In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 99-694V
Filed: June 25, 2007
(Corrected Decision:
Originally Filed June 22, 2007)[1]

TO BE PUBLISHED

DANIEL MELBOURNE,	*	
	*	
Petitioner,	*	Attorney's Fees and Costs;
	*	Jurisdiction; Reasonable Number of
v.	*	Hours; Excessive Internal Communication;
	*	No Reasonable Basis for Continuing
SECRETARY OF THE DEPARTMENT	*	Claim
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

Clifford Shoemaker, *Shoemaker and Associates, Vienna, Virginia, for Petitioner.*
Robin Brodrick, *United States Department of Justice, Washington, D.C., for Respondent.*

ATTORNEYS' FEES AND COSTS DECISION[2]

GOLKIEWICZ, Chief Special Master

I. PROCEDURAL BACKGROUND

On August 6, 1999, petitioner Daniel Melbourne filed for compensation under the Vaccine Compensation Program[3] ("the Act" or "the Program") alleging that the Hepatitis B (Hep

[1] The decision filed June 22, 2007 contained an error in the total amount of attorneys' fees and costs awarded. This decision contains the correct amount to be awarded.

[2] The undersigned intends to post this decision on the United States Court of Federal Claims's 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" decision will be available to the public. Id.

[3] The National Vaccine Injury Compensation 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.A. §§ 300aa-10 et seq. (West 1991 & Supp. 2002) ("Vaccine Act" or the "Act"). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

B) vaccination he received in 1994 caused him to suffer an injury that he later specified as migratory arthritis. Petition (Pet.) at 1. Proceedings in this matter were suspended for 180 days pursuant to Vaccine Rule 9(a). See Order filed Apr. 27, 2000. Petitioner filed four status reports between May 16, 2000 and March 13, 2001 indicating that he was in the process of collecting medical records and working with potential experts. See Petitioner's Status Reports filed May 16, 2000, Aug. 21, 2000, Dec. 12, 2000, and Mar. 13, 2001. On July 19, 2002, petitioner filed a status report in response to the court's July 9, 2002 Order indicating that he would like this case temporarily stayed pending the outcome of the Hepatitis B proceeding. See Petitioner's Status Report filed July 19, 2002.

Petitioner filed the only set of medical records in this case on July 13, 2005. See Petitioner's Exhibits (P. Ex.) 1-5. On November 16, 2005 respondent filed his Rule 4(c) Report and Motion to Dismiss arguing that petitioner failed to provide sufficient evidence to establish receipt of his vaccine, and thus there is no jurisdictional basis for the claim, or in the alternative, that petitioner has failed to prosecute his case. Respondent's Rule 4(c) Report (R. Report) at 1. On January 13, 2006, petitioner filed his response arguing that the petition should not be dismissed for failure to establish jurisdiction because although no vaccination record has been filed, petitioner states that "[t]here are several locations in the medical records that have been filed that mention the Petitioner's Hepatitis B vaccinations." Response to Respondent's Motion to Dismiss (Response to R. Report) at 2. On June 16, 2006 petitioner filed a Notice of Voluntary Dismissal pursuant to Vaccine Rule 21(a). Petitioner than moved to withdraw his notice of voluntary dismissal and filed a Motion for Judgment on the Record. See Motion to Withdraw Notice of Voluntarily Dismissal and Motion for Judgment on the Record filed June 22, 2006. Thereafter, the undersigned issued a Decision on July 7, 2006 dismissing petitioner's claim for failure to establish a *prima facie* case for compensation. Decision filed July 7, 2006.

