In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-897 V
Filed: June 7, 2011
For Publication

SERGIO and VERONICA SOTO, parents of ALEXANDER SOTO, a minor,	*	
Petitioners,	*	Attorneys' Fees and Costs; Interim Award
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Ronald C. Homer, Boston, MA, for petitioners.
Chrysovalantis P. Kefalas, Washington, D.C., for respondent.

MILLMAN, Special Master

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS[1]

On March 7, 2011, petitioners filed an Interim Application for Final Attorneys' Fees and Costs, seeking an interim award of fees and costs ("Interim Application") pursuant to *Avera v. Sec'y of HHS*, 515 F.3d 1343 (Fed. Cir. 2008). Specifically, petitioners requested **$26,723.40** in attorneys' fees and **$4,564.17** in attorneys' costs. They also requested **$1,225.**00 in fees for their prior attorney William Barr. Interim Application at 1. On March 21, 2011, respondent filed her Opposition to petitioners' Interim Application, opposing an interim award of attorneys' fees and costs. On April 12, 2011, petitioners filed a Reply to respondent's Opposition as well as a Supplemental Application for Final Attorneys' Fees, requesting an additional **$3,926.10** in attorneys' fees. On April 26, 2011, respondent filed a response to petitioners' supplemental application, maintaining that an award of interim fees is inappropriate in this case, but also stating that $3,926.10 was not an unreasonable amount to have been incurred. Both petitioners' first and supplemental applications will be discussed below.

[1] Vaccine Rule 18(b) states that 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 constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

I. The Appropriateness of an Interim Award.

Relying on the Federal Circuit's decision in *Avera*, petitioners seek an interim award of attorneys' fees and costs. In *Avera*, the Federal Circuit held that the Vaccine Act's silence on the subject of interim fees does not prohibit their award. In her opposition brief, respondent intimates that *Avera* was wrongly decided. R's Opp. at 5 n.1 ("Recognizing that an award of interim attorneys' fees and costs is not authorized by the Vaccine Act, members of Congress have repeatedly introduced proposed Amendments to the Act that would provide such interim compensation for attorneys' fees and/or costs, including after *Avera* was decided.") She argues that *Avera* permits interim fees and costs only under the very limited procedural posture obtaining in that case, and that as the instant case is factually and procedurally distinct, interim fees are not authorized by the Vaccine Act or *Avera* here. Respondent regularly makes the same arguments in all cases in which petitioners seek interim fees. The special masters have not accepted these arguments. See *Hammitt v. Sec'y of* HHS No. 07-170V, 2011 WL 1827221, at *4 (Fed. Cl. Spec. Mstr., Apr. 7, 2011); *Whitener v. Sec'y of HHS*, No. 06-477V, 2011 WL 1467919, at *1 (Fed. Cl. Spec. Mstr., Mar. 25, 2011). The undersigned holds that an interim award is both permitted and appropriate in this case. In doing so the undersigned necessarily rejects respondent's objections that (i) the Vaccine Act does not authorize interim awards, and (ii) that *Avera* should be interpreted narrowly to deny an interim award in this case. *Whitener*, 2011 WL 1827221, at *2.

A. Respondent's Objection to Interim Fees.

In her opposition, respondent contends that the scope of § 300aa-15(e)(1) is clear from the plain language and cannot be interpreted to allow interim fee awards in this case. *See* R Opp. at 4. Respondent maintains that an award of attorneys' fees and costs can only accompany a ruling on entitlement or, if entitlement is denied, a holding that the petitioner filed the petition in good faith and with a reasonable basis to go forward. *Id.* Under § 300aa-15(e)(1), an award of compensation for damages or a ruling that petitioner filed in good faith and had a reasonable basis to go forward alone constitute the preconditions for an award of attorneys' fees and costs. *Id.*

In addition to the Act's plain language and legislative history, respondent relies on the Federal Circuit's decision in *Avera* to support her argument that interim fees are not permissible in this case. R Opp. at 7. Here, respondent's central argument is that the Federal Circuit's holding in *Avera* "must be limited to the very narrow procedural and factual scenario at issue in that case—a request for payment of an undisputed portion of a fee award during the pendency of an appeal regarding attorneys' fees and costs, following a resolution on the merits." *Id*.

