OFFICE OF SPECIAL MASTERS

No. 90-2049V

(Filed: November 13, 1997)

* *		
MELISSA FARNSWORTH, a minor and incompetent, by her mother and next friend, DEBORAH FARNSWORTH,	*	
Petitioner,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

Clifford Shoemaker, Vienna, Virginia, for petitioner.

Catharine Reeves, Department of Justice, Washington, D.C., for respondent.

DECISION

HASTINGS, Special Master.

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 obtaining Program compensation in this case. Respondent has filed an opposition challenging the amount of the request in several respects. I will discuss these challenges separately below.

I

HOURLY RATE ISSUES

Respondent first challenges the hourly rates claimed for the work of attorneys J. Bradley Horn and Clifford Shoemaker.

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. J. Bradley Horn

In this case, petitioner requests $175 per hour for the services of attorney J. Bradley Horn. The respondent suggests that I compensate Mr. Horn at the rate of $85 per hour. The background of Mr. Horn is well-described in the record of this case. He graduated from law school in 1994, served as a clerk to a special master of this court for two years, and has been in private practice, engaged chiefly in Program work, for the past year.

In *Robertson v. Secretary of HHS*, No. 95-187V, 1997 WL 338601 (Fed. Cl. Spec. Mstr. June 4, 1997), Special Master Abell of this court found that Mr. Horn had performed admirably in Program proceedings, and awarded $135 per hour for his services. My own impression of Mr. Horn, similarly, has been that he appears to be an exceedingly well-organized, energetic, and competent attorney. Moreover, his three years of full-time work on the Program has clearly made him highly knowledgeable about the Program, and therefore able to process Program cases efficiently. He also works in the high-cost Washington, D.C. area. Therefore, although I acknowledge that $135 is a relatively high hourly rate for an attorney so recently out of law school, I agree with Special Master Abell that $135 is a reasonable rate for Mr. Horn's services. I will award that rate in this case.

C. Clifford Shoemaker

Petitioner requests $225 per hour for the services of Clifford Shoemaker, but respondent suggests $175.

Respondent's basic argument has merit. In my view, an award of $225 for Mr. Shoemaker's work in this case would simply be excessive in the context of the Vaccine Program. In this regard, I note that in a number of decisions awarding fees in Program cases, issued in 1992, I and a number of other special masters expressed the view that counsel under the Program ordinarily should not be awarded hourly rates in excess of $175. *See 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); *see also Betlach v. Secretary of HHS*, No. 95-3V, 1996 WL 749707, at *3 (Fed. Cl. Spec. Mstr. Dec. 17, 1996). And while general inflation since 1992 has caused some slight loosening of that $175 "cap" by some of these special masters, I still adhere to the general principles set forth in those decisions. Further, I note that a number of decisions of judges and special masters have reasoned that it is not necessarily reasonable for the *Program* to pay the same high hourly rates that some attorneys receive in other settings. *See*, *e.g.*, *Maloney*, *supra*; *Zeagler v. Secretary of HHS*, 19 Cl. Ct. 151, 153 (1989). See also the comment of Judge Harkins that "the fees that are awarded under government programs are not meant to duplicate the fees the attorney would normally receive for non-program cases," but need only be sufficient to attract competent counsel to Program cases. *Edgar v. Secretary of HHS*, 32 Fed. Cl. 506, 509 (1994), citing *Blum v. Stenson*, 465 U.S. 886, 897 (1984).

I also note that in the above-mentioned recent decision in *Robertson*, *supra*, Special Master Abell awarded $175 per hour for Mr. Shoemaker's services in a Program case. In earlier published decisions, Mr. Shoemaker was awarded $150 per hour by Special Master Baird (*Borden v. Secretary of HHS*, No. 90-1169V, 1992 WL 78691 (Cl. Ct. Spec. Mstr. March 31, 1992)) and $175 per hour by Special Master French (*Cousins v. Secretary of HHS*, No. 90-2052V, 1992 WL 58809 (Cl. Ct. Spec. Mstr. March 9, 1992)).

