

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-258V

Filed: January 3, 2011

LEMONT BURGESS and)	
KRISTINA MILLER, As Parents)	
And Natural Guardians of their daughter,)	
AULBURN BURGESS,)	FOR PUBLICATION
)	
Petitioners,)	
)	Interim Attorneys' Fees & Costs;
v.)	<u>Avera</u> ; hourly rate; guardianship;
)	travel time; expert costs.
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

Anne C. Toale, Esq., Maglio Christopher & Toale, Sarasota, FL, for Petitioners;
Michael P. Milmoie, Esq., United States Dep't of Justice, Washington, D.C., for Respondent.

INTERIM ATTORNEYS' FEES AND COSTS DECISION¹

LORD, Special Master.

Petitioners in the above-captioned case filed a motion seeking an award of interim attorneys' fees and costs (the "Application") on September 13, 2010. Petitioners initially requested an award of \$34,137.50 in interim attorneys' fees and \$13,683.30 in interim costs. Petitioners filed a reply brief in response to Respondent's objections to this Application seeking an additional \$7,028.50 for a total of \$54,849.30. In support of this motion, Petitioners' counsel stated that it is likely that Petitioners will soon be represented by other counsel. Petitioners now seek interim attorneys' fees and costs while still counsel of record in this case.

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request the redaction "of any information furnished by that party (1) that is 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." Rules of the United States Court of Federal Claims (RCFC), Appendix B, Vaccine Rule 18(b). In the absence of a timely objection, the entire document will be made publicly available.

Respondent filed an opposition to Petitioners' motion for interim attorneys' fees and costs arguing that Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), does not authorize an award of interim attorneys' fees and costs in this case. Respondent argued that, even if the Special Master found that interim fees were appropriate, the Application did not address any of the "required" factors warranting an award of interim fees and costs, as set forth in Avera. See Resp't Resp. at 4. Respondent also objected to Petitioners' counsel's requested hourly rate, the overall number of hours charged by Petitioners' attorneys, all hours charged for the establishment of a guardianship, the fees charged by Petitioners' experts, and travel hours by Petitioners' attorneys. These objections are addressed below.

(1) Authorization of Interim Attorneys' Fees and Costs

I am bound to follow Avera. See 42 U.S.C. § 300aa-12(f); e.g., Coltec Indus., Inc. v. United States, 454 F.3d 1340, 1353 (Fed Cir. 2006) ("no question" that the Court of Federal Claims is required to follow the precedent of the Federal Circuit).

The Secretary argues that Avera creates a narrow set of circumstances under which interim fees may be granted, in the discretion of the special master. I need not address the scope of Avera in this decision. In this case, counsel for Petitioners is seeking to withdraw from the representation. Counsel's ability to recover fees and costs on an interim basis after withdrawing may be problematic. See Silver v. Sec'y of Health & Human Servs., No. 99-462V, 2009 WL 2950503 *9-10 (Fed. Cl. Spec. Mstr. Aug. 24, 2009). Accordingly, I find that, considering even the limited circumstances that the Secretary argues furnish grounds for awarding interim fees, such an award is appropriate here.

The record does not indicate a lack of good faith and/or reasonable basis for this claim, and the Secretary does not maintain that these pre-requisites to awarding interim fees are lacking.² Accordingly, I grant the request.

(2) Hourly Rate

Petitioners' counsel is awarded the requested hourly rate. I find that the requested hourly rate is reasonable and consistent with the market rate, and has previously been awarded by Special Master Vowell in Gruber v. Sec'y of Health &

² Historically, special masters have been "quite generous in finding a reasonable basis for petitioners." Turner v. Sec'y of Health & Human Servs., No. 99-544V, 2007 WL 4410030, *8 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) (quoting Turpin v. Sec'y of Health & Human Servs., No. 99-564V, 2005 WL 1026714, *2 (Fed. Cl. Spec. Mstr. Feb. 10, 2005)). The Secretary stated that in this instance, "it is impossible to know how the evidence will develop" in this case and thus, it was "premature to know whether there is a reasonable basis [for] petitioners' case." Resp't Sur-reply at 11-12.

Human Servs., No. 00-749V, 2009 WL 2135739 (Fed. Cl. Spec. Mstr. Jun. 24, 2009) vacated on other grounds, 91 Fed.Cl. 773 (2010).

(3) Travel Time

I also find that Petitioners' counsel is entitled to 100% reimbursement for the travel time, as requested in the Application. The limited number of hours requested by Petitioners for counsel's time driving to meetings with petitioners and their pediatrician is reasonable and necessary for the fulfillment of counsel's obligations.

(4) Number of Hours Billed

I also find that the time spent by Petitioners' counsel in conferences with attorney Don Russo, and for time associated with certain administrative tasks and review of case law, is reasonable. Thus, Petitioners will be awarded the full amount requested in the Application for these activities.

(5) Fees and Costs for Establishment of Guardianship

The fees and costs associated with establishing a guardianship for the minor child are appropriate and reasonable. Section 300aa-15(e)(1) of the Vaccine Act permits an award of attorneys' fees and costs "incurred in any proceeding on such petition." The recent trend in the case law is to award costs associated with establishing a guardianship. See Gruber, No. 00-749V, 2009 WL 2135739, at *11 (citing cases). Thus, Petitioners are awarded interim fees and costs associated with establishing the guardianship as detailed in the Application.

(6) Interim Expert Fees

Petitioners also are awarded interim costs associated with expert witnesses. Respondent objects to an award of interim costs to Petitioners' expert, Dr. Kinsbourne, arguing that Dr. Kinsbourne's opinion in this case is "highly suspect."

I am reluctant to premise an award of costs for experts' fees on the sufficiency of an expert's report. The proper focus of the inquiry is whether there was a reasonable basis for the claim at the time the cost was incurred. See *Perreira v. Sec'y of Health & Human Servs.*, 33 F.3d 1375, 1377 (Fed. Cir. 1994) (noting that counsel has a continuing obligation to determine whether there is a reasonable basis to proceed with a claim). I find that a reasonable basis for this claim existed at the time Petitioners incurred the cost of Dr. Kinsbourne's expert report.

(7) Fees and Costs for Preparing Reply Brief

Respondent's response to the Application raised a number of objections, as discussed above, and requested substantiation of certain items, such as Petitioners' counsel's hourly rate. Petitioners filed a substantive response with 24 exhibits to address each of Respondent's objections and concerns. This work generated another \$7,028.50 in attorneys' fees and costs. Respondent objected to this amount as being excessive. Given the number of objections raised by Respondent, I find that the time spent by Petitioners' counsel in preparing the response to be reasonable. Thus, Petitioners are awarded the full amount for their counsel preparing this response.

CONCLUSION

Petitioners are awarded **\$54,849.30** in interim attorneys' fees and costs. The undersigned determines that there is no reason to delay entry of judgment on interim attorneys' fees and costs. Therefore, in the absence of a motion for review filed under RCFC Appendix B, the clerk of the court shall enter judgment in accordance with this decision.³

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Chief Special Master

³ Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.