In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 99-588V

(Filed: August 14, 2006)

SUMMER ERIN DENSMORE, Petitioner, v. SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	*	UNPUBLISHED Attorneys' Fees and Costs, Expert Fees, Reasonable

Clifford J. Shoemaker, Esq., Vienna, Virginia, for Petitioner.
Julia McInerny, Esq., United States Department of Justice, Washington, D.C., for Respondent.

DECISION ON ATTORNEYS' FEES AND COSTS[1]

ABELL, Special Master:

Background

On 4 August 1999, Petitioner brought a claim under the National Childhood Vaccine Injury Compensation Act (Vaccine Act or Act)[2] for injuries allegedly sequela to her 21 May 1996 Hepatitis B vaccination.

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[1] Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), a petitioner has 14 days from the date of this decision within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

[2] The statutory provisions governing the Vaccine Act 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.

Determining that Petitioner had not met her burden of proof, on 10 March 2005 the petition was dismissed with prejudice.

One year ago, on 28 July 2005, Petitioner first filed an application for Attorneys' Fees and Costs. That began a long process wherein Petitioner and Respondent argued the question of whether a new fee schematic should be applied to cases before this Court. In the end, however, they finally reached an understanding as to the hourly rates. Respondent averred that they would not object on that point, but regarding certain other matters including the reasonableness of the number of hours expended and concerning certain costs, the parties could not agree and have instead asked this Court to decide these matters. On 26 June 2006, the final brief regarding this application was filed. On 20 July 2006, this Court conducted a telephonic status conference in one last effort to assist the parties at reaching an accord. However, at that time, the parties maintained nothing would do but that this Court decide the dispute.

Legal Background

In general, the Act allows for the recovery of reasonable attorney fees and costs. § 15(e). However, such an award is not automatic. When compensation is denied, as it was in this case, reasonable attorney fees and costs may be awarded provided the special master finds that the petition was (1) brought in good faith and (2) there was a reasonable basis for the claim. § 15(e)(1).

In determining whether fees and costs are reasonable, the case law on point indicates that special masters ought to rely on their judgement 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, No. 99-653V, 2005 WL 589431 (Fed. Cl. Spec. Mstr. Feb. 24, 2005). In so doing and given the nature of this Program, special masters need not engage in a line-by-line analysis of an application but may utilize their experience with litigation before this body and the attorneys involved. 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).

However, there are certain guidelines that are habitually heeded. For instance, compensation ought not be granted for "hours that are excessive, redundant, or otherwise unnecessary." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Moreover, "The question is not whether counsel 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.").

As to medical experts, the question of reasonableness applies the same as it does to attorneys'

fees. Crossett v. Secretary of HHS, No. 89-73V, 1990 WL 293878, at *4 (Cl. Ct. Spec. Mstr. Aug. 3, 1990). Likewise, Petitioner bears the burden of substantiating an expert's hours and the rate requested. See Baker v. Secretary of HHS, No. 99-653V, slip op. at *5 (Fed. Cl. 2005). In determining the reasonableness of expert costs the Court may consider such factors as 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 likely to be of assistance to the court 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).

With these guiding principles in mind, the Court now brings to bear its 15 years of experience in adjudicating cases before the "Vaccine Court."

Discussion

First, the Court would note again that there is no issue about the hourly rates for the attorneys and legal assistants. So, presumably the Court will accept those rates as reasonable. However, Respondent has raised an objection as to the number of hours expended by the attorneys and assistants in this case as well as to certain costs incurred.

Respondent bases a portion of its rationale on the history of this case. This petition was filed on 4 August 1999 just two days before the two-year look-back window expired on the 6 August 1997 addition of Hepatitis B to the Vaccine Injury Table. See § 16(b). It was filed without records. Though there is some dispute as to whether such is a properly filed Petition under subsection 11(c) of the Vaccine Act, this Court generally accepts such skeletal petitions (those filed sans records). See Stewart v. Secretary of HHS, No. 02-819V, 2002 WL 319695743, at *4 (Fed. Cl. Spec. Mstr. Dec. 30, 2002); see also Robles v. Secretary of HHS, 155 F.3d 566, 1998 WL 228174 (Fed. Cir. 1998) (unpublished disposition). Yet, while such a filing is adequate to stop the running of the statute of limitations, it does little by way of demonstrating whether the claim is reasonable or brought in good faith.

