

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 99-462V

(Filed: August 24, 2009)

DEBBIE SILVER,

Petitioner,

v.

SECRETARY OF HEALTH
& HUMAN SERVICES,

Respondent.

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TO BE PUBLISHED
Motion for intervention;
Interim attorneys' fees and costs;
Vaccine Rule 15

**Altom M. Maglio, Sarasota, Florida, for Intervenor Plaintiffs; and
Renee Gentry, Vienna, Virginia, for Intervenor Plaintiffs.
Michael G. McLaren, Memphis, Tennessee, for Petitioner.
Ryan D. Pyles, United States Department of Justice, Washington, D.C., for Respondent.**

ORDER DENYING PETITIONER'S FORMER COUNSEL'S MOTION TO INTERVENE¹

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Petitioner's Claim

On July 16, 1999, Petitioner, Debbie Silver, filed a Petition pursuant to the National

¹ Because this document contains a reasoned explanation for the action of the undersigned, the document shall post on the website of the United States Court of Federal Claims 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 fourteen 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 timely objection, the entire document will be made publicly available.

Vaccine Injury Compensation Program (the "Act" or "the Program"). Petition ("Pet.") at 1.² Petitioner alleges that she received Hepatitis B vaccinations in August and September 1997, Pet. at 1, and that one hour after her September 1997 vaccination she developed malaise, flu-like symptoms, fatigue and joint pain. Petitioner Exhibit 6 at 9 ("Pet'r Ex. ___"); see also Pet'r Ex. 5 at 1. The facts pertaining to Petitioner's claim are summarized below.

Petitioner was born on June 1, 1961. Pet'r Ex. 2 at 16. She developed normally through childhood and adolescence. Pet'r Ex. 1 at 5.

In May 1989, Petitioner, aged 27, presented to Dr. Winnie Ooi complaining of chest pain, numbness of her left arm and other unspecified neurological symptoms. Pet'r Ex. 2 at 20. Prior to her examination with Dr. Ooi, Petitioner underwent blood testing that indicated elevated anti-nuclear antibodies ("ANA"), a normal blood count, and normal liver, kidney and thyroid function. Id.

In April 1990, Petitioner presented to her physicians with complaints of photosensitivity, muscle weakness, pleuritic chest pain, emotional lability and increased fatigue. Pet'r Ex. 2 at 24. She was started on Prednisone therapy, which led to improved muscle strength, but also to Prednisone psychosis, characterized by headaches and agitation. Id. Therefore, her physician withdrew her from Prednisone. Id.

On July 6, 1990, Petitioner began receiving care from Dr. Israeli Jaffe at Columbia Presbyterian Medical Center in New York. Id. During the summer and fall of 1990, Petitioner presented to Dr. Jaffe with complaints of increased fatigue, pleuritic chest pain, generalized polyarthritis, proximal muscle weakness and systemic malaise. Pet'r Ex. 2 at 24-25. She was diagnosed by Dr. Jaffe in December 1990 as suffering from "systemic lupus with central nervous system involvement as well as joint and pleura." Id. at 25.³ Dr. Jaffe placed Petitioner on corticosteroids to control her symptoms. Id. He noted that during this period Petitioner was receiving psychotherapy but no psychoactive drugs. Id.

During subsequent visits to Dr. Jaffe between 1991 and 1993, Petitioner continued to report fatigue, chest pain, pleurisy and joint pain. Pet'r Ex. 8 at 9-13. Dr. Jaffe prescribed

² The National Vaccine Injury Compensation 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-10-34 (2006) ("Vaccine Act" or the "Act"). Hereinafter, individual section references will be to 42 U.S.C. § 300aa of the Vaccine Act.

