

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-372V

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Published

STEPHEN TORDAY, M.D.,

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Petitioner,

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Attorney fees and costs; Economist

v.

costs

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SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

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Respondent.

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Lisa Annette Roquemore, Broker & Associates, P.C., Irvine, C.A., for petitioner.

Darryl R. Wishard, United States Department of Justice, Washington, D.C., for respondent.

DECISION ON ATTORNEY FEES AND COSTS¹

GOLKIEWICZ, Special Master.

The undersigned issued on April 7, 2011, a Ruling on Attorney Fees and Costs and Order (hereinafter “Ruling”), which resolved all aspects of petitioner’s request for fees and costs except for the cost of the economist. The undersigned required additional information in order to resolve this cost item. Ruling at 11. After exchanging further information, the parties were unable to informally resolve this last issue. See Petitioner’s April 20, 2011 Status Report (“P STR”). Petitioner filed with his Status Report a Supplemental Declaration from the economist, Constantijn Paris (“Paris Dec”). Respondent filed on April 22, 2011, her Response (“R Res”). Petitioner did not reply. The undersigned considered the newly filed information, along with the filings submitted with Petitioner’s Final Application and awards petitioner \$31,405.00 for the economist’s costs.

Before discussing this issue, it is noted that the findings included in the Ruling pertaining to the requested fees and costs, other than the economist’s costs, are affirmed and awarded as

¹ The undersigned intends to post this decision on the website for the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, the entire decision will be available to the public. Id. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing. Further, consistent with the statutory requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.

part of this Decision. Thus, as found in the Ruling, petitioner is awarded \$61,481.00 for fees, \$17,150.00 for petitioner's life care planner and \$51.35 for counsel's costs.²

As discussed in the Ruling, petitioner seeks \$56,445.00 for two economists retained to calculate petitioner's lost wages. Two issues are presented: 1) what are the reasonable hourly rates for the economists and 2) what is a reasonable number of hours expended in calculating the lost wages. The second issue pertains mainly to time spent by the second economist, Mr. Padmanabhan, regarding his efforts with the anticipated Social Security benefits. See Ruling at 11.

Legal Standard

To determine reasonable attorneys' fees, this court has traditionally employed the lodestar method, which involves "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blanchard v. Bergeron, 489 U.S. 87, 94 (1989) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Avera v. Sec'y HHS, 515 F.3d 343, 1347-48 (quoting Hensley) (Fed. Cir. 2008); Saxon v. Sec'y of the Dept. of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993). The resulting lodestar figure is an initial estimate of reasonable attorneys' fees that may then be adjusted if the fee is deemed unreasonable based upon the nature of the services rendered in the case. Blanchard, 489 U.S. at 94; Pierce v. Underwood, 487 U.S. 552, 581 (1988) (Brennan, J. et al., concurring); Blum, 465 U.S. at 897, 899; Hensley, 461 U.S. at 434. See also, Ceballos v. Sec'y of the Dept. of Health & Human Servs., No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004).

The requirement that attorneys' fees be reasonable **applies likewise to costs**, *e.g.*, consultant and expert fee costs. "The conjunction 'and' conjoins both 'attorneys' fees' and 'other costs' and the word 'reasonable' necessarily modifies both. Not only must any request for attorneys' fees be reasonable, so must any request for reimbursement of costs." Perreira v. Sec'y of the Dept. of Health & Human Servs., 27 Fed. Cl. 29, 34 (1992), aff'd, 33 F.3d 1375 (Fed. Cir. 1994).

The burden lies with petitioner to provide adequate documentation at the time he submits his fee application that the fees and costs petitioner is requesting are reasonable. Wasson v. Sec'y of the Dept. of Health & Human Servs., 24 Cl. Ct. 482, 484 fn. 1(1991). My colleague discussed the reasonableness standard in the context of "reasonable costs" as follows:

"Reasonableness" may be evaluated from a paying client's perspective. The United States Supreme Court stated that "[h]ours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority." Hensley, 461 U.S. 424, 433-34 (emphasis in original). If a hypothetical yet reasonable client would be willing to pay for an expert's report, then it is appropriate to award compensation for that expert's report. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections, 522 F.3d 182, 184 (2d Cir. 2008) (stating a trial court must act to ensure that the attorney does not recoup fees that the market would not otherwise

² This award is in addition to a previous award of interim fees and costs in the amount of \$110,979.