Petitioner filed his motion for attorneys' fees and costs in the amount of $10,324.21 on February 7, 2007. Petitioner's Application for Fees and Costs (P. App.). Respondent filed his Opposition on February 26, 2007. Respondent's Opposition to Petitioner's Application for Attorneys' Fees and Costs (R. Opp.) filed Feb. 26, 2007. Petitioner filed his response on March 2, 2007. Petitioner's Response to Respondent's Opposition to Petitioner's Application for Attorneys' Fees and Costs (P. Response) filed Mar. 2, 2007. Respondent filed his reply on March 22, 2007. Respondent's Sur-Reply to Petitioner's Application (R. Sur-Rep.) filed Mar. 22, 2007. On March 30, 2007, petitioner filed his reply. Petitioner's Reply to Respondent's Sur-Reply (P. Sur-Reply) filed Mar. 30, 2007. This attorneys' fees issue is now ripe for decision.

I. DISCUSSION

A. This Court Has Jurisdiction to Award Attorneys' Fees and Costs in the Instant Case

Petitioners' Position

Petitioner argues that he is entitled to reasonable attorneys' fees and costs if the special master determines that the petition was brought in good faith and there was a reasonable basis for filing the claim. P. Response at 1; see 42 U.S.C.A. § 300aa-15(e)(1)(B). Further, petitioner

argues that the undersigned found jurisdiction in order to issue a decision on entitlement and ruled that petitioner's case must be dismissed for failure to establish a *prima facie* case. P. Response at 1; see Decision filed July 7, 2006. Petitioner also states that he does not have to furnish proof of receipt of a covered vaccine in order to be awarded attorneys' fees and costs, and in any event, petitioner filed six exhibits of medical records which reference petitioner's receipt of a hepatitis B vaccination. P. Response at 2.

Respondent's Position

Respondent argues that the court lacks jurisdiction to award compensation for attorneys' fees and costs because petitioner failed to prove that he received a covered vaccination. R. Opp. at 1. In essence, respondent's argument is that receipt of a covered vaccination is a jurisdictional prerequisite under the Act. Id. at 6.[4] Thus, all attorneys' fees and costs should be denied. Id.

Respondent argues that a Vaccine Petition's documentation requirements, including proof of vaccination, are expressly referenced in §11(b) and "must be considered jurisdictional in nature." R. Opp. at 6. In Brice v. Sec'y of Health and Human Servs., 358 F.3d 865, 868 (Fed. Cir. 2004), the court held that the court must have jurisdiction over petitioner's claim under the Vaccine Act in order to award attorneys' fees. Thus, respondent argues because petitioner did not submit proof that he received a hepatitis B vaccine, the court did not have jurisdiction over his claim and thus, is not entitled to an award of attorneys' fees. R. Opp. at 6. Further, §15 which authorizes an award of attorney's fees specifically references §11 and thus, in respondent's view "indicates compliance with Section 11, including its documentation requirements" as a prerequisite to an award. Id. at 7. Therefore, respondent argues "if petitioner fails to meet the jurisdictional criteria of Section 300aa-11(c), the petition may not be brought under the Vaccine Act, and attorneys' fees and costs cannot be awarded." Id. Respondent states that "petitioner has relied solely on his own allegations" and has not submitted sufficient documentation substantiating proof that he received a hepatitis B vaccine. Respondent does note that the medical records that were filed contain references to petitioner's hepatitis B vaccination, but that "they all appear to be based on petitioner's own reports." Id. at 8.

Analysis of Jurisdictional Requirements for an Award of Attorneys' Fees and Costs

There are few established instances in which this court lacks jurisdiction over petitioner's claim and thus, lacks jurisdiction to award attorneys' fees and costs as respondent has noted.[5]

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[4] It should be noted that respondent did not challenge the undersigned's issuance of a decision dismissing this petition on the merits, and not on jurisdictional grounds. See Respondent's Response to Petitioner's Motion for Judgment on the Record, filed July 5, 2006.

[5] See, e.g., Brice and Martin. In Brice, the court dismissed the petition for lack of jurisdiction because the petition was time-barred. Thus, petitioner was barred from filing her claim because she filed outside the statute of limitations. In Martin, the court dismissed for lack of jurisdiction because (continued...)