³ Systemic lupus erythematosus ("SLE") is a chronic, remitting, relapsing, inflammatory, often febrile multi-systemic disorder of the connective tissues, that can have an acute or insidious onset. It is characterized principally by involvement of the joints skin, kidneys and serosal membranes. It is marked by a variety of abnormalities, including arthritis, arthralgias, central nervous system manifestations, pleurisy, pericarditis, positive LE cell test and hemolytic anemia. Dorland's Illustrated Medical Dictionary 1072 (30th ed. 2003).

various medications including steroids and salicylic acid, which had varying assistive effects to Petitioner's condition. Id. Petitioner presented again to Dr. Jaffe on August 9, 1996, with pleurisy, worsening fatigue, and dry mouth, nose and eyes. Pet'r Ex. 8 at 16. In a subsequent visit to Dr. Jaffe on November 15, 1996, Petitioner reported that though she had recovered from being sick for three weeks, she was still suffering from fatigue, but no pleurisy. Id. at 17. Between November 1996 and May 1997, Petitioner's health improved and she reported that her symptoms were in remission. See e.g. Pet'r Ex. 21 at 13; Pet'r Ex. 15 at 53; Pet'r Ex. 15 at 63.

On May 29, 1997, Petitioner, aged 36, presented to Florida Atlantic University Student Health Center, where she was studying speech therapy, and reported that her lupus was in remission. Pet'r Ex. 21 at 13. She requested the Hepatitis B vaccination. Id. Dr. Weiss, a treating physician, approved her receiving the Hepatitis B vaccination. Pet'r Ex. 21 at 12. She received her first vaccination on August 8, 1997. Pet'r Ex. 21 at 11. She reported that she did not have any reaction to this first vaccination. Pet'r Ex. 2 at 8. Her second dose of the vaccination was administered on September 2, 1997. Pet'r Ex. 19 at 25.

Petitioner reported that one hour after her September 2, 1997, Hepatitis B vaccination she felt joint pain, fatigue and experienced electrical sensations in her leg. Pet'r Ex. 6 at 9. On May 13, 1998, she presented to Dr. Jaffe and related that she had experienced pleurisy five months earlier, which resolved, but that she was again suffering from fatigue and transient arthralgias. Pet'r Ex. 8 at 18. She attributed all of her symptoms to the second Hepatitis B vaccination. Pet'r Ex. 8 at 18. At a visit on June 22, 1998, Petitioner reported similar symptoms to Dr. Pancheta Wilson. Pet'r Ex. 3 at 11. On July 6, 1998, 10 months after the vaccination, she complained to Dr. Wilson that her fatigue, joint pain, and muscle ache had worsened. Pet'r. Ex. 3 at 10. From 1998 to 1999, Petitioner presented to several specialists, who provided varying diagnoses, including chronic immune fatigue dysfunction syndrome, multiple sclerosis, myelitis, and lupus. Her symptoms of chronic fatigue, pleurisy, and muscle weakness continued. Pet'r. Ex. 2 at 16. As time progressed, she presented with complaints of hair loss, Raynaud's syndrome, and insomnia. In the course of her treatment, Petitioner also contracted bladder cancer. Pet'r. Ex. 19 at 2.

B. Case Development

The Petition was filed on July 16, 1999. Shortly thereafter, Petitioner embarked on the collection and filing of medical records. See Order, Sept. 14, 1999; Status Reports, Feb. 15, 2000 and April 27, 2000. On May 1, 2000, Petitioner notified the court that she was ready to proceed based on the records filed. Order, May 2, 2000. The special master ordered Respondent to file its report pursuant to Rule 4(c) of the Vaccine Rules by June 30, 2000. Order, May 2, 2000. On May 16, 2000, Petitioner notified the court that there were additional medical records expected to be filed in the case. Status Report, May 16, 2000; see also Status Report, August 21, 2000.

Respondent filed its Rule 4(c) Report on September 9, 2000, asserting the case was not

appropriate for compensation and that pertinent medical records had not been submitted. Respondent's Report at 1, 6. A hearing scheduled for November 29, 2000, in Fort Lauderdale, Florida, was subsequently cancelled at Petitioner's request. Order, Nov. 20, 2000; see also Order, Nov. 1, 2000. In the order cancelling the hearing, the special master noted that Petitioner had failed to file a status report and medical records. Order, Nov. 20, 2000. Petitioner was ordered to file the outstanding items as well as any medical expert opinions by December 29, 2000. Id.

