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

No. 04-1041V
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JENNIFER STONE, and GARY STONE, Parents and Next Friends of AMELIA STONE, a minor,	*	
Petitioners,	*	Decision on Motion for Interim Attorney Fees and Costs; Expert rate and hours reduced for lack of expertise; Attorney hours reduced for general excessiveness and vague description of tasks
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Richard Gage, Richard Gage, P.C., Cheyenne, W.Y., for Petitioner.
Alexis B. Babcock, U.S. Department of Justice, Washington, D.C., for Respondent.

DECISION ON PETITIONERS' MOTION FOR INTERIM ATTORNEY'S FEES AND COSTS[1]

The Petition in this case was filed on June 21, 2005. Jennifer and Gary Stone sought compensation on behalf for their daughter, Amelia Stone, who suffers from Severe Myoclonic Epilepsy of Infancy ("SMEI"). Petitioners alleged a DTaP vaccination Amelia received was a substantial cause of her SMEI. Respondent denied the DTaP vaccination caused Amelia's injury, alleging that Amelia's SMEI is caused by a mutation in her SCN1A gene. The undersigned found respondent demonstrated by a preponderance of the evidence that Amelia's SCN1A gene mutation more likely than not caused her SMEI and denied compensation for petitioners. Stone v. Sec'y of the Dept. of Health & Human Servs., 2010 WL 1848220, appeal

[1] The undersigned intends to post this Order on the United States Court of Federal Claims' website, 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 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" Order will be available to the public. Id.

docketed, No. 04-1041V (Fed. Cl. Spec. Mstr. April 15, 2010). Petitioners' Motion for Review is currently pending.

On July 15, 2010, petitioners filed an Application for Interim Attorney's Fees and Costs requesting a total of $157,873.86. P Application for Interim Award of Attorneys' Fees and Reimbursement of Costs, filed July 25, 2010 (hereinafter "P Interim Application"). Petitioners prefaced the Application, stating they were requesting the lowest potential hourly rates, which were previously paid to petitioners' counsel in this program. Petitioners "reserved the right to request [counsel's] full hourly rates in his final fee petition in this case." P Interim Application, 1.

On July 29, 2010, respondent filed a response to the petitioners' Application. R Response in Opposition to Petitioner's Application for Interim Award of Attorneys' Fees and Reimbursement of Costs, filed July 29, 2010 (hereinafter "R Opposition"). Respondent took issue with: a number of counsel's hours that respondent found to be excessive, inappropriate, redundant or vaguely documented; a number of costs respondent found are inappropriate or insufficiently documented; and the vague documentation and the requested $500.00 hourly rate for Dr. Kinsbourne.[2] Finally, petitioners filed a response to respondent's opposition. P Response to Respondent's Opposition to Petitioner's Application for Interim Award of Attorneys' Fees and Reimbursement of Costs, filed August 25, 2010 (hereinafter "P Response"). The issue is ripe for decision.

Upon review of the parties' filings, the areas in contention are limited. The undersigned has determined the remainder of the fees and costs application is reasonable and will only discuss those issues that are in contention.

A. LEGAL BACKGROUND

Pursuant to 42 U.S.C. § 300aa-15(e) of the National Childhood Vaccine Injury Act,[3] special masters may award "reasonable" attorney fees as part of compensation. In Avera v. Sec'y of the Dept. of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), the Federal Circuit found this to include an award for interim fees and costs. A petitioner may be awarded fees and costs even if a petitioner was unsuccessful on the merits of the case. §300aa-15(e)(1). 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

[2] Respondent also noted a double billing for a flight, which petitioner agreed was an inadvertent error and reduced from the Application. P Response to Respondent's Opposition to Petitioner's Application for Interim Award of Attorneys' Fees and Reimbursement of Costs, filed August 25, 2010 (hereinafter "P Response").

[3] The National Vaccine Injury Compensation Program (hereinafter Program) comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (2006)(hereinafter "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

v. Sec'y of the Dept. of Health & Human Servs., 515 F.3d 1343, 1347-48 (quoting Hensley) (Fed. Cir. 2008); Saxton 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, which 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, for example, 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). The Federal Circuit, in examining the documentation requirements in other legal contexts, made clear that the documentation must be sufficiently detailed to enable the reviewing judge to determine its reasonableness.

