

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS**

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STEVEN DUDASH,	*	
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Petitioner,	*	No. 09-646V
	*	Special Master Christian J. Moran
v.	*	
	*	Filed: April 7, 2011
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	Attorney' fees and costs on interim
	*	basis; <u>Avera</u> .
Respondent.	*	

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Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA, for petitioner,  
Voris E. Johnson, Jr., U.S. Dep't of Justice, Washington, D.C., for respondent.

**UNPUBLISHED DECISION AWARDING ATTORNEYS'  
FEES AND COSTS ON AN INTERIM BASIS<sup>1</sup>**

Mr. Dudash alleges that an influenza vaccine caused him to develop a neurological injury. He seeks compensation pursuant to to the National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-1 et seq. (2006). The

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

evidentiary development of Mr. Dudash's case, including the testimony from expert witnesses at a hearing, is complete. The parties have also filed their briefs after the hearing. Mr. Dudash's claim for compensation is fully ready for adjudication.

After Mr. Dudash filed his final brief on the merits of his claim, he filed a motion requesting an award of attorneys' fees and costs. He characterizes such an award as one on an interim basis and argues that Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), authorizes this award.

In opposition, respondent argues that the pertinent part of the Vaccine Act, 42 U.S.C. § 300aa—15(e)(1), does not authorize an award under the circumstances of this case, which respondent labels an award "pendent lite." Respondent contends that Mr. Dudash's case differs from Avera and, therefore, contends that Avera does not support an award of attorneys' fees and costs to Mr. Dudash now.

In short, the pending dispute concerns the extent of special masters' authority to award attorneys' fees and costs before resolving the merits of the case. On this point, Mr. Dudash's reliance on Avera is sound and respondent's attempt to limit Avera to its facts is not persuasive. As discussed below, Mr. Dudash has demonstrated that an award of attorneys' fees and costs is appropriate and, consequently, he is awarded **\$81,809.02** in attorneys' fees and costs.

### **Whether Special Masters Are Authorized To Award Attorneys' Fees And Costs Before Resolving the Merits of a Case?**

The statute authorizing special masters to award attorneys' fees and costs to petitioners in the Vaccine Program differs from most federal statutes authorizing awards of attorneys' fees and costs in that the Vaccine Act does not require a petitioner to be a prevailing party. Avera, 515 F.3d at 1346. "If the judgment of the United States Court of Federal Claims . . . does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim." 42 U.S.C. § 300aa—15(e)(1).

The Secretary builds her argument upon the clause "the judgment of the United States Court of Federal Claims." She argues that when entitlement is

denied, this judgment is a “precondition to an award of fees and costs.” The Secretary further argues that without an amendment to the statute, special masters may not award attorneys’ fees before an entry of judgment denying compensation. Resp’t Opp’n, filed March 14, 2011, at 2.<sup>2</sup>

The problem with respondent’s argument is that the Federal Circuit has already interpreted this statute, once in Avera and a second time in Shaw v. Sec’y of Health & Human Servs., 609 F.3d 1372 (Fed. Cir. 2010). Federal Circuit decisions are binding on special masters and it is the duty of special masters to follow those decisions. 42 U.S.C. § 300aa—12(f); see also Althen v. Sec’y of Health & Human Servs., 418 F.3d 1274, 1280 (Fed. Cir. 2005) (stating “[q]uestions of law regarding the interpretation or implementation of the Vaccine Act are matters for the courts”); cf. Coltec v. United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006). As explained below, Avera and Shaw support an award of attorneys’ fees and costs in Mr. Dudash’s case.

In Avera, the special master found that the petitioners were not entitled to compensation and judgment entered. Avera, 515 F.3d at 1345; Avera v. Sec’y of Health & Human Servs., No. 04-1385V, 2005 WL 6117662 (Fed. Cl. Spec. Mstr. Dec. 21, 2005). The petitioners sought an award of attorneys’ fees and costs, and their amended application sought an award at hourly rates for their attorney as set by the Laffey matrix. The special master denied petitioners’ request at this rate. Avera, 515 F.3d at 1346; Avera v. Sec’y of Health & Human Servs., No. 04-1385V, 2006 WL 5618158 (Fed. Cl. Spec. Mstr. Aug. 29, 2006).

