

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

(E-Filed: March 27, 2009)

No. 01-707V

_____)	
MICHAEL STEPHEN SHAW,)	
)	TO BE PUBLISHED
Petitioner,)	
)	Interim Petition for Attorneys’
)	Fees and Cost; Partial Grant of
v.)	Requested Amount;
)	Deferred Consideration of
SECRETARY OF THE DEPARTMENT OF)	Contested Portion of Request
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
_____)	

Ronald Homer, Boston, MA, for petitioner.

Voris R. Johnson, Department of Justice, Civil Division, Torts Branch, Washington, DC, for respondent.

INTERIM ATTORNEYS’ FEES AND ATTORNEYS’ COSTS DECISION¹

Pending before the undersigned is Petitioner’s Application for Interim Fees and

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.

Costs (P’s App.). Petitioner seeks interim fees and costs pursuant to 42 U.S.C. § 300aa-15(e) of the National Childhood Vaccine Injury Act of 1986, as amended (the Vaccine Act), and Rule 13 of the United States Court of Federal Claims Vaccine Rules, and further to the guidance provided in Avera v. Secretary of the Department of Health and Human Services, 515 F.3d 1343 (Fed. Cir. 2008). P’s App. at 1.

Based on the cited authority, petitioner requests interim attorneys’ fees in the amount of \$142,778.50. Id. Petitioner requests interim attorneys’ costs in the amount of \$32,311.45. Id. Petitioner also requests interim petitioner’s costs in the amount of \$150.00. Id. The total interim fees and costs request is \$175,239.95. Id.

Respondent filed an objection to petitioner’s request. Respondent’s Response in Opposition to Petitioner’s Application for Interim Fees and Costs (R’s Opp.). Petitioner in turn responded to respondent’s objections. Petitioner’s Response to Respondent’s Response in Opposition to Petitioner’s Application for Interim Fees and Costs (P’s Response). For the reasons detailed below, the undersigned grants an interim award of fees and costs in the amount of \$12,632.59.

I. DISCUSSION

A. An Award of Fees

Section 15(e)(1) of the Vaccine Act permits a special master to award reasonable attorneys’ fees and costs incurred in a proceeding on vaccine petition. 42 U.S.C. § 300aa-15(e)(1). Vaccine Rule 13 authorizes the Clerk of the Court to forward a filed request for attorneys’ fees and costs to the special master to whom the case was assigned for consideration and decision. Vaccine Rule 13, Rules of the Court of Federal Claims, Appendix B. Reasonable attorneys’ fees are determined by using a lodestar calculation that involves “multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.” See Blum v. Stenson, 465 U.S. 886, 888 (1984); Avera, 515 F.3d at 1347-1348. The determined fee amount may be adjusted upward or downward. Id.

The Supreme Court has provided guidance regarding what factors may be considered in making a fee determination. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). However, the quality of counsel’s representation, the complexity of the case and novelty of the subject matter should be reflected in the reasonableness of the hourly rates and hours expended by the attorney and should not alone be the basis for an adjustment. Id. at 898-899. Any adjustment to the fee award must be supported by specific evidence

regarding the quality of counsel's service and the relationship of that service to the results obtained for the client. Blum, 465 U.S. at 899; see also Hensley at 434.

B. Authority to Award Interim Fees

In Avera, the Federal Circuit determined that the Vaccine Act permits the awards of interim fees, but does not require an interim award in every case. 515 F.3d at 1352. Relevant factors in determining when an interim fee award might be appropriate include whether the case involved protracted proceedings, whether costly experts were retained, or whether petitioner would suffer undue hardship. See Avera, 515 F.3d at 1352.

C. The Pending Fee Request

Petitioner's request for interim fees and costs drew a strong objection from respondent. Respondent initially opposed the request on the ground that petitioner had not demonstrated the factors outlined in the Federal Circuit's decision in Avera that would support an interim award in this case. R's Opp. at 1 (citing Avera, 515 F.3d 1343). Respondent argued, alternatively, that were the undersigned "inclined" to grant an interim award, then the undersigned should reduce the award from the amount requested "because the number of hours expended on this case by petitioner's counsel and petitioner's expert . . . are outrageously excessive and unreasonable in the context of this case [and] [o]ther costs appear excessive and unreasonable." Id.

In the filed opposition, respondent asserts that "much of the time billed by petitioner's counsel is redundant and/or excessive," id. at 6, for a case that "has involved only one hearing at which just three witnesses testified," id. at 7. Respondent challenges the more than 260 hours billed by petitioner's counsel for preparing for the entitlement hearing alone. See id. at 7-11. Moreover, respondent challenges the hourly rate of \$255 sought for petitioner's counsel, Ms. Thao Ho, as "excessive." Id. at 8 n.6. Respondent states that "40 hours of hearing preparation was more than sufficient." Id. at 11. Respondent cites Ms. Ho's hourly rate of \$175.00 for handling vaccine cases at her prior firm as a benchmark rate for her vaccine work. See id. at 8 n.6.

Respondent asserts that certain of the billing entries reflect inefficient duplications of effort on several discrete tasks by either multiple attorneys, multiple paralegals, or multiple law clerks. See id. at 11-13. Respondent views the time spent on the fee application, specifically 24.5 hours of paralegal time and 2 hours of attorney time, as "excessive." Id. at 13. Respondent also challenges petitioner's counsel's claimed travel

time of seven hours at her full billable rate as “excessive.” Id. at 14. Because the submitted airline receipt with the fee application reflects actual travel time of approximately four hours, respondent urges that counsel “should receive her full rate for four hours of travel time and half of her full rate for the remainder of her actual travel time.” Id.

