

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 04-1370V

(Filed: August 2, 2011)

TO BE PUBLISHED¹

SHEN WANG, Guardian ad Litem for
TIFFANY KU,

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

Vaccine Act Interim Costs.

DECISION AWARDING INTERIM COSTS

HASTINGS, *Special Master.*

In this case under the National Vaccine Injury Compensation Program (hereinafter “the Program”), Shen Wang (“Petitioner”) seeks, pursuant to 42 U.S.C. § 300aa-15(e),² an “interim” award for litigation costs incurred in the course of Petitioner’s attempt to obtain Program compensation. After careful consideration, I have determined to grant the request, for the reasons set forth below.

¹Because I have designated this document to be published, this document will be made available to the public unless petitioner files, within fourteen days, an objection to the disclosure of any material in this decision that would constitute “medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” See 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

²The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2006). Hereinafter, for ease of citation, all § references will be to 42 U.S.C. (2006).

I

PROCEDURAL BACKGROUND

Petitioner, Shen Wang, filed this petition on August 24, 2004, alleging that a vaccination injured her daughter, Tiffany Ku. On December 3, 2007, the Secretary of Health and Human Services (“Respondent”) filed a document conceding that petitioner is entitled to compensation on account of Tiffany’s injury.

Since that time, the parties have been attempting to settle the “damages” issue, but such efforts have not been fully successful, so that an evidentiary hearing concerning the damages issue has been scheduled for October 12-14, 2011.

On May 31, 2011, Petitioner filed an application for “interim costs” seeking an award of \$18,767. (Hereinafter “Pet. App.”) Respondent filed an “Opposition” to Petitioner’s application on June 24, 2011 (hereinafter “Opp.”), and Petitioner filed a “Response” thereto on June 27, 2011 (“Response”).

II

LEGAL STANDARD FOR AWARDING ATTORNEYS’ FEES AND COSTS

A. In general

Special masters have the authority to award “reasonable” attorneys’ fees and litigation costs in Vaccine Act cases. § 300aa-15(e)(1). This is true even when a petitioner is unsuccessful on the merits of the case, if the petition was filed in good faith and with a reasonable basis. (*Id.*) “The determination of the amount of reasonable attorneys’ fees and costs is within the special master’s discretion.” *Saxton v. Sec’y of HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993); see also *Shaw v. Sec’y of HHS*, 609 F.3d 1372, 1377 (Fed. Cir. 2010).

Further, as to all aspects of a claim for attorneys’ fees and costs, the burden is on the *petitioner* to demonstrate that the attorneys’ fees claimed are “reasonable.” *Sabella v. Sec’y of HHS*, 86 Fed. Cl. 201, at 215 (Fed. Cl. 2009); *Hensley v. Eckerhart*, 461 U.S. 424, at 437 (1983); *Rupert v. Sec’y of HHS*, 52 Fed.Cl. 684, at 686 (2002); *Wilcox v. Sec’y of HHS*, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). The petitioner’s burden of proof to demonstrate “reasonableness” applies equally to *costs* as well as attorneys’ fees. *Perreira v. Sec’y of HHS*, 27 Fed. Cl. 29, 34 (1992), *aff’d* 33 F.3d 1375 (Fed. Cir. 1994).

One test of the “reasonableness” of a fee or cost item is whether a hypothetical petitioner, who had to use his own resources to pay his attorney for Vaccine Act representation, would be willing to pay for such expenditure. *Riggins v. Sec’y of HHS*, No. 99-382V, 2009 WL 3319818, at *3 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff’d by unpublished order* (Fed. Cl. Dec. 10, 2009), *affirmed*, 40 Fed. Appx. 479 (Fed. Cir. 2011); *Sabella v. Sec’y of HHS*, No. 02-1627V, 2008 WL

4426040, at *28 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff'd in part and rev'd in part*, 86 Fed. Cl. 201 (2009). In this regard, the United States Court of Appeals for the Federal Circuit has noted that--

[i]n the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.

Saxton, 3 F.3d at 1521 (emphasis in original), quoting *Hensley*, 461 U.S. at 433-34. Therefore, in assessing the number of hours reasonably expended by an attorney, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley* 461 U.S. at 434; see also *Riggins*, 2009 WL 3319818, at *4.

B. "Interim" fees and costs

In *Avera v. Sec'y of HHS*, 515 F. 3d 1343, 1352 (2008), the U.S. Court of Appeals for the Federal Circuit indicated that an award of "interim" fees and costs--that is, an award *prior* to the entry of a final judgment on the initial question of whether the petitioner is entitled to compensation for the alleged vaccine injury--can be appropriate in Vaccine Act cases. The *Avera* court did not specify in what *particular* circumstances such an award might appropriately be issued, but the court made it clear that such "interim" awards *can* be appropriate.³ The Federal Circuit gave the same indication again in *Shaw v. Sec'y of HHS*, 609 F. 3d 1372, 1373-74 (2010).