Respondent emphasizes that *Avera* fits within the scope of §300aa-15(e)(1) because "judgment had entered on the decision denying compensation." *Id.* at 6. That is, an "interim award" in the Program can only be one that occurs at a specific and limited time in litigation—after judgment on the merits (a more draconian position than that a ruling on entitlement has not yet occurred), but before a final award of fees. Respondent does not explain how this applies to a

case where an attorney seeks to leave representation of petitioners, but presumably her "precondition" that an award of compensation be made would mean that *Avera* permits interim fees in this case only when the undersigned issues a decision either for petitioners or dismissing the case. Seeking to place the instant case outside *Avera*'s scope, respondent notes that petitioners' procedural posture here is different than where "petitioners merely sought payment of that portion of the fee award that the government did not dispute on appeal" in *Avera*. *Id*. at 7. Respondent characterizes any fees and costs award made prior to an award of compensation as an award *pendente lite*, implying that there is a meaningful distinction between such an award and an interim award. *Id*.

B. Petitioners' Reply to Respondent's Opposition

Petitioners' Reply to respondent's Opposition asserts that payment of interim attorneys' fees and costs in this case, in which petitioners have yet to receive a ruling on entitlement, is appropriate because it is consistent with congressional intent that petitioners have access to competent attorneys. P Reply at 3. They cite *Saunders v. Sec'y of HHS*, 25 F.3d 1031, 1035 (Fed. Cir. 1994), as well as the Federal Circuit's decision in *Avera*, that the award of interim attorneys' fees and costs is integral to ensuring that petitioners have a readily available competent bar to represent them. *Avera*, 515 F.3d at 1352, citing *Saunders*, 25 F.3d at 1035. See also *Shaw v. Sec'y of HHS*, 609 F.3d 1372, 1374-75 (Fed. Cir. 2010), and its approval of the award of interim attorneys' fees and costs before a ruling on entitlement ("Deferring consideration of attorneys' fees and costs until a decision on the merits is effectively a denial of interim fees." 609 F.3d at 1376). Petitioners also note that there will be no further filing of attorneys' fees and costs for the Conway, Homer & Chin-Caplan, P.C. firm that currently represents them because they will move to withdraw once petitioners find other counsel. P Reply at 8-9. A similar situation occurred in which counsel were ceasing to represent petitioners in *Burgess v. Sec'y of HHS*, No. 07-258V, 2011 WL 159760 (Fed. Cl. Spec. Mstr., Jan. 3, 2011), and the special master therein awarded interim attorneys' fees and costs to petitioners' counsel.

Petitioners in the instant action also cite *Dudash v. Sec'y of HHS*, No. 09-646V, 2011 WL 1598836 (Fed. Cl. Spec. Mstr. Apr. 7, 2011), in which the special master awarded interim attorneys' fees and costs without having first determined entitlement. R Reply at 11. The special master in *Dudash* distinguished the denial of interim fees and costs in *Avera* from *Dudash* because petitioners in *Avera* sought them only pending the appeal of attorneys' fees awarded below, whereas petitioners in *Dudash* sought them pending a ruling on entitlement. 2011 WL 1598836, at *2. *Dudash* was a case on all fours with *Shaw*. The special master in *Dudash* also noted that respondent's objection to the award of interim attorneys' fees and costs was barred by the Federal Circuit's decision in *Martin v. Sec'y of HHS*, 62 F.3d 1403, 1405-06 (Fed. Cir. 1995), was inapposite because the special master in *Martin* had no subject matter jurisdiction over the case; hence, no award of attorneys' fees and costs was permissible. 2011 WL 1598836, at *3 n.5. Respondent in the instant action also argued that the Federal Circuit decision in *Martin* bars the award of attorneys' fees and costs here. R Opp. at 4-5.