Additionally, respondent challenges the \$25,800 amount billed for the services of petitioner’s expert, Dr. Sherri Tenpenny. Id. at 14-15. Respondent contends that the 49 hours spent preparing her report and the 21.5 hours spent on “prehearing review” were “excessive “ and that Dr. Tenpenny should not be reimbursed for “educating herself about issues that a qualified expert would already know.” Id. at 14. Respondent attributes the costly preparation time to Dr. Tenpenny’s lack of expertise to testify about the neurological condition at issue in this case. See id. at 15. Respondent also objects to the 21 hours that Dr. Tenpenny billed for travel time when her travel receipt reflects less than 10 hours of actual travel time. Id.

Other costs that respondent found unreasonable were: (1) the cost of \$638.92 for two pre-paid hotel reservations that were subsequently cancelled when the entitlement hearing was rescheduled, id. at 16; (2) the \$1,169.50 airline ticket for Dr. Tenpenny to fly on March 16, 2008, from Cleveland to Houston to Salt Lake City when the entitlement hearing was held on March 12, 2008, in Sacramento, California, id. at 3, 16; and (3) the \$139.19 dinner charge for petitioner’s counsel and Dr. Tenpenny while on travel for the entitlement hearing, id. at 16.

Petitioner responded to respondent’s objections in detail noting that petitioner’s case was filed nearly seven years ago and has involved the conduct of an entitlement hearing and “extensive post-hearing briefing.” P’s Response at 3. Petitioner represents that further to a “post-opposition discussion [between the parties] with respect to this specific aspect of respondent’s opposition to [the] application for interim fees[,] . . . respondent now agrees that [this] case does in fact meet the Avera criteria for interim fees and . . . withdraws this specific objection.” Id. at 4. The parties, however, have not reached any additional accord on the sought fees and costs.

As indicated in the undersigned’s Order issued on September 24, 2008, the undersigned is amenable to considering an award of the pending interim fees and costs request that is not in dispute, and the undersigned defers consideration of the disputed portions of the interim fees and costs request until a final petition for fees and costs is submitted. See Order of 9/24/08. The undersigned reasons that as one of the earlier filed hepatitis B cases which was subject to a period of delay in prosecution pending efforts to resolve the numerous filed cases through omnibus proceedings, this matter has been

pending for a protracted period of time. A substantial volume of medical records have been obtained and filed, and an entitlement hearing has been held. As evidenced by the noted objections that respondent has raised regarding petitioner's interim fee request, the undersigned anticipates that the final fee application will be contested as vigorously and will further delay a decision on petitioner's petition for fees and costs. In view of the duration of this proceeding and because the parties have been able to identify several discrete aspects of the request to which respondent does not object and that the undersigned finds reasonable, the undersigned exercises her discretion to make an interim award of fees and costs.

The portions of the request that do not appear to be in dispute, for purposes of this interim award, are as follows: (1) petitioner's court cost of \$150.00, see P's App, Tab C at 1; (2) petitioner's counsel's fees of \$7,000.00 for 40 hours of hearing preparation at an hourly rate of \$175.00 for petitioner's counsel, see R's Opp. at 8 n.6, 11; (3) petitioner's counsel's fees of \$918.75 for 4 hours of flight travel by petitioner's counsel to the hearing at an hourly rate of \$87.50, the remaining 3 hours of travel by petitioner's counsel to the hearing at an hourly rate of \$87.50, and 3.5 hours of travel by petitioner's counsel from the hearing at an hourly rate of \$87.50², see P's App, Tab A at 55-56; R's Opp. at 14; and (4) petitioner's counsel's costs of \$4,563.84, which represents the amount of costs originally requested (\$32,311.45) reduced by Dr. Tenpenny's requested fee of \$25,800 and by the other disputed costs of \$638.92 for two cancelled, pre-paid hotel reservations, the \$1,169.50 airline ticket charge for Dr. Tenpenny to fly to Cleveland to Houston to Salt Lake City on March 16, 2008, and the \$139.19 dinner charge for petitioner's counsel and Dr. Tenpenny during travel for the hearing. The total amount appropriate for award now is \$12,632.59. The disputed aspects of the interim fee petition will be addressed in the final decision on fees and costs.

II. CONCLUSION

It is the opinion of the undersigned that the circumstances of this case are appropriate for an interim award of petitioner's counsel's fees of \$7,918.75, and petitioner's counsel's costs of \$4,563.84 and petitioner's costs of \$150.00. Petitioner is entitled to an award of interim attorneys' fees, attorneys' costs, and petitioner's costs. The undersigned determines that there is no just reason to delay the entry of judgment on an award of interim attorneys' fees, attorneys' costs, and petitioner's costs. Therefore, in the absence of a motion for review filed under Appendix B of the Rules of the United

² All travel time has been compensated at half the hourly rate for Ms. Ho to which respondent does not object.

States Court of Federal Claims, the Clerk of the Court shall enter judgment in petitioner's favor for \$12,632.59 in interim attorneys' fees, attorneys' costs, and petitioner's costs. Under 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/ Patricia E. Campbell-Smith

Patricia E. Campbell-Smith

Special Master