In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS
No. 04-1185V
Filed: January 3, 2013
Not to be Published

TEENA GRAVES, Parent of, NICOLE GRAVES, a Minor,	*	
Petitioners,	*	Autism; Interim Attorneys' Fees and Costs
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES	*	
Respondent.	*	

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS [1]

On July 19, 2004, petitioner filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ("the Program"),[2] alleging that Nicole was injured by a vaccine or vaccines listed on the Vaccine Injury Table. *See* § 14.

Petitioner's counsel filed a motion to withdraw as counsel in this case on June 15, 2012. Petitioner's counsel also filed a motion for an award of interim attorneys' fees and costs adopting the parties' stipulation on June 15, 2012. The parties' stipulation

[1] Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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

indicates that the respondent does not oppose the amount of attorneys' fees and costs requested; however the stipulation indicates that respondent does oppose an award of interim attorneys' fees and costs.

Respondent filed a Response to Petitioner's Motion for Interim Attorneys' Fees and Costs on July 3, 2012. 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 v. Sec'y of HHS*, 515 F.3d 1343 (Fed. Cir. 2008). Respondent, citing *Avera*, 515 F.3d at 1352, argues that interim attorneys' fees and costs are available in only the following limited circumstances: "protracted proceedings, significant expert costs, or where the petitioner had suffered undue hardship." Respondent's Response at 1-2. Respondent argues that such circumstances are not present in this case and the withdrawal of counsel does not fall into these limited circumstances. *Id.* 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 of 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*] factors . . . .").

I find that an award of interim attorneys' fees and costs is appropriate in this case. Additionally, I find that the issues presented in the instant case are virtually identical to the issues presented in a recent interim fee decision awarding fees and costs in another claim pending in the Omnibus Autism Proceeding ("OAP"). *Edmonds v. Sec'y of HHS*, No. 04-87V, 2012 WL 1229149 (Fed. Cl. Spec. Mstr. Mar. 22, 2012). As such, I adopt and incorporate the reasoning expressed in *Edmonds* in the instant decision.

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; *Shaw v. Sec'y of HHS*, 609 F.3d 1372, 1374 (Fed. Cir. 2010), ("the Vaccine Act permits [an] award of interim fees and costs"); *Cloer v. Sec'y of HHS*, 674 F.3d 1358, 1361-1362 (Fed. Cir. 2012) ("Congress made clear that denying interim attorneys' fees under the Vaccine Act is contrary to an underlying purpose of the Vaccine Act."). *See also* Vaccine Rule 13(b).

As a participant in the OAP, 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 discussed in *Edmonds*:

> In the OAP test cases, petitioners ultimately did not prevail on their claims. However, numerous affidavits, medical opinions, scientific articles, and hearing transcripts were filed in support of the cases. That evidence is sufficient to support a finding that the basis for bringing the OAP test cases was reasonable. Because the premise for the OAP test cases was reasonable, it necessarily follows that petitioners in this case reasonably participated in the OAP and, at the conclusion of the test cases, reasonably evaluated with counsel the likelihood of their success in further

> pursuing their claim. The undersigned finds that the basis for filing and maintaining this claim has been reasonable up to this point in the litigation.

Edmonds, 2012 WL 1229149, at *8 (citing *Kirk v. Sec'y of HHS*, No. 08-241V, 2009 WL 775396, at *1 (Fed. Cl. Spec. Mstr. Mar. 13, 2009)). As a reasonable basis was found in each of the OAP test cases, it follows that the petitioner in the instant case likewise had a reasonable basis at least until the resolution of the test cases.[3]

Counsel has diligently represented petitioner for a number of years while this claim was pending in the court's protracted OAP proceedings. *Edmonds,* 2012 WL 1229149, at *8-9 (discussing the protracted nature of the OAP, as well as, the litigation costs borne by counsel with cases in the OAP). Petitioner has chosen to continue this claim without the aid of her current counsel and it is therefore likely subsequent proceedings in this case will be further protracted. As it appears that petitioner's counsel has taken a position that is in conflict with his client's, he is ethically prohibited from continuing to represent petitioner. *Edmonds* at *11-12 (discussing the constraints placed on counsel from continuing representation in these circumstances).

The necessary dissolution of the attorney-client relationship at this time will impede the ability of counsel to obtain payment of fees and costs at the conclusion of this case. *Edmonds*, 2012 WL 1229149, at *9-10 (discussing the hardships former counsel confronts attempting to be reimbursed for reasonable fees and costs at the conclusion of a case). The purpose of § 15(e) is to encourage representation of vaccine-injured persons, a purpose that may be thwarted if counsel are caught in a dilemma between an ethically-required withdrawal of representation and the need to remain counsel of record in order to obtain fees and costs. *Id.* at *11. Accordingly, not allowing interim fees at this time would pose an undue hardship on petitioner and counsel alike.

Due to the protracted history of this claim, the presented conflict of interest necessitating counsel's withdrawal from representation, the time required to resolve the pending claim, and the hardship presented if petitioner's counsel is not awarded fees at this time, I am persuaded that an interim fee award is appropriate.

Accordingly, I hold petitioner is entitled to reasonable interim attorneys' fees and costs pursuant to §§ 15(b) and (e)(1) and under *Avera*. Petitioner seeks a total amount of $ 3,730.00 for attorneys' fees and costs jointly payable to petitioner and petitioner's counsel, Conway, Homer & Chin-Caplan, P.C. Respondent does not object to the amount of the fees and costs sought.

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[3] The OAP test cases are *Cedillo v.Sec'y of HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Hazlehurst v. Sec'y of HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Snyder v. Sec'y of HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Dwyer v. Sec'y of HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec'y of HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y of HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

The request for interim attorneys' fees and costs is granted. Petitioner is 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 total amount of $3,730.00.[4] This award shall be in the form of one check for $3,730.00, payable jointly to the petitioner and petitioner's counsel, Conway, Homer & Chin-Caplan, P.C.

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/ George L. Hastings
George L. Hastings
Special Master

[4] This amount is intended to cover all legal expenses incurred in this matter to date by counsel. 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).