

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 05-803V
Filed: October 25, 2010

JOHN DAVID FIELDS,	*	
and wife, CHRISTINA NICOLE FIELDS,	*	
as Legal Representatives for	*	
NICOLE FIELDS, a Minor,	*	
	*	Interim attorney fees and costs
Petitioners,	*	decision
	*	
v.	*	
	*	
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

SECOND INTERIM ATTORNEY’S FEES AND COSTS DECISION¹

GOLKIEWICZ, Special Master.

Previously, petitioners filed a Motion for Interim Attorney’s Fees and Costs on September 21, 2009. Petitioners requested a total of \$5,366.00 in attorney’s fees and \$2,562.11 in litigation costs, which was supported by their counsel’s affidavit, Exhibit B, and fees and costs statements, Exhibit B-1. See Petitioner’s Second Motion for Award of Interim Attorney’s Fees (hereinafter “Application for Fees”), filed September 21, 2009. On December 10, 2009, the parties jointly contacted the court via telephone. Respondent indicated that she reviewed petitioners’ Application for Fees and that she had no objection to amounts requested by petitioners. After reviewing the request, the court awarded \$7,928.11 in interim attorney’s fees and other litigation costs. Interim Attorney’s Fees and Costs Decision, filed December 22, 2009.

On September 20, 2010, petitioners filed a second, entitled “Third”, Motion for Award of Interim Attorney’s Fees. P Third Motion for Award of Interim Attorney’s Fees, filed September

¹ The undersigned intends 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). As provided by Vaccine Rule 18(b), 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). Otherwise, the entire decision will be available to the public. Id.

20, 2010 (hereinafter “Second Motion for Interim Fees”). In the Second Motion for Interim Fees, petitioners request \$4,100.00 in attorney’s fees and \$4,085.49 in out-of-pocket expenses incurred in the last twelve months by petitioners’ attorney. Second Motion for Interim Fees, ¶ 9; P Exhibit B-1. Petitioners include their attorney’s Contract of Employment, P Ex A, Affidavit of counsel, P Ex B, and billing records, P Ex B-1. Petitioners also acknowledge receipt of the previous award of interim fees, \$7,928.11, on or about May 4, 2010. Second Motion for Interim Fees, ¶ 4.

On October 1, 2010, respondent filed her Opposition to Petitioners’ Third Motion for Award of Interim Attorney’s Fees (hereinafter “Opposition”). Respondent cites Avera v. Sec’y of the Dept. of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), arguing that petitioners fail “to demonstrate the necessary circumstances to justify a second interim award.” Opposition, 2. Respondent notes that any protraction of proceedings is due to petitioners’ approximately four and a half year delay in filing an expert report and that no showing is made that petitioner have incurred undue hardship justifying a second award. Respondent further argues that, considering the factors identified in Avera, the Federal Circuit’s decision does not contemplate multiple interim fee awards. Respondent also notes some aspects of petitioners’ Second Application of Fees that may appear unreasonable, such as billing in quarter hour increments, the amount of time billed for work on attorney’s fees, and the lack of documentation for Dr. Wheless’s fees. Opposition, 3 n. 3.

Pursuant to 42 U.S.C. § 300aa-15(e) of the National Childhood Vaccine Injury Act,² special masters may award “reasonable” attorney fees as part of compensation. In Avera v. Sec’y of the Dept. of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), the Federal Circuit found this to permit, but not require, an award for interim fees and costs. Of note, the Federal Circuit found interim fees were not appropriate in Avera. Id. In finding interim fee awards permissible, the Federal Circuit noted interim fee awards may be appropriate when proceedings were protracted, costly experts are employed and appellants have demonstrated that they have suffered undue hardship. Avera, 515 F.3d at 1352.

The burden lies with petitioners to provide adequate documentation at the time they submit their fee application that the fees and costs petitioners are requesting are reasonable. Wasson v. Sec’y of the Dept. of Health & Human Servs., 24 Cl. Ct. 482, 484 fn. 1 (1991). While the burden rests with petitioner to prove reasonableness, petitioner is not given a “blank check to incur expenses.” Perreira v. Sec’y of the Dept. of Health & Human Servs., 27 Fed. Cl. 29, 34 (1992), aff’d, 33 F.3d 1375 (Fed. Cir. 1994).

In the case *sub judice*, petitioners have simply failed to demonstrate that a second award of interim fees is appropriate at this time. Review of the docket shows that petitioners have filed a status report, Dr. Wheless’s expert and supplemental reports, and the interim, Second Application for Fees. The undersigned also acknowledges petitioners are preparing for a hearing that is scheduled to take place on December 9, 2010.

² The National Vaccine Injury Compensation Program (hereinafter 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. (2006) (hereinafter “Vaccine Act” or “the Act”). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

The undersigned does not agree with respondent's interpretation that multiple interim fee awards are not contemplated under Avera. However, that issue need not be decided here. The burden rests with petitioners to substantiate any request for fees and costs, interim or final. Petitioners failed to make any showing under Avera justifying a second award of interim fees. Petitioners' counsel states simply that he has "consistently and diligently pursued this matter on behalf of petitioners." Second Motion for Interim Fees, ¶ 3. Without any substantiation, the undersigned cannot find that this case is one where a second interim award of fees is appropriate.³

Petitioners' Second Motion for Award of Interim Attorney Fees is denied. The Clerk shall enter the judgment accordingly.

IT IS SO ORDERED.

Gary J. Golkiewicz
Special Master

³ Although denying petitioners' Second Application for Fees on broader grounds, the undersigned does note a billing practice of petitioners' counsel that has been commented on in this program. Review of petitioners' Exhibit B-1 shows that petitioners' counsel is billing in time increments no less than one quarter hour. This may be an instance where the activities accounted for in these records simply took the amount of time requested. However, in past cases, billing in quarter hour increments was unreasonable since many tasks simply do not take one quarter hour. See, e.g., Winters v. Sec'y of the Dept. of Health & Human Servs., No. 91-4V, 1993 WL 114646 (Fed. Ct. Spc. Mstr. April 1, 1993); Rasmussen v. Sec'y of the Dept. of Health & Human Servs., No. 91-1566V, 1996 WL 752289 (Fed. Ct. Spc. Mstr. Nov. 8, 1995). Further, as respondent points out, petitioners have failed to provide documentation of all costs requested, specifically Dr. Wheless's fees. The undersigned anticipates these concerns will be addressed in any future request for fees.