> The court needs contemporaneous records of exact time spent on the case, by whom, their status and usual billing rates, as well as a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and any other expenditures related to the case. **In the absence of such an itemized statement, the court is unable to determine whether the hours, fees and expenses, are reasonable for any individual item.**

Naporano, 825 F.2d at 404 (emphasis added)(citing St. Paul Fire and Marine Insurance v. United States, 4 Cl. Ct.762, 771 (Cl. Ct. 1984). Because the specificity of documentation is at issue herein, see infra pp. 5-6, the Vaccine Guidelines advise counsel to:

> maintain detailed contemporaneous records of time and funds expended under the program. [The fee request should include] contemporaneous time records that indicate the date and specific character of the service performed, the number of hours (or fraction thereof) expended for each service, and the name of the person providing such service. Each task should have its own line entry indicating the amount of time spent on that task. Several tasks lumped together with one time entry frustrates the court's ability to assess the reasonableness of the request.

Regarding the Vaccine Guidelines, Judge Allegra stated, "[t]hese guidelines reflect the accumulated wisdom of numerous decisions emphasizing that fee records must be specific, avoid "mixed entries" that lump together several activities, and represent contemporaneous entries."

Savin v. Sec'y of the Dept. of Health & Human Servs., 85 Fed. Cl. 313, 316 -317 (Fed. Cl. 2008)(citing Lipsett v. Blanco, 975 F.2d 934, 938 (1st Cir. 1992) (affirming reduction of hours where "several entries contain[ed] only gauzy generalities" too nebulous to allow the opposing party to dispute their accuracy or reasonableness); In re Donovan, 877 F.2d 982, 995 (D.C. Cir.1989) (confirming that the district court properly excluded hours with "vague description[s] such as legal issues," "conference re all aspects," and "call re status"); Tomazzoli v. Sheedy, 804 F.2d 93, 98 (7th Cir. 1986) (affirming reduction in hours where plaintiff listed hours spent on "research" without greater specificity); In re Meese, 907 F.2d 1192, 1203-04 (D.C. Cir. 1990) (reducing the award by ten percent because numerous time records made no mention of the subject matter of the work performed); Cadena v. Pacesetter Corp., 224 F.3d 1203, 1215 (10th Cir. 2000) ("'[I]f [prevailing parties] intend to seek attorney's fees . . . [their attorneys] must keep meticulous, contemporaneous time records [.]"); In re Olson, 884 F.2d 1415, 1428 (D.C.Cir.1989) (disallowing entries that failed to identify the subject of a meeting, conference, or phone call and requiring contemporaneous records proving the reasonableness of hours and rates); Grendel's Den v. Larkin, 749 F.2d 945, 952 (1st Cir.1984) ("in cases involving fee applications ... the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award, or in egregious cases, disallowance")).

While the burden rests with petitioner to prove reasonableness, petitioner is not given a "blank check to incur expenses." Perreira, 27 Fed. Cl. at 34. The Federal Circuit has stated "[i]t was well within the special master's discretion to reduce the hours [expended in a matter] to a number that, in his experience and judgment, was reasonable for the work done." Saxton, 3 F.3d at 1521; Sabella v. Sec'y of the Dept. of Health & Human Servs., 86 Fed. Cl. 201, 211 ("The special master . . . is not required to award fees and costs for every hour claimed, he need only award fees and costs that are reasonable. See 42 U.S.C. § 300aa-15(e).").

