

United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 01-0060V

(Filed: November 17, 2006)

TAMMY KUPERUS, as Natural Parent of	*	
PHILLIP KUPERUS, a minor,	*	
	*	
	*	
	*	
Petitioner,	*	
	*	
v.	*	To Be PUBLISHED
	*	Attorney fees & costs,
	*	Reasonable expert fees
	*	
SECRETARY OF THE DEPARTMENT OF	*	
HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

William Dobreff, Esq., Warren, Michigan, for Petitioner.
Althea W. Davis, Esq., United States Department of Justice, Washington, D.C., for Respondent.

DECISION ON ATTORNEY FEES AND COSTS¹

ABELL, Special Master:

I. BACKGROUND

On 9 December 2005, Petitioner filed an application for Attorney's Fees and Costs. That filing was a bit premature as the Court's decision did not issue till 8 May 2006. Nevertheless, after numerous discussions between the parties, the Petitioner revised several elements of her demand. The demand for attorney's fees was reduced to **\$44,000.00**. The demand for costs born by the attorney was reduced to **\$20,594.89**. Respondent does not object to either of these tallies.

¹ The Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b)(2), she may seek the redaction of material in this decision that "would constitute a clearly unwarranted invasion of privacy."

As to the cost requested for Petitioner's expert, Dr. Robert Shuman, Respondent does object to the amount requested, **\$68,050.34**, which includes \$66,612.00 in fees (approximately 190.32 hours at \$350.00 per hour) plus \$1,438.34 in costs.

In reviewing the fee application and subsequent filings, it has come to light that the Petitioner paid **\$4,000.00** to Dr. Shuman in July 2001. This amount should have been included in the application on behalf of Petitioner as a past unreimbursable expense.

As to the dispute regarding Dr. Shuman's fees and hourly rate, the Court would note that he is one of the only doctors in the world, not to mention the course of human history, with board certification in neurology with special competence in child neurology, board certification in pathology with special competence in neuropathology, and board certification in neuroimaging (MRI). Petitioner's Exhibit ("Pet. Ex.") 123 at 2. He is a 1968 graduate of Stanford Medical School and was a practicing physician for more than thirty-five years. Regarding legal matters, he has applied an hourly rate of \$350 per hour since 1991.

Dr. Shuman was the treating pediatric neurologist for Petitioner's son, Phillip. In conjunction with this case, Dr. Shuman authored not one, but three separate reports, submitted medical articles in support of his opinion, and testified during a telephonic entitlement hearing held 25 September 2002. The first report included "a limited number of articles (11) and research listed in support." Pet. Ex. 123 at 5. The second report, prepared at the request of this Court regarding his medical opinion, was more expansive and included a 23 page report with 57 medical references. Id. at 9. A third report involved a detailed analysis of the changes in the child's MRIs over time.

Based in no small part on the testimony of Dr. Shuman, the Court ruled in Petitioner's favor. In that published Ruling, filed 23 October 2003, the Court noted:

Petitioner's medical expert, Dr. Shuman, posits a convincing theory of biologic plausibility based on the immunological challenge presented by the DTaP vaccination. In his "Opus Kuperus," Dr. Shuman stated that ADEM is an immune-mediated attack on the central nervous system (CNS) and can be stimulated by any one of the antigens in the DTaP vaccine.

...

Taking into account Dr. Shuman's obvious expertise and comprehensive research in the subject, the Court accepts Dr. Shuman's explanation of biologic plausibility. Additionally, objective evidence in the form of numerous medical articles also support Dr. Shuman's theory. Thus, the Court finds that it is indeed biologically plausible that the DTaP vaccine can result in ADEM.

Kuperus v Secretary of HHS, No. 01-0060V, 2003 WL 22912885 at * 10-11 (Fed. Cl. Spec. Mstr. Oct. 23, 2003). Dr. Shuman referred to his report concerning the cause of Phillip's ADEM as his "Opus Kuperus," see Pet. Ex. 35, because of the time and effort involved in its compilation. Id.

Originally, Respondent contended that "[b]oth the number of hours and hourly rate requested for Dr. Shuman's services are excessive and should be reduced to reflect reasonable compensation for his time spent in this case." Respondent argued that the numerous hours spent researching medical literature were "inordinate, even considering the medical issues involved in this case." Response to Petitioner's Application for Attorney's Fees and Costs, filed 25 May 2006, at 5. Respondent also showed concern as to hours requested sans documentation and also regarding an allusion made by Dr. Shuman at trial of an intent to publish his report.

In reply to Respondent's complaint, Petitioner filed a plethora of exhibits in support of the cost request for Dr. Shuman.² Included were additional bills and an affidavit from the doctor explaining in detail the basis for the rate and the number of hours. Pet. Ex. 123. In that affidavit, Dr. Shuman indicates that he did not publish his report though it might be of some benefit for the medical community.

