

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-241V

(Filed: March 13, 2009)

MICHAEL KIRK and ANNA C. KIRK, *
natural parents and guardians for AVA L. KIRK, *
a minor, *

Petitioners, *

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

INTERIM ATTORNEY'S FEES AND COSTS ORDER

Petitioners filed for an award of interim fees and costs in this matter, and respondent argues that such an award is improper under the facts of this case. The undersigned finds that an interim award is appropriate.

The procedural facts are not in dispute. Petitioners filed their case on April 7, 2008. The minor child was inoculated on April 11, 2007 with MMR, HIB and HepA vaccines. By April 17, 2007 she was seizing and was hospitalized. See Petitioners' Response to Respondent's Opposition at 1 (hereinafter P Res at _). Petitioners' represent that since the injured child, Ava, was diagnosed with autism-like symptoms, this case could have been processed under the court's Omnibus Autism Proceeding. See Autism General Order #1 filed July 3, 2002. However, initially, petitioners presented the case as a possible "table case." See P Res at 2. Pursuant to court Order, respondent indicated that he would defend the case, that is respondent contested the contention that the case should be compensated. See Respondent's Response in Opposition to Petitioners' Application for Interim Fees and Costs (hereinafter R Res Opp at _) at 2. Accordingly, petitioners had the case reviewed by an expert to determine whether the averment of a table case could be supported. After some further development of the factual record, petitioners' expert indicated that he was unable to support the table case. P Res at 2. Thus, on September 9, 2008, petitioners moved to transfer the case to the autism Omnibus proceeding. That motion was granted. Thereafter, petitioners moved for an award for interim fees and costs.

Petitioners seek an award for \$15,425 in fees and \$19.23 in costs. Respondent objected to any award at this time, and in the alternative if an award is deemed appropriate that the award be reduced. The undersigned has considered the parties' arguments and finds that an award at this time is warranted, but agrees with respondent that petitioners' request must be reduced.

Respondent's first contention is that there is insufficient information at this time to determine whether there is a reasonable basis for filing the petition. See § 15(e). As petitioners set forth in their response, the initial discussions regarding this case concerned the possibility of a table case. The information supporting the possible Table case provides the requisite support for a reasonable basis. In addition, the allegation of autism and inclusion within the OAP is also support of the reasonable basis. Respondent has recently not objected to interim fees in the OAP test cases (citations are not yet available). If there is a reasonable basis underlying the autism test cases, it follows that there is a reasonable basis for other cases filed in the OAP.¹

Next, respondent raises various arguments regarding the application of the Federal Circuit's decision in Avera v. Sec'y of HHS, 515 F.3d 1343 (Fed. Cir. 2008). Suffice it to say that respondent's reading of Avera is exceedingly narrow and unjustified. Respondent goes so far as to say that the court "made clear that interim fee awards should be the rare exception, and not the rule." R Res. at 4. Respondent provides no supportive citation for this statement, and that is not surprise since there is no indication in Avera that the Circuit believed such limitations on interim fees was warranted. In fact, the undersigned reads Avera in the opposite manner, setting a broad, discretionary vehicle for ensuring that petitioners are not punished financially while pursuing their vaccine claim.

The guidance offered by the Circuit in Avera was slim, but the general principle underlying an award of interim fees was clear: avoid working a substantial financial hardship on petitioners and their counsel and thereby ensure "that vaccine injury claimants have readily available a competent bar to prosecute their claims." Avera at 1352 citing Saunders v. Sec'y HHS, 25 F.3d 1031, 1035 (Fed. Cir. 1994). The Circuit added that interim fees are "particularly appropriate" where the proceedings are protracted or costly experts have been retained. Id. However, contrary to respondent's interpretation, these factors do not limit the overarching purpose of the interim fees, but are considerations in determining whether or not petitioners or their counsel will suffer an undue hardship from not awarding interim fees.

In this case, the undersigned agrees with petitioners that a denial of interim fees will work an undue hardship on petitioners' counsel. Further, the award of interim fees in this situation is exactly what the Circuit envisioned when it stated that "denying interim fees awards would clearly make it more difficult for claimants to secure competent counsel because delaying payments decreases the effective value of awards." Id.

¹ There may be a question of the reasonableness of continuing the claim. But that is another question left for a latter day, most likely following the final resolution of the OAP test cases after all appeals are exhausted.

Petitioners have elected to pursue this case as part of the OAP. The undersigned is not going to detail the proceedings to date under the OAP since counsel are aptly familiar with the proceedings. In summary, the first test cases have been decided, with additional decisions expected by the end of the year. However, given the importance of the decisions and the number of cases impacted, it is expected that appeals will be taken up through the Federal Circuit. That process can easily take two to three years. In addition, once the Federal Circuit issues their binding decisions, the teachings from those decisions will have to be applied to the remaining over 4,000 cases pending under the OAP. By any formulation, that could be a lengthy process. Accordingly, that extensive time prior to the resolution of this case under the OAP will work an undue hardship on counsel.² As with most firms practicing under the Vaccine Program, counsel in this case works in a small firm. Extending thousands of dollars of in essence credit for years is the very situation the Circuit expressed concern that decreasing the effective value of awards by delayed payments will reduce the availability of competent counsel. It cannot be seriously argued that in essence loaning cases thousands of dollars for years is not a hardship. It is clearly incorrect to suggest that it is not an undue hardship for a small firm to loan thousands of dollars for years.³

Respondent argues that petitioners should not be paid interim fees because they opted into the OAP by choice and thus in effect opted for the protracted proceedings. That is a false argument. The court constructed the Omnibus Autism Proceeding. Petitioners are availing themselves of an option of litigation that the court offered. It is a viable option for petitioners that by its nature and importance is going to take time to resolve. Petitioners did not select protracted proceedings, the proceedings are necessarily time consuming and petitioners' case will take time to resolve as a result.

Respondent questions the amount of time petitioners counsel has expended to date. The undersigned during a conference call on this matter agreed. Unfortunately, the parties were unable to reach an informal agreement on the matter. After reviewing the filings, the undersigned agrees with respondent's objections. In addition, respondent notes that the \$1,662.50 claimed for time spent discussing the matter with Dr. Kinsbourne requires further justification. The undersigned initially disagreed but after reviewing petitioners' Response now sides with respondent. Petitioners exhibit D to their response catalogues the time related to the \$1,662.50. However, on page 5 of the response, petitioners state that \$3,680 in expert costs are due. There appears to be no support for this latter figure. Accordingly, further clarification and support is needed.

Accordingly, petitioners shall file by no later than March 20, 2009 the clarification and support for the expert fees. In the meantime, the undersigned requests that the parties attempt to

²It must be understood that the undersigned is not hereby sanctioning the filing of interim fee petitions in other OAP cases. This case is somewhat unique in that petitioners appropriately pursued the case as a Table case. It was only after that effort failed and significant time and costs were incurred that petitioners elected to proceed under the OAP.

³ That finding is made without even considering the impact on the small firm of the current credit crisis pervading our economy.

resolve this matter informally. Petitioners will be awarded interim fees, the only issue is how much. Petitioners' request will be reduced. The parties should be able to agree on an appropriate allowable figure.

IT IS SO ORDERED.

/s/ Gary J. Golkiewicz

Gary J. Golkiewicz
Chief Special Master