In the United States Court of Federal Claims

NOT FOR PUBLICATION

No. 99-653V

(Originally Filed June 21, 2005)
(Reissued July 11, 2005)

* *
JOANNE BAKER, legal representative for JONATHAN BAKER,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.
* *

Michael J. Katarincic, Milwaukee, WI, attorney of record for petitioner.

Ann K. Donohue, Department of Justice, Washington, D.C., with whom was ***Assistant Attorney General Peter D. Keisler***, for respondent. ***Timothy P. Garren***, Director, ***Mark W. Rogers***, Deputy Director, ***Gabrielle M. Fielding***, Assistant Director, and ***Catharine E. Reeves***, Senior Trial Counsel.

OPINION & ORDER

Futey, **Judge**.

This case is before the court on petitioner's Motion For Review Of Special Master Millman's February 24, 2005 Decision. Petitioner maintains that factual errors from interpreting Dr. Classen's experience led to a decision that was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."[1] Petitioner also claims that the tone and wording of the decision is further evidence of judicial bias creating an abuse of discretion. Respondent, on the other hand, avers

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[1] Petitioner's Memorandum Of Objections To Special Master Millman's February 24, 2005 Decision at 1 ("Pet.'s Mem.").

that the special master's decision was correctly entered as it appropriately awarded a reasonable amount of hours at a reasonable rate.

Factual Background[2]

On August 5, 1999, Joanne Baker, legal representative for Jonathan Baker, filed a petition for compensation pursuant the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act"), 42 U.S.C. §§ 300aa-1 to 300aa-34. Petitioner alleged that as a result of the vaccinations administered to Jonathan on May 3, 1999, Jonathan sustained insulin dependent diabetes mellitus ("IDDM"). A two-day hearing was held on February 20-21, 2003 at which Dr. John Barthelow Classen testified for petitioner. Respondent countered with the testimony of three experts, Dr. Neal A. Halsey, Dr. Burton Zweiman, and Dr. Barry Bercu. Following the hearing, supplemental medical evidence and other written evidence by respondent, petitioner, and the special master were added to the record.[3] On September 26, 2003, Special Master Laura D. Millman held that petitioner failed to prove a prima facie case and dismissed the petition with prejudice. ***Baker v. Sec'y of DHHS***, No. 99-653V, 2003 WL 22416622, at *36 (Fed. Cl. Spec. Mstr. Sept. 26, 2003) ("***Decision***"). On November 10, 2003, the Clerk of the Court subsequently entered judgment.

On May 11, 2004, petitioner acting *pro se* filed a Motion For Review of the special master's September 26, 2003 decision which was dismissed for lack of subject matter jurisdiction on July 7, 2004.[4] On July 20, 2004, petitioner moved the court to reconsider the decision and, on September 1, 2004, the motion was denied.

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[2] Only facts relevant to this opinion are discussed herein. The facts were discussed in greater detail in the special master's February 24, 2005 decision. ***Baker v. Sec'y of DHHS***, No. 99-653V, 2005 WL 589431 (Fed. Cl. Spec. Mstr. Feb. 24, 2005).

[3] Respondent's Memorandum In Response To Petitioner's Motion For Review at 3 ("Resp.'s Mem.").

[4] Petitioner filed the motion for review with the United States Court of Appeals for the Federal Circuit (Federal Circuit) 103 days after the special master's decision. After the Federal Circuit dismissed the claim for failure to prosecute, ***Baker v. Sec'y of DHHS***, 95 Fed. Appx. 313, 2004 WL 880389, at *1 (Fed. Cir. Mar. 24, 2004) (unpublished), petitioner filed a motion for review with this court 228 days after the special master's decision. See ***Baker v. Sec'y of DHHS***, 61 Fed. Cl. 669 (2004). Therefore, the court found that it lacked jurisdiction since the motion for review was not filed within the jurisdictional 30 day period.