At a status conference held 14 August 2006, Respondent indicated that it would not object to the hourly rate requested. However, concerns remained as to the number of hours claimed by Dr. Shuman. Respondent argues that hours spent in "private scientific research" are not compensable under the Vaccine program as that role is specifically designated to certain official bodies, like the National Institutes of Health, and not private litigants. Furthermore, while Respondent does not question the qualifications of Dr. Shuman, it continues to challenge the reasonability of the number of hours spent researching and preparing his medical opinion. In particular, Respondent is incredulous that Dr. Shuman, in preparation for this case, would have to "read, analyze, understand, criticize and take relevant materials from the articles spanning the ENTIRE period between 1798 through 2001, a span of 203 years." Pet. Ex. 123 (emphasis in original). Instead, Respondent argues that, "Dr. Shuman's many years of training, experience, and treatment of children with neurological disorders, coupled with his three board certifications, would give him a significant knowledge base from which to review the medical issues in this case and provide an opinion." Respondent's contentions are summarized as follows:

- The claim for 117.5 hours spent researching 203 years of medical literature is unreasonable and should be reduced to a reasonable number of hours;
- The claim for 31 hours spent preparing the third report, which discusses alterations in the MRIs, is unreasonable and should be reduced accordingly; and finally,
- The claim for 4.5 hours spent organizing medical articles should be viewed not as a reasonable expert expense but as an administrative cost and therefore not reimbursable at Dr. Shuman's hourly rate.

² This filing was inexcusably late. Nevertheless, out of fairness to Petitioner, the Court allowed it to enter into the evidentiary record. However, given that Petitioner had already been granted two extensions, and given that those deadlines had been long exceeded without notice to the Court or opposing counsel, the Court closed the record except for a supplemental response from Respondent. Order, 15 August 2006. Even so, Petitioner attempted to file a brief. That filing was struck from the record. Order, 22 August 2006.

II. LEGAL STANDARDS

The preeminent question in the present case, as with all requests for Attorney's Fees and Costs, is one of reasonableness. The Vaccine Act³ indicates that, in cases such as these, where petitioners are entitled to compensation, such compensation includes "(A) reasonable attorneys' fees, and (B) other costs, incurred in any proceeding on such petition." § 15(e)(1).

Under the Act, compensation runs to petitioners or their agents. § 15(a). Hence, when addressing a challenge to a request for attorney's fees and costs, the Court must first consider reasonableness in the context of a petitioner's perspective and circumstances or, put another way, whether it is reasonable for a petitioner to have entered into a particular relationship. Ultimately, the question of reasonability must be determined by the Court with careful consideration on a case by case basis.

In the present instance, the Court cannot conclude it unreasonable for Petitioner to have employed the treating neurologist, Dr. Shuman, as an expert in this case. In fact, not only is Dr. Shuman a treating doctor, he is also one of the top experts in the field. Furthermore, based on Petitioner's filings in justification of Dr. Shuman's hourly rate, and based on Respondent's lack of a sustained objection in that regard, the Court concludes that \$350 per hour is a reasonable rate for a doctor of his qualifications and is, perhaps, somewhat lower than might be expected.

Yet, while it may be reasonable for the Petitioner to have entered into an arrangement with Dr. Shuman, that is not to say that Petitioner is given a blank check. Instead, Petitioner or Petitioner's counsel has an ongoing obligation to monitor the costs associated with an expert such that the arrangement does not become unreasonable.

As aforementioned, in cases like this, where compensation is awarded on the petition, reasonable attorneys' fees and other costs will flow. § 15(e)(1). Moreover, it has been held that the standard of reasonability applies the same to expert costs as it does to attorney fees. Crossett v. Secretary of HHS, No. 89-73V, 1990 WL 293878, at *4 (Cl. Ct. Spec. Mstr. Aug. 3, 1990). Likewise, the Petitioner bears the burden of substantiating an expert's hours and the rate requested. See Baker v. Secretary of HHS, No. 99-653V, 2005 WL 589431 (Fed. Cl. Spec. Mstr. Feb. 24, 2005). In determining the reasonableness of expert costs the Court has traditionally considered many factors, including: the witness' area of expertise; the education and training required to provide expert testimony in that area; the prevailing rates for other comparable experts working in that same particular geographical area; the nature, quality and complexity of the information provided; and any other factor that is of assistance in balancing the interests implicated by the Vaccine Act. Wilcox v. Secretary of HHS, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). In

³ The statutory provisions governing the National Childhood Vaccine Injury Act of 1986 are found in 42 U.S.C. §§300aa-10 *et seq.* (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

the end, compensation ought not be granted for "hours that are excessive, redundant, or otherwise unnecessary." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Hence, "The question is not whether [an expert] expended the number of hours claimed but whether it was reasonable and necessary for him to do so." Wasson v. Secretary of HHS, No. 90-208V, 1991 WL 135015, at *3 (Fed. Cl. Spec. Mstr. July 5, 1991), remanded 24 Cl. Ct. 482 (1991), aff'd 988 F.2d 131 (Fed. Cir. 1993) ("The Special Master did not abuse her discretion in substantially reducing compensation for attorney fees using her considerable experience with the Vaccine Act, her knowledge of the issues in this case, and comparison with awards in similar cases.").