Petitioner failed to comply with the special master's November 20, 2000, order. On January 24, 2001, the special master issued an order noting the failure to comply, and warning that continued failure to comply might subject Petitioner to dismissal for failure to prosecute. Order, January 24, 2001. The special master also ordered that Petitioner's counsel's total amount for attorneys' fees be reduced by one hour for each additional failure to comply.

Petitioner informed the court on January 24, 2001, that Petitioner was collecting medical records and preparing affidavits. Status Report, Jan. 24, 2001. Eight months later, on August 1, 2001, Petitioner filed a motion for issuance of a subpoena, which was granted. Order, Aug. 8, 2001.

During the 18-month period from August 8, 2001, through February 24, 2003, Petitioner did not file any evidence into the record. On February 24, 2003, the special master stayed all proceedings in the case until Petitioner notified the court that she was prepared to proceed. Order, February 24, 2003. On August 6, 2004, after a lapse of nearly three years from the court's August 8, 2001, order granting subpoena power, Petitioner filed medical records from her treating physicians. See Pet'r Exs. 8-26.

There was no activity for nineteen months, from August 6, 2004, until March 27, 2006, when the special master convened an in-person status conference. Petitioner's counsel represented that new counsel would be filing a substitution of counsel in the near future. Order, March 29, 2006. Respondent was ordered to file an amended Rule 4 Report and Petitioner was ordered to file a motion for substitution of counsel by May 30, 2006. Id. On April 10, 2006, Respondent filed an amended Rule 4 Report.

On June 2, 2006, Petitioner notified the court that the substitution of counsel had not yet occurred, and requested additional time. Status Report, June 16, 2006. Petitioner also stated that she was collecting additional medical records. Id. On June 21, 2006, Clifford J. Shoemaker, Esquire of the firm of Shoemaker & Associates, was replaced by Altom M. Maglio, Esquire of the firm of Maglio Christopher Toale & Pitts, as attorney of record. Motion for Substitution of Counsel, June 21, 2006.

Petitioner was ordered to file her expert report in support of her claim by July 6, 2006. Order, June 7, 2006. Petitioner filed the expert report, after receiving extensions of time, on September 7, 2006. Pet'r Ex. 40. Petitioner filed a second expert report, after additional

extensions of time, on December 22, 2006. Pet'r Ex. 51. Respondent filed expert reports on March 9, 2007, and April 13, 2007. See Resp't Exs. A-D. Petitioner thereafter filed additional medical records, ending with the last filing of medical records on July 11, 2007.

On October 4, 2007, petitioner's counsel, Altom Maglio, filed a motion to withdraw, citing irreconcilable differences with Petitioner. Motion to Withdraw and Motion for Enlargement of Time, October 4, 2007. Michael G. McLaren, Esquire of the firm of Black & McLaren, became Petitioner's counsel on December 12, 2007. Motion to Substitute or Change Attorney of Record, Dec. 12, 2007. On January 3, 2008, former counsel Maglio filed notice that he intended to file for attorneys' fees and costs. Notice, January 3, 2008. On February 11, 2008, former counsel Shoemaker submitted a notice stating that he also would be filing information regarding attorneys' fees and costs. Notice, February 11, 2008, at ¶5.⁴

A fact hearing in this case has been scheduled for November 18, 2009, in Fort Lauderdale, Florida.

C. Motion For Intervention

On June 29, 2009, the Shoemaker and Maglio firms ("Movants"), filed a motion to intervene for "the limited purpose of seeking counsel fees and costs." Petitioner's Former Counsel's Motion to Intervene Pursuant to RCFC 24(a)(2) ("Motion") at 1. The Movants assert that they

have an interest relating to the transaction that is the subject of the within action, to wit: their fees and costs, and are so situated that disposing of the action may as a practical matter impair or impede their ability to protect their interest unless they are allowed to intervene.

Motion at 2. The Motion is based solely on Rule 24(a)(2) of the Rules of the United States Court of Federal Claims (RCFC) 24(a)(2). Motion at 1. The grounds for the motion include: (1) the length of time served as petitioner's counsel; (2) the time that has passed since the Movants served as counsel; and (3) the belief that the above-captioned case will be pending for a "considerable time to come." Id. The Shoemaker firm claims a total of \$19,525.69 in fees and costs, and the Maglio firm claims a total of \$36,522.64.