C. Respondent's Argument is Unpersuasive.

The Federal Circuit has addressed interim fees awards in the context of cases lacking a determination of entitlement in *Shaw*. In light of the decisions in *Shaw*, *Burgess*, and *Dudash*, the undersigned finds petitioners' arguments more persuasive than respondent's.

Respondent's argument that the undersigned should read *Avera* narrowly is unpersuasive. "The Federal Circuit's discussion of the availability of interim awards sweeps broadly, both in *Avera* itself (*see* 515 F.3d at 1351-52), as well as in *Shaw* (*see* 609 F.3d at 1374)." *Whitener*, 2011 WL 1467919, at *3. In *Avera*, the Federal Circuit specified only when interim fees "are particularly appropriate" without stating that those circumstances ("where proceedings are protracted and costly experts must be retained" and "undue hardship") are the only circumstances in which petitioners may receive interim attorneys' fees and costs awards. 515 F.3d at 1352.

II. Interim Fees are Appropriate in this Case.

Although petitioners are not at this point in the litigation entitled to compensation in this case, they are entitled to reasonable attorneys' fees and costs. § 300aa-15(e)(1). A special master may award reasonable attorneys' fees and costs if the petition was brought in good faith and there was a reasonable basis for the claim. § 300aa-15(e)(1). Here, petitioners prosecuted their claim with both good faith and a reasonable basis. Good faith is an exceedingly easy test to meet—here Alexander's parents had a good faith belief that Alexander's vaccination caused his injury. Moreover, respondent does not contest the reasonable basis of petitioners' claim, and the undersigned finds no reason in the record to question it either.

Additional Factors Supporting an Interim Award

Petitioners' attorneys in this case have expended a large number of hours on this case. Although some of the hours may be duplicative, discussed *infra*, the vast majority were legitimately expended in furtherance of petitioners' case. The undersigned can find no reason to subject counsel in the Vaccine Program to delays in compensation for indefinite periods of time, when their service to their client is almost at an end and they will not be filing future fee applications in this case. Paying attorneys when their service is complete is appropriate.

II. Determining the Amount of Attorneys' Fees and Costs to be Awarded.

A. The Legal Framework for Determining a Reasonable Award.

This court applies the lodestar method to any request for attorneys' fees and costs. *See Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) ("The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984))); *see also Avera*, 515 F.3d at 1347-48; *Saxton v. Sec'y of HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993). The standards set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), for calculating attorneys' fees "are generally applicable in all cases in which Congress has authorized an award of fees."

Hensley, 461 U.S. at 433 n.7.

The reasonable hourly rate is "the prevailing market rate," which is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895 n.11. Petitioners have the burden to demonstrate that the hourly rate requested is reasonable: "[T]he burden is on the fee applicant to produce satisfactory evidence–in addition to the attorney's own affidavits–that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.*

The "prevailing market rate" is determined using the "forum rule." *Avera*, 515 F.3d at 1349 ("to determine an award of attorneys' fees, a court in general should use the forum rate in the lodestar calculation"). In *Avera*, the Federal Circuit also adopted the "*Davis* exception"[2] to the forum rule. The court held that the *Davis* exception applies when the bulk of the work in a case is performed outside the forum (Washington, DC, in Vaccine Act cases), in a locale where the attorneys' rates are substantially lower. 515 F.3d at 1349.

In the recent case of *Perdue v. Kenny A.*, the United States Supreme Court found that the presumptive lodestar fee should be enhanced or reduced only in extraordinary circumstances, although not in that case. 130 S. Ct. 1662, 559 U.S. ___ (2010). The Court stated that the lodestar may be enhanced only when "specific evidence" shows "that the lodestar fee would not have been 'adequate to attract competent counsel.'" 130 S. Ct. at 1674 (quoting *Blum*, 465 U.S. at 897).