III

THE CIRCUMSTANCES OF THIS CASE JUSTIFY AN INTERIM AWARD OF COSTS AT THIS TIME

The *Avera* court did not provide a detailed set of guidelines concerning *in what situations* an award of interim fees is warranted in a Vaccine Act case. The court did afford some guidance, noting that "[i]nterim fees are particularly appropriate in cases where proceedings are protracted and costly experts must be retained," and indicating that interim fees would be appropriate in order to avoid "undue hardship." 515 F. 3d at 1352. But it appears to me that the *Avera* court's quoted statements were designed merely to give *examples* and *general guidance* concerning when interim fees and costs might be awarded, leaving the special masters broad *discretion* to consider many factors in considering whether an interim award is appropriate in a particular case.

³In many cases in recent months, respondent has raised a *legal argument* that an "interim" award is appropriate only in a very narrow set of circumstances--*i.e.*, *after* either an award of compensation resulting from the alleged vaccine injury has been made to the petitioners, or a judgment denying such compensation has been entered by the court. However, respondent has not raised such a legal argument in this case. And if respondent did, I would reject that legal argument for the reasons set forth in *Hirmiz v. Sec'y of HHS*, No. 06-371V, 2011 WL 2680721 (Fed. Cl. Spec. Mstr. June 13, 2011), at *3-5.

A. Prior cases

Since *Avera*, there has been a considerable amount of case law concerning the topic of when an interim fees award is appropriate. In *Avila v. Sec’y of HHS*, 90 Fed. Cl. 590, 598 (2009), a judge of this court opined that an interim fees award should be denied when--

a petitioner fails to demonstrate that he has suffered undue hardship; the amount of fees sought is not substantial; no experts were employed; and only a short delay in the award [would transpire in the absence of an interim award].

The judge added that the amount of \$9,882, involved in that case, “is not substantial.” *Id.* at 599.

In *Doe/11 v. Sec’y of HHS*, 89 Fed. Cl. 661, 667 (Fed. Cl. 2009), the judge indicated that an interim award should be granted in a case in which (1) proceedings before the special master had been “protracted” (a period of nearly 10 years), (2) the petitioners had presented expert testimony at a trial, and (3) a “final” fees award would not likely take place for some time, due to an appeal.⁴

In *Dobrydneva v. Sec’y of HHS*, 94 Fed. Cl. 134, 148 (2010), the judge found that where the petitioners asserted that they needed funds in the form of an interim award in order to obtain testimony from an expert witness, such an award was justified.

In *Franklin v. Sec’y of HHS*, No. 99-0855V, 2009 WL 2524492, at *4 (Fed. Cl. Spec. Mstr. July 28, 2009), the special master found it appropriate to award interim fees, again in a situation where (1) the petition had been pending for a long time, (2) petitioner’s counsel had paid significant amounts to experts, and (3) final resolution of the case would likely take some time. He found that the above-described factors, taken together, constituted an “undue hardship” on petitioner’s counsel. (*Id.*)

In *Hall v. Sec’y of HHS*, No. 02-1052V, 2009 WL 3094881, at **1-2 (Fed. Cl. Spec. Mstr. July 28, 2009), the special master found an interim award to be merited where (1) the amount due to counsel (over \$64,000) was substantial, (2) the case had been pending about seven years, and (3) due to an appeal the attorney would likely have to wait a considerable additional time for that amount if an interim award was not issued.

In *Broekelschen v. Sec’y of HHS*, No. 07-137V, 2008 WL 5456319, at **2-3 (Fed. Cl. Spec. Mstr. Dec. 17, 2008), the special master again made an award for interim fees and costs. The special master found that the petitioner’s attorney had incurred the substantial amount of \$150,000 in fees

⁴In *Doe/11*, the judge reversed the special master as to the *appropriate amount* of the interim award, but the special master below had actually concluded, like the judge, that an interim award *was* appropriate, due to the prior protracted proceedings and the fact that a pending appeal would likely delay the final fees award. See *Doe/11 v. Sec’y of HHS*, 2009 WL 1803457, at *4 (Fed. Cl. Spec. Mstr. June 9, 2009).

and costs, and that there was a significant possibility of a lengthy delay until final resolution of the case.