In opposition, Respondent argues that the Motion is specifically disallowed by Vaccine Rule 15, which states, in pertinent part, "[n]o person may intervene in a vaccine injury compensation proceeding." Response to Petitioner's Former Counsel's Motion to Intervene

⁴ Mr. Shoemaker's Notice states that his request for attorneys' fees and costs is "in accordance with" the Act and with Vaccine Rules 13 and 15. Notice, February 11, 2008, § 5. The instant Motion does not mention Vaccine Rule 13 or 15, and is instead based on Rule 24 of the Rules of the Court of Federal Claims.

Pursuant to RCFC 24(a)(2) (“Response”) at 1. Respondent asserts that Rule 24(a)(2) affords intervention only under specific circumstances not present in the instant case. Respondent argues that in vaccine litigation “adjudging the *res* of the case” will not encumber the Movants’ eligibility for an award of attorneys’ fees and costs. Response at 2 (*italics in original*). Respondent posits that an award of interim fees is discretionary and not a matter of right and, “accordingly, the movants have no interest as a matter of right that would entitle them to intervene for the purpose of interim fees,” under Rule 24(a)(2). *Id.* at 2.

The Movants respond that claims for attorneys’ fees and costs do not constitute vaccine injury “compensation” and, as a result, Vaccine Rule 15 does not apply to their Motion. Petitioner’s Former Counsels’ Reply Brief in Support of their Motion to Intervene (“Reply”) at 1. The Movants distinguish their Motion from that of a third party, such as a vaccine manufacturer, who would have a potential interest in the *res* of the case. Reply at 2. The Movants state that the Federal Circuit in *Saunders v. Sec’y of Health & Human Servs.*, 25 F.3d 1031, 1035 (Fed. Cir. 1994), held that the term “compensation,” in subsection 300aa-15(f)(1), refers to payment of compensatory damages, *not* attorneys’ fees and costs. Reply at 2. Based on *Saunders*, the Movants argue that the terms “compensation” and “attorney’s fees and costs” “mean completely different things throughout the Act.” *Id.* at 4. By extension, the Movants reason, these terms “mean different things in the Rules.” *Id.* “Accordingly,” Vaccine Rule 15 does not apply to their application for attorneys’ fees and costs. *Id.*

The Movants assert that they brought the instant case “in good faith and expended considerable time, effort, and resources, but have ceased representing the petitioner and cannot, without leave of court, take any action in the matter.” Reply at 6. They state that, because Vaccine Rule 15 does not apply to their application for attorneys’ fees, they relied on RCFC 24(a)(2) “in their initial papers,” but that additional support for their position is Vaccine Rule 1, which, they assert, contains the “equitable powers” of the special master. *Id.*

II. DISCUSSION

A. Introduction

In general, the award of interim attorneys’ fees lies within the sound discretion of the special master. See *Avera v. Sec’y of Health & Human Servs.*, 515 F.3d 1343, 1352 (Fed. Cir. 2008); *Masias v. Sec’y of Health & Human Servs.*, 2009 WL 899703 (Fed. Cl. March 1, 2009), and cases cited therein. In this case, however, Movants have sought to intervene for the purpose of requesting payment of interim fees and costs. Vaccine Rule 15 expressly prohibits intervention in vaccine injury compensation proceedings by “any person.” Because Vaccine Rule 15 applies as written, in the absence of any conflict with the Act or other applicable law, the Movants’ request for intervention must be denied. Although Vaccine Rule 15 may not have been intended to apply to former counsel for petitioners, its application in this context is appropriate, since permitting intervention at this time would prejudice Petitioner’s rights to a fair and

expeditious hearing.⁵

B. Vaccine Rule 15

The Vaccine Rules of the United States Court of Federal Claims state in pertinent part:

Rule 15. Third Parties

No person may intervene in a vaccine injury compensation proceeding, but the special master may afford all interested individuals an opportunity to submit relevant written information within 60 days after publication of notice of the petition in the Federal Register, or later with leave of the special master.⁶

On its face, this provision unequivocally bars intervention.

