mr. Downing, and Respondent’s counsel participated.<sup>5</sup> Mr. Downing maintained that he still wanted to withdraw. Although Respondent’s counsel expressed concern regarding whether the case could proceed efficiently in the absence of Petitioner being represented by counsel, Respondent did not object to Petitioner’s former counsel’s withdrawal.<sup>6</sup> And, although she regretted her counsel’s withdrawal, Petitioner understood his reasons and did not object to his withdrawal.

As to the application for interim fees, Petitioner stated that she did not object to her counsel being paid fees. Respondent reiterated her position that she did not believe the circumstances justified an interim fee award but agreed that the amounts sought were reasonable.

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<sup>4</sup> On January 30, 2012, Respondent filed a Motion to Show Cause why Petitioner’s claim should not be dismissed. (“Respondent’s Motion to Show Cause”). Respondent argued that because neither of the two experts to which the matter was referred had prepared a report, it was reasonable to infer that the reason for the absence of a report was that neither expert felt they could prepare a report to support Petitioner’s claim. Respondent’s Motion to Show Cause at 3. Respondent requested that Petitioner be ordered to file an expert opinion or show cause why the case should not be dismissed. *Id.* at 3-4. Undersigned deferred consideration of this motion to give Petitioner time to find new counsel and to see if an expert report would be filed. New counsel entered his appearance on August 1, 2012. On August 15, 2012, undersigned denied Respondent’s motion without prejudice. Subsequently, Petitioner filed a supporting expert report. Respondent has not renewed her Motion to Show Cause.

<sup>5</sup> The status conference was digitally recorded.

<sup>6</sup> Respondent’s stated position was consistent with the position in her Response to Motion for Interim Fees, in which she argued that Petitioner’s former counsel should be required to respond to the Motion for Show Cause before withdrawing. In Respondent’s view, once counsel withdrew, the Court and Respondent would have to rely on a response submitted by Petitioner *pro se*, who is less experienced in legal matters. Respondent’s Response to Application for Interim Fees at 2-3.

Petitioner's former counsel's application to withdraw was granted.<sup>7</sup> Petitioner was given 120 days to retain new counsel. Subsequently, on August 1, 2012, Petitioner's current counsel entered his appearance. Petitioner's former counsel's Application for Interim Fees is now ready for decision.

## II. APPLICABLE LEGAL STANDARDS

The Vaccine Act permits an award of "reasonable attorneys' fees" and "other costs." 42 U.S.C. § 300aa-15(e)(1). This provision permits an award of fees even when a petitioner does not prevail. *Id.* In so doing, this provision ensures the existence of a competent bar willing to represent those potentially injured by vaccinations. *Saunders v. Sec'y of Health & Human Servs.*, 25 F.3d 1031, 1035-36 (Fed. Cir. 1994) (a secondary purpose of the Vaccine Act, to ensure that vaccine-injury claimants will have readily available a competent bar to prosecute their claims under the Act, is effected by permitting the award of attorneys' fees and costs both to prevailing and non-prevailing claimants).

When compensation is not awarded, reasonable fees can still be awarded as long as it is shown that the petition was filed in good faith and there was a reasonable basis for it. 42 U.S.C. § 300aa-15(e)(1); *Shaw v. Sec'y of Health & Human Servs.*, 609 F.3d 1372, 1375 (Fed. Cir. 2010). Good faith requires only a subjective belief that a vaccine claim exists. A presumption of good faith is afforded petitioners in Vaccine Act cases. *See Grice v. Sec'y of Health & Human Servs.*, 36 Fed. Cl. 114, 121 (1996).

The Vaccine Act does not define what constitutes a reasonable basis, but case law provides guidance. In contrast to the subjective standard relating to the good faith requirement, the reasonable basis requirement is "objective, looking not at the likelihood of success of a claim but more to the feasibility of the claim." *McKellar v. Sec'y of Health & Human Servs.*, 101 Fed. Cl. 297, 303 (2011), *citing DiRoma v. Sec'y of Health & Human Servs.*, No. 90-3277, 1993 WL 496981, at \*1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). A determination of reasonableness is appropriate at the various stages of the proceeding, and such determination is informed by looking to the totality of the circumstances. *McKellar*, 101 Fed. Cl. at 303. Although a claim may have had a reasonable basis at the time of its filing, the reasonableness of further pursuing the claim may come into question when new evidence becomes available or the lack of supporting evidence becomes apparent. *Perreira v. Sec'y of Health & Human Servs.*, 27 Fed. Cl. 29, 33 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994).