In assessing the number of hours reasonably expended, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." Hensley, 461 U.S. at 434 (1983). In making reductions, the special master is not necessarily required to base his or her decisions on a line-by-line evaluation of the fee application. Wasson, 24 Cl. Ct. at 484 (affirming the special master's general approach to petitioner's fee request where the entries and documentation contained in the 82 page fee petition were organized in such a manner that specific citation and review were rendered impossible), aff'd, 988 F.2d 131 (Fed. Cir. 1993). Moreover, special masters may rely on their experience with the Vaccine Act and its attorneys to determine the reasonable number of hours expended. Wasson, 24 Cl. Ct. at 486, aff'd, 988 F.2d 131 (Fed. Cir. 1993). Just as "[t]rial courts routinely use their prior experience to reduce hourly rates and the number of hours claimed in attorney fee requests . . . . [v]accine program special masters are also entitled to use their prior experience in reviewing fee applications." Saxton, 3 F.3d 1517, 1521 (Fed. Cir.1993) (citing Farrar v. Sec'y of the Dept. of Health & Human Servs., 1992 WL 336502, *2-3 (Cl. Ct. Spec. Mstr. Nov. 2, 1992) (requested fees of $24,168.75 reduced to $4,112.50)); Thompson v. Sec'y of the Dept. of Health & Human Servs., No. 90-530V, 1991 WL 165686, *2-3 (Cl. Ct. Spec. Mstr. Aug. 13, 1991)(requested fees of $18,039.75 reduced to $9,000); Wasson, 24 Cl. Ct. at 483 (1991), on remand, No. 90-208V, 1992 WL 26662

(Fed. Cl. Spec. Mstr. Jan. 2, 1992), aff'd, 988 F.2d 131 (Fed. Cir. 1993)(requested fees of $151,575 reduced to $16,500; the special master disregarded the claim for 698.5 hours and estimated what, in her experience, would be a reasonable number of hours for a case of that difficulty)).

Additionally, a special master may reduce an unreasonable fees and costs request *sua sponte*, regardless of whether respondent filed an objection to a particular request. In making such a reduction, a special master is not required to provide petitioner with an opportunity to explain the unreasonable request, as the burden lies with petitioner to provide an adequate description and documentation of all requested costs and fees in the first instance. Sabella, 86 Fed. Cl. at 208-09; Saunders v. Sec'y of the Dept. of Health & Human Servs., 26 Cl. Ct. 1221, 1226 (1992); Duncan v. Sec'y of the Dept. of Health & Human Servs., No. 99-455, 2008 WL 4743493, *1 (Fed. Cl., Aug. 4, 2008) ("the Special Master had no additional obligation to warn petitioners that he might go beyond the particularized list of respondent's challenges."); Savin v. Sec'y of the Dept. of Health & Human Servs., 85 Fed. Cl. 313, 317-19 (2008) (Order denying Motion for Review).

B. DISCUSSION

1. ATTORNEY & PARALEGAL – HOURLY RATES

Petitioners requested hourly rates for attorney and paralegal work, to which respondent has not objected. As noted above, petitioners requested hourly attorney rates that have previously been awarded and "reserved the right to request [counsel's] full hourly rates in his final fee petition in this case." P Interim Application at 1. Upon review of the filings and work done in this matter, the undersigned awards the hourly rates as requested by petitioners.

2. ATTORNEY & PARALEGAL – HOURS REQUESTED

As totaled by respondent, petitioners requested 426 hours for attorney time and 54.4 hours for paralegal time. R Opposition at 1. Respondent also noted that petitioners' request includes 34.4 hours of the attorney's time related to the Motion for Review; respondent does not object to this amount related to the Motion for Review. R Opposition at 3. The total requested for attorney and paralegal fees is $97,118.00. P Interim Application, Tab A.

However, respondent does object to some of the hours claimed, arguing these hours are excessive, inappropriate or redundant. Respondent first claims the total number of hours requested is "generally excessive." More specifically, respondent argues that 40.2 attorney hours and 16.2 paralegal hours for what is documented as "file review," "case review," "work on case," and "research" are vague and do not allow meaningful evaluation of the claimed hours. R Opposition at 5. In response, petitioners argue a court should be realistic in its expectations for documenting hours, it should not "micro-manage" a lawyer's practices, and it should not "overbear the 'billing judgment' of the petitioner's attorneys" without valid reason to do so. P Response at 1-3. Petitioners claim that counsel's billing practices have been the same for the last two decades and was adequate in past cases under the Act. Petitioners also point to the length,

complexity and extraordinary efforts exhibited in the underlying entitlement case to justify the number of hours claimed and the vaguely described tasks pointed out by respondent.

