

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 07-784V

Filed: January 24, 2012

VERONICA ARGUETA,	)	
as the legal representative of her minor son,	)	
JOSHUA ARGUETA,	)	NOT TO BE PUBLISHED
	)	
Petitioner,	)	Interim Fee Application; Motion
	)	to Substitute Attorney; Notice of
v.	)	Appearance; Appeal; changed
	)	circumstances; reasonable fees
SECRETARY OF	)	and costs; second major
HEALTH AND HUMAN SERVICES,	)	litigation; diphtheria-tetanus-
	)	acellular pertussis (DTaP)
Respondent.	)	
	)	

### ORDER<sup>1</sup>

#### Procedural background

On November 8, 2007, Petitioner Veronica Argueta filed a Petition For Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”) on behalf of her son Joshua.<sup>2</sup> Petitioner alleged that Joshua suffered a “Table encephalopathy” within 72 hours of receiving a diphtheria-tetanus-acellular pertussis (“DTaP”) vaccine on November 10, 2004. Curtis Webb, Esquire, represented Petitioner through hearing, which commenced in Seattle, Washington, on August 3, 2010.

On November 22, 2010, Petitioner filed a motion for interim fees and costs in the amount of \$108,106.09. The Secretary opposed the motion.

On June 30, 2011, following the hearing and post-hearing briefing, I issued a decision denying entitlement. Argueta v. Sec’y of Dep’t of Health & Human Servs., No. 07-784V, 2011 WL 2945803 (Fed. Cl. Spec. Mstr. June 30, 2011).

<sup>1</sup> In accordance with Vaccine Rule 18(b), petitioner has 14 days to file a proper motion seeking redaction of medical or other information that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Redactions ordered by the special master, if any, will appear in the document as posted on the United States Court of Federal Claims’ website.

<sup>2</sup> The 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).

On July 19, 2011, Mr. Webb filed a motion seeking to withdraw as counsel for Petitioner. On July 22, 2011, Mr. Webb filed a statement in support of his motion to withdraw, citing irreconcilable differences with his client concerning prosecution of the claim. The motion to withdraw was granted on July 25, 2011. Petitioner's motion for interim fees and costs remained pending.

Petitioner appealed the entitlement decision pro se. On December 22, 2011, Judge Edward J. Damich affirmed the decision denying entitlement, Arqueta v. Sec'y of Dep't of Health & Human Servs., --- Fed. Cl. ---, 2011 WL 6965896 (2011), and judgment entered.

### **Status Conference**

On January 12, 2012, Mr. Webb filed a "Notice of Appearance," requesting the Clerk to enter him "as the attorney of record." Consented Mot. to Substitute Att'y, ECF No. 67. No explanation for his reappearance was offered. The motion was granted without action by my chambers.<sup>3</sup>

On January 23, 2012, I conducted a conference at Mr. Webb's request. Mr. Webb inquired about the status of Petitioner's motion for payment of interim fees. He stated that he had resumed his representation of Petitioner and that he intended to file an appeal from Judge Damich's affirmation of the entitlement decision to the United States Court of Appeals for the Federal Circuit.

After discussing the matter with Mr. Webb and counsel for the Secretary, Darryl Wishard, Esq., I requested that both parties take a fresh look at the application for interim fees and costs, in light of significantly changed circumstances. Specifically, since the application was filed originally, the case has progressed through decision and appeal, and judgment has entered. In addition, based on Mr. Webb's representation that Petitioner intended to file an appeal to the Federal Circuit, it will be some time before the matter is concluded.

In light of these developments, I noted that it appeared to be appropriate, even under the Secretary's interpretation of Avera v. Sec'y of Dep't of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), to grant an interim award of fees and costs at this time. Mr. Wishard consented to bring this to the attention of his client, along with my request for re-consideration of the Secretary's opposition.

In addition, I was informed that the difference between the parties concerning the reasonable amount of fees and costs might not be insurmountable. I urged the parties to attempt to reach an agreement on the amount that should be paid, noting the

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<sup>3</sup> The paper-filed motion, which was directed to the Clerk and addressed to "Chief Special Master Lord" and "Judge Damich," was already stamped with the words "No Action Necessary, Attorney Has Been Substituted Pursuant to Rule 83.1 (c)(4)" when my chambers received notification of the filing.

Supreme Court's adjuration (which has been applied to the Vaccine Program), to avoid "a second major litigation" concerning attorneys' fees. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). Counsel agreed to undertake an effort to resolve their differences concerning the amount of the award requested by Petitioner.

In light of the above, the parties agreed that it would be reasonable to provide a period of 30 days in which to re-visit the issues. At the end of the 30 days, a status conference will be held to determine the progress that has been made toward resolution.

**Accordingly,**

A telephonic status conference is set for **Thursday, March 1, 2012 at 3:00 p.m. (ET)**. The Court will initiate the phone call.

Any questions regarding this Order shall be directed to my law clerk, Jay All, at (202) 357-6353.

**IT IS SO ORDERED.**

s/ Dee Lord  
Dee Lord  
Special Master