On October 1, 2004, petitioner filed a Motion For Attorney's Fees requesting fees amounting to $62,415.13 exclusive of the amounts owed to petitioner's expert. Dr. Classen, petitioner's expert, requested additional fees and costs amounting to $101,484.58 for 404.42 hours at a rate of $250.00 per hour. The request for expert fees combined with the request for petitioner's counsel's fees aggregated for a total attorney's fees request of $163,899.71. Regarding petitioner's counsel's fees request, after negotiations between petitioner and respondent, petitioner amended the fee request on November 8, 2004, reducing the total for attorney time and expenses from $62,415.13 to $58,700.00. On November 15, 2004, respondent filed an Opposition To Petitioner's Application For Attorney's Fees And Costs where respondent indicated objections as to Dr. Classen's fees and costs, claiming a substantial reduction was warranted.[5] On December 1, 2004, the special master filed by her leave additional evidence, letters from Dr. Classen dated November 30, 2004.[6]

After reviewing the evidence, the special master, on February 24, 2005, found that "a reasonable amount of hours for Dr. Classen's work in this case is 79.3 hours at an hourly rate of $200.00 or $15,860.00." ***Baker v. Sec'y of DHHS***, No. 99-653V, 2005 WL 589431, at *7 (Fed. Cl. Spec. Mstr. Feb. 24, 2005) (footnote omitted) ("***Fee Decision***"). Combining Dr. Classen's reimbursement with the agreed upon amount of $58,700.00 for petitioner's counsel, petitioner was awarded a total of $74,560.00 in attorney's fees and costs. ***Id.*** On March 16, 2005, petitioner filed a Motion For Reconsideration Of The Fee Decision which was denied on March 23, 2005. ***Baker ex rel. Baker v. Sec'y of DHHS***, No. 99-653V, 2005 WL 834647 (Fed. Cl. Spec. Mstr. Mar. 23, 2005) ("***Reconsideration of Fee Decision***"). The motion for review presently before the court was filed March 24, 2005. On April 25, 2005, respondent filed its Memorandum In Response To Petitioner's Motion For Review.

Discussion

Under 42 U.S.C. § 300aa-15(e)(1), a special master *may* award reasonable attorney's fees and other costs, even if the judgment does not award compensation, if the special master determines that petitioner brought the claim in good faith and

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[5] Respondent consented to petitioner's counsel receiving $58,700.00. While not at issue in the present action, this court subscribes to the practice of awarding a maximum of $125.00 per hour for attorney's fees (increased by a cost of living adjustment or other special factor if it is justified) and assumes that the sum awarded to petitioner's counsel is reflective of this standard. See ***Filtration Dev. Co., LLC v. United States***, 63 Fed. Cl. 612, 616 (2005).

[6] Resp.'s Mem. at 4 (citing Special Master's Order of December 1, 2004).

with a reasonable basis. When deciding a motion for review of a Vaccine Act claim, the court may:

> (A) uphold the findings of fact and conclusions of law of the special master and sustain the special master's decision,
> (B) set aside any findings of fact or conclusion of law of the special master found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings of fact and conclusions of law, or
> (C) remand the petition to the special master for further action in accordance with the court's direction.

42 U.S.C. § 300aa-12(e)(2). This court will be "highly deferential to the factual findings of the special master." ***Munn v. Sec'y of DHHS***, 970 F.2d 863, 869 (Fed. Cir. 1992). "Fact[ual] findings are reviewed . . . under the arbitrary and capricious standard; legal questions under the 'not in accordance with law' standard; and discretionary rulings under the abuse of discretion standard . . . ." ***Id.*** at 870 n.10. "Under the arbitrary and capricious standard, the reviewing court should not substitute its judgment for that of the decision maker." ***Carter v. Sec'y of DHHS***, 21 Cl. Ct. 651, 653 (1990) (citing ***Citizens to Preserve Overton Park v. Volpe***, 401 U.S. 402 (1971)). The decision of the special master should be affirmed "as long as the special master considers all of the relevant factors, makes no clear error in judgment, and articulates a rational connection between the facts found and the choice made . . . ." ***Johnson v. Sec'y of DHHS***, 33 Fed. Cl. 712, 720 (1995) (citing ***Fricano v. Sec'y of DHHS***, 22 Cl. Ct. 796, 798 (1991) (citing ***Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.***, 419 U.S. 281, 285 (1974))). "If the special master has considered the relevant evidence of record, drawn plausible inferences and articulated a rational basis for the decision, reversible error will be extremely difficult to demonstrate." ***Hines v. Sec'y of DHHS***, 940 F.2d 1518, 1528 (Fed. Cir. 1991).