As to the timing of an award of fees, in *Avera v. Sec'y of Health & Human Servs.*, 515 F.3d 1343, 1352 (Fed. Cir. 2008), the United States Court of Appeals for the Federal Circuit explicitly recognized that the Vaccine Act permitted the award of attorneys' fees and costs on an interim basis. Following *Avera*, the Federal Circuit has clarified that an interim fee award may be made prior to a decision on entitlement. *Shaw v. Sec'y of Health & Human Servs.*, 609 F.3d 1372, 1374-75 (Fed. Cir. 2010) ("A special master can often determine at an early stage of the

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<sup>7</sup> During the period between Mr. Downing's withdrawal and the appointment of new counsel the Application for Interim Fees was stayed until it was determined whether new counsel would appear or, if not, the matter would be resolved through a ruling on the record, which would have resulted in the Application for Interim Fees being converted to an Application for Final Fees.

proceedings whether a claim was brought in good faith and with a reasonable basis.”) (quoting *Avera* 515 F.3d at 1352).

In *Avera*, the Federal Circuit provided examples of circumstances where an interim fee award may be appropriate, such as when the case involved protracted legal proceedings, when costly experts had been retained, or when there was undue hardship. *Avera*, 515 F.3d at 1352; *see also McKellar*, 101 Fed. Cl. at 301 (“some special showing is necessary to warrant interim fees, including but not limited to delineated [*Avera*] factors . . . .”); Vaccine Rule 13(b). Since *Avera*, cases have clarified that an award of interim fees is in the special master’s discretion and that there are various circumstances under which an interim award is appropriate. *See Crutchfield v. Sec’y of Health & Human Serv.*, No. 09-39V, 2011 WL 3806351, at \*5-7 (Fed. Cl. Spec. Mstr. Aug. 4, 2011)(listing cases). One circumstance that has been recognized as appropriate for an award of interim fees is where a petitioner’s attorney is withdrawing. *Woods v. Sec’y of Health & Human Servs.*, 105 Fed. Cl. 148, 154 (2012).

Once it is established that an award of fees is appropriate, the appropriate amount of fees, the “reasonable attorneys’ fees,” must be determined. 42 U.S.C. § 300aa-15. The determination of the amount of reasonable attorneys’ fees is also in the special master’s discretion. *Shaw*, 609 F.3d at 1377, *citing Saxton v. Sec’y of Health & Human Servs.*, 3 F.3d 1517, 1520 (Fed. Cir. 1993). In cases where there is no dispute as to the amount of fees claimed, Special Masters have awarded a petitioner’s counsel that undisputed amount generally. *See e.g., Shaw*, 609 F.3d at 1377.

### III. DISCUSSION

As explained below, Petitioner has satisfied the requirements for an award of interim fees.

#### **A. Petitioner Has Acted in Good Faith and Has Established A Reasonable Basis for the Claim.**

A review of the record as a whole indicates that the claim was brought in good faith and there was a reasonable basis for it. With regard to good faith, it is clear that Petitioner has a subjective belief that the vaccination caused her son’s injury. Respondent has not challenged the presumption of good faith here, and the undersigned is satisfied that Petitioner filed this claim earnestly believing that her son suffered a vaccine-related injury.

As to reasonable basis, the evidence indicates that the claim was and remains feasible. The medical records indicate that four days after he received an influenza vaccination, Petitioner’s son was hospitalized with acute disseminated encephalomyelitis with bilateral optic nerve involvement. Petitioner’s Exhibit 1 at 859, 917. At that time, the doctors indicated that it was significant that Petitioner’s son had received a flu vaccine four days prior. *Id.* The medical records discuss the possible relationship between the onset of Petitioner’s son’s medical condition and the influenza vaccine. *See* Petitioner’s Exhibit 2, p. 636; Petitioner’s Exhibit 23, p. 1907. Additionally, although Petitioner’s former counsel did not obtain an expert report, he did hire experts to review the matter. Subsequently, an expert report was filed in which Petitioner’s

expert opines there is a causal connection between the receipt of the vaccination and Petitioner's son's illness. Petitioner's Exhibit 28.1. A reasonable basis existed and continues to exist for this claim.