Those instances are inapplicable here. In the instant case this court had jurisdiction over petitioner's claim to render a decision, and presently has jurisdiction to determine a reasonable award of fees and costs. While respondent is correct that petitioner must meet the jurisdictional criteria under §11(c) in order to bring a claim, "a court assessing jurisdiction must determine whether the facts alleged establish that there is jurisdiction." Martin v. Sec'y of Health & Human Servs., 62 F. 3d 1403, 1407 (Fed. Cir. 1995).

As was recently decided by my colleague, Congress did not suggest that jurisdiction is established only when petitioner proves he received a covered vaccine. The undersigned concurs. Instead, petitioner establishes the jurisdiction of the Court of Federal Claims over his petition by alleging that he received a covered vaccine. Rydzewski v. Sec'y of Health and Human Servs., 2007 WL 949759, No. 99-571 (Fed. Cl. Spec. Mstr. March 12, 2007) at *8. If this court were to follow respondent's approach to jurisdiction, that is the court only has jurisdiction over cases that meet the elements of §11(c) - which are the elements of a successful claim - this court would have jurisdiction only over successful claims. See Rydzewski at *4. Moreover, such an approach would force petitioners to prove their claim in order to establish the court's jurisdiction before their case is adjudicated on the merits. Congress cannot have intended such a high hurdle. In addition, such an interpretation would conflict with another section of the Act - §15(e). Section 15(e) expressly gives this court jurisdiction to award attorneys' fees and costs to unsuccessful petitioners under §15(e). Thus, contrary to respondent's position, the Act provides for fees to petitioners who fail to prove the elements of §11(c) - an unsuccessful petitioner. To provide fees the court had to have jurisdiction over the unsuccessful petitioner who failed to meet §11(c). Thus, it follows that proving the elements of §11(c) is not a prerequisite to jurisdiction.

In any event, the undersigned finds that petitioner did submit sufficient evidence of receiving a covered vaccine. While the records do not contain a specific vaccination record, the medical records referenced symptoms petitioner suffered allegedly due to the hepatitis B vaccine. For example, Petitioner's Exhibit 3 notes "symptoms began after hep B vaccine," and "Hep B - 12/93 vaccine - 1/94 boost - onset of symptoms;" P. Ex. 3 at 3; P. Ex. 3, page 5 mentions a reaction to hepatitis B vaccine; P Ex. 4, page 25 notes "insidious onset after Hep B vaccine 1994;" and P. Ex. 5, page 1 notes that petitioner noticed his pain started after his second Hepatitis B injection and the physician noted a reaction to Hepatitis B. On its face, this type of documentation is sufficient to pursue a claim, and in fact has been found in numerous past cases, sufficient to support a claim. However, ultimately petitioner could not offer sufficient proof that his hepatitis B vaccination did in fact cause his injury. Thus, his petition was dismissed for want of proof, i.e. that petitioner failed to make out a *prima facie* case. His petition was not dismissed for lack of jurisdiction.

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[5](...continued)
petitioner brought a civil action after November 15, 1988 and then filed a petition under the Vaccine Act – an action which is barred under 42 U.S.C. § 300aa-11(a)(6) (Supp. V 1993). Martin at 1404 n.1.