The Movants, citing Vaccine Rule 1, argue that the special master must use “equitable powers” to permit intervention in opposition to Vaccine Rule 15. See Reply at 7.⁷ Any discretionary power the special master possesses under the Vaccine Rules is, however, delimited by the authority conferred on the special master by the Court of Federal Claims. See Patton v. Sec’y of Health and Human Servs., 25 F.3d 1021, 1027 (Fed. Cir. 1994) (noting that the special masters’ discretion is prescribed by “the framework laid out by the Court of Federal Claims pursuant to its authority under the Act.”) Vaccine Rule 1(b) applies by its terms only to matters not specifically addressed elsewhere in the rules, which is clearly not the case with respect to intervention. In addition, Vaccine Rule 1(c) provides that the RCFC “apply only to the extent they are consistent with the Vaccine Rules.” A rule prohibiting intervention by any person (Vaccine Rule 15) is not consistent with a rule permitting intervention under certain circumstances (RCFC 24). RCFC 24 therefore does not apply in this proceeding.

In short, absent any conflict with a statutory or other applicable provision, Vaccine Rule 15 is binding. Moreover, even if the special master possessed the authority to exercise discretion

⁵ The result would be the same under RCFC 24(a)(2), which gives the trial court discretion to deny intervention where permitting it would interfere with the timely adjudication of claims before the court. See, e.g., Cherokee Nation of Oklahoma v. United States, 69 Fed. Cl. 148, 152 (2005) (trial court must decide, among other things, whether the prejudice to the rights of the existing parties by allowing intervention outweighs the prejudice to the would-be intervenor by denying intervention) (citing Belton Indus., Inc. v. United States, 6 F.3d 756, 762 (Fed. Cir. 1993)).

⁶ The Vaccine Rules are set out in Appendix B of the Rules of the Court of Federal Claims.

⁷ Vaccine Rule 1(b) states: “**Matters Not Specifically Addressed by the Vaccine Rules.** In any matter not specifically addressed by the Vaccine Rules, the special master or the court may regulate the applicable practice, consistent with these rules and with the purpose of the Vaccine Act, to decide the case promptly and efficiently.” (Emphasis in original).

under these circumstances, intervention by the Movants in advance of a decision on entitlement could prejudice the rights of Petitioner. An award of attorneys' fees may be made to a petitioner who has not been awarded compensation, but such an award is contingent on a finding that the petition was brought "in good faith" and "with a reasonable basis," Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1352 (Fed. Cir. 2008). Based on the long and complicated history of this case, in particular, it is not immediately apparent, as it might be in other cases, that interim fees should be awarded. Consideration of whether to award interim attorneys' fees at this time would overlap factually with consideration of Petitioner's substantive claim for compensation. In addition, examination of the details concerning the Movants' representation could reveal facts unfavorable to Petitioner, resulting in further prejudice. See Motion to Withdraw and Motion for Enlargement of Time, October 4, 2007. (counsel's motion for withdrawal citing "irreconcilable differences"); cf. Heston v. Sec'y of Health & Human Servs., 41 Fed. Cl. 41, 47 (1998) ("allowing direct payments to counsel could produce an incentive for counsel to reveal against the client's will certain information about the client that could place the client in an unsympathetic light.")

In addition to the substantial prejudice that may be suffered by Petitioner, resolving the question of interim fees would further delay resolution of the entitlement proceeding. This should not be permitted absent a compelling reason, lest the result actually be the "unending litigation" of which the Movants complain. See Reply at 4. See generally Brice v. Sec'y of Health & Human Services, 240 F.3d 1367, 1373 (Fed. Cir. 2001) ("Lengthy collateral litigation is directly inconsistent with Congress's objective in the Vaccine Act to settle claims quickly and easily.")

