

Respondent filed a Response to Petitioner's Motion for Interim Attorneys' Fees and Costs ("Response") on May 13, 2013. Respondent does not oppose an award of attorneys' fees and costs the amount of \$19, 603.31; however respondent does oppose an award of interim attorneys' fees and costs at this time. Response at 1, fn 1. 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 very similar 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 I further find that petitioner had a reasonable basis for her limited pursuit of an alternate theory of causation subsequent to the resolution of the OAP test cases. See Amended Petition filed February 24, 2012.

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 attorneys’ fees

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).

and costs in the amount of \$20,596.11 for work performed by Conway, Homer & Chin-Caplan, P.C.⁴

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 \$20,596.11.⁵ This award shall be in the form of one check for \$20,596.11, 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.⁶

IT IS SO ORDERED.

/s/ George L. Hastings
George L. Hastings
Special Master

⁴ Respondent in her response indicates that she does not oppose attorneys' fees and costs in the amount of \$19, 603.31, although respondent does oppose an award at this time. Respondent's Response at 1, fn 1. Respondent's Response does not indicate why she opposes the difference between this amount, \$19, 603.31, and petitioner's request of \$20, 596.11. A member of my staff confirmed via email on July 1, 2013, that respondent does indeed oppose \$992.80 of petitioner's requested attorneys' fees and costs. However, respondent has failed to state any basis for her objection of \$992.80.

⁵ 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).

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).