

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

JOSEPH MICHAEL D'ANGIOLINI, *

Petitioner, *

v. *

SECRETARY OF HEALTH *

AND HUMAN SERVICES, *

Respondent. *

No. 99-578V
Special Master Christian J. Moran

Filed: July 18, 2012

Award of attorneys' fees and costs
on an interim basis, amount not
disputed.

Barry W. Kregel, Dolchin, Slotkin & Todd, P.C., Philadelphia, PA, for petitioner;
Heather L. Pearlman, United States Dep't of Justice, Washington, DC, for
respondent.

DECISION AWARDING ATTORNEYS' FEES AND COSTS ON AN INTERIM BASIS¹

Mr. D'Angiolini seeks compensation pursuant to the National Childhood Vaccine Injury Compensation Program. See 42 U.S.C. § 300aa—10 et seq. (2006). He alleges that doses of the hepatitis B vaccination caused his health to deteriorate and he has produced reports from experts supporting this claim.

While the question of whether Mr. D'Angiolini is entitled to any compensation remains pending, he filed a motion requesting an award of attorneys' fees and costs on an interim basis. Pet'r Appl'n, filed June 18, 2012. The Secretary has "elect[ed] not to raise her statutory objection at this time in response

¹ The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

to this particular request for interim attorneys' fees and costs." Resp't Resp., filed June 28, 2012, at 2.

In regard to the amount of attorneys' fees and costs, the parties have compromised. Mr. D'Angiolini has agreed to reduce the amount requested and the Secretary has not objected to the lower amount.

PROCEDURAL HISTORY

An abbreviated recitation of the procedural history begins in 1999, when Attorney Clifford J. Shoemaker represented Mr. D'Angiolini. Mr. Shoemaker filed a petition for Mr. D'Angiolini on August 4, 1999.

Relatively little work on Mr. D'Angiolini's case was done until 2006. In that year, the case became more active. Eventually, the undersigned held three hearings as part of the process for finding facts regarding Mr. D'Angiolini's health before and after his hepatitis B vaccinations.

Shortly after the third hearing in 2008, Mr. Shoemaker stopped representing Mr. D'Angiolini. On May 28, 2008, Mr. Shoemaker filed a notice regarding attorneys' fees and costs, stating that "Shoemaker & Associates, at the court's request, will file relevant information regarding attorney's fees and costs."

For approximately six months, Mr. D'Angiolini represented himself pro se. On November 25, 2008, Mr. Barry W. Kregel became counsel of record and Mr. Kregel continues to represent Mr. D'Angiolini.

When Mr. Kregel entered the case, the immediate outstanding issue concerned the findings of fact. On behalf of Mr. D'Angiolini, Mr. Kregel tried to re-open the record by subpoenaing one of Mr. D'Angiolini's treating doctors, who had testified at an earlier hearing when Mr. Shoemaker represented Mr. D'Angiolini. Because the record was adequately developed, Mr. D'Angiolini was not permitted to compel a treating doctor to testify a second time.

The undersigned issued findings of fact on April 29, 2010. Mr. Kregel retained two experts on behalf of Mr. D'Angiolini and these two experts opined that the hepatitis B vaccines harmed Mr. D'Angiolini.

After the Secretary filed reports from experts challenging the causation opinions, a hearing was scheduled for February 2012. The parties' pre-trial briefs

identified inconsistencies within Mr. D'Angiolini's evidence that made his likelihood of prevailing extremely remote. Thus, at Mr. Kregel's request, the hearing was cancelled to allow him to clarify aspects of the expert's opinions. There has been another round of expert reports. A hearing is now set for January 2013.

On June 18, 2012, Mr. D'Angiolini submitted a request for an award of attorneys' fees and costs on an interim basis. His application includes work performed by both Mr. Shoemaker and Mr. Kregel. The Secretary filed a limited response.

ANALYSIS

Broadly speaking, there are two issues. The first is whether Mr. D'Angiolini should receive any attorneys' fees and costs at this time. The second question is assuming that some award is appropriate, what is a reasonable amount.