In determining the number of hours reasonably expended, a court must exclude hours that are "excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434. Special masters may use their experience in Vaccine Act cases to determine whether the hourly rate and the hours expended are reasonable. *Wasson v. Sec'y of HHS*, No. 90-208V, 24 Cl. Ct. 482, 483 (1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993) (Table) (noting special masters have broad discretion in calculating fees and costs awards); *see also Masias v. Sec'y of HHS*, No. 2010-5077, 634 F.3d 1283, 1292 (Fed. Cir. 2011) (finding it is within the special master's discretion to distinguish the work done by an attorney in a Vaccine Act case from other types of litigation in calculating an hourly rate and finding it is within the special master's discretion to rely on prior Vaccine Act cases establishing a relevant local rate); *Rodriguez v. Sec'y of HHS*, No. 2010-5093, 632 F.3d 1381, 1386 (Fed. Cir. 2011) (finding it is within the special master's discretion to consider Vaccine Act work specifically in computing an hourly rate).

B. Reasonable Hourly Rates.

As discussed in *Schueman v. Sec'y of HHS*, No. 04-693V, 2010 WL 3421956, at *4 (Fed. Cl. Spec. Mstr. Aug. 11, 2010), determining an appropriate hourly rate under *Avera* typically

[2] The "Davis exception" is based on *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA*, 169 F.3d 755 (D.C. Cir. 1999).

requires three steps: determination of the forum rate, determination of the local rate, and comparison of the two to determine whether there is a "very significant difference" in compensation indicating that the *Davis* exception applies. Relying on persuasive reasoning set forth in *Rodriguez*, the undersigned finds that the forum rate for an attorney with substantial experience in Vaccine Act or similar litigation is between $310.00 and $335.00 per hour for work performed from 2006 to 2009. *Rodriguez*, 632 F.3d at 1383; *see also Schueman*, 2010 WL 3421956, at *4.

Respondent does not object to the requested hourly rates. In the instant action, petitioners' attorneys practice in Boston, MA. The local rate in Boston is not very significantly different from the forum rate in Washington, D.C. Therefore, the undersigned does not apply the *Davis* exception. The undersigned applies the prevailing forum rate. The attorneys representing petitioners have had their rates approved in numerous previous cases. The undersigned sees no reason to disturb the reasoning of these previous decisions.

Petitioners request between $101-105 for paralegal work and $318-330 per hour for Attorney Conway ("Mr. Conway"), $290 per hour for Attorney Homer ("Mr. Homer"), $200 per hour for Attorney Ciampolillo ("Ms. Ciampolillo"), $300 per hour for Attorney Chin-Caplan ("Ms. Chin-Caplan"), $208 per hour for Attorney Fashano ("Ms. Fashano"), and $200 per hour for Attorney Pepper ("Mr. Pepper"). Each of these rates is consistent with the prevailing forum rate

Although petitioners' rates are reasonable, numerous claimed hours are excessive, redundant, or otherwise unnecessary. Inexplicably, every attorney in petitioners' counsel's law firm but one worked on this case. Numerous unnecessary hours were expended on intra-firm communications due to this rampant redundancy. Moreover, having so many attorneys work on one case caused duplicative review and unnecessary meetings.

On February 20, 2009, Mr. Conway entered 3 hours of time for a conference, review of records, conference call, and drafting two memoranda. CHCC Pre-bill worksheet ("Worksheet") at 2. A paralegal billed 1.3 hours for this same conference. Since Mr. Conway followed through with the reviews and memoranda, the paralegal's attendance was redundant. The undersigned reduces the award by $131.30.

On March 22, 2010, Mr. Homer and Ms. Ciampolillo participated in a .2 hour case meeting. Worksheet at 7-8. Mr. Homer and Ms. Ciampolillo had each previously met with one or more paralegals, but not with one another about this case. Had one attorney handled this case, this repetition would have been avoided. The undersigned reduces the award by $40.00 for Ms. Ciampolillo's redundancy.

