OFFICE OF SPECIAL MASTERS

No. 90-2331V

(Filed: July 17, 1997)

* *		
	*	
TERESA GONZALEZ, by and through her	*	
legal Representative, TAMA GONZALEZ,	*	
	*	
	*	
Petitioner,	*	**TO BE PUBLISHED**
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	
* *		

Michael Skow, Sacramento, California, appeared for petitioner.

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

DECISION (ATTORNEYS' FEES)

HASTINGS, Special Master.

In this case filed under the National Vaccine Injury Compensation Program,[(1)] petitioner seeks an award for attorneys' fees and costs. After reviewing the file I find that this petition was brought in good faith and that there existed a reasonable basis for the claim. Therefore, an award of fees and costs is appropriate.

Respondent, however, has filed an opposition to the claim, raising two separate points, which I will discuss separately below.

I

ISSUE OF TIMELINESS OF APPLICATION

First, respondent points out that petitioner's counsel has filed the application in an untimely fashion, and argues that therefore I should deny any award. Respondent notes that under Vaccine Rule 13 (the "Vaccine Rules" are contained at Appendix J of the Rules of the United States Court of Federal Claims) an application for attorneys' fees "shall be filed no later than 21 days following the filing of an election pursuant to Vaccine Rule 12." In this case, the election under Vaccine Rule 12 was deemed to be made, pursuant to the final sentence of Vaccine Rule 12(a), on April 11, 1994. Therefore, under Vaccine Rule 13 the fees application was due to be filed by May 2, 1994, but was not in fact filed until three years later, on May 15, 1997.

I find respondent's position, however, to be unnecessarily harsh. The Vaccine Rules nowhere specify that a special master has no discretion to entertain a fees application if it is not filed within the period prescribed in the rule. And surely respondent must also be well aware that in actual practice since enactment of the current Vaccine Rules several years ago, it has in fact been common for counsel to file after the expiration of the period, and I am aware of no case in which a special master has denied an award for that reason alone.[(2)] I conclude that I have discretion to grant fee requests, when appropriate under all the circumstances, even when the fee application is not timely-filed.

As to the specific circumstances here, I note that the case on the merits was pursued in good faith by the counsel in question. And I also note that those counsel, Messrs. Klein and Skow, have, in my experience, provided diligent and effective service to many Program petitioners. Apparently in this case, through oversight, it was not discovered until recently that no fee application had ever been filed. But respondent has failed to point out how anyone was prejudiced or harmed by this unusual delay. There has been no suggestion that respondent was unable to effectively review the substance of the application because of the delay. Rather, in reality, the only prejudice really has been to the counsel in question themselves, who have in effect allowed funds rightfully due to them to remain in the Program coffers for three years.

Of course, respondent is correct in arguing that courts should not routinely overlook flagrant violation of court rules. In situations where the court or other parties can be prejudiced by failure to follow court rules, in some situations it is quite appropriate for courts to strictly enforce such rules in order to deter future violations. But with respect to the rule at issue here, there is obviously strong incentive for counsel to file their fees applications as soon as possible--*i.e.*, the basic desire to quickly obtain their fees. I see little to be gained by further punishing these particular counsel for their oversight in failing to timely file the fees application in this case.

Taking all the circumstances into account, I conclude that it is appropriate to grant an award of fees and costs in this case.

II

HOURLY RATE ISSUE

Next, respondent urges that if I do grant an award, I reduce the $200 hourly rate requested by Mr. Klein to no more than $175.

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, 429-440 (1983). 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.

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. Resolution here

Respondent's argument has merit. In my view, an award of $200 for Mr. Klein'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, slip op. at pp. 2-4 p. 8 n. 9, pp. 9-10 (Cl. Ct. Spec. Mstr. June 30, 1992); *Scheuer v. Secretary of HHS*, No. 90-1639V, slip op. at 2-3 (Cl. Ct. Spec. Mstr. May 21, 1992); *Baker v. Secretary of HHS*, No. 89-111V (Cl. Ct. Spec. Mstr. May 29, 1992); *Watson v. Secretary of HHS*, No. 91-1354V (Cl. Ct. Spec. Mstr. July 2, 1992); *Vickery v. Secretary of HHS*, No. 90-977V (Cl. Ct. Spec. Mstr. Sept. 24, 1992); *Moreno v. Secretary of HHS*, No. 90-1255 (Cl. Ct. Spec. Mstr. Sept. 11, 1992); *Petrozelle v. Secretary of HHS*, No. 90-2215 (Cl. Ct. Spec. Mstr. Sept. 16, 1992). 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 these 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*; *Miller v. Secretary of HHS*, No. 90-474V (Cl. Ct. Dec. 16, 1991); *Zeagler v. Secretary of HHS*, 19 Cl. Ct. 151 (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).

Taking into account 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. Klein in this case is $185 per hour.

III

CONCLUSION

Reducing Mr. Klein's hourly rate by $15 per hour, for 2.3 hours of work, reduces the overall claim by $34.50. Accordingly, my decision is that fees and costs are to be awarded in the total amount of $5,843.75 ($5,878.25 claimed - $34.50) pursuant to § 300aa-15(b) and (e)(1).

_____

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. In fact, I am aware that there have been many suggestions that the time deadline of Vaccine Rule 13 be expanded or eliminated, and I expect that such a change will occur during the next regular revision of the Rules of the Court of Federal Claims.