Respondent also argues that time spent communicating with a life care planner in 2006 and 2007 are inappropriate for reimbursement given petitioners' did not succeed on their claim. R Opposition at 5. Petitioners argue the life care planner was utilized to assess a possible settlement value, which petitioners' counsel felt appropriate at that time. As noted in the undersigned's Decision denying entitlement to petitioners, two prior cases involving seizures after a child's DTaP vaccination granted entitlement to compensation.[4] Prior to the introduction of evidence that Amelia possessed the SCN1A gene mutation, petitioners may have reasonably envisioned this case resolving in the same manner as these two prior cases. In fact, the undersigned informally communicated to the parties that petitioners would likely succeed. For this reason, the undersigned does not find the minimal amounts of time spent communicating with a life care planner, or costs related to this effort, unreasonable. See infra p. 11.

The undersigned acknowledges the substantial amount of time and effort that went into Amelia's case, as well as the importance and complexity of the issues related to the SCN1A gene mutation. However, the undersigned concurs with respondent that the cumulative number of vague entries is unreasonable. See supra pp. 3-4 (discussing the substance to be provided in billing records). Even considering the complexity of this case, the continuous phone conversations with Dr. Kinsbourne, the number of file reviews, "worked on electronic entries," and medical literature research are unreasonable in the absence of substantial explanation. The heart of this case is a medical issue, for which significant amounts of time are awarded for the extensive efforts of petitioners' expert. Counsel's unexplained hours not devoted to this medical issue are not compensable. The undersigned will deduct 10% from counsel's total requested time for this excessive and vague bill. For simplicity, the time will be deducted at counsel's lowest requested rate, $200.00. Again, the burden lies with petitioner to provide adequate documentation that the fees and costs requested are reasonable and the special master is not required to make a line-by-line evaluation of the fee application. See, e.g., Wasson v. Sec'y of the Dept. of Health & Human Servs., 24 Cl. Ct. 482, 484, 484 fn. 1 (1991).

The undersigned awards petitioners 383.4 hours for attorney time and 54.4 hours for paralegal time. A reduction of $8520.00 is made to the total attorney fees requested. The total amount awarded for legal fees is $88,598.00.

3. DR. KINSBOURNE – HOURLY RATE

Petitioners requested, and Dr. Kinsbourne documented, two hourly rates, $300.00 per hour and $500.00 per hour. It appears to the undersigned that Dr. Kinsbourne began billing the $500.00 rate sporadically in and following his April 2007 billing entry. P Interim Application,

[4] See Simon Sec'y of Dept. of Health & Human Servs., No. 05-941V, 2007 WL 1772062 (Fed. Cl. Spec. Mstr. June 1, 2007) and Mersburgh Sec'y of Dept. of Health & Human Servs., No. 04-997V, 2007 WL 5160384 (Fed. Cl. Spec. Mstr July 9, 2007).

Tab D, pp. 31-35.[5] A rationale for the intermittent use of the $500.00 rate was not given by petitioners, nor is one explicitly evident from Dr. Kinsbourne's billing entries. The only explanation the undersigned can divine regarding the sporadic use of the $500.00 rate is that Dr. Kinsbourne charged this higher rate when dealing with the substantive issues once the genetics issues were presented by respondent in April 2007. P Interim Application, Tab D, pp. 32-35. Communication, such as emails and teleconferences, after April 2007 were charged at a rate of $300.00. Id. Of note, in a prior decision, Simon v. Sec'y of Dept. of Health & Human Servs., No. 05-941, 2009 WL 623833, at *8 (Fed. Cl. Spec. Mstr. Feb. 21, 2008), Dr. Kinsbourne was awarded a rate of $300.00 for his work in non-expert capacity.

Respondent does not object to Dr. Kinsbourne's $300.00 rate. R Opposition at 6. Respondent does, however, object to Dr. Kinsbourne's $500.00 rate. Respondent acknowledged the award of the $500.00 rate in two cases, noting that this rate was awarded due to Dr. Kinsbourne's "'knowledge and efficiency' derived from his extensive experience in Vaccine Act cases." R Opposition at 8. Respondent argues that Dr. Kinsbourne's performance in this case is lacking the "knowledge and efficiency" for which he was previously awarded $500.00. Id. The undersigned agrees. Specifically, respondent questions whether 88.2 hours spent reviewing literature and trial preparation after the first evidentiary hearing can be considered efficient. Id. at 9.