"The trial forum 'has discretion in determining the amount of a fee award. This is appropriate in view of the [trial forum's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.'" ***Saxton v. Sec'y of DHHS***, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (quoting ***Hensley v. Eckerhart***, 461 U.S. 424, 437 (1983)) (citations omitted). "Fees for experts are subject to the same reasonableness standards that the attorneys' fees are and will be scrutinized in the same manner." ***Crossett v. Sec'y of DHHS***, No. 89-73V, 1990 WL 293878, at *4 (Cl. Ct. Spec. Mstr. Aug. 3, 1990). To determine reasonableness, "[v]accine program special masters are also entitled to use their prior experience in reviewing fee applications." ***Saxton***, 3 F.3d at 1521 (citations omitted). The awarded fee determinations "are within the discretion of a trial forum and are entitled to deference." ***Id.***; see also ***Commissioner, INS v. Jean***,

496 U.S. 154, 161 (1990); ***Hensley***, 461 U.S. at 437; ***Delta-X Corp. v. Baker Hughes Prod. Tools, Inc.***, 984 F.2d 410, 414 (Fed. Cir. 1993).

I. Rate Per Hour

"The reasonableness of the attorney fee rate claimed is 'to be calculated according to the prevailing market rates in the relevant community . . . .'" ***Farrar v. Sec'y of DHHS***, No. 90-1167V, 1992 WL 336502, at *2 (Fed. Cl. Spec. Mstr. Nov. 2, 1992) (quoting ***Blum v. Stenson***, 465 U.S. 886, 896 (1984)). "[P]etitioners must substantiate the hourly rates claimed by their experts and the number of hours spent in providing services." ***Wilcox v. Sec'y of DHHS***, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997).

The court will set aside the holding of the special master if the special master abused her discretion, acting in an arbitrary or capricious manner. See 42 U.S.C. § 300aa-12(e)(2). Special Master Millman found that Dr. Classen is not board certified in any specialty and "is not formally trained or recognized by professionals." ***Fee Decision*** at *5. Since petitioner lacked evidence as to the market rate for the specific location of Baltimore, Maryland, the special master took it upon herself to apply her experience to determine a proper market rate. ***Id.***

Petitioner contends that since evidence as to the qualifications of Dr. Classen were produced showing a rate of $250.00 per hour paid in another case, the same rate should be applied and accuses the special master of judicial bias.[7] The mere production of evidence to attempt to claim a higher hourly rate, however, does not ensure that a requested rate will be awarded. See ***Beatty v. Sec'y of DHHS***, No. 98-911V, 2003 WL 21439671, at *5-6 (Fed. Cl. Spec. Mstr. Mar. 17, 2003) (asking for an hourly rate of $295.00 for an attorney and granting $205.00 per hour); ***Betlach v. Sec'y of DHHS***, No. 95-3V, 1996 WL 749707, at *1-2 (Fed. Cl. Spec. Mstr. Dec. 17, 1996) (asking for an hourly rate of $180.00 and receiving $175.00). Dr. Classen may have been paid his requested hourly rate in the past,[8] but the rate does not bind the special master. See ***Helms ex. rel. Helms v. Sec'y of DHHS***, No. 96-518V, 2002 WL 31441212, at *17 (Fed. Cl. Spec. Mstr. Aug. 8, 2002) ("[N]o attorney's past history or customary rate can act as an *ipso facto* substitute for work in all vaccine cases."); ***Hanlon v. Sec'y of DHHS***, 40 Fed. Cl. 625, 630 (1998), *aff'd*, 191 F.3d 1344 (Fed. Cir. 1999) ("Special masters are neither bound by their own decisions nor by cases from the Court of Federal Claims, except, of course, in the same case on remand."). The amount to be awarded is a "prevailing market rate" and the standard

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7 Pet.'s Mem. at 1-4.

8 ***Id.*** at 4; see also ***Baker v. Sec'y of DHHS***, No. 99-653V, 2005 WL 589431, at *3 (Fed. Cl. Spec. Mstr. Feb. 24, 2005).

upon which the decision is based remains "reasonableness." See ***Farrar***, 1992 WL 336502, at *2; ***Crossett***, 1990 WL 293878, at *4. When a special master deems inappropriate a previously awarded hourly rate, she is not bound by it. No evidence has been presented to lead the court to believe that the special master's decision was absent a reasonable basis in the matter regarding Dr. Classen.