Perhaps because Vaccine Rule 15 so clearly precludes intervention, no reported cases guide the analysis of the question raised by the Motion.⁸ In an analogous context, however, the court in Heston held that payment of attorneys' fees and costs must be made to petitioner, not directly to counsel. Reversing a special master's decision granting payment directly to counsel on equitable grounds, the court held that, under the language of the Act, the petitioner is entitled to receive the award. 41 Fed. Cl. at 43-44. Placing emphasis on the wording of Sections 15(b) and (e) of the Act, the court held that compensation is a unitary award "to a petitioner,"

⁸ Even outside the limited context of the Vaccine Act, there are few reported federal cases in which former attorneys seek to intervene for the purpose of obtaining their fees. See, e.g., Cherokee, 69 Fed. Cl. at 156 (permitting intervention because the law firm might otherwise be "precluded by the entry of the consent decree" from obtaining its fees); Venegas v. Skaggs, 867 F.2d 527 (9th Cir. 1989), aff'd on other grounds sub nom. 495 U.S. 82 (1990) (granting intervention for purpose of enforcing lien for attorneys' fees); Panola Land Buying Ass'n. v. Clark, 844 F.2d 1506 (11th Cir. 1988) (denying intervention by attorneys where EAJA fees were waived by client in settlement); Swann v. City of Dallas, 172 F.R.D. 211 (N.D.Tex.1997) (granting intervention by attorneys to modify supersedeas bond); Laker Airways Ltd, et al. v. Pan American World Airways, et al., 109 F.R.D. 541 (1985) (denying intervention where attorneys fees were "in no way" before the court and intervention "could seriously disrupt settlement negotiations."); Dixon-Covington v. AARP, 2005 WL 1271675 (D.D.C. May 5, 2005) (recommending that intervention by former attorneys' seeking fees be denied).

notwithstanding that “portions of the award may be paid at different times.” Id. at 45 and note 1 (distinguishing Saunders).⁹

Foremost in the Heston court’s perspective was the best interest of individuals seeking compensation for vaccine injuries, not “the benefit of their attorneys.” Id. at 46. While the details are different, the reasoning of the Heston decision applies to the instant Motion. Both the literal application of Vaccine Rule 15 and the policy underlying the Act militate against permitting intervention by the Movants without the Petitioner’s participation and before a decision on entitlement has been reached.

C. The Movants’ Contentions

The Movants argue that the distinction between an award of compensation, as compared to an award of attorneys’ fees and costs, precludes application of any of the Vaccine Rules, including Rule 15, to their Motion. Reply at 4. The special master finds no merit in the Movant’s contentions.

1. The textual argument

The Movants maintain that because attorneys’ fees are not “compensation,” citing Saunders, Vaccine Rule 15 does not apply to their Motion. Reply at 1-2. In support of their arguments, the Movants focus on the word “compensation” in Vaccine Rule 15, placing great emphasis on the language prohibiting intervenors ““in a vaccine injury compensation proceeding.”” Reply at 1 (emphasis in original). They imply that because Vaccine Rule 15 applies to a “compensation” proceeding it does not apply to a proceeding to obtain reimbursement of “attorneys’ fees and costs.” The Movants’ parsing of the language of Rule 15 is arbitrary. Since Vaccine Rule 15 applies by its terms to vaccine injury compensation proceedings and the matter in which the Movants seek to intervene is a vaccine injury compensation proceeding, the language of Rule 15 simply and plainly bars intervention by “any person,” including former counsel.

The Movants contend that they “act outside the context of the petitioner’s vaccine injury compensation proceeding.” Reply at 2. This argument proves too much. If one accepts the proposition that the Motion is made “outside the context” of this vaccine injury compensation proceeding, the Movants cannot pursue the relief they seek in this forum. In short, there is no action other than a vaccine injury compensation proceeding in which the special master can afford the Movants any relief at all. In this sense, the Movants’ argument refutes itself, as the Movants impliedly concede. See Reply at 7 (“Movants respectfully request leave to intervene in this matter . . .”) (emphasis added).

⁹ In practice, payments of attorneys’ fees and costs in the Vaccine Program generally is made jointly to petitioner and their counsel.