Dr. Kinsbourne has long testified in this Program regarding neurological aspects of cases and that portion of his testimony here is appropriate. However, as discussed in the entitlement Decision, Dr. Kinsbourne's testimony regarding the genetic aspects of this case was questionable. Petitioners initially indicated they would file the expert opinion of a geneticist but ultimately utilized Dr. Kinsbourne to rebut the testimony given by respondent's clinical neurogeneticist, Dr. Raymond. See, e.g., Stone, 2010 WL 1848220, *1. The underlying entitlement Decision noted that Dr. Kinsbourne's testimony has been both applauded and criticized.[6] Numerous general concerns regarding his testimony in this case were evidenced.[7]

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[5] Petitioners' Application for Fees and Costs is not paginated. The undersigned utilizes page numbers within each "Tab" submitted by petitioners.

[6] "Dr. Kinsbourne has testified in the National Vaccine Injury Compensation Program from its inception. Over the years, Dr. Kinsbourne has been found to be persuasive, but also has been criticized. While the undersigned recognized Dr. Kinsbourne's good efforts in Simon v. Sec'y of Dept. of Health & Human Servs., No. 05-941, 2009 WL 623833, *7 (Fed. Cl. Spec. Mstr. Feb. 21, 2008), more recently the undersigned criticized Dr. Kinsbourne's testimony at length with regard to that case but notably discussed the decline in the quality of Dr. Kinsbourne's testimony in recent years. Egan v. Sec'y of Dept. of Health & Human Servs., No. 05-1032, 2009 WL 1440240 at *17-19 (Fed. Cl. Spec. Mstr. May 1, 2009)(unpublished). My colleague expressed similar concerns about Dr. Kinsbourne in Snyder v. Sec'y of Dept. of Health & Human Servs., No. 01-162, 2009 WL 332044, *11-12 (Fed. Cl. Spec. Mstr. February 12, 2009), aff'd, 88 Fed. Cl. 706 (2009). He was also harshly criticized by my former colleague in Moberly ex rel. Moberly v. Sec'y of Dept. of Health & Human Servs., No. 98-910V, 2006 WL 659522, *5-6 (Fed. Cl. Spec. Mstr. Feb. 28, 2006), aff'd, 85 Fed. Cl. 571 (2009), aff'd, 592 F.3d 1315 (Fed. Cir. 2010). The concerns and criticisms raised in these cases were unfortunately apparent with respect to Dr. Kinsbourne's testimony in the instant case." Stone, 2010 WL 1848220, at * 8.

[7] "A significant concern regarding Dr. Kinsbourne's reliability as an expert witness is that he has not maintained a 'hospital based clinical pediatric neurology practice' since 1981. Thus, despite his familiarity with cases involving

Furthermore, Dr. Kinsbourne's testimony, as it related to the sizeable genetics portions of this matter, was unimpressive.

> The juxtaposition between the testimony of Dr. Raymond and Dr. Kinsbourne was striking. In contrast to Dr. Raymond's cogent explanations, Dr. Kinsbourne was unable to adequately address the issues presented in this case. When the undersigned asked Dr. Kinsbourne the critical question upon which his theory hinged, "is there an article that talks about environmental effect that says the environmental effect [vaccination, etc] is something more than a trigger, that it actually has an impact on the genetic abnormality?" Dr. Kinsbourne responded "[t]hat's a lovely question which I wish you had asked me earlier meaning like a month ago so I could have researched it." The undersigned then noted "it's a jump to say that the trigger actually alters the path." To which Dr. Kinsbourne responded, "**It is.** I understand that fully. My thought is that if a potentially damaging event acts as a trigger, it really acts both as a trigger and a damaging event, so that we have in fact, this particular trigger was a vaccine elicited status epilepticus, and right there we have a damaging event. . . . So the first assault on the brain, which was highly predisposed, not able to cope with the assault, was mediated by a vaccine launched effect." The undersigned finds Dr. Kinsbourne's testimony unpersuasive. Again there is no evidence of the initial vaccine triggered fever and seizure causing any **damage** to Amelia. Nor is there any cogent explanation for how an environmental trigger, specifically a vaccine, significantly contributed to Amelia's SMEI. Dr. Kinsbourne's testimony, discussed above, is extremely speculative; speculative testimony does not provide preponderant evidence.