Petitioner avers that the special master "misstates and miscomprehends the training and professional experience of Dr. Classen."[9] Petitioner points to Dr. Classen's three year fellowship at the Laboratory of Immunology, National Institute of Allergy and Infectious Diseases ("NIH") and claims "[a] fellowship is a formal training program for a scientist, it is analogous to a residency program for scientists."[10] It was the determination of the special master, however, that Dr. Classen lacks formal training. ***Fee Decision*** at *5. While a fellowship is commendable, it does not require the special master to award a higher hourly wage.

Petitioner also alleges a distinction between clinical experience which would be applicable when a medical diagnosis should be given and scientific experience which would be applicable in determining whether the vaccine caused IDDM. Upon determining the proper hourly rate for an expert, however, it is reasonable to examine the clinical experience. When ascertaining the qualifications of a self-anointed expert, both clinical experience and scientific experience should be considered. See, e.g., ***Thelen v. Sec'y of DHHS***, No. 90-22V, 1991 WL 38084, at *3 n.6 (Fed. Cl. Spec. Mstr. Mar. 6, 1991) (discrediting the doctor due to his lack of clinical experience). While Dr. Classen has numerous publications on immunology attributed to him, this fact alone does not lead to the conclusion that an hourly rate of $250.00 is warranted. An expert's background and accomplishments, including the lack of clinical experience, should indicate the proper rate to be awarded. Thus, due to Dr. Classen's lack of clinical experience, a $200.00 hourly rate appears reasonable.

Special Master Millman properly examined the evidence before her and in combination with her experience in the Vaccine Program, acted within her discretion to reduce the hourly rate to one the market would sustain. ***Fee Decision*** at *5. Petitioner's objection to the award of $200.00 per hour for Dr. Classen's services is therefore unpersuasive.

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9 Pet.'s Mem. at 4.

10 ***Id.*** at 5.

II. Hours Reduction

"The question is not whether [the expert] expended the number of hours claimed, but whether it was necessary or reasonable for him to do so." ***Wasson v. Sec'y of DHHS***, No. 90-208V, 1991 WL 135015, at *3 (Cl. Ct. Spec. Mstr. July 5, 1991), *remanded* (for additional explanation of basis for awards), 24 Cl. Ct. 482, 483 (Nov. 19, 1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993) (table). "It is incumbent upon petitioner to explain to the court why the hours spent on the case were reasonable." ***Wilcox***, 1997 WL 101572, at *4. "It [is] well within the special master's discretion to reduce the hours to a number that, in his experience and judgment, [is] reasonable for the work done." ***Saxton***, 3 F.3d at 1521. "[T]he court may rely on its experience to ascertain the reasonableness of the hours expended in prosecuting a claim." ***Castillo v. Sec'y of DHHS***, No. 95-652V, 1999 WL 1427754, at *2 (Fed. Cl. Spec. Mstr. Dec. 17, 1999) (citations omitted). In assessing the number of hours reasonably expended, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary . . . ." ***Hensley***, 461 U.S. at 434.

Petitioner asserts that the reduction in hours by the special master was made arbitrarily, without regard to the reasonableness standard as required under 42 U.S.C. § 300aa-15(e)(1).[11] Of primary concern to petitioner is the reduction of 186.5 hours to 27.0 hours for the work associated with a 96-page monograph and for the reviewing of documents and charts.[12] The special master declined to "pay experts for work they would be doing in any event." ***Fee Decision*** at *5. She was "of the opinion that Dr. Classen would have written his articles on vaccine causation whether or not he had become involved in this action." ***Id.*** As previously stated, when reviewing the requested hours, the special master must exclude "hours that are excessive, redundant, or otherwise unnecessary . . . ." ***Hensley***, 461 U.S. at 434. The special master's reasoning is detailed and sound. See ***Fee Decision*** at *2-7. Since the special master reasoned that the monograph would have been created regardless of the pending litigation, the monograph could reasonably be characterized as "unnecessary," especially in light of Dr. Classen's extensive testimony. See ***id.*** at *5. The findings suggest nothing more than the permissible application of the special master's discretion. See ***Saxton***, 3 F.3d at 1521.