B. The Number of Hours Expended Are Unreasonable

Respondent's Position

Respondent's alternative argument, if petitioner has met the jurisdictional requirements, is that petitioner's award should be limited to the extent that petitioner demonstrated a reasonable basis for the fees and costs. R. Opp. at 9. Respondent argues that there is evidence in the record that as early as August 2003 petitioner did not want to continue pursuit of his claim, "yet counsel pursued the case until June of 2006." Id. Thus, respondent contends that all hours billed after August 2003 are unreasonable and should be denied. Id. Respondent notes that there are billing entries in August 2003 which indicate that counsel was communicating with his client regarding dismissal of the case. R. Opp. at 9; Fee App., Ex. 3 at 5. Respondent also notes that there are entries in 2005 which indicate that petitioner wanted to dismiss his claim. R. Opp. at 10. Further, respondent notes, that a letter from petitioner dated August 29, 2005 appears to indicate that "petitioner anticipated this was the end of his case." Id.; Fee. App. Ex. 2. However, respondent notes that petitioner did not file anything dispositive until June 16, 2006. R. Opp. at 10. Thus, it is respondent's contention that it is unreasonable for an attorney to continue to pursue a case once a client indicates that he no longer wishes to prosecute the case. Respondent argues that a fee-paying client would object to being billed for another thirty hours of time spent by his attorneys in prosecuting his claim after the client indicated he no longer wanted to pursue his case. R. Sur-Rep. at 5. Further, the thirty hours represents approximately seventy-five percent of the total hours billed. Id.

Respondent objects to several specific items billed by petitioner's attorneys. Respondent objects to reimbursement of attorneys' fees for counsel's erroneous filing of petitioner's voluntary dismissal. Respondent objects to petitioner's counsel's twelve hours of review of medical records amounting to less than one hundred pages. Respondent also objects to the nondescript entries such as "Review Activity in Case" and to counsel's billing regarding counsel's firm attempts to locate petitioner. R. Opp. at 11-12. Finally, respondent, in his reply to petitioner's contention that the extensive hours spent on discussions between counsel was necessary due to the "potential pitfalls" for concluding the case, argues that petitioner's counsel is one of the most experienced counsel in the Vaccine Program. R. Sur-Rep. at 5. Respondent notes that counsel billed over ten hours to these discussions. Id. Respondent contends that based upon counsel's experience such extensive discussions were not reasonable or necessary. Id.

Petitioner's Position

Petitioner argues that his "claim did not simply *vanish* upon his desire [to dismiss his petition]." P. Response at 4 (emphasis in original). Further, petitioner's counsel's ethical and professional obligations to his client did not end upon petitioner expressing a desire to dismiss his petition. Id. Petitioner argues that counsel had an obligation to continue to represent petitioner, including informing petitioner of the effects of dismissal, obtaining documentation from petitioner, and responding to court orders and respondent's pleadings. Id. With regard to the

hours spent on the filing of a Notice of Voluntary Dismissal to which respondent objects, petitioner contends that it was necessary for counsel to communicate with him regarding the impact of a voluntary dismissal versus a judgment on the record. Id. Petitioner argues that billing entries marked "dismissing the case" were related to efforts regarding how to properly conclude the case. Id. at 5. Further, determining the proper method for concluding a case is a reasonable legal function. Id. In fact, petitioner argues, it is because of Mr. Shoemaker's experience that only a small amount of time was spent on this activity. Id. Petitioner concedes that the Notice of Voluntary Dismissal was filed erroneously and does not object to the removal of 0.2 hours of time. Id. at 6.

In response to respondent's objection to the twelve hours spent reviewing medical records, petitioner contends that it is not unreasonable for an attorney to review a record more than once. P. Response. at 7. This is particularly true, petitioner argues, when petitioner's counsel must review the records to respond to a motion to dismiss or to an order requiring a detailed status report. Id. Further, upon respondent's assertions that there was no proof of vaccination, petitioner's counsel once again reviewed the medical records and had to review the records a further time in order to respond to respondent's opposition to attorneys' fees. Id. With regard to entries marked "Review Activity in Case" to which respondent objects, petitioner contends that in the "normal course of practice and case management, Mr. Shoemaker monitors the dockets and proceedings in all cases." Id. Petitioner argues that the amount of time billed is minimal and has been awarded in the past. Id. at 7-8. Finally, petitioner amends his application to remove the blank entry encompassing 0.3 hours of time as it was a clerical error. Petitioner also adds another 4.5 hours of time to respond to respondent's opposition. Id. at 8-9.