Stone, 2010 WL 1848220, at *39 (internal citations omitted)(emphasis in the original).

Although the undersigned found that Dr. Kinsbourne was "credible and provided very good expert services" in Simon, warranting the $500.00 rate, the undersigned finds the case at

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seizure-related disorders alleging vaccine causation and his many past distinguished professional appointments in neurology, Dr. Kinsbourne no longer maintains a clinical practice treating patients with seizure disorders in an acute setting, and has not done so in almost thirty years. Dr. Kinsbourne has continued to see only patients related to the 'behavioral aspects' of pediatric neurology after 1981. Dr. Kinsbourne's testimony at the Hearing on May 15, 2009, reflected his lack of recent clinical practice. His testimony is highly generalized and lacks any grounding in practice. While Dr. Kinsbourne may keep current with medical literature . . . his testimony amounts to little more than repeating snippets from that literature. He has no current experience or context outside of 'behavioral aspects' of pediatric neurology with which to apply, question, or discuss an article's teachings. Dr. Kinsbourne testified he has not focused his practice, research or teaching for the past twenty-five years in the area of seizure disorders. In fact, Dr. Kinsbourne testified he has not 'managed seizure disorders since 1980.' Dr. Kinsbourne does not publish, research, teach, counsel, attend meetings or conferences, or have any special training in relation to the field of genetics. Nor does Dr. Kinsbourne have any 'experience or training or knowledge in clinical genetics, molecular genetics, and neurogenetics.' The fact that for the past twenty-five years Dr. Kinsbourne has not focused his practice, research or teachings in the field of seizure disorders, and that Dr. Kinsbourne has no expertise in the field of genetics significantly limited his ability to offer reliable, persuasive, and cogent testimony in this case." Stone, 2010 WL 1848220, at * 8.

hand is not such an "appropriate circumstance." See Simon, No. 05-941, 2009 WL 623833, at *7. Revisiting the factors utilized in Simon, 2008 WL 623833, at *3, the undersigned is not doubting Dr. Kinsbourne's ability to testify regarding neurology and, of course, Dr. Kinsbourne's education and training are still exemplary. His experience in the past is definitely noteworthy but his lack of a current clinical practice causes a deficit in his testimony. That deficit is becoming more apparent and is being exposed with greater frequency to petitioners' detriment. Further, Dr. Kinsbourne's education, training and experience in the field of genetics are fairly nonexistent. Although Dr. Kinsbourne's experience and expertise may provide efficiency in some Vaccine Act cases, use of his testimony as it related to the genetics portion of this case was inefficient and ineffectual. No evidence was provided by petitioners regarding the market rate or the rates traditionally charged for a comparable expert.[8]

Ultimately, the undersigned awards petitioners a rate for Dr. Kinsbourne at $300.00 per hour. Considering the quality of Dr. Kinsbourne's testimony and thus the quality of information Dr. Kinsbourne provided in this case, $300.00 per hour constitutes generous remuneration.

4. DR. KINSBOURNE – HOURS REQUESTED

Petitioners requested, and Dr. Kinsbourne billed, 145.6 hours total for Dr. Kinsbourne. P Interim Application, Tab D. As noted by respondent, 57.6 hours were spent from the beginning of the case through the August 2006 hearing, and 88.2 hours were spent after the first hearing through the conclusion of his bill for this case. Respondent objects to the lack of specificity in Dr. Kinsbourne's bill, as well as to specific blocks of time. R Opposition at 7-8. Respondent specifically objects to the 11 hours of hearing travel time billed in August 2006, based upon the expert's home location in relation to the location of the hearing, and to the 88.2 hours spent by the expert subsequent to the first hearing. Id.