Taking into account of all these factors, as well as the fact that due to inflation the value of $175 has inevitably shrunk somewhat since that figure was adopted as a general "cap" by myself and other special masters in 1992, I find that a reasonable rate for the services of Mr. Shoemaker in this case is $185 per hour.

II

ISSUES CONCERNING NUMBER OF

ATTORNEY HOURS BILLED

Respondent first urges that the overall number of attorney hours claimed is simply too high, given the fact that the case was eventually voluntarily dismissed prior to any evidentiary hearing before the special master. In this respect, respondent also argues that petitioner's counsel may have spent some of this allegedly excessive time on matters that could or should have been handled by a secretary or paralegal.

After careful review, however, I find that the explanations contained in petitioner's reply (pp. 4-5) are generally persuasive. The total number of attorney hours claimed seems to be within the range of reason, based upon my experience in other Program cases. I will make no general reduction in hours claimed by counsel.

Respondent also takes special aim at the relatively high number of hours billed for preparing the attorneys' fee application in this case. This case involves special circumstances, however, since the high number of hours resulted chiefly from the efforts of petitioner's counsel in raising a complex and novel argument concerning the issue of *to whom* the check for attorneys' fees in this case should be directed. Ultimately, petitioner's counsel elected to withdraw the request that the check be made payable to

counsel. But this is an important issue,[(4)] and I conclude that petitioner's counsel acted reasonably in raising and spending time in briefing that argument in this case. Accordingly, I will not reduce the hours claimed in this regard.

III

COSTS

Respondent also raises several different issues regarding the claimed costs.

A. Contested items claimed by petitioners themselves

I agree with respondent that petitioners have not demonstrated that they should be compensated for the claimed $800 and $1195 items.

B. Westlaw fees

As to this item, petitioner's explanation at p. 6 of her reply was adequate; I will reduce the amount originally claimed only by $1.04, as suggested in the reply. (In this regard, as explained with respect to the attorney hours, I find that it was appropriate for counsel to perform computer research on the important attorneys' fees issue that they originally raised.)

C. "In-house" photocopying

Petitioner's counsel have not established to my satisfaction that their actual, out-of-pocket per-page cost of "in-house" photocopying was greater than $.08 per page. I will allow only that amount in this case.

D. Deposition expenses

I found petitioner's explanation concerning these items (reply at p. 6, para. 5) to be adequate.

III

SUMMARY AND CONCLUSION

The following amounts are allowable for fees and costs:

Horn fees (50.6 hours[(5)] x $135) $ 6,831.00

Shoemaker fees (62.75 hours x $185) $11,608.75

Costs -- $ 7,699.38 claimed

less $1,195.00

less $ 800.00

less $ 1.04 (Westlaw)

less $ 29.46 (photocopying)

$5,673.88 costs allowed $ 5,673.88

Total $24,113.63

Accordingly, my decision is that fees and costs are to be awarded in the total amount of $24,113.63 pursuant to § 300aa-15(e).

_____

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, 94, 109 S. Ct. 939, 945 (1989), reaffirmed its view that such approach is "the centerpiece of attorney's fee awards."

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 v. Stenson*, 465 U.S. 886, 898-902 (1984); *Hensley, supra*, 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 such adjustment of the "lodestar" figures.

4. I note that since petitioner's briefs were filed in this case, I have in fact addressed that issue in *Heston v. Secretary of HHS*, No. 90-3318V, 1997 WL _____ (Fed. Cl. Spec. Mstr. Oct. 3, 1997). A review of that opinion, I hope, will demonstrate both the importance and the complexity of the issue raised by petitioner in this case.

5. Mr. Horn claimed 46.5 hours in the original application, plus 4.1 hours in the reply filed on August 6, 1997. Mr. Shoemaker claimed 61.95 hours in the original application, plus .8 hours in the reply.