I. Should Mr. D'Angiolini Be Awarded Attorneys' Fees and Costs on an Interim Basis?

In Avera v. Sec'y of Health & Human Servs., the Federal Circuit stated that awards of attorneys' fees and costs on an interim basis are permitted in the Vaccine Program. 515 F.3d 1343, 1352 (Fed. Cir. 2008). Although the Secretary has argued that the circumstances in which Avera permits an award of attorneys' fees and costs on an interim basis are relatively narrow in other cases, the undersigned has disagreed with this argument. See, e.g., Nuttall v. Sec'y of Health & Human Servs., No. 07-810V, 2011 WL 5926131, at *2 (Fed. Cl. Spec. Mstr. Nov. 4, 2011) (citing cases). In light of these decisions, the Secretary did not press this argument.

A subsidiary question is whether an interim award should be made in this case, which is a matter of discretion. This question turns on the circumstances of this case.

To be eligible for any award of attorneys' fees and costs, Mr. D'Angiolini must satisfy the standards for good faith and reasonable basis. See 42 U.S.C. § 300aa—15(e) (2006). The submission of expert reports fulfills the reasonable basis standard in this case.

Another question is whether an award of attorneys' fees and costs should be made now, that is, on an interim basis. This issue involves consideration of various factors, including protracted proceedings, costly experts, and undue hardship. Avera, 515 F.3d at 1351-52; McKellar v. Sec'y of Health & Human Servs., 101 Fed. Cl. 297, 300-01 (2011) (discussing Avera factors).

Mr. D'Angiolini satisfies these factors. The case has been pending for nearly 13 years, although the reasons for this delay are primarily attributable to Mr. D'Angiolini. Even so, 13 years is a long time. Additionally, Mr. D'Angiolini has retained experts whose invoices exceed \$10,000. Finally, Mr. D'Angiolini and his mother have personally incurred costs. Although these costs are not extraordinary, there seems to be little reason to force Mr. D'Angiolini and his mother to wait for reimbursement of these costs. Consequently, Mr. D'Angiolini will be awarded some amount of attorneys' fees and costs on an interim basis.

II. What Is A Reasonable Amount of Attorneys' Fees and Costs?

The second issue is determining a reasonable amount for attorneys' fees and costs. For Mr. Krengel's firm, the Secretary agreed not to object to an award for \$85,422.50 in attorneys' fees and \$13,163.57 in attorneys' costs.² For Shoemaker & Associates, the Secretary agreed not to object to a total award of \$102,875.00 for attorneys' fees and costs. For Ms. D'Angiolini, the Secretary agreed not to object to an award of \$4,900 for costs that she incurred.

In a July 17, 2012 status conference, the attorneys confirmed that the amounts discussed in the preceding paragraph correspond to all work done before February 2, 2012.³ A review of the material indicates that the components of Mr. D'Angiolini's request are reasonable. He is awarded the amount to which the Secretary has not objected.

III. Conclusion

The petitioners are entitled to an award of interim attorneys' fees and costs. The special master determines that there is no just reason to delay the entry of judgment on interim attorneys' fees and costs. Therefore, in the absence of a

² The amount for attorneys' costs includes the amount for an expert.

³ There was a small question about the division of costs between Mr. Shoemaker and Ms. D'Angiolini. A July 18, 2012 status report resolved it.

motion for review filed under RCFC Appendix B, **the clerk of court shall enter judgment in petitioner's favor for \$206,361.07 in interim attorneys' fees and costs.** The amount shall be paid in three separate checks: (1) a check made out to petitioner and Dolchin, Slotkin & Todd, P.C. in the amount of \$ 98,586.07; (2) a check made out to petitioner and Shoemaker & Associates in the amount of \$102,875.00; (3) a check made out to Mrs. D'Angiolini, solely, in the amount of \$4,900.00. Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

IT IS SO ORDERED.

s/ Christian J. Moran
Christian J. Moran
Special Master