bear. Indeed, the district court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively); Goos v. National Ass'n of Realtors, 68 F.3d 1380, 1386 (D.C. Cir.1995) (phrasing the question as “would a private attorney being paid by a client reasonably have engaged in similar time expenditures); Norman v. Housing Authority of the City of Montgomery, 836 F.2d 1292, 1302 (11th Cir. 1988) (recognizing that “in the private sector the economically rational person engages some cost benefit analysis”); Presault v. United States, 52 Fed. Cl. 667, 680 (2002). The client must be pictured hypothetically because individual attributes of Mr. Sabella (for example, his wealth or poverty) should not determine whether the cost is reasonable. Furthermore, it must be assumed that the client would have to pay for the expert because the client's self-interest would lessen the likelihood that the client would invest money into the expert needlessly.

One aspect of the general rule that costs must be reasonable to be compensable is that costs are not awarded for work that is not necessary work. Duplicative work is presumptively unnecessary. Attorneys are not entitled to compensation for performing work that is not necessary. Hensley, 461 U.S. at 434. The same principle restricts experts. Kantor.

Sabella v. Sec'y of the Dept. of Health & Human Servs., No. 02-1627V, 2008 WL 4426040, at *28 (Fed. Cl. Spec. Mstr. Sept. 23, 2008) (hereinafter Sabella I) partially aff'd and partially rev'd (on other grounds) by Sabella v. Sec'y of the Dept. of Health & Human Servs., 86 Fed. Cl. 201 (2009) (hereinafter Sabella II).

The above standard will be applied to the issues in this case.

Hourly rates

Petitioner seeks hourly rates of \$525 for Mr. Panis and \$450 for Mr. Padmanabhan. Respondent objected citing a special master decision from 2006 awarding \$250 per hour for a “highly qualified and competent” Ph.D economist. Brown v. Sec'y of the Dept. of Health & Human Servs., No. 00-182V, slip op. at 5 (Fed. Cl. Spec. Mstr. July 21, 2006) (previously filed as R Ex E.) Petitioner filed in support of the requested rates the affidavit of James Dertouzos. P Ex M. As noted by the undersigned in the Ruling, from his CV, Mr. Dertouzos “is obviously a highly qualified economist.” See CV attached to P Ex M. However, his affidavit provided little assistance as it stated in its totality:

Hi Stan. I normally bill out at \$500 per hour. As I suggested, this appears to be below market and will probably go to \$600 for new clients. I hope things are well for you. Jim

P Ex M. The undersigned noted that based upon a review of the respective CVs, if Mr. Dertouzos was billing at \$500 per hour, both Mr. Panis and Mr. Padmanabhan should be compensated at a lower rate. Ruling at 10, 11. Lastly, petitioner relied upon a decision in Carrera-Meza v. Sec'y of the Dept. of Health & Human Servs., No. 03-2016V, slip op. (Fed. Cl. Spec. Mstr. Feb. 26, 2008), where petitioner contended that the undersigned “approved” an

hourly rate of \$475 for Mr. Panis. However, as the undersigned discussed in the Ruling, the fees and costs were settled by the parties in Carrera-Meza pursuant to a tentative finding the undersigned gave the parties. Because the case was settled, the undersigned made no specific findings and thus never “approved” Mr. Panis’s requested rate. Ruling at 11.

