

**In the United States Court of Federal Claims**

No. 09-841V  
(Filed: May 3, 2012)

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KATHERINE MCKELLAR,

*Petitioner,*

v.

SECRETARY OF THE  
DEPARTMENT OF HEALTH AND  
HUMAN SERVICES,

*Respondent.*

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ORDER GRANTING MOTION FOR REVIEW AND DENYING  
INTERIM ATTORNEYS' FEES AND COSTS<sup>1</sup>

On June 3, 2011, the special master granted petitioner's request for interim fees. Respondent filed a motion for review of that decision, which we granted on November 4, 2011. *McKellar v. Sec'y of Health & Human Servs.*, 101 Fed. Cl. 297 (2011). Agreeing with petitioner, we held that interim fees are permissible in vaccine cases, citing *Avera v. Secretary of Health & Human Services*, 515 F.3d 1343 (Fed. Cir. 2008), although "there is not a presumption of entitlement of interim fees." *McKellar*, 101 Fed. Cl. at 300. Instead, "some special showing is necessary to warrant interim fees, including but not limited to the delineated factors of protracted proceedings, costly experts, or undue hardship." *Id.* at 301. The special master's June 2011 decision awarded interim fees because petitioner's counsel was seeking to withdraw. She also believed that the petition was brought in good faith and possessed a reasonable basis.

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<sup>1</sup> In accord with the Rules of the Court of Federal Claims, App. B, Rule 18(b), this opinion is initially being filed under seal. By rule, the parties are afforded 14 days in which to propose redactions.

We rejected the notion that withdrawing counsel is a sufficient basis for awarding interim fees, but nevertheless evaluated the merits of the fee request. What prompted the final request treatment were statements in the June 2011 decision that, “Petitioner’s medical records disclosed no evidence of a valid claim for compensation,” *McKellar v. Sec’y of Health and Human Servs.*, No. 09-841, 2011 WL 3425606 at \*2 (Fed. Cl. Spec. Mstr. Jun. 3, 2011), and that further prosecution of the case would draw into question the reasonableness of a fee award. It was our impression that the special master had effectively rejected the case on the merits. Concern about whether the good faith and reasonable basis tests had been conflated lead to a remand, however.

The special master issued her decision on remand on January 13, 2012, and granted interim fees. *McKellar v. Sec’y Health & Human Servs.*, No. 09-841, 2012 WL 362030 (Fed. Cl. Spec. Mstr. Jan. 13, 2012). The special master clarified her statements about the viability of petitioner’s claim: “I meant the statement to express that, as the record stands, it could not furnish grounds for an award of compensation.” *Id.* at \*10. In effect, the special master was noting that petitioner would need to submit additional evidence to justify compensation under the Vaccine Act, but that “There is no reason why this case could not proceed to hearing and a possible award. Petitioner’s claim is feasible, not frivolous.” *Id.* It is conceivable that petitioner might, for example, assert a significant aggravation of a pre-existing condition. *Id.* at \*11. In other words, the case has not been rejected on the merits and needs additional factual development.<sup>2</sup>

Because we treated the motion for fees as if it were a final request however, the special master understandably did the same and went on to address the merits of an award without consideration of the grounds for an interim fee award. She carefully separated the factors of good faith and reasonable basis and concluded that there were grounds to award fees.

Our rationale for ignoring the question of the justification for interim

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<sup>2</sup> The special master also noted that, in a status report filed by petitioner on December 9, 2011, petitioner wants to pursue the case, and that, “At this time, counsel for petitioner intends to remain as counsel of record for the petitioner. . . .” Status Report at 2, Dec. 9, 2011, ECF No. 42. Subsequent status reports suggest that plaintiff may be trying to substitute counsel, however. *See* Status Report, Mar. 15, 2012, ECF No. 49.

fees thus turns out to be unfounded. The special master has clarified that she has no fixed views on the merits of the petition, and, at least as of the writing of this order, counsel of record remains involved in the case. Accordingly, it would be inappropriate to treat the motion for interim fees as anything other than what it is denominated. As we ruled previously, however, grounds do not exist here for an interim fee award. *McKellar*, 101 Fed. Cl. at 302. We thus grant respondent's motion for review and deny the award of interim fees without prejudice to re-application by petitioner in the event sufficient *Avera*-based grounds arise at a later date.

s/ Eric G. Bruggink  
ERIC G. BRUGGINK  
Judge