As 2010 progressed, more attorneys were added to the case. On May 25, 2010, Ms. Chin-Caplan had a meeting with a paralegal. Worksheet at 17. While the undersigned does not have enough information to determine that another attorney's involvement was totally unnecessary, certainly the duplication of an additional attorney along with a paralegal to become familiar with the case was duplicative. The undersigned reduces the paralegal's time on May 25,

2010 and June 14, 2010 for a total of $31.50.

On July 12 and 13, 2010, Ms. Fashano was unnecessarily brought into the fold on this case. Worksheet at 19-21. The undersigned reduces the award by $20.80 for her time on July 12, 2010, and by an additional $83.20 for her time on July 13, 2010.

July 20, 2010 produced yet another combination of attorneys at a meeting, this time between Ms. Chin-Caplan and Mr. Pepper. Worksheet at 21. Mr. Pepper's addition is duplicative. The undersigned reduces the award by $60.00.

August 2, 2010 and August 6, 2010 produced two more case meetings on how to proceed. This could have been accomplished by one attorney sufficiently familiar with the case. The undersigned reduces the award by $40.00 and $20.00 for Ms. Ciampolillo's attendance at these meetings.

On August 5, 2010, Mr. Pepper spent some portion of 2.8 hours in "prep for [attorney] meeting." Worksheet at 22. Preparation for yet another case meeting with most of the firm was duplicative and unnecessary. This is again the type of activity that would be starkly reduced by keeping the case in the hands of one or two (at most) attorneys and a small number of paralegals. The undersigned reduces the award by $160.00, or .8 hours.

On August 11, 2010, Mr. Pepper, Ms. Chin-Caplan, Ms. Fashano, Ms. Ciampolillo and Mr. Conway met for approximately 42 minutes, or .7 hours, on the status of this case. At this point, it is worth noting that counsel had not yet found an expert, and nothing indicates that all this time had been spent negotiating with respondent. In other words, five attorneys met for the better part of an hour in the midst of nothing more than an expert search. This was excessive. Mr. Conway spent .8 hours, rather than .7, because he apparently wrote a memo to the file. Mr. Pepper presented research. Beyond those two, the remaining attorneys were duplicative. The undersigned reduces the award by $210.00 for Ms. Chin-Caplan, $145.60 for Ms. Fashano, and $140.00 for Ms. Ciampolillo.

On August 16, 2010, Ms. Chin-Caplan and Ms. Ciampolillo billed for yet another case meeting, followed by an August 23, 2010 case meeting between Ms. Chin-Caplan and a paralegal, followed by another meeting between Ms. Chin-Caplan and Mr. Pepper on August 25. Worksheet at 23-24. Coordinating among this large litigation team continued to expend unnecessary time and resources. The undersigned reduces by half the time of Mr. Pepper, the paralegal, and Ms. Ciampolillo, for a total of $75.75.

On August 26, 2011, Mr. Pepper billed .3 hours for a motion for an extension of time, and Mr. Homer .1 hours for an edit to that motion. Worksheet at 24. This was the second motion for an extension of time. A total of 24 minutes of billable time is unnecessary for essentially copying and pasting the first motion, and it did not require editing. The undersigned reduces the award by .2 hours, or $40.00 for Mr. Pepper, and .1, or $30.00, for Mr. Homer.

On October 4, 2010, Ms. Ciampolillo apparently billed $60.00 for .3 hours to meet with a paralegal about the status of the case after an expert had been contacted, and Ms. Chin-Caplan and Mr. Pepper met about the same issue the next day, October 5, 2010. Worksheet at 26-27. The undersigned reduces Ms. Ciampolillo's and Mr. Pepper's time as redundant, for a total of $100.00.