Relevant Case Law

Pursuant to 42 U.S.C.A. § 300aa-15(e), special masters may award "reasonable" attorney's fees as part of compensation. This is true even if petitioner was unsuccessful on the merits of the case. § 300aa-15(e)(1). To determine reasonable attorney's 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); Blum v. Stenson, 465 U.S. 886, 888 (1984); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The resulting lodestar figure is an initial estimate of reasonable attorney's 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 Health and Human Servs., No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004).

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." Hensely v. Eckerhart, 461 U.S. 424, 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 v. Sec'y of Health and Human Servs., 24 Cl. Ct. 482, 484 (1991) (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 court 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 v. Sec'y of Health and Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (citing Farrar v. Sec'y of Health and Human Servs., 1992 WL 336502. at * 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 Health and Human Servs., No. 90-530V, 1991 WL 165686, at * 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 (Cl. Ct. Spec. Mstr. Jan. 2, 1992), aff'd, 988 F.2d 131 (Fed. Cir. 1993) (hourly rates reduced, and requested fees of $151,575 reduced to $16,500; 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). "It is well within the special master's discretion to reduce the hours to a number that, in his experience and judgment, was reasonable for the work done." Saxton, 3 F.3d at 1521.[6]

Analysis of Hours Expended

Although the total number of hours spent and the total amount of attorneys' fees and costs is comparable to other similar cases filed in the Vaccine Program, the number of hours billed is unreasonable in light of the fact that there was little substantive work done on this case and very little was done to advance petitioner's claim. Moreover, petitioner is not entitled to attorneys' fees and costs once the reasonable basis for maintaining the claim ceased to exist. Perreira v. Sec'y of Health and Human Servs., 33 F.3d 1375 (Fed. Cir. 1994)(holding that "when the reasonable basis that may have been sufficient to bring the claim ceases to exist, it cannot be said that the claim is maintained in good faith.") Id. at 1377. Petitioner argues that although he expressed a desire to dismiss his claim, his counsel's ethical and professional responsibility to represent petitioner and to inform him of the consequences of his decision remained. P. Resp. at 4 and n.7. Petitioner is correct that counsel has an ethical obligation to ensure that his client is properly informed regarding his decision to dismiss and the relevant considerations and legal

[6]The Federal Circuit noted that "The Court of Federal Claims erred in prohibiting the special master from considering his past experiences with attorneys in the vaccine program -- this past experience is a relevant factor and should be taken into account." Saxton, 3 F.3d at 1521, citing Hensley, 461 U.S. at 430, n.3 (awards in similar cases and counsel's experience and ability are two of twelve factors relevant to a fee determination); Slimfold Mfg. Co. v. Kinkead Indus., Inc., 932 F.2d 1453, 1459 (Fed. Cir. 1991) (district court may rely on its prior experience and knowledge in determining reasonable hours and fees).

options. However, while an attorney has an ethical obligation to advocate for his client's cause, an attorney also has an obligation to the court to avoid frivolous litigation. Perreira, 33 F.3d 1375 at 1377. Thus, continuing to pursue this claim with no support in the contemporaneous medical records or without a medical opinion was unreasonable. See Perreira v. Sec'y Health and Human Servs., 27 Fed. Cl. 29 (Fed. Cl. 1992). The court, and the Department of Justice for that matter, has liberally construed the attorneys' fees provision in awarding fees and costs to counsel for their efforts in supporting a vaccine claim. However, there comes a point when those unsuccessful efforts foretell pointless continuous efforts. At that point, counsel's fees, other than to end the case, are no longer compensable as the case no longer has a reasonable basis. Perreira at 1377. That is the case here. When petitioner asked to dismiss the case, especially in light of the absence of supporting medical records or medical expert opinion, counsel had no basis for continuing the claim. At that point, only time spent ending the litigation is time reasonably spent.