Petitioners filed a motion for review at the Court of Federal Claims. While at the Court of Federal Claims, the petitioners requested that the Court enter “interim payment of the amount approved by the Special Master.” Avera v. Sec’y of Health & Human Servs., 75 Fed. Cl. 400, 401 (2007). The Court denied the request for an interim award. Id. at 407; see also Avera, 515 F.3d at 1347.

Petitioners appealed to the Federal Circuit. On the issue of interim fees, the respondent argued that the “text of the Vaccine Act prohibits a special master or court from granting an award of interim fees.” Avera, 515 F.3d at 1350, citing

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<sup>2</sup> If Mr. Dudash were entitled to compensation, then the statute mandates a payment of attorneys’ fees and costs. His claim for compensation has not been adjudicated. This decision’s discussion about petitioners who do not receive compensation should not be construed as indicating that Mr. Dudash will not receive compensation.

respondent's brief. The basis for respondent's argument was sections 15(f)(1) and 21(a). The Federal Circuit rejected this argument as inconsistent with its previous decision in Saunders v. Sec'y of Health & Human Servs., 25 F.3d 1031 (Fed. Cir. 1994). The Federal Circuit stated that "There is nothing in the Vaccine Act that prohibits the award of interim fees." Avera, 515 F.3d at 1351. After surveying cases interpreting other fee-shifting statutes, the Federal Circuit stated that "the special master and the Court of Federal Claims erred in holding that an interim fees award is not permissible. The statute permits such awards." Id. at 1352.

However, the Federal Circuit found that an award of interim fees was not appropriate under the circumstances in which the "appellants only sought interim fees pending appeal," among other factors. Consequently, the Federal Circuit "affirm[ed] the judgment (but not the reasoning) of the Court of Federal Claims that held that petitioner was not entitled to an award of interim fees." Id.

After Avera, there was at least some question about the import of the decision. For example, because the Federal Circuit affirmed the judgment of the Court of Federal Claims, the respondent prevailed and, therefore, may have lacked the right to seek further review of the Federal Circuit's decision. It was suggested that Avera's discussion of the availability of interim fees was dicta. Franklin v. Sec'y of Health & Human Servs., No. 99-855V, 2009 WL 2524492, at \*9 n. 17 (Fed. Cl. Spec. Mstr. July 28, 2009).

Any confusion about Avera was dispelled by the subsequent decision in Shaw, whose early procedural history is on all fours with Mr. Dudash's case. Before there was a judgment on petitioner's claim for compensation, the petitioner filed a motion for attorneys' fees. Respondent's primary objection was that the amount requested was excessive. The special master awarded a portion of the attorneys' fees requested and deferred resolution of the remaining amount requested. Shaw v. Sec'y of Health & Human Servs., No. 01-707, 2009 WL 1010058 (Fed. Cl. Spec. Mstr. March 27, 2009).

Arguing that the amount of compensation awarded in the March 27, 2009 decision was not reasonable, the petitioner filed a motion for review. Respondent's position at the Court is not clear.<sup>3</sup> The Court held that it lacked

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<sup>3</sup> To be consistent with the arguments presented in Mr. Dudash's case, respondent should have argued in Shaw that the special master exceeded her authority in awarding the portion of attorneys' fees and costs that she did award.

jurisdiction to consider the interim award of attorneys' fees and costs because such an award was not final. Shaw v. Sec'y of Health & Human Servs., 88 Fed. Cl. 463, 465 (2009).

The petitioner filed an appeal with the Federal Circuit, arguing that the Court of Federal Claims erred in finding that it lacked jurisdiction to consider the motion for review that had challenged the award of only a portion of attorneys' fees and costs on an interim basis. Shaw, therefore, presented the Federal Circuit with an opportunity to examine its decision in Avera. Shaw stated "In Avera, we held that the Vaccine Act permits the award of interim fees and costs, rejecting the government's argument that a fee award is only permissible after judgment under § 300aa-15." Shaw, 609 F.3d at 1374.<sup>4</sup>

This language resolves respondent's argument here. The Federal Circuit has rejected the argument that the respondent presents – that an award of attorneys' fees is permitted only after a judgment.<sup>5</sup> Consequently, there is authorization to award Mr. Dudash attorneys' fees even though a decision on his claim for compensation remains pending.

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<sup>4</sup> Shaw also held that the Court of Federal Claims possessed the jurisdiction to entertain the petitioner's motion for review.