Along the same lines: the section of the Act providing for the award of attorneys' fees specifically states that attorneys' fees and costs are part of the compensation to be awarded petitioner. 42 U.S.C. § 300aa-15(e).¹⁰ If the amounts sought by the Movants are not encompassed within the term "compensation" as that term is used in the statute, the Movants have no grounds under the Act on which to base their claim. The Movants' assertion that the terms "compensation" and "attorneys' fees and costs," "mean completely different things throughout the Act," negates their attempt to recover attorneys' fees and costs pursuant to section 300aa-15(e), which is the only avenue the Act provides for obtaining such reimbursement.

2. Saunders

The Movants rely heavily on Saunders to support their contention that Vaccine Rule 15 does not apply to their Motion because, as the argument runs, they seek to intervene only to claim attorneys' fees and costs, not to seek compensation. In the Movants' view, because Saunders held that attorneys' fees and costs are not included in the term "compensation" as used in Sections 300aa-15(f)(1) and -21(a) of the Act; Vaccine Rule 15 does not apply. See Reply at 2-4. The Movants' attempt thus to extend the reach of the Saunders decision is unwarranted.

In Saunders, following judgment dismissing her petition, the petitioner declined to accept the court's judgment on her claim and instead filed an election to institute a civil action for damages, pursuant to 42 U.S.C. § 300aa-21(a). 25 F.3d at 1032. The petitioner subsequently filed an application for attorneys' fees and costs incurred in the vaccine injury proceeding, pursuant to 42 U.S.C. § 300aa-15(e)(1). Id. at 1032-33. The government opposed the application based on 42 U.S.C. § 300aa-15(f)(1), which states, "no compensation may be paid until an election has been made, or has been deemed to have been made, under section 300aa-21(a) of this title to receive compensation." Id. at 1033. The government argued that sections 300aa-15(f)(1) and -21(a) prohibit the payment of any compensation, including attorneys' fees and costs, unless "an election to accept the judgment has been filed or is deemed to have been filed." Id. at 1034. In effect, the government took the position that a petitioner whose case was dismissed under the Act could not obtain reimbursement of attorneys' fees and costs without giving up the right to file a tort suit. See Avera, 515 F.3d at 1351.

The Federal Circuit rejected this argument, noting that, "even when the court's judgment does not award compensation, Congress intended the petitioner . . . to recover reasonable attorneys' fees and costs if 'the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.'" Saunders, 25 F.3d at 1036.; see 42 U.S.C. § 300aa-15(e). Reasoning that Congress did not intend "to force a petitioner . . . to incur attorneys' fees and costs in the Court of Federal Claims and then to compel the petitioner to

¹⁰ In pertinent part, section 15(e) states: "(1) In awarding compensation on a petition filed under section 300aa-11 of this title, the special master or court shall also award as part of such compensation an amount to cover – (A) reasonable attorneys' fees, and (B) other costs, incurred in any proceeding on such petition."

choose between recovering those fees and costs or foregoing the right to bring a claim in state or federal court,” *id.*, the court held that the term “compensation” as used in section 15(f)(1) and –21(a) was analogous to compensatory damages, and thus did not preclude an award of attorneys’ fees and costs. *Id.* at 1035 and note 6. In so doing, the court sought to interpret the Act “in a way that is consistent with the intent of Congress.” *Id.* at 1036, citing Hellebrand v. Sec’y of Health & Human Servs., 999 F.2d 1565, 1570-71 (Fed. Cir. 1993).

Because Saunders held that the term compensation is used in one context to indicate only compensatory damages, the Movants argue that the term compensation is never used in the Act to include attorneys’ fees and costs. The Movants’ interpretation of Saunders does not withstand careful consideration of the decision itself. As the court stated in Saunders, the term compensation “is used mainly in the Vaccine Act to mean payment for expenses incurred and losses suffered as a result of the administration of a vaccine.” Saunders, 25 F.3d at 1034 (citations omitted) (emphasis added). And, “the primary focus of the term ‘compensation’ is upon payment for expenses incurred and losses suffered from the administration of a vaccine, rather than upon recovery of attorneys’ fees and costs incurred in court proceedings under the Program.” *Id.* at 1034-35 (emphasis added). Saunders neither holds nor implies that the term compensation is used exclusively to mean expenses and losses incurred by the petitioner; indeed, the language quoted above evidences the Federal Circuit’s understanding that there are provisions of the Act in which both compensatory damages and attorneys’ fees are encompassed by the term compensation.