Petitioner argues that Mr. Panis’s hourly rate is reasonable for California. P STR at 2. Petitioner concedes that he did not do an exhaustive search of economists in California, “but neither [counsel] nor a petitioner should have to conduct such an exhaustive search. Petitioners should be able to select qualified experts who are qualified and reputable. . . .” Id. Petitioner can select any expert he desires, but the expert will be compensated at a “reasonable” hourly rate. The logical conclusion of petitioner’s contention is that petitioners can select whomever they choose and pay them at whatever rate requested and bill that rate accordingly and receive reimbursement from the Vaccine Program. That simply is legally incorrect. The case law establishes firmly the obligation to monitor expert costs and to bill at “reasonable” hourly rates. As the undersigned discussed in the Simon case that “the **petitioner must monitor the expert’s overall fees to ensure that the fees remain reasonable.**” Simon v. Sec’y of the Dept. of Health & Human Servs., No. 05-941, 2008 WL 623883, * 2 (Fed. Cl. Spec. Mstr. Feb. 21, 2008)(emphasis in original) (citing Perreira v. Sec’y of the Dept. of Health & Human Servs., No. 90-847V, 1992 WL 164436, at*4 (Cl. Ct. Spec. Mstr. June 12, 1992), aff’d 33 Fed. 3d 1375 (Fed. Cir. 1994) (“This court has continuously warned counsel of their obligation to monitor expert fees.”)(citations omitted)); see also Riggins v. Sec’y of the Dept. of Health & Human Servs., No. 99-382, 2009 WL 3319818, *5 (Fed. Cl. Spec. Mstr. Jun. 15, 2009)(“[P]etitioner, or petitioner’s counsel, must continuously monitor counsel’s fees incurred working on a case, and also all fees and costs incurred by experts and/or consultants in the prosecution of petitioner’s case, in order to ensure that all costs remain reasonable and appropriate in a given matter.”), aff’d, 406 F. App’x 479 (Fed. Cir. 2011). Lastly, counsel contends that the requested rates are low compared to the relevant community. However, counsel has presented one affidavit, which documents a lower hourly rate. The affidavit was from 2007 and no other affidavits were provided.

Petitioner also submitted the Supplemental Declaration of Mr. Panis. Of note, Mr. Panis references other litigation where he was compensated at the rate of \$600 per hour for expert services. What is missing is a description of the type of services. As with any professional service, there are degrees of difficulty that impact the level of expertise needed to address the respective issue. One need not see a neurosurgeon for a bump on the head, and one may or may not need to contract with the most experienced, most credentialed economist for a wage calculation. Reasonable fees are calculated on the basis of comparing professionals providing like services. See Blum, 465 U.S. at 895. Simply because an expert is compensated \$600 per hour providing services in litigation involving complex corporate issues does not mean that the same expert will be compensated at the same rate calculating an individual’s lost wages. The degree of difficulty is vastly different, requiring different levels of expertise which command in the marketplace different levels of compensation.

Contrary to petitioner’s contentions, respondent filed information from the 2009 SEAK National Guide to Expert Witness Fees and Billing Procedures regarding hourly rates charged by economists. R Ex F. Respondent notes that petitioner relied upon the 2004 edition to support the hourly rate of his life care planner. See Ruling at 10. Factoring in inflation, the average hourly fee would be \$276 for file review and preparation and \$345 for trial testimony. R Ex F

72-73. However, the figures cited by respondent are averages and the range for responding economists is wide. For example, under the category “Economics (All),” the range for document preparation is a low of \$125 to a high of \$555 per hour, and for trial testimony a low of \$125 to a high of \$688 per hour. Thus, while the requested rates are higher than the averages, they are within the range of reported expert rates for economists.

In resolving this matter, I have considered all of the information and arguments submitted. As stated in the Ruling, a comparison of the CVs of Mr. Dertouzos with those of petitioner’s economists shows that Mr. Dertouzos has greater qualifications, and thus should command the higher hourly rate. Mr. Dertouzos’s e-mail to Mr. Panis is from 2007. P Ex M. Petitioner bears the burden of proof and must suffer the consequences of not updating Mr. Dertouzos’s information or for not submitting other information. Based on what is in the record, Mr. Dertouzos billed at \$500 per hour. What he currently bills at is unknown. Thus, Mr. Panis is compensated at \$450 per hour and Mr. Padmanabhan is compensated at \$400 per hour. These figures are higher than the averages from the SEAK data, but are well within the range reported for economists.

Number of Hours

Petitioner billed 114.90 hours for the two economists to calculate petitioner’s lost wages. Mr. Panis billed 63.20 hours and Mr. Padmanabhan billed 51.70 hours. The undersigned questioned whether there was a duplication of efforts, especially focusing on nearly 50 hours spent by the economists on calculating social security benefits. Ruling at 11. In response to the undersigned’s strong suggestion that respondent provide “context” for items or time to which respondent objected, Ruling at 8, respondent indicates that petitioner’s economists were not “pivotal” in resolving the lost wages; respondent noted the economists “aided only in providing a number” for petitioner’s demand. R Res at 1. Respondent notes in fact that petitioner’s economists relied upon “faulty assumptions” resulting in respondent relying upon petitioner’s tax returns and other data provided by petitioner in calculating a reasonable range of lost wages. Id. As indicated in the Ruling, the parties informally resolved the lost wages issue. Ruling at 2. Petitioner did not Reply to respondent’s Response.