<sup>5</sup> Respondent also cites Martin v. Sec'y of Health & Human Servs., 62 F.3d 1403, 1405-06 (Fed. Cir. 1995). In that case, the Federal Circuit stated that "the special master's (or the court's) discretion [to award fees and costs] is not unfettered; there must first be a judgment 'on such a petition.'" Martin does not control the outcome of Mr. Dudash's motion because whether a judgment on compensation is required for an award of attorneys' fees was not squarely presented in Martin. Rather, Martin held that the Office of Special Masters lacked the authority to award attorneys' fees and costs when the Office of Special Masters lacked jurisdiction to entertain the petitioners' underlying claim for compensation. In this circumstance, the language from Martin is dicta. See Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1282 (Fed. Cir. 2002); see also Brecht v. Abrahamson, 507 U.S. 619, 631 (1993). Therefore, the binding Federal Circuit precedents are Avera and Shaw.

## **Whether Mr. Dudash’s Case Satisfies the Requirements for an Award of Attorneys’ Fees and Costs**

Petitioners who have not been awarded compensation may be entitled to an award of attorneys’ fees and costs when “the petition was brought in good faith and there was a reasonable basis for the claim.” 42 U.S.C. § 300aa—15(e)(1). Here, respondent does not present any argument regarding Mr. Dudash’s good faith or reasonable basis. Mr. Dudash has presented the testimony of Dr. Höke, who opined that the flu vaccine caused his neurological problem. Mr. Dudash’s case satisfies the good faith and reasonable basis standard.

## **Whether Mr. Dudash Should Be Awarded Attorneys’ Fees and Costs as a Matter of Discretion**

Although special masters are authorized to award attorneys’ fees without first issuing a decision as to whether a petitioner is entitled to compensation and although Mr. Dudash has been found to have a reasonable basis for his petition, Mr. Dudash is not entitled as a matter of right to an award at this time. Instead, special masters have discretion to award attorneys’ fees. Saxton v. Sec’y of Health & Human Servs., 3 F.3d 1517, 1520 (Fed. Cir. 1993). Traditionally, special masters have exercised their discretion to award attorneys’ fees because doing so promotes a “secondary purpose of the [Vaccine] Act[, which] is to ensure that vaccine-injury claimants will have readily available a competent bar to prosecute their claims under the Act.” Saunders, 25 F.3d at 1035; accord Morse v. Sec’y of Health & Human Servs., 93 Fed. Cl. 780, 791 (2010).

Respondent contends that even if an award of attorneys’ fees and costs before a judgment on entitlement were permitted, Avera “made it clear that interim fee awards should be the rare exception, and not the rule.” In support of this argument, respondent notes that the Federal Circuit affirmed the underlying judgment that did not award interim attorneys’ fees because Avera did not involve protracted proceedings, costly experts had not been retained, and the petitioner did not suffer an undue hardship. Resp’t Opp’n at 6. Respondent’s argument is essentially that Avera announced a set of criteria that a petitioner must establish as a prerequisite for an award of attorneys’ fees before judgment. Without satisfying all those criteria, a petitioner cannot be awarded attorneys’ fees and costs before judgment. See Resp’t Resp. at 7 (stating “Petitioner here has similarly failed to demonstrate the necessary circumstances to justify an interim award.”). The specific gaps identified by respondent are the expeditious processing of Mr.

Dudash's case and a lack of showing that Mr. Dudash, and not his counsel, have suffered "actual hardship."

Mr. Dudash's hardship (or the lack thereof) has been overemphasized. Respondent's argument seems to elevate petitioner's hardship to an absolute necessity. However, neither Avera nor any other appellate authority has characterized the various facts mentioned in Avera as essential requirements. Instead, the overall tone of Avera suggests that "protracted proceedings," "costly experts," and "undue hardship" are factors that should be considered and weighed when evaluating a request for attorneys' fees before judgment.

Here, the factors weigh in favor of an award of attorneys' fees before a judgment.

- Protracted Proceedings

From the perspective of Mr. Dudash's attorneys, his case has lasted more than two and a half years. The invoices from Mr. Dudash's law firm show that his attorneys and paralegals began working on his case in August 2008. They spent approximately 14 months gathering medical records.