Saunders, moreover, did not involve the Vaccine Rules. Even if the Movant’s argument concerning interpretation of the Act itself were correct, it would be a further stretch to extend Saunders to apply to the Vaccine Rules. Again, nothing in Saunders warrants that extension.

3. The Movants’ Policy Arguments

The Movants maintain that the Act’s policy of encouraging attorneys to provide representation to injured vaccinees would be undermined by denial of their Motion. See Reply at 4-6. They point out that the Federal Circuit in Avera, discussing the policies supporting the award of interim fees under other federal statutes, noted that those policies are especially potent under the Act, where an award of fees and costs may be obtained even when the underlying claim for compensation fails. See 515 F.3d at 1352; Reply at 5.¹¹

Special masters are keenly aware of the contribution made by vaccinees’ attorneys in facilitating adjudication of these demanding cases, and recognize that the Act’s provisions regarding attorneys’ fees and costs are designed to encourage representation of injured vaccinees by skilled advocates. See Avera, 515 F.3d at 1352 (noting “one of the underlying purposes of the Vaccine Act was to ensure that vaccine injury claimants have readily available a competent bar to

¹¹ Consistent with the Saunders decision, see 515 F.3d at 1352, Avera holds that interim fees are not prohibited by subsection 300aa-15(f)(1).

prosecute their claims.”) Vaccine Rule 15, however, promotes a different and no less important statutory purpose – streamlining vaccine injury compensation cases to create a more efficient and expeditious alternative to tort litigation. Without Vaccine Rule 15, any number of third parties, such as doctors, hospitals, vaccine manufacturers, and insurers, might seek to intervene in vaccine injury compensation proceedings. Such intervention would undermine the overarching purpose of the Act.

Admittedly, it is less clear that Vaccine Rule 15 is intended to bar intervention by former counsel seeking only compensation for attorneys’ fees and costs. There are cognizable arguments for making an “exception” to Vaccine Rule 15 in favor of attorneys seeking only fees and costs. The policy arguments discussed herein that weigh against permitting intervention, however, are more persuasive.

The result, perhaps, is not so harsh as it might appear. Former counsel regularly receive amounts due for their past representation of petitioners when, as permitted under the Vaccine Rules, petitioners seek attorneys’ fees and costs, usually within 180 days of a judgment or the filing of an order concluding the proceedings. Vaccine Rule 13. See Sabella v. Sec’y of Health & Human Servs., 86 Fed. Cl. 201, 212-13 (2009) (upholding the special master’s award of fees to prior counsel); Chestnut v. Sec’y of Health & Human Servs., No. 04-534V, 2009 WL 1490572 (Fed. Cl. Spec. Mstr. April 28, 2009) (unpublished). The mechanism for such payment is an award to the petitioner and current or former counsel that indicates and includes the amounts for former counsel’s attorneys’ fees and costs. Former counsel in this case may seek reimbursement of their fees and costs at an appropriate point in the progress of the case toward final resolution, when such fees and costs are sought by Petitioner.

Denying the Motion in this somewhat unusual case should not discourage counsel from representing vaccine injury claimants, see Reply at 4. As former counsel, the Movants have no need of immediate reimbursement to support the Petition in this case. The only irretrievable loss to the Movants is the time value of money.¹² As the Act is designed primarily for the benefit of persons who suffer vaccine injuries, not their attorneys, the potential pecuniary loss complained of by the Movants is not undue. Cf. Heston, 41 Fed. Cl. at 48-49.

III. Conclusion

¹² It is true that, consistent with well-established case law holding that interest against the United States may not be awarded absent an express waiver of sovereign immunity, interest has been held not to be available to augment an award of attorneys’ fees and costs under the Act. See Library of Congress v. Shaw, 478 U.S. 310, 314 (1986); Int’l Bus. Machs. Corp. v. United States, 201 F.3d 1367, 1369 (Fed. Cir. 2000).

For the foregoing reasons, the Motion by former counsel to intervene in this proceeding is **DENIED.**

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Special Master