In response, regarding respondent's objections to the lack of specificity, petitioners make arguments similar to those made regarding the specificity of counsel's hours. P Response at 5-7; see supra pp. 5-6. Also, petitioners note that the time billed generically as teleconferencing or emailing is detailed in petitioners' counsel's billing record. Id. Regarding the travel time to which respondent objected, petitioners explained that 11 hours was indeed the full time Dr. Kinsbourne spent on travel to the August hearing due to being unable to change to an earlier flight. P Response at 6. Regarding the 88.2 hours, petitioners remind the court of the complexity of this case. Id. Further, petitioners argue that the amount of work done in this case was driven by respondent, not petitioners. Id. Finally, petitioners explained that some work done in this case by Dr. Kinsbourne overlapped efforts in a case that was heard alongside Amelia's case; any time discrete to Amelia's case are billed herein and any time not discrete to

[8] The undersigned finds it difficult to imagine presenting evidence of comparable rates, considering petitioners presented the opinion of a non-practicing neurologist on genetics issues, issues that came into the spotlight in the last decade.

the other case is also billed herein. Id.[9] This argument is apparently a partial explanation for the amount of hours spent after the first hearing when the SCN1A mutation became an issue and this will be noted for any fees decisions of the other case.

The undersigned awards a reduced number of hours Dr. Kinsbourne. First, the undersigned agrees with respondent that the general lack of specificity makes evaluation for reasonableness of Dr. Kinsbourne's time difficult. However, the undersigned does note that the hours involved in communication with petitioners' counsel appear to coincide with counsel's billing records. The undersigned agrees with petitioners regarding the complexity of the case and the fact that Dr. Kinsbourne's bill is similar to that of many experts, even another expert consulted in this same case. See, e.g., P Interim Application, Tab D, pp. 36-37. And petitioners have sufficiently explained the 11 hour travel day in August 2006.

However, the undersigned finds that the 88.2 hours Dr. Kinsbourne spent after the revelation that this case involved a genetic component was excessive and reflects his lack of education, training and expertise in genetics. Adding to the lack of a background in genetics, Dr. Kinsbourne's lack of current clinical experience with SMEI, since the genetic component was more recently recognized by the medical community, necessitated Dr. Kinsbourne spending unreasonable amounts of time educating himself on this issue. Experts are expected to bring a base of knowledge to cases and the Program is not the appropriate forum to compensate the training and education of an expert.

> It should be noted that a physician providing expert testimony, "[s]hould have recent and substantive experience or knowledge in the areas in which they testify . . . Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field." AMA Council on Ethical and Judicial Affairs, "Code of Medical Ethics" at 9.07, Medical Testimony (2002-2003 ed.). See Falksen v. Secretary of HHS, No. 01-031, 2004 WL 785056, at * 10 (Fed. Cl. Spec. Mstr. Mar. 30, 2004); Weiss v. Secretary of HHS, No. 03-190V, 2003 WL 22853059, at * 2 n. 1 (Fed. Cl. Spec. Mstr. Oct. 9, 2003). Thus, the expert, schooled and experienced in the relevant discipline, brings to the case a broad foundation of knowledge that is utilized in analyzing the facts of a given case. With this expertise as a base, the expert's time spent analyzing the facts, reviewing the most recent literature and testifying should be **relatively** limited.

Presley v. Sec'y of the Dept. of Health & Human Servs., No.98-417V, 2005 WL 6120642, at *12 (Fed. Cl. Spec. Mstr. July 12, 2005); cf. Wadie v. Sec'y of the Dept. of Health & Human Servs., No. 99-493V, 2009 WL 961217, at *9 (Fed. Cl. Spec. Mstr. Mar. 23, 2009)(disallowing fees for "work performed by or associated with" Dr. Kinsbourne when no neurological injury was evidenced).

[9] Dr. Kinsbourne is cautioned to ensure that no double billing occurs for the case heard alongside Amelia's, Hammitt v. Sec'y of the Dept. of Health & Human Servs., No. 07-170V, slip op. (Fed. Cl. Spec. Mstr. Aug. 31, 2010).