In the beginning, Petitioner's counsel grouped this petition along with hundreds of similar cases involving the administration of the Hepatitis B vaccine. For years, this case proceeded in that category. Eventually a number of such cases were transferred to the present special master. And in Spring 2003 it was decided that this case would proceed on its own merit. So, on 4 March 2003, noting that "[a]s of the date of this order, no records or filings of any type have been submitted in support of Petitioner's claim" this Court ordered Petitioner "to submit such records and filings post haste." Order, 4 March 2006 (emphasis in original).[3] The first records filed by Petitioner were

[3] After these Hepatitis B cases were reassigned to the present special master in Spring 2001, Petitioner's counsel requested, and this Court granted, permission to issue subpoenas duces tecum. There is no evidence on record in the years between that authorization and till the first filings were made in this case in May 2003, of any efforts on the part of Petitioner's counsel, to compel compliance on a subpoena.

submitted 8 May 2003. And by 24 March 2004, Petitioner had filed only 90 or so pages of medical records and some 40 pages of insurance billing records. Nevertheless, an evidentiary hearing was conducted by the Court to establish the facts surrounding the onset of Petitioner's alleged injury. At that time the Court issued a bench ruling. Nothing further was filed by Petitioner who eventually requested that the Court issue a ruling based on the written record.[4] The Court complied and, on 10 March 2005, dismissed this petition.

Respondent argues that, given the history of this case, 142.27 hours expended by four attorneys is exorbitant. Moreover, Respondent objects to certain rather vague entries which do not provide a sufficient breakdown of the tasks conducted such that their reasonability can be adjudicated. Further, Respondent objects to certain entries that constitute "non-substantive, ministerial work" which ought not be reimbursed.

Concerning the hours expended in this case, specifically, Respondent objects to 23 hours attributed by Mr. Shoemaker to the year 2003, the entries for which indicate that the majority of those hours went to interoffice communication regarding the medical records, reviewing the status of the medical records and the status of the file, updating the calendar, discussing the case with his staff, and preparing internal memos. Respondent lists more than nineteen examples. See Respondent's Opposition to Petitioner's Application for Attorneys' Fees and Costs, 26 October 2005, at *10 n. 9. Respondent also objects to 10.3 hours which Mr. Shoemaker indicates were spent consulting with Dr. Bellanti and Dr. Tornatore, as neither of these gentlemen were utilized or filed reports as experts in this case. Respondent objects that 56.7 hours spent in 2004 by Mr. Shoemaker involved excessive time spent in interoffice communication concerning this case which is very limited in scope. Moreover, regarding Mr. Shoemaker, Respondent also objects to time billed in 2004 relating to medical expert(s) that were never introduced as such nor was anything filed on their behalf. As concerns Mrs. Knickelbein, Respondent objects to 34.45 hours spent in 2003, in addition to that spent by Mr. Shoemaker, for administrative or office duties and not for legal work on the case. Id. at *11. Mrs. Knickelbein allegedly spent her time that year evaluating the files for missing records, requesting records, preparing a list of such, some document scanning, etcetera. Withal, on 2 December 2003, Mrs. Knickelbein spent .4 hours editing a report from Dr. Bellanti which was never filed nor was he presented as an expert witness. Concerning Mrs. Knickelbein, Respondent also objects to 16.7 hours spent in 2004. Respondent argues these hours are duplicative of the work done by Shoemaker. Finally, Respondent argues that the hours assigned to legal assistants appeared administrative in nature rather than legal.