When submitting a petition for attorneys' fees and costs, the attorneys must exercise good billing judgment. In other words, the amount of time actually expended is not necessarily the amount of time reasonably expended. See Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). Further, the Supreme Court held in Hensley v. Eckhart that "[i]n the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." Hensley v. Eckhart, 461 U.S. 424, 434 (1983) (quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc)) (emphasis in original). For example, the Court of Appeals for the Seventh Circuit noted that an attorney who spent much time updating her case list and calender with the status of her client's case and in holding conferences with her paralegal regarding the paralegal's communications with the court are **not** "the type of legal services an attorney would normally bill to a paying client because they contribute little if anything toward furthering [the client's] interest in this case." Spegon v. Catholic Bishop of Chi., 175 F.3d 544, 552 (7th Cir. 1999).

Similarly, in the case at bar, there are some entries by petitioner's attorneys that are of the type which an attorney would not normally bill a paying client because they do not further the client's interest in the case. For example, attorney Shoemaker billed .50 hours to review an excel chart, update information and *transfer information to laptop* on May 30, 2006. Transferring information to a laptop is administrative in nature, and it is highly doubtful that a paying client would pay his attorney for this task. Further, as respondent has noted, petitioner expressed his desire to dismiss his case as early as August 2003 and petitioner's counsel continued to pursue the case until June 2006. Thus, respondent argues that all hours billed after August 2003 are unreasonable and should be denied. R. Opp. at 9. While the undersigned does not agree completely that all hours billed after August 2003 are unreasonable, the undersigned notes that only those hours billed which furthered the client's interest in the case should be allowed. Respondent notes that petitioner's counsel billed over ten hours for billing entries for discussions among counsel at counsel's firm regarding dismissal of this case. R. Opp. at 5. This is approximately twenty-five percent of the total time the petitioner's counsel spent on this case. While some time spent discussing the client's options for dismissal and some time spent advising

the client on his options are reasonable, spending ten of the total forty-three hours is clearly unreasonable. That is especially the case where counsel is well-versed in the Vaccine Act and the Rules of Practice. Counsel in this case is such counsel. Moreover, petitioner sent a letter to counsel dated August 29, 2005. His letter indicates that he signed the form and made a claim for reimbursement of the filing fee. P. Fee App. Ex. 2. The billing entries indicate that petitioner sent a letter to counsel on August 22, 2005 requesting that his petition be withdrawn. P. Fee App. at 8. Why then does petitioner's counsel continue to set up status conferences, calender deadlines, attend status conferences, and confer with medical experts about petitioner's case when petitioner had already requested that his case be dismissed? For instance, on December 28, 2005, attorney Shoemaker billed .50 hours of time to meet with Dr. Bellanti to review petitioner's case as a potential expert. This entry and similar time spent will be disallowed.

There are other billing entries which appear to be an unreasonable duplication of efforts, appear to be an unreasonable amount of time spent or are otherwise unproductive. On January 12-13, 2006, attorney Shoemaker billed .90 hours of time to "Prepare pleadings" and "Finish pleadings and file." A review of the record indicates that the pleading that was filed is a one page, one line motion to file electronically. See Motion for Leave to Electronically, filed Jan. 13, 2006. This is a simple, boilerplate motion that should have taken, very generously, no longer than ten minutes to prepare. Therefore, the undersigned will reduce the number of hours billed from .90 hours to .20. It is noted that this entry also raises serious questions and concerns about the accuracy of petitioner's counsel's billing system. If counsel is billing almost one hour to prepare a one page, one line pleading, the undersigned is concerned about the accuracy of billing entries for more substantive pleadings in this case and in others before this court. Further, there appears to be several entries where petitioner's counsel of record, a seasoned vaccine attorney, and his associates held office conferences discussing petitioner's case or sent emails back and forth discussing petitioner's case. While it is reasonable for attorneys in a firm to confer regarding the firm's cases, it is unreasonable to have this amount of communication regarding a case that never progressed on any substantive issue, never went to hearing, and was ultimately dismissed for lack of evidence. Much of the time counsel spent conferring was discussing how to dismiss this case. The communication in this case showed no useful purpose in advancing this case -- the client asked that it be dismissed. Petitioner's counsel, a seasoned vaccine attorney, has dismissed scores of cases in the past. There was no showing that this case involved any unusual legal issues. Therefore, the dismissal should have involved the efforts of one attorney and not three attorneys.