Petitioner did address through Mr. Panis the undersigned’s concerns regarding the time spent calculating the social security benefits. Mr. Panis’s explanation is simply unavailing. The undersigned’s expressed concerns were essentially why was so much time spent on calculating a benefit that is readily identifiable on the official website of the Social Security Administration or any number of other financial websites. Ruling at 11. To his credit, Mr. Panis attempts to provide a rational response. However, in doing so, Mr. Panis proves the point that petitioner failed to monitor the economists’ activities resulting in much unnecessary efforts. See Simon v. Sec’y of the Dept. of Health & Human Servs., No. 05-941, 2008 WL 623883 at * 2 (Fed. Cl. Spec. Mstr. Feb. 21, 2008) (“the **petitioner must monitor the expert’s overall fees to ensure that the fees remain reasonable.**”). Mr. Panis first explains how he used his subordinate who bills at a lower hourly rate. He then states that Mr. Padmanabhan “downloaded and installed a benefit calculator from the Social Security Administration’s website.” Panis Dec at 6. He then explains how using the 119 page user guide Mr. Padmanabhan “figured out how to control the assumptions it makes and how to use the software, and ran it under actual and but-for scenarios.” Id. Mr. Padmanabhan actually discovered a flaw that resulted in overstating petitioner’s benefit. Id. What Mr. Panis does not answer is the question the undersigned posed in the Ruling - why?

Mr. Panis fails to address the fundamental point made in the Ruling, that is once you know the past years of service and the attached social security wages, the assumed future social security wages and the assumed number of years to be worked, that data can be entered into available calculators to compute your social security benefits at different retirement dates. As stated in the Ruling, “it is unnecessary to understand the social security formula to calculate the benefit.” *Id.* Mr. Panis’s explanation does not address or take issue with that critical statement. The statement is critical because it calls into question the bulk of time spent by Mr. Padmanabhan.

It is axiomatic that petitioner bears the burden of supporting their request. As stated in the Ruling, case law provides that the moving party is not owed a second opportunity to correct deficiencies in proof. Ruling at 11 (citing Sabella v. Sec’y of the Dept. of Health & Human Servs., 86 Fed. Cl. 201, 209 (Fed. Cl. 2009)). However, the undersigned found that under the circumstances of this case, petitioner should be given a second opportunity. Petitioner did not take full advantage of the opportunity. Mr. Panis’s declaration explains how Mr. Padmanabhan spent his time, but does not address the undersigned’s explicit question of why the time was spent. Thus, petitioner failed to support the requested hours. Reviewing the time sheets, Mr. Panis is awarded 52.90 hours (10.30 hours for social security calculations are denied as duplicative of Mr. Padmanabhan’s efforts) at \$450 per hour for a total of \$23,805.00. Mr. Padmanabhan is awarded 10 hours for the social security calculations and the 9 hours assisting on the damages calculations for a total of 19 hours at \$400 per hour for a total of \$7,600.00. Thus, Petitioner is awarded a total of \$31,405.00 for his economists.

While this understandably will appear to petitioner and the economists as a draconian reduction, based upon the submitted proof it is in fact a generous award.

Conclusion

Based upon the discussions in the Ruling and herein, petitioner is awarded \$61,481.50 for his attorney’s fees, \$17,150.00 for petitioner’s life care planner, \$51.35 for his attorney’s costs, and \$31,405.00 for his economist.³ **Specifically, petitioner is awarded a lump sum of \$110,087.85 in the form of a check payable jointly to petitioner and petitioner’s attorney.** The Clerk of the Court is directed to enter judgment accordingly.⁴

IT IS SO ORDERED.

s/ Gary J. Golkiewicz

Gary J. Golkiewicz

Special Master

³ In the Ruling at page 13, footnote 3, a discrepancy is noted regarding whether petitioner is owed any costs in this case or if petitioner paid a \$2,000 retainer to the economists and thus is owed \$2,000 from the awarded costs. Petitioner failed to address this issue. Since petitioner is the payee, it is expected that if in fact petitioner paid this retainer, petitioner shall retain \$2,000 of the costs found owed the economists and pay the economists the difference, or \$29,405. If petitioner did not pay the retainer, the full \$31,405 is owed the economists.

⁴ Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge. Furthermore, 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.A. §300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally, Beck v. Secretary of the Dept. of Health & Human Servs., 924 F.2d 1029 (Fed. Cir. 1991).