Mr. Dudash filed his case on October 1, 2009, and medical records were filed one week later. Mr. Dudash consulted Dr. Höke in January 2010, see Pet'r Appl'n, tab C, at 25. Mr. Dudash filed Dr. Höke's report, which stated that the flu vaccine caused Mr. Dudash's neurological problems, on March 22, 2010. This filing essentially perfected Mr. Dudash's case. See Simanski v. Sec'y of Health & Human Servs., No. 03-103V, 2010 WL 5648874, \*16-17 (Fed. Cl. Dec. 15, 2010) (discussing perfecting a claim in the Vaccine Program), appeal docketed, No. 2011-5050 (Fed. Cir. Feb. 14, 2011). Mr. Dudash submitted Dr. Höke's report approximately six months after he filed his petition.

After Dr. Höke's report, responsibility for the pace of adjudication was shared among Mr. Dudash, respondent, and the undersigned special master. Respondent presented the report from Dr. Stommel on June 2, 2010 (72 days after Dr. Höke's report). The parties set about finding a mutually convenient date for a hearing.

The hearing was held on October 22, 2010, which is approximately one year after Mr. Dudash filed his petition.<sup>6</sup> Both parties filed briefs after the hearing and the briefing process extended until February 18, 2011. The case remains submitted for adjudication.

The Secretary argues that Mr. Dudash's case has not had protracted proceedings. But, this argument is based upon when the petition was filed, not when Mr. Dudash's attorneys began working on his case. See Resp't Opp'n at 7. Because the Vaccine Act states that medical records shall be filed with the petition, time spent by petitioners in pre-filing development of their cases should be considered in determining whether proceedings have been protracted.

While the attorneys have been working on Mr. Dudash's case, their law firm has not been paid for its work. The law firm has also incurred costs that have not been reimbursed by Mr. Dudash. Dr. Höke has been paid only a retainer that does not cover all his time. The duration of proceedings suggests that both the law firm and Dr. Höke should be paid sooner rather than later.

- Costly experts

Dr. Höke has submitted an invoice for \$12,375.00. Pet'r Appl'n, tab C, at 25. This amount qualifies as being costly.

- Undue Hardship

Respondent argues that the only hardship that matters is a hardship incurred by a petitioner and not the petitioner's attorney. See Resp't Opp'n at 7 (stating "As the party seeking compensation under the Act, petitioner, and not his counsel must show an undue hardship in order for interim fees to be available under Avera."). This argument overlooks other Federal Circuit decisions that promote awards of attorneys' fees as a way "to ensure that vaccine-injury claimants will have readily available a competent bar to prosecute their claims under the Act." Saunders, 25 F.3d at 1035.

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<sup>6</sup> The relative quickness in processing this case is due, in part, to Mr. Dudash's filing medical records with his petition. Mr. Dudash's case is unlike some cases in the Vaccine Program in which petitioners file their cases without medical records and then spend many months gathering medical records.

Mr. Dudash's attorney has worked on his case for more than two years. There seems to be no reason to delay paying him for work performed years ago.

In sum, the factors identified in Avera weigh in favor of awarding attorneys' fees before judgment. The simplest explanation might be that money today is better than money tomorrow. Although respondent argues that awards of attorneys' fees before judgment should be reserved for "the rare exception, and not the rule," Resp't Opp'n at 6, the converse is more likely to be true. Appellate authorities have not directed special masters to award interim fees only in exceptional cases. Absent some guidance on this point, the better practice is to pay qualified petitioners for their attorneys' fees when practical, regardless of whether there is a judgment on the merits.

### **What is a Reasonable Amount of Attorneys' Fees and Costs?**

Because an award of attorneys' fees and costs is appropriate, the remaining question is how much should be awarded. The statute limits any award to a "reasonable" amount. 42 U.S.C. § 300aa—15.

Mr. Dudash and the Secretary have discussed what amount is reasonable. Mr. Dudash has reduced his request to \$81,809.02, and the Secretary has not interposed any objection. This amount is reasonable.

**Mr. Dudash is awarded \$81,809.02 in attorneys' fees and costs.** There is no just reason to delay the entry of judgment on interim attorneys' fees and costs. Therefore, in the absence of a motion for review, the Clerk's Office is instructed to enter judgment in accord with this decision. A check in this amount shall be made payable to Mr. Dudash and his attorney jointly.

IT IS SO ORDERED.

S/ Christian J. Moran  
Christian J. Moran  
Special Master