As regards the costs in this case, Respondent objects to the outlay of expenses for Legal Nurse Association, Inc.'s review of the medical records – a review the attorneys, according to their entries, were already conducting. In specific, claims Respondent $765.00 for costs and services performed 2 April 2003 through 8 July 2003. Respondent also objects to the hourly rate and the amount charged from Dr. Mark Geier. In that respect, Petitioner requested $3,437.50 for the services

[4] "Decision Without Evidentiary Hearing. The special master may decide a case on the basis of written filings without evidentiary hearing. . . ." RCFC Appendix B Rule 8(d).

of Dr. Geier (including an October 2003 invoice for 13.5 hours and a January 2004 invoice for .25 hours both at $250 per hour). Finally, Respondent objects to $221.60 for copying, printing and postage as a specific breakdown was not provided and as some of that cost appears "to encompass overhead of a law practice." See, Respondent's Objection, 26 October 2005 at 14.

Discussion

The Court does find that 142.27 hours are rather excessive in this particular case. On the one hand, the Court notes that not much by way of hours is claimed in the attorney's invoice for the period between the original filing and Spring 2003, and that is apropos because not much was actually accomplished on this case in that period. In the year 2003, the Court understands that Respondent's objections lie primarily with the time spent communicating internally about this case. And the Court joins in that concern. While some communication is expected in these sorts of cases, it is unusual to the Court that two attorneys working on this case would require or claim so much by way of mutual correspondence. This begins to raise the question as to whether one of the attorneys might be unnecessarily redundant; however, the Court is not in the business of telling attorneys how to run their practice. Yet, the question of reasonability is uniquely this Court's demesne. Moreover, Respondent objects to time spent consulting with medical experts and revising their reports when neither experts nor reports were actually presented in the matter at hand. The Court agrees. As to those hours spent in consultation with various experts, the Court has no way of divining whether those hours were in fact specific to this individual case or what exactly was discussed. Now, when it comes to Dr. Tornatore, who apparently was being consulted as a potential treating physician, the Court will allow a bit more leeway. And as concerns the attorneys' time spent in discussion with Dr. Geier, who was utilized as a consultant in the case and for whom an invoice was filed, again the Court will not interpose itself between an attorney and whomever the attorney wishes to consult, so long as any fees coming out of said engagement are considered reasonable. Now as to hours spent by legal assistants or by Attorney Knickelbein which Respondent argues were utilized on non-legal matters, the Court notes that the line is a fine one between legal activity which is compensable herein and administrative matters which are not compensable as they are considered part of an attorney's overhead. In fine, if an attorney – in the case of legal assistants – or a more experienced counsel in the case of an attorney, would otherwise have had to perform a task on this case, and it was done instead by an attorney or legal assistant at a lower hourly rate, the Court is loathe to discriminate against such delegation. And furthermore, the Court does not intend at this juncture to enter into a line by line analysis of Petitioner's claim as Respondent is requesting, though Respondent takes great pains to critique every jot and tittle of Petitioner's request as is its right. However, the Court will note that, while the hourly rate was a matter of an understanding on the part of the parties to this case, the higher rate accorded Mr. Shoemaker, as reflective of his extensive experience in this Program, entails that he would spend less time on a given case than would a novice attorney. Therefore, the Court is particularly critical of the hours requested on his part. Furthermore, the Court does note that some of the hours appear excessive and many of the entries vague. Therefore, given the dearth of medical records filed, the years of inactivity on this case, and counsels' experience on these matters, while considering that an evidentiary fact hearing was conducted, albeit a short hearing which concluded with a bench ruling and without briefs, and because the Attorneys' Fees and Costs dispute

has required additional briefing leading to this decision, the Court holds that 110 hours are reasonably claimed by the attorneys in this case.

In her Amended Application for Attorneys' Fees and Costs, Petitioner requests 154.97 total hours. That total is reduced by 44.97 hours. The lion's share of that reduction, or 30 hours, will come from Mr. Shoemaker due to his extensive experience in the program coupled with the number of excessive entries and particularly those concerned with interoffice communication. The remaining 14.97 hours are reduced from those hours reported by Mrs. Knickelbein. However, in the interest of fairness, and because this Court does not wish to create a chilling effect on those competent counsel who chose to make this Court their primary milieu, the reduced hours will be taken at the lowest hourly rate for each attorney or $250 and $155 respectively for a total reduction of $9,820.35.