Petitioner contends that the 2.16 hours claimed as "miscellaneous communications" were improperly declined and attempts to provide additional

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[11] ***Id.*** at 8-12.

[12] ***Id.***

evidence to substantiate the claim.[13] As respondent mentions, however, these materials were examined in the special master's Order Denying Motion For Reconsideration and were held to be either duplicate material or improperly inserted. ***Reconsideration of Fee Decision*** at *1, 3; see also ***Sword v. United States***, 44 Fed. Cl. 183, 190 (1999) (finding that "to present additional evidence after his initial effort proves unpersuasive . . . would sacrifice the legislature's goal of making" Vaccine Act proceedings expeditious).

Generally, petitioner objects to the hour reductions associated with specific tasks imposed by the special master.[14] Despite the explanation behind the reasoning for reductions on each item where hours were claimed, petitioner alleges that the deductions were arbitrarily reduced.[15] The special master was presented with vague, inexact estimates of hourly allotments which Dr. Classen's letter to petitioner's counsel dated April 27, 2004 admitted. See ***Fee Decision*** at *2-3 (quoting a letter from Dr. Classen to petitioner's counsel, dated April 27, 2004: "Regarding my time spent. I don't have exact records of what I did on any given day."). "To demonstrate 'reasonable hours' worked, the applicant should provide contemporaneous time records and a personal affidavit in support of the fee petition." ***Ciotoli v. Sec'y of DHHS***, 18 Cl. Ct. 576, 593 (1989) (citing ***Grendel's Den v. Larkin***, 749 F.2d 945, 952 (1st Cir. 1984)). Since Dr. Classen was requesting fees for 404.42 hours, he made rough estimates for substantial allotments of time on November 30, 2004. These estimations were accompanied by a letter explaining, in part, that more hours were expended, however, the work was billed to "other similar cases" that he was working on. ***Fee Decision*** at *2-3 (stating "Dr. Classen does not list what activity he was engaged in for these 404.42 hours" and then quoting a letter from Dr. Classen to petitioner's counsel dated November 30, 2004). This hardly amounts to the specificity accorded in "contemporaneous time records." See ***Ciotoli***, 18 Cl. Ct. at 593.

When objective evidence existed as to the allocation of hours spent, the special master deferred to the time records and awarded the hours without reduction. See ***Fee Decision*** at *6 (special master calculated the total time for telephone calls from telephone records). In light of the broad estimations, inadequate records, and limited documentation policy, it was reasonable for the special master to apply her experience and background in Vaccine Act cases to determine an appropriate allotment of billable hours. See ***Ceballos v. Sec'y of DHHS***, No. 99-97V, 2004 WL 784910, at *14 (Fed. Cl. Spec. Mstr. Mar. 25, 2004) (denying the petitioner's request

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[13] ***Id.*** at 12-13.

[14] ***Id.*** at 13-18.

[15] ***Id.*** at 12-17.

for medical expenses without any documentation to substantiate the request); ***Wilcox***, 1997 WL 101572, at *4 ("Caselaw clearly and uniformly shows that the failure to document the claimed costs results in denial of that claim." (citations omitted)). After carefully explaining the time allocated to each report and document, the hours were calculated for a total amount of hours to be attributed to the doctor's work. Viewing the evidence before the special master and her interpretation of the proper amount of hours to be awarded, it can hardly be stated that the basis for her decision was either arbitrary or capricious. The special master considered the relevant evidence, applied her knowledge of the Vaccine Program and articulated a rational basis for the decision. See ***Hines***, 940 F.2d at 1528 ("If the special master has considered the relevant evidence of record, drawn plausible inferences and articulated a rational basis for the decision, reversible error will be extremely difficult to demonstrate."); see also ***Gurr v. Sec'y of DHHS***, 37 Fed. Cl. 314, 317 (1997) (regarding the high standard set in ***Hines***, "[a]nything short of such a showing is unavailing to appellant and requires that the decision of the special master be affirmed").[16]

Conclusion

For the above-stated reasons, petitioner's Motion For Review Of Special Master Millman's February 24, 2005 Decision is hereby DENIED. The special master's decision is AFFIRMED.

IT IS SO ORDERED.

BOHDAN A. FUTEY
Judge

[16] The court examined petitioner's other objections and found them to be without merit.