OFFICE OF SPECIAL MASTERS

No. 91-504V

(Filed: January 29, 1999)

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DEAN ALVIN COATS, Incapacitated Person,	*	
by ARETA JEANINE COATS, Guardian,	*	
	*	
Petitioner,	*	**TO BE PUBLISHED**
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	
* *		

Richard Streeter, Washington, D.C., for petitioner.

David Terzian, Department of Justice, Washington, D.C., for respondent.

DECISION (ATTORNEYS' FEES)

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), petitioner seeks, pursuant to § 300aa-15(e)[(1)], an award for attorneys' fees and costs incurred in attempting to obtain Program compensation in this case. Respondent has filed an opposition challenging the amount of petitioner's request in several respects. Petitioner's counsel has elected not to respond to the respondent's opposition, except for the clarification of petitioner's cost items filed on January 11, 1999.

I

ENTITLEMENT TO FEES AND COSTS GENERALLY

Pursuant to § 300aa-15(e)(1), a special master may make an award of attorneys' fees and costs even when, as in this case, the petitioner is not found to qualify for a Program award, if the petition was filed in "good faith" and upon a "reasonable basis." In this case, it appears to the undersigned that this petition was filed in good faith and upon a reasonable basis. Therefore, an award of fees and costs is appropriate.

II

ATTORNEYS' FEES

A. Background case law

The Supreme Court has set forth guidelines that apply to the calculation of attorneys' fees awarded by statute. *See City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 429-40 (1983).[(2)] Under that Court's adopted approach, the basic calculation starts with the number of hours reasonably expended by the attorney, and then multiplies that figure by a reasonable hourly rate.[(3)]

The reasonable hourly rate is "the prevailing market rate in the relevant community" for similar services by lawyers of comparable skill, experience, and reputation. *Blum v. Stenson*, 465 U.S. 886, 895 (1984). As the Supreme Court recognized in *Blum*, the determination of an appropriate market rate is "inherently difficult." *Id*. at 895 n.11. In light of this difficulty, the Court gave broad discretion to the courts to determine the prevailing market rate in the relevant community, given the individual circumstances of the case. *Id*. at 896 n.11. The burden is on the fee applicant to demonstrate that the rate claimed is appropriate. *Id*.

B. Whiteman firm

As to the Whiteman law firm, respondent argues that certain claimed hours should not be compensated, or should be compensated at a rate lower than claimed. I have reviewed each of the challenged time entries, and rule as follows. The entries dated 5-7-91, 3-1-95, and 3-3-97 seem appropriate as requested. The four hours claimed for 11-7-94 and the two hours claimed for 11-18-94, on the other hand, seem to have been expended on paralegal-level tasks, and thus will be compensated at a rate of $50 per hour. Finally, the attorney time billed on 1-8-98 (.1), 11-20-97 (.2), 5-31-95 (.3), and 12-30-97 (.2) seems to have been expended on secretarial-level tasks, the cost of which should be subsumed in an attorney's hourly rate as part of his "overhead;" this time (a total of .8 hours) will be disallowed.

Accordingly, this firm will be compensated for 58.8 hours (65.6 claimed - 6 - .8) at $95 per hour, plus six hours at $50 per hour.

C. Barnes firm

As to this firm, respondent first challenges the hourly rates claimed for Mr. Streeter. I agree that Mr. Streeter has not demonstrated that his services should be compensated at the requested hourly rates, ranging from $205 to $260 over different time periods. The fact that, as represented in Ex. D, Mr. Streeter apparently has regularly charged those rates for his services is, of course, some evidence that those figures represent reasonable rates for his services *in non-Program cases*. However, in my view, the hourly rates claimed for Mr. Streeter's time in this case would be excessive in the context of the *Program*. In this regard, I note that in a number of decisions awarding fees in Program cases, judges and special masters of this Court have expressed the view that counsel under the Program should not necessarily be compensated at the same hourly rates that they might charge in other types of cases. See *Edgar v. Secretary of HHS*, 32 Fed. Cl. 506, 509 (1994) ("the fees that are awarded under government programs are not meant to duplicate the fees the attorney would normally receive for non-program cases"). See also, *e.g.*, *Maloney v. Secretary of HHS*, No. 90-1034V, 1992 WL 167257, at *6 (Cl. Ct. Spec. Mstr. June 30, 1992); *Scheuer v. Secretary of HHS*, No. 90-1639V, 1992 WL 13577, at *3 (Cl. Ct.

Spec. Mstr. May 21, 1992); *Vickery v. Secretary of HHS*, No. 90-977V, 1992 WL 281073, at *6 (Cl. Ct. Spec. Mstr. Sept. 24, 1992); *Petrozelle v. Secretary of HHS*, No. 90-2215, 1992 WL 249782, at *1 (Cl. Ct. Spec. Mstr. Sept. 16, 1992); *Betlach v. Secretary of HHS*, No. 95-3V, 1996 WL 749707, at *3 (Fed. Cl. Spec. Mstr. Dec. 17, 1996); *Zeagler v. Secretary of HHS*, 19 Cl. Ct. 151, 153 (1989).

In this case, Mr. Streeter seems to have done very little of the *substantive* work in the case, which was chiefly performed by the Whiteman firm. Mr. Streeter seems to have been engaged simply because he practices in Washington, D.C., and is admitted to the bar of this court. Thus, the services that he performed do not seem to have required the expertise of a $200-per-hour lawyer. Moreover, Mr. Streeter has not supplied me with any information as to his legal background or experience. In these circumstances, I will compensate him at the rate of $150 per hour.

