In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

E-Filed: October 4, 2012

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DRAGON RADULOVIC and TATJANA RADULOVIC, Parents of PETER RADULOVIC, a minor,	*	UNPUBLISHED
	*	No. 03-1658V
Petitioners,	*	Chief Special Master Campbell-Smith
v.	*	Autism; Interim Attorneys' Fees and Costs
SECRETARY OF HEALTH AND HUMAN SERVICES	*	
Respondent.	*	
* *		

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS[1]

On July 8, 2003, petitioners filed a Short-Form Autism Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ("the Program"),[2] alleging that Peter was injured by a vaccine or vaccines listed on the Vaccine Injury

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[1] Because this unpublished decision contains a reasoned explanation for the action in this case, the undersigned intends to post this decision on the website of the United States Court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). In accordance with the Vaccine Rules, each party has 14 days within which to request redaction "of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, the undersigned agrees that the identified material fits within the requirements of that provision, such material will be deleted from public access.

[2] The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, 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.

Table. Petition at 1 (incorporating the Master Autism Petition for Vaccine Compensation in Autism General Order #1).[3]

Petitioners' counsel filed a motion to withdraw as counsel in this case on June 22, 2012. On July 9, 2012, petitioners' counsel filed a motion for an award of interim attorneys' fees and costs adopting the parties' stipulation. The parties' stipulation indicates that the respondent does not oppose the amount of attorneys' fees and costs

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[3] Autism General Order #1 adopted the Master Autism Petition for Vaccine Compensation for use by petitioners filing claims intended to be part of the Omnibus Autism Proceeding (OAP). By electing to file a Short-Form Autism Petition for Vaccine Compensation petitioners alleged that:

> [a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccinee in question has developed a neurodevelopmental disorder, consisting of an Autism Spectrum Disorder or a similar disorder. This disorder was caused by a measles-mumps-rubella (MMR) vaccination; by the "thimerosal" ingredient in certain Diphtheria-Tetanus-Pertussis (DTP), Diphtheria-Tetanus-acellular Pertussis (DTaP), Hepatitis B, and Hemophilus Influenza Type B(HIB) vaccinations; or by some combination of the two . . . .
>
> The petition is being filed within three years after the first symptom of the disorder, or within three years after the first symptom of a vaccine-caused significant aggravation of the disorder. (If the vaccine-related death is alleged, the petition is being filed within two years after the date of death and no later than 48 months after onset of the injury from which death resulted.)

Autism General Order # 1 filed July 3, 2002, Exhibit A, Master Autism Petition for Vaccine Compensation at 2. Autism General Order #1 is published at 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002). Documents filed into the OAP are maintained by the clerk of this court in the file known as the "Autism Master File." An electronic version of the file is available on the court's website. Accompanying the electronic version of the file is a docket sheet that identifies all of the documents contained in the file. The complete text of most of the documents in the file is electronically accessible, with the exception of those few documents that must be withheld from the court's website due either to copyright considerations or to the privacy protection afforded under § 300aa-12(d)(4)(A) of the Act. To access the electronic version of the Autism Master File, visit this court's website at www.uscfc.uscourts.gov. Select the "Vaccine Info" page, then the "Autism Proceeding" page.

requested; however the stipulation indicates respondent does oppose an award of interim attorneys' fees and costs.

Respondent filed a Response to Petitioners' Motion for Interim Attorneys' Fees and Costs on July 26, 2012. Respondent argues an award of interim attorneys' fees and costs is inappropriate at this time and urges the court to deny petitioners' 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 argues that interim attorneys' fees and costs are available in only the following limited circumstances: "protracted proceedings, significant expert costs, or where petitioner had suffered undue hardship." Respondent's Response at 1 (citing Avera, 515 F.3d at 1352).

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. Cloer v. Sec'y of HHS, 675 F.3d 1358, 1361-62 (Fed. Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3095 (U.S. Aug. 22, 2012) (No. 12-236) ("Congress made clear that denying interim attorneys' fees under the Vaccine Act is contrary to an underlying purpose of the Vaccine Act."); Shaw v. Sec'y of HHS, 609 F.3d 1372, 1374 (Fed. Cir. 2010) (rejecting the government's argument that a fee award is only permissible after judgment under § 300aa–15); Avera, 515 F.3d at 1352 ("The statute permits [interim] awards."). See also Vaccine Rule 13(b) (making express reference to requests for interim fees).

As a participant in the OAP, I find that up to this point, petitioners 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 petitioners in the instant case likewise had a reasonable basis at least until the resolution of the test cases.[4]

Counsel has diligently represented petitioners 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). At this time, counsel avers that due to ongoing differences, he is unable to proceed with a new theory as petitioners desire. Motion to Withdraw at 2. Petitioners have chosen to continue this claim without the aid of their current counsel and it is therefore likely subsequent proceedings in this case will be further protracted. Because petitioners' counsel has taken a position that is in conflict with his clients' position, he in fact is ethically prohibited from continuing to represent petitioners. 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

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[4] The Theory 1 OAP test cases are Cedillo v. Sec'y, HHS, No. 98–916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 89 Fed. Cl. 158 (2009), aff'd, 617 F.3d 1328 (Fed. Cir. 2010); Hazlehurst v. Sec'y, HHS, No. 03–654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 88 Fed. Cl. 473 (2009), aff'd, 604 F.3d 1343 (Fed. Cir. 2010); Snyder v. Sec'y, HHS, No. 01–162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 88 Fed. Cl. 706 (2009). Petitioners in Snyder did not appeal the decision of the U.S. Court of Federal Claims. The Theory 2 OAP test cases are Dwyer v. Sec'y, HHS, No. 03–1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); King v. Sec'y, HHS, No. 03–584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); Mead v. Sec'y, HHS, No. 03–215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). The petitioners in each of the three Theory 2 cases chose not to appeal.

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 petitioners 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 petitioners' counsel is not awarded fees at this time, I am persuaded that an interim fee award is appropriate.

Accordingly, I hold petitioners are entitled to reasonable interim attorneys' fees and costs pursuant to §§ 15(b) and (e)(1) and under Avera. Petitioners seek attorneys' fees and costs in the amount of $7,671.78. Respondent does not object to the amount of the fees and costs sought.

The request for interim attorneys' fees and costs is GRANTED. Petitioners are 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 lump sum of $7,671.78 [5] to be paid in the form of a check payable jointly to the petitioners and petitioners' counsel, Walter Sam Holland. This amount is to be promptly forwarded to Walter Sam Holland.

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/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Chief Special Master

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[5] This amount is intended to cover all legal expenses incurred in this matter. 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 Beck v. Sec'y of HHS, 924 F.2d 1029, 1031-35 (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).