On October 28, 2010, Mr. Pepper spent .5 hours drafting a status report and discussing it with Ms. Ciampolillo, who spent .2 hours editing the report and .2 hours meeting. After .9 hours editing and meeting time were expended here, Mr. Homer spent another .1 hour editing. Three attorneys to file a status report with less than a single perfunctory page of text is unnecessary. The undersigned reduces Mr. Homer's billed time of $30.00 and Ms. Ciampolillo's .4 hours or $80.00, for a total of $110.00.

Another status report was produced by Mr. Pepper and edited by Ms. Ciampolillo on December 14, 2011. This was the same simple, mechanical production as the October 28, 2010 status report, making a second attorney's input similarly unnecessary. The undersigned reduces the award by $100.00 for the unnecessary meeting and Ms. Ciampolillo's unnecessary edits.

The duplication of attorneys in this case produced two additional significantly overdone tasks. The drafting of petitioner Mr. Soto's two-page affidavit was undertaken by three attorneys, for a total of 2.5 hours and $548.00 in fees. The undersigned finds that Ms. Ciampolillo's time should have been quite enough on such a simple task, that is, the mere drafting of a client's statement. The undersigned reduces Mr. Homer's edit of .1 hour and .2 of .3 hours of Mr. Conway's edit, for a total of $95.00.

Finally, the amended petition was produced by three attorneys who expended 12.2 hours. The undersigned recognizes the importance of the amended fee petition. However, at least one of the three attorneys was unnecessary. The undersigned reduces .4 hours of Mr. Homer's time, amounting to $120.00.

Each of the foregoing instances represents duplicative attorney activity. The total deductions amount to $1,732.35. Counsel should take heed that in future, involving many attorneys on a case that should involve only one or two is an unwise practice that is not compensable. The undersigned subtracts $1,732.35 from the total fees requested by the law firm Conway, Homer & Chin-Caplan of $26,723.40, and awards $24,991.05. On April 12, 2011, petitioners filed a supplemental application for "final" interim attorneys' fees, requesting an additional $3,926.10 in attorneys' fees. Respondent does not object to this amount. The undersigned does not find it to be excessive or redundant and awards it in full for a total attorneys' fee award of **$28,917.15.**

Petitioners also requested $1,225.00 in fees for petitioners' former counsel, William L. Barr. Attorney Barr's requested rate is $350.00 per hour. Mr. Barr is located in Chicago, IL, where the legal market rate does not differ very significantly from the forum rate; therefore, the *Davis* exception does not apply. The hourly rate of $350.00 falls within the acceptable range for an experienced attorney. Although $350.00 an hour may be excessive given that Mr. Barr does

not appear to have substantial vaccine experience, he appears to have been conservative in billing only for 3.5 hours. The undersigned finds that **$1,225.00** in fees for the services Mr. Barr rendered is reasonable. Respondent does not object to this amount.

C. Reasonable Costs.

Petitioners request interim costs in the amount of **$4,546.17**. Respondent does not object to this amount. After a thorough review, the undersigned finds nothing objectionable about the costs requested.

In accordance with General Order #9, petitioners represent that they incurred no personal costs to pursue the petition.

IV. Conclusion.

Petitioners have demonstrated that an interim award of attorneys' fees and costs is appropriate in this case. The undersigned awards petitioners interim attorneys' fees and costs in the following amounts:

a. **$33,463.32**, representing $24,991.05 in fees, $3,926.10 in supplemental fees, and $4,546.17 in attorneys' costs. The award shall be in the form of a check made jointly payable to petitioners and the law firm of Conway, Homer & Chin-Caplan, P.C.

b. **$1,225.00** in attorneys' fees for petitioners' former counsel. The award shall be in the form of a check made jointly payable to petitioners and the law firm William L. Barr, Ltd.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.[3]

IT IS SO ORDERED.

Dated: June 7, 2011

/s/ Laura D. Millman
Laura D. Millman
Special Master

[3] Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.