Respondent also challenges some of the hours billed by Mr. Streeter, and there again seems to be some merit in these arguments. I will reduce the claimed hours from 8.2 to seven.

III

COSTS

A. Petitioner's own costs

I will allow the $425 requested with regard to the services of Dr. Spenos, who seems to have been consulted as an expert witness, and apparently was paid by the petitioner herself.

B. Whiteman firm

The request for funds for Dr. Joy's services has been withdrawn, and I have dealt with Dr. Spenos above. The other costs claimed by this firm, totaling $2,040.75, seem appropriate, and will be allowed.

C. Barnes firm

I will allow the long distance phone charges ($7.83), messenger/courier charges ($27.63), and postage charges ($6.42). As to the $42.80 charged for "copying," which I presume to be "in-house" photocopying, I will allow $13.70, or 32% of the claim. My guess is that the firm is charging about $.25-per-page, while I find no more than $.08 per page to be appropriate in the absence of documentation. I have concluded that the $.08-per-page figure is a reasonable one for situations in which, as is the case here, the petitioner's counsel has not supplied evidence demonstrating that his actual, out-of-pocket cost of "in-house" photocopying was greater than $.08 per page. Accord: *Guy v. Secretary of HHS*, 38 Fed. Cl. 403, 407 (1997); *Barnes v. Secretary of HHS*, No. 90-1510V, 1992 WL 185708 (Cl. Ct. Spec. Mstr. July 16, 1992); *Froehlich v. Secretary of HHS*, No. 90-676V, 1992 WL 75169 (Cl. Ct. Spec. Mstr. March 20, 1992); *Sims v. Secretary of HHS*, No. 90-1514V, 1993 WL 277090 (Fed. Cl. Spec. Mstr. July 9, 1993).

Finally, as to the "telecopy" (also known as "telefax" or "fax") charges, totaling $21.00, I will deny them. In *Wilcox v. Secretary of HHS*, No. 90-991V, 1997 WL 101572, at *2 (Fed. Cl. Spec. Mstr. Feb. 14, 1997), Chief Special Master Golkiewicz indicated that he is willing to *consider* telefax expense as a compensable cost item, as opposed to an item always to be subsumed in the hourly rate as part of office "overhead." However, that opinion stressed that an attorney seeking recompense for telefax expense must supply some reasonable evidence as to the *actual*, out-of-pocket costs involved in utilizing telefaxes. The special master denied any reimbursement in that case, for lack of any such evidence.[(4)]

The same approach was taken by Special Master Edwards in *Berry v. Secretary of HHS*, No. 97-0180, 1998 WL 481882 (Fed. Cl. Spec. Mstr. July 27, 1998). (See also *Guy*, *supra*, 38 Fed. Cl. at 407, ruling that telecopying ("facsimile") charges should be subsumed in "overhead".)

In this case, petitioner's counsel has supplied no information from which I can tell whether his use of telefaxes was reasonable, or whether his cost computations regarding the telefaxes are reasonable. Therefore, I must deny that claimed expense in this case.

IV

SUMMARY AND CONCLUSION

The following amounts are allowable for fees and costs:

A. Whiteman firm

Fees (58.8 hours times $95 per hour) $ 5,586.00

Fees (6 hours times $50 per hour) $ 300.00

Costs $ 2,040.75

Total $7,926.75

B. Barnes firm

Fees (7 hours times $150 per hour) $ 1,050.00

Costs ($7.83 plus $6.42 plus $27.63 plus $13.70) $ 55.58

Total $1,105.58

C. Petitioner

Dr. Spenos $ 425.00

Grand Total $9,457.33

Accordingly, my decision is that fees and costs are to be awarded in the total amount of $9,457.33 pursuant to § 300aa-15(e), in the form of a check made payable jointly to petitioner and her counsel of record. Of that total, $7,926.75 shall go to the Whiteman firm, $1,105.58 to the Barnes firm, and $425 to the person who actually payed Dr. Spenos, presumably petitioner.

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George L. Hastings, Jr.

Special Master

1. The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (1994 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (1994 ed.).

2. The Supreme Court has declared that "[t]he standards set forth in [*the Hensley*] opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" *Hensley*, 461 U.S. at 433 n.7. Most recently, that Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989), reaffirmed its view that such approach is "the centerpiece of attorney's fee awards." *Id*. at 94.

3. Once a total, sometimes called the "lodestar," is reached by multiplying the reasonable hourly rate by the number of hours expended, it may then be appropriate in a few cases to adjust the lodestar upward or downward based on the application of special factors in the case. *Hensley*, 461 U.S. at 434; *see also Martin v. United States*, 12 Cl. Ct. 223, 227 (1987) (*remanded in part on other issue*, 852 F.2d 1292 (Fed. Cir. 1988)). However, the recent teaching of the courts has been that such adjustments are to be made only in the very exceptional case, on the basis of a specific and strong showing by the fee applicant. *See, e.g., Blum*, 465 U.S. at 898-902; *Hensley*, 461 U.S. at 434 n.9; *Copeland v. Marshall*, 641 F.2d 880, 890-94 (D.C. Cir. 1980) (*en banc*). Here, petitioner has not requested any adjustment of the "lodestar" figure.

4. The special master in *Wilcox* also indicated the view that it is unreasonable for counsel to bill the Program for *routine* use of telefax communications, implying that telefaxes should only be used in special situations, when mailing items would be too slow. I find myself in agreement with that observation as well.