In *Masias v. Sec’y of HHS*, No. 99-697V, 2009 WL 899703, at **1-3 (Fed. Cl. Spec. Mstr. Mar. 12, 2009), a special master once more awarded interim fees and costs. The case had been pending for about 10 years, the amount awarded was significant (about \$48,000), and the special master found that a key factor justifying an interim award was, once again, the fact that without an interim award the petitioner’s attorney would likely have to wait a substantial additional amount of time to receive that compensation.

In one case, Special Master Golkiewicz issued two different opinions, the first setting forth his *general* views as to the appropriate circumstances for an interim award, and the second actually awarding interim fees and costs in that case. *Kirk v. Sec’y of HHS*, No. 08-241V, 2009 WL 775396 (Fed. Cl. Spec. Mstr. Mar. 13, 2009), and 2009 WL 973158 (Fed. Cl. Spec. Mstr. Mar. 17, 2009). The special master disagreed with the respondent’s argument that interim fees awards “should be the rare exception, not the rule.” (2009 WL 775396 at *1.) Instead, he concluded that *Avera* provided special masters with “broad discretion” to determine whether interim fees were appropriate in a case, for the general purpose of “ensuring that petitioners are not punished financially while pursuing their vaccine claim.” (*Id.*) The special master acknowledged that the *Avera* court stated that interim fees are “particularly appropriate” where the proceedings are protracted or costly experts had been obtained, but rejected the view that the *Avera* court meant those factors to strictly limit the circumstances for interim awards. (*Id.*) Rather, the special master indicated that pursuant to *Avera*, a special master should consider whether, under the overall circumstances, “petitioners *or their counsel* will suffer an undue hardship” in the absence of an interim award. (*Id.* at *2, emphasis added.) In that case, the amount involved was about \$15,000 in attorneys’ fees plus a small amount of costs (*id.* at *1), and it appeared that the final resolution of the case might not take place for a considerable time period (*id.* at *2). The special master found that it would be an undue hardship for the “small” law firm involved in the case to go without those funds for “years.” (*Id.*) The special master, accordingly, did make an award of interim fees and costs. (2009 WL 973158, at *1.)

In *MacNeir v. Sec’y of HHS*, No. 03-1914V, 2010 WL 891145, at *1-4 (Fed. Cl. Spec. Mstr. Feb. 12, 2010), the special master granted an interim award of fees and costs in the amount of \$12,062, in a case in which the petitioners’ counsel had expended most of the fees and costs in obtaining and filing medical records, and the case had been pending about seven years.

I also note that several of the decisions have specifically commented that under *Avera*, the special master’s determination whether or not to make an award of interim fees and costs is a matter of *discretion* based upon all the circumstances of the case. *Broekelschen*, 2008 WL 5456319 at *2; *Hall*, 2009 WL 3423036 at *1-2; *Masias*, 2009 WL 899703 at *3; *Kirk*, 2009 WL 775396, at *1.

B. This case

The overall circumstances of this case, in my view, are appropriate for an interim award at this time. First, it is clear that this case was brought in good faith and with a reasonable basis in fact.

Second, the overall circumstances of this case fit within the very broad guidelines suggested in the *Avera* opinion concerning the topic of when an interim award is appropriate. In this case, the petition has been pending since 2004. Petitioner seeks the substantial amount of \$18,767 in costs. And it seems likely that it will be a fairly long time before any final decision is rendered in this case, because the “damages” issue is *very* complicated.

It is true, as Respondent has pointed out, that Petitioner has already received an award of interim fees and costs in this case. But that was awarded on November 20, 2009. Since that time, due to the extraordinarily complicated damages issue in this case, Petitioner’s main witness concerning damages, Ellen Econs, has had to prepare a new life care plan and do considerable work in the case. I find that it was reasonable for Petitioner to have Ms. Econs do this work, and that Ms. Econs’ charges for that work were reasonable. Further, in the very unusual circumstances of this case, I find that it is reasonable to make this second limited award of costs, nearly two years after the first award.

Further, during a digitally-recorded telephonic status conference⁵ held on July 11, 2011, Petitioner’s counsel, Thomas Gallagher, explained that it would constitute a substantial hardship for either the Petitioner or himself, to pay Ms. Econs at this time, absent an interim award of costs.

In sum, I conclude that the overall circumstances of this case justify the issuance of an interim award at this time, to enable Petitioner to pay Ms. Econs for her services.

IV

SUMMARY AND CONCLUSION

For the reasons set forth above, I conclude that it is appropriate to make an interim award of costs to Petitioner at this time. The amount of the award is \$18,767.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master

⁵The recording of that conference has not been transcribed, but could be transcribed at any time.