As for the costs in question, for the reasons articulated supra, this Court has no qualm with Petitioner engaging a consultant, in this case the Legal Nurse Association, Inc., to review medical records. While the counsels indicated herein are quite competent and experienced, and in particular Mr. Shoemaker, yet it still stands to reason that they would choose to have experienced medical personnel review medical documents. Presumably Respondent does not rely entirely on its counsel for such matters. Moreover, the rate charged by the consulting company in this petition is just shy of what three hours of Mr. Shoemaker's time would cost and presumably, learned though he is, such a review may have taken more time. So presumably employing the Legal Nurse Association, Inc. saved both time and money in the end.

Respondent also objects to the amount requested for Dr. Geier. This Court has made clear its position on Dr. Geier when it involves him testifying as a subject matter expert in an area outside his expertise. However, in this particular instance, Petitioner indicates that she employed him not as an expert but as a consultant to offer a review of medical literature and whatnot. As was just mentioned, the Court has no firm objection to the practice of utilizing consultants provided it is reasonable. While the Court would be reticent to accept testimony from Dr. Geier in this case, as he is by training a geneticist and not an immunologist, still the Court does note that Dr. Geier is quite familiar with the Vaccine Program and, presumably, as a medical doctor would be of some service in reviewing the medical literature and other sources for supporting evidence. However, as the Court has also noted, Mr. Shoemaker and his attorneys, in particular Miss Gentry, are quite experienced in the field as well. Nevertheless, Petitioner has the right to engage a consultant in a reasonable manner. The alternative to having Dr. Geier perform the literature search and evaluation, is either to have a research service perform the task or for counsel to undertake that effort. It may be beneficial in most instances to have a doctor who is familiar with the Program conduct the research rather than counsel; however, in this particular instance, counsel is very learned in the program. From the Court's perspective, Dr. Geier is performing work for Petitioner as someone who is presumably learned in the program but is not a medical expert, and Petitioner did not offer him as an expert. Now if the Court were to authorize reimbursement for Mr. Shoemaker for doing said research, he would be paid more per hour than Dr. Geier. however, if one of the other attorneys who is learned in the program were to conduct the self-same research, she would be paid less than $250 per hour. That Dr. Geier is capable of doing an educated research and evaluation does not strike the

Court as unreasonable. Moreover, the Court will not second guess the number of hours attributed to that search and evaluation. However, while it is not unreasonable to have him conduct the research, he should not be reimbursed at an expert's hourly rate. His expertise as a geneticist is of little value in this case. Yet, Dr. Geier is someone familiar with the program who also has medical qualifications, which likely gives him an edge over one of Mr. Shoemaker's associates, but not necessarily over Mr. Shoemaker himself. Hence, the Court will utilize an hourly fee equivalent to that of the highest rate attributed to an associate in the time-period in question (2003-2004) or $175 per hour, which is an appropriate rate for a research assistant with his qualifications, for a total of $2,406.25 or a reduction of $1,031.25 from the total amount requested.

As to Respondent's final objection, $221.60 for copying, printing and postage appears perfectly reasonable to the Court even without an extensive breakdown, which would also entail an additional expenditure of Mr. Shoemaker's time.

Conclusion

In cases such as this, where compensation on a petition is denied, the recovery of attorneys' fees and costs is at the discretion of the Special Master. § 15(e)(1). Provided such is awarded, the request itself must needs be reasonable. Moreover, compensation cannot be awarded for rates or for "hours that are excessive, redundant, or otherwise unnecessary."Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Given the undersigned's extensive experience in adjudicating matters in the National Vaccine Injury program since May 1991, the Court finds the following appropriate reductions appropriate: $9,820.35 reduced from attorneys' fees and $1,031.25 reduced from Petitioner's costs.

Petitioner requested a grand total of $39,382.38. That amount is reduced by $10,851.60. 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 **$28,530.78**[5] for reasonable attorneys' fees and costs. **A check for $28,530.78 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).