In making determinations on the reasonableness of fees and costs, this Court is to rely on its judgment and prior experience. See Wasson v. Secretary of HHS, No. 90-208V, 1991 WL 135015 (Fed. Cl. Spec. Mstr. July 5, 1991), remanded 24 Cl. Ct. 482 (1991), aff'd 988 F.2d 131 (Fed. Cir. 1993); Saxton v. Secretary of HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993); See also Baker v. Secretary of HHS, 2005 WL 589431, slip op. at *5 (Fed. Cl. Spec. Mstr. Feb. 24, 2005). In so doing and given the nature of this Program, this Court need not engage in a line-by-line analysis but may utilize its experience with litigation in the Vaccine Program and those involved therein. Castillo v. Secretary of HHS, No. 95-652V, 1999 WL 1427754, *3 (Fed. Cl. Spec. Mstr. Dec. 17, 1999); and Plott v. Secretary of HHS, No. 92-633V, 1997 WL 842543, *5 (Fed. Cl. Spec. Mstr. Apr. 23, 1997).

This Court has reduced costs requested for medical experts in instances where extensive background research has been conducted so that a doctor can present as a subject matter expert in a particular field. Heckler v. Secretary of HHS, No. 01-319V, slip. op. *6 (Fed. Cl. Spec. Mstr. Mar. 10, 2006). That is to say, while it is reasonable for an expert in a given field to conduct a certain amount of research to familiarize himself with the state of the art, the Court expects an expert to arrive with a certain base knowledge. This consideration is amplified where an expert's qualifications justify a high hourly rate. While it is reasonable to award higher hourly rates to well-qualified experts, that is, in part, with the understanding that such experts will expend fewer hours on a case. The most obvious reductions, of course, result when an expert is either testifying to or performing tasks that are disproportionate to his skill level or outside his subject matter expertise. Heckler, No. 01-319V, slip. op. *3 ; Densmore v. Secretary of HHS, No. 99-588V, slip. op. *6 (Fed. Cl. Spec. Mstr. Aug. 14, 2006) (reducing an expert's rate where that expert was employed in the role of a consultant to perform a medical literature review and evaluation and not as an expert in his given field). Regardless, the underlying question is whether it is reasonable for a petitioner to have secured a particular expert with this sort of qualifications, vel non.

The Court has also reduced costs requested for medical experts where excessive hours are unsubstantiated in the evidentiary record. Heckler, No. 01-319V, slip. op. *3, 6. In fine, a petitioner must justify the costs requested. For instance, an award may be reduced where numerous hours were claimed but where little or no work product was filed with the Court. The underlying question is whether it is reasonable for Petitioner to have expended, or allowed to be expended, an amount of monies on an expert and can that cost be substantiated.

While not applicable to the present case, this Court has also reduced costs requested for medical experts where the hourly rate is not commensurate with an expert's level of experience, and particularly where an expert claims a rate comparable to someone with far greater expertise and training. Heckler, No. 01-319V, slip. op. *3. In addition, the Court has reduced an hourly rate requested for an expert where evidence in the record demonstrated that a flat rate had been utilized to calculate an expert's hourly rate, which is unacceptable in this program. That rate was reduced to a reasonable hourly rate. Brown v. Secretary of HHS, No. 00-0182V, slip. op. *5 (Fed. Cl. Spec. Mstr. July 21, 2006). The underlying question in such instances is whether it is reasonable for Petitioner to have entered into such an arrangement in the first place.

III. DISCUSSION

In this particular dispute, ultimately, the Court must consider whether Petitioner's claim regarding Dr. Shuman is reasonable. Should the Petitioner or Petitioner's counsel have kept a tighter rein on Dr. Shuman's efforts and particularly regarding the nearly 120 hours spent researching medical literature back to the year 1798, the 31 hours attributed to the third report, and the 4.5 hours spent organizing medical articles?

