

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 01-14V
Filed: July 27, 2010**

ROBERT DELMONTE and EVA	*	
DELMONTE, as Parents, Natural	*	
Guardians and Legal Representatives	*	
of their Minor Child, Matthew Delmonte,	*	Interim Attorney Fees and Costs;
	*	<i>Avera</i> ; Omnibus Autism Proceeding
Petitioners,	*	
v.	*	
	*	
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

DECISION¹ on INTERIM FEES AND COSTS

Vowell, Special Master:

In this case under the National Vaccine Injury Compensation Program (hereinafter “the Program”),² petitioners filed a [65] motion for an award of interim attorney fees and costs on November 11, 2009. See *Avera v. Sec’y, HHS*, 515 F.3d 1343, 1352 (Fed. Cir. 2008). On July 23, 2010, counsel for the parties filed a [79] status report and joint stipulation regarding petitioners’ interim fees and expenses [“Stipulation”]. The Stipulation represents an amended request by petitioners with regard to costs incurred and the hours expended by their counsel, Mr. Michael G. McLaren and his law firm, Black, McLaren, Jones, Ryland & Griffee, P.C. The amended

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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, 116 Stat. 2899, 2913 (Dec. 17, 2002). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

² The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2006).

request is for a total of **\$19,626.20** representing no costs from petitioners³ and all fees and costs incurred by petitioners' counsel through and including November 11, 2009. Respondent does not object to the amended fees and costs request.⁴

I find that petitioners are entitled to an award of interim attorney fees and costs under the facts and circumstances of this case. Like an application for final attorney fees and costs, an application for interim fees and costs must demonstrate that petitioners brought the case "in good faith" and with a "reasonable basis." *Avera*, 515 F.3d at 1352 (citing § 300aa-15(e)(1)). I conclude that this case meets that standard. It appears to have been timely filed, (see Order filed Nov. 21, 2008), and this case is pending in the Omnibus Autism Proceeding ["OAP"]. While the test case petitioners in the OAP failed to establish entitlement, their theories of causation were substantial enough to meet the good faith and reasonable basis standards. See, e.g., *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044, at *1 (Fed. Cl. Spec. Mstr. Feb. 12, 2009).

The Federal Circuit explained in *Avera* that interim fees are particularly appropriate in cases where proceedings are protracted, costly experts must be retained, or petitioner would suffer an undue hardship without an interim fee award. 515 F.3d at 1352. In this case, the proceeding has been necessarily protracted because of petitioners' participation in the OAP. The OAP was created because the large number of petitions alleging vaccine causation of autism presented a significant strain on the resources of both the bench and the bar. See *Snyder*, 2009 WL 332044, at *4; Autism General Order #1, filed July 3, 2002.⁵ Throughout the history of the Vaccine Act, omnibus proceedings have generally proven to be an efficient mechanism for resolving cases presenting the same injury and similar medical hypotheses for causation. See *Snyder*, 2009 WL 332044, at *2-3. While the results in test cases are not binding on omnibus participants other than the test case petitioners, test cases permit a cost-effective means to explore the scientific and medical issues in common among omnibus participants.

However, omnibus proceedings have costs of their own, and in the OAP, one of those costs is the significant periods of delay that ensued as the Petitioners' Steering Committee pursued discovery and preparation for the test case hearings. In an effort to speed the ultimate resolution of the petitions that were not test cases, the petitioners in the instant application were ordered to file medical records establishing that their case was timely filed, that their son had received vaccinations covered by the Vaccine Act,

³ Petitioners did not file a statement comports with General Order 9. However, because any costs personally incurred by petitioners can be addressed in a subsequent award of fees and costs, I have elected to act on this interim application without that statement.

⁴ Respondent does maintain an objection to the appropriateness of an award of interim fees in this case. See Stipulation at 2.

⁵ 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002), *available at* <http://www.uscfc.uscourts.gov/sites/default/files/autism/Autism+General+Order1.pdf>.

and that he had a diagnosis on the autism spectrum. The filing of these documents occasioned both costs and attorney time.