**B. An Interim Fee Award is Appropriate Here.**

Respondent objects to Petitioner's former counsel's application for interim attorneys' fees, arguing that the limited circumstances recognized in *Avera*, 515 F.3d at 1352, as being appropriate for the award of interim fees, *i.e.* protracted proceedings, significant expert costs or undue hardship, are not present in this case. Contrary to Respondent's argument, at least two such circumstances are present.

**1. Protracted Proceedings**

First, an award of interim fees is appropriate because these proceedings are protracted. These proceedings have been ongoing for over six (6) years. While former counsel, Mr. Downing, did much to move the case forward, at the time he moved to withdraw the case had progressed only to the point where expert reports were to be scheduled to be filed. And although it is uncertain at present whether this case will be litigated or settled, irrespective of the manner in which it proceeds, it is unlikely to be resolved in less than a year. Given the length of time this action has already been pending and the length of time it is anticipated to remain pending, these proceedings are clearly protracted.

**2. Undue Hardship**

Additionally, there will be a significant undue hardship suffered, within the meaning of *Avera*, if Petitioner is forced to wait until Petitioner's claim is resolved before her former counsel is paid his fees. As recognized by the Court in *Woods v. Sec'y of Health & Human Servs.*, 105 Fed. Cl. 148, 154 (2012), once counsel has withdrawn from a case, there is a hardship that warrants payment of interim fees by virtue of the fact that former counsel is unable to make any future filings, is limited ethically from further participation, may find it difficult to keep apprised of the progress of the case and may not be able to anticipate when he will be paid. 105 Fed. Cl. at 154. As in *Woods*, it is a hardship for Petitioner to have her former counsel not be paid for his vigorous and diligent representation for a lengthy period of time after he no longer represents Petitioner.

The circumstances recognized in *Avera* as justifying an interim fee award--protracted proceedings and undue hardship—are present here. Payment of interim fees is justified.

**C. The Amounts Requested Are Reasonable.**

Having determined that Petitioner's former counsel is entitled to fees, the amount that is reasonable must be determined. Respondent does not object to an award of the amount claimed, \$28,267.53. Respondent's Response, fn. 4.<sup>8</sup> The undersigned finds that the amount of

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<sup>8</sup> Respondent has noted that in her submissions, Petitioner had not made a statement in compliance with General Order No. 9. Respondent requested that any award of interim costs

\$28,267.53 in attorneys' fees and costs, to which there is no objection, is reasonable based on this stage of the proceedings. Based on the request's reasonableness, the undersigned **GRANTS** the Petitioner's request for an award of interim fees incurred by her former counsel.

#### **IV. CONCLUSION**

For the reasons explained above, the undersigned finds that an award of interim attorneys' fees and costs to Mr. Downing is appropriate in this case. The decision shall reflect that Petitioner is awarded attorneys' fees and costs on an interim basis as follows:

**in a check made payable jointly to Petitioner (Carol Jakes) and Petitioner's former counsel (Andrew D. Downing of the law firm Rhodes, Hieronymus, Jones, Tucker & Gable), the amount of \$ 28,267.53. The interim award check shall be mailed directly to Andrew D. Downing, Esquire, Rhodes, Hieronymus, et al., 100 West 5<sup>th</sup> Street, Suite 400, PO Box 21100, Tulsa, OK 74121-1100.**

**IT IS SO ORDERED.**

s/ Daria Zane  
Daria J. Zane  
Special Master

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also address any costs borne by Petitioner, including her filing fee and the costs of obtaining the medical records while she proceeded with her case, *pro se*. At a status conference held on March 13, 2012, Petitioner stated that she had not included her costs in Mr. Downing's application for fees and requested that she be permitted to submit her requests for costs at a later time. The undersigned granted this request.