Applying the aforementioned standards to Respondent's objections regarding the case at bar, the Court first considers whether 117.5 hours spent conducting research is reasonable. On the one hand, it is highly unusual to see such a well-qualified expert expend so many hours on research. Typically, this Court either denies compensation for such research or drastically reduces the hours attributed thereto. However, this case is somewhat sui generis. First, it should be noted that the type of research conducted by Dr. Shuman is not, as Respondent would characterize it, the type contemplated in the Vaccine Act that is relegated to the National Institutes of Health and others. Second, the Federal Circuit recently acknowledged that the Vaccine Court is operating "in a field bereft of complete and direct proof of how vaccines affect the human body." Althen v. Secretary of HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005). Third, Dr. Shuman was already a pre-eminent expert in his field when this child arrived at his practice. Hence, his time was not utilized in building a fundamental knowledge of the medical situation. Instead, Dr. Shuman utilized his extensive knowledge of the subject to conduct an expansive and ambitious research project rather than using research to supplement an anemic subject matter comprehension. Furthermore, given that vaccine injuries are such rare occurrences, it stands to reason that even a premier practicing physician might, under certain circumstances, have to conduct a substantial amount of research. Perhaps some hours should be shaved off for research done on literature from 1798 through the modern era, which can be of little assistance in the present; however, the Court is not sure how many hours were spent researching this time-frame and suspects Dr. Shuman's statement in this regard is, in essence, rhetorical. In this particular instance, and given Dr. Shuman's detailed affidavit explaining how and why these hours were spent, the Court finds nothing unreasonable in the expenditure of 117.5 hours.⁴

⁴ Respondent has not parsed these hours so as to determine what is reasonable from their perspective but instead appears to be asking for some sort of bulk or percentage reduction. This Court is not convinced that such is appropriate in this case.

A similar analysis is applied to the 31 hours spent preparing a third report, seven pages long, concerning the evolution of three sets of MRI tests that included a "review and comparison of these 3 sets of MRI's, the photo scanning of these MRI's, their integration into the report and creation of this third report." Pet. Ex. 123 at 12. Given Dr. Shuman's expertise in these matters, particularly his board certification in neuroimaging, and having some concern that certain of these tasks appear administrative rather than expert in nature, the Court finds that Petitioner has not substantiated a claim for 31 hours. Accordingly, that number is reduced to 15 hours (4 hours review, 8 hours drafting, and 3 hours compiling and communicating the report), which the Court finds, based on its extensive experience in the Vaccine Program, reasonable.

As concerns Respondent's dispute concerning 4.5 hours spent arranging medical articles, the Court notes that approximately 68 articles encompassing more than 1,500 printed pages were referenced in this case. In the end, the Court finds nothing unreasonable about an expert arranging the medical articles in the manner most appropriate for presentation and allocating 4.5 hours on such a task.

Finally, though no time sheets have been filed, the Court will assume that some time was spent by Dr. Shuman in the preparation of the 11 August 2006 filing of exhibits 109 to 124 in his defense. See, e.g., Cohan v. Commissioner of Internal Revenue, 39 F.2d 540, 543-44 (C.A.2 1930). Hence, an additional 10 hours will be credited to the doctor at his usual rate.

IV. CONCLUSION

The Court would like to thank Dr. Shuman for the time he spent on this case and would urge him to consider publishing his "Opus Kuperus" for the benefit of the medical community and those injured by vaccinations. Dr. Shuman is the sort of expert whose participation the Court wishes to encourage. The Court also recognizes that petitioners are often at a disadvantage in finding doctors who may be willing to involve themselves in these matters. Moreover, the Court is concerned that objections to an expert's costs, while sometimes necessary, might have a chilling effect on the participation of competent medical and legal professionals.

Nevertheless, based on the Court's analysis of Petitioner's application for attorney's fees and costs, those costs relating to Dr. Shuman are reduced by a net total of 6 hours at \$350 per hour for a total reduction of \$2,100. Given the undersigned's extensive experience in adjudicating matters in the National Vaccine Injury program since May 1991, the Court finds **\$66,050.34** a reasonable award for Dr. Shuman's services.

In addition, Petitioner is awarded **\$44,000.00** in attorney fees and **\$20,594.89** in costs attributable to legal representation. Further, Petitioner is awarded an additional **\$4,000.00** for past unreimbursable expenses paid to Dr. Shuman.

Therefore, in the absence of a motion for review filed in accordance with RCFC Appendix B, the clerk of the court is directed to enter judgment in favor of Petitioner in the amount of

\$134,645.23⁵ for reasonable attorneys' fees and costs. A check for \$134,645.23 shall be paid to Petitioner and Petitioner's counsel jointly.

IT IS SO ORDERED.

Richard B. Abell
Special Master

⁵ This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. See generally, Beck v. Secretary of HHS, 924 F.2d 1029 (Fed. Cir. 1991).