Appellate review of one of the six OAP test cases remains pending.⁶ Although the other five cases were either affirmed on appeal or no petitions for review were filed, Mr. and Mrs. Delmonte have, quite properly, elected to wait for the resolution of all of the test cases before deciding whether to offer additional evidence or to move to dismiss their case, which has been pending before this Court for approximately nine years. The length of the proceedings may justify an award of attorney fees and costs. *Avera*, 515 F.3d at 1352. I note that this application for an interim award of fees and costs has been pending for over six months itself, as the parties attempted to negotiate a resolution of the issues raised by the application.

Respondent's objection to an interim award of fees in this case is not frivolous. With over 4500 cases remaining open in the OAP, and some 300 recently dismissed, the magnitude of the attorney fees and costs issues—currently dormant in most of these cases—presents a challenge to the bench and bar only somewhat less daunting than the problems presented when the petitions themselves were filed. Interim fees applications have the potential to double the workload associated with fees and costs applications on both respondent and the court. In most OAP cases, the fees and costs generated thus far are not high, but to a law firm with a substantial number of OAP cases, they represent a significant amount of accounts receivable that have remained outstanding for years. These unpaid fees and costs reduce the ability of law firms representing Vaccine Act petitioners to “front” other fees and costs, such as expert witnesses,⁷ production of additional records, and litigation on issues such as the appropriateness of a case proceeding in the OAP and the statute of limitations in such cases.

It is clear that petitioners in this case have not demonstrated undue hardship or the inability to retain costly experts without payment of interim fees. However, the proceedings in their case have been protracted. At the point at which their application for interim fees was filed, the potential for even more delay in the OAP was obvious. In *Avera*, petitioners argued the chilling effect that the unavailability of interim fees had on their counsel's ability to pursue Vaccine Act cases. See 515 F.3d at 1352. In deciding

⁶ At the time this application for fees and costs was made, decisions in the Theory 2 test cases had not yet been issued by the special masters who heard them. Those decisions issued in March, 2010, and were not appealed. However, at the time petitioners in the instant case requested interim fees and costs, they had no way of knowing how long the decisions would remain pending in this court or in the appellate processes applicable to Vaccine Act litigation.

⁷ Decisions in the test cases were limited to the evidence and hypotheses presented in those cases. Other theories of how vaccines may cause or contribute to autism spectrum disorders are not precluded by the decisions in the MMR and thimerosal test cases. Such theories may or may not have a reasonable basis in science or medicine, but further litigation on such theories is not precluded by the test case decisions.

in *Avera* that interim fees were available in Vaccine Act litigation, the Federal Circuit did not provide bright line rules regarding when such fees were appropriate. I hold that a delay of approximately nine years in a case part of an as-yet unresolved omnibus proceeding is sufficient to warrant an interim fee award.⁸

Since 2003, when Mr. McLaren's firm took over this case, petitioners have pursued expert advice and collected medical records in response to court orders. Petitioners in the OAP were encouraged to wait on the outcome of the test cases in order to facilitate the most efficient use of judicial and medical resources and time. I find that these circumstances establish the appropriateness of an interim award at this time.

A review of the materials offered in support of the application for interim attorney fees and costs indicates that the stipulated amounts are reasonable. **Accordingly, I hereby award the total of \$19,626.20⁹ issued in the form of a check payable jointly to petitioners, Robert Delmonte and Eva Delmonte, and petitioners' counsel's firm, Black, McLaren, Jones, Ryland & Griffee, P.C., for attorney fees and costs.**

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment in petitioners' favor for \$19,626.20 in interim attorney fees and costs.¹⁰

IT IS SO ORDERED.

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

⁸ I note, however, that the posture of the OAP has changed since this application was filed. The three Theory 2 test cases were resolved adversely to the test case petitioners and were not appealed.

⁹ This amount is intended to cover all legal expenses incurred through the dates stated herein. This award encompasses all charges by the attorney against a client, "advanced costs," as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-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).

¹⁰ Entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review. See Vaccine Rule 11(a).