Unlike his ability to efficiently testify on the neurological issues involving petitions, the genetic component of Amelia's case required Dr. Kinsbourne to expend significantly more effort to overcome his lack of knowledge. It is obvious that Dr. Kinsbourne took great efforts to provide petitioners with supportive evidence. However, those extensive efforts should not come at the expense of the Program. The 88.2 hours spent after the genetic issue came to light is simply unreasonable. Upon review of Dr. Kinsbourne's billing entries, 28.5 hours was spent reviewing literature after the genetic issue arose and the expert spent 14 hours preparing for the second hearing; totaling 42.5 hours. P Interim Application, Tab D, pp. 32-35. The undersigned reduces this time by 50%; 21.25 hours, at an hourly rate of $300.00, are subtracted from Dr. Kinsbourne's time.

As stated, petitioners are awarded 124.35 hours for Dr. Kinsbourne's work; 105.35 hours are awarded at the rate of $300.00 per hour and 19 hours are awarded at the 50% rate, $150.00, for time the expert spent traveling. Petitioners are awarded $34,455.00 for Dr. Kinsbourne.

5. OTHER COSTS

The remainder of petitioners' $9,105.86 in costs entail: the filing fee, consultation fees, costs for acquiring medical records, hearing travel expenses, shipping, postage, binding and copying expenses. P Interim Application Tab C at 10; P Interim Application Tab D at 25-30. Respondent objects to: a $145.40 copying charge for records sent the a life care planner since petitioners did not succeed on their claim; an airfare fee that involved change fees when petitioners requested rescheduling a hearing due to a family emergency; and meal expenses claimed for the Hearing on May 15, 2009, as they appear excessive. R Opposition at 5-6. Respondent also noted a double billing for the May 2009 flight of $279, which petitioners agreed was an error and should be disallowed. R Opposition 6; P Response at 4. Without this double-billing, the remaining costs requested are $8,826.86.

Regarding the cost for copying records for a life care planner, the undersigned awards petitioners the $145.40 cost for the same reason petitioners are granted fees for consulting the life care planner. Prior to introduction of the genetic information, it was reasonable to anticipate this case may have resolved in petitioners' favor. See supra p. 6. As for the airfare, including the change fees incurred for the first evidentiary hearing, the undersigned awards petitioners the full amount of airfare, $643.19. The undersigned does not find that rescheduling one evidentiary hearing due to a family emergency to be out of the ordinary or unreasonable.

Respondent's last objection regarding costs is that the meal costs claimed for the May 15, 2009, Hearing are excessive. The total meal costs claimed for the May 2009 Hearing are: $187.66 on May 14, 2009; $227.36 on May 15, 2009; and $27.12 on May 16, 2009.[10]

[10] Petitioners claim three discrete meal costs with individual receipts: $13.56 on May 14, 2009; $19.66 on May 15, 2009; and $2.05 on May 16, 2009. P Application, Tab D at 27, 48. On top of this amount are meal costs included in petitioners' "lodging expense for trial." P Application, Tab D at 27, 52. The costs for meals included on the Sofitel hotel bill are: $174.10 on May 14, 2009; $207.70 on May 15, 2009; and $25.07 on May 16, 2009. P Application, Tab D at 52.

Petitioners' only response to respondent's objections was, "[r]eceipts are provided for the meal expenses. If this is not adequate, perhaps this Court should consider going to a *per diem* system in this Program." P Response at 5. Without further explanation of the meal costs, such as whether the costs include meals for counsel and petitioners' expert, the undersigned agrees with respondent that the costs are excessive. Petitioners are awarded: $50.00 for meals on May 14, 2009; $100.00 for meals on May 15, 2009, the actual full hearing day; and $27.12, as requested, for meals on May 16, 2009. Ultimately, a total of $265.02 is disallowed for petitioners' other costs and petitioners are awarded a total of $8,651.84 for their costs other than fees for Dr. Kinsbourne.

CONCLUSION

Upon review of the case, petitioners' Interim Fees and Costs Application, and respondent's objections, the court hereby awards the petitioners attorneys' fees and costs in the amount of:

Legal Fees:	$88,598.00
Dr. Kinsbourne costs:	$34,455.00
Other Costs:	$8,561.84

Specifically, petitioners are awarded a lump sum of $131,614.84 in the form of a check payable jointly to petitioners and petitioners' attorney of record.

The Clerk of the Court is directed to enter judgment accordingly.[11]

IT IS SO ORDERED.

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
Special Master

[11] 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.