There are several entries where petitioner's counsel discusses how to dismiss petitioner's case - that is by a motion for judgment on the record or by voluntary dismissal. On November 16, 2005, respondent filed his Rule 4(c) Report and Motion to Dismiss. According to Vaccine Rule 21(a), voluntary dismissal is appropriate in the following scenarios: 1) petitioner may file a voluntary dismissal before service of respondent's report or 2) after the service of respondent's report, by filing a stipulation signed by all parties who have appeared in the proceeding. On June 8, 2006, attorney Shoemaker billed .40 hours for communication with attorney Knicklebein regarding using voluntary dismissal in this case and getting the client's signature on the dismissal. Petitioner's counsel is a senior attorney and practices regularly before this court. He should be

familiar with the rules of the court and should have known that at this point the filing of a voluntary dismissal is appropriate only if all parties signed the stipulation, including respondent's counsel. However, on June 16, 2006, petitioner filed a notice of voluntary dismissal without respondent's counsel's signature. That same day the undersigned's staff attorney informed petitioner's counsel that this was improper and that respondent's counsel's signature was needed. Petitioner's counsel later withdrew the pleadings. While petitioner does not object to reducing the number of hours associated with attorney Knickelbein's filing of this erroneous motion by .20 hours, the undersigned will also reduce the hours spent by attorney Shoemaker to review this pleading and to explain to his associate the use of voluntary dismissal.

In sum, as early as August 2003, according to counsel's billing entries, petitioner considered dismissing this case. Petitioner filed a status report on March 17, 2005 indicating that the "last time Counsel for Petitioner spoke to the Petitioner he stated his frustration with the Program and that he might want to dismiss his claim." On August 27, 2005, counsel's billing entries show that petitioner wished to withdraw his petition. Petitioner has not rebutted either the August 2003 or the August 2005 dates regarding petitioner's desire to dismiss his case. Because counsel no longer had the client's permission to continue the case and counsel knew or should have known that the medical records did not support petitioner's case, the amount of time spent to end the case was unreasonable. The undersigned has reviewed the entire fee petition and will allow all time spent by counsel until the end of 2003. However, after 2003, the undersigned will allow only the time that was reasonably spent by counsel to properly end the case for the client. The breakdown of allowable fees is detailed in the following chart.

Name	Year	Hours	Rate	Total
Clifford Shoemaker	1999-2003	8.6	$250.00	$2150
	2005	1.5	$275.00	$412.50
	2006-2007	1.8	$300.00	$540.00
				Grand Total: $3102.50
Renee Gentry	2002	.33	$175.00	$57.75
	2006	2.0	$200.00	$400.00
	2007	8.0[7]	$215.00	$1720.00
				Grand Total: $2177.75
Sabrina Knickelbein	2003-2005	7.53	$155.00	$1167.15
	2006	1.2	$165.00	$198.00

[7] This includes the 4.5 hours counsel billed for responding to respondent's opposition.

				Grand Total: $1365.15
Bradley Horn	all	1.1	$195.00	$214.50
Ghada Anis	all	0.7	$160.00	$112.00
Legal Assistants	all	1.2	$55.00	$66.00
Total Attorneys' Fees for Firm				$7037.90

III. CONCLUSION

This case presents an egregious example of an attorney failing to exercise good billing judgment. Petitioner requested dismissal in August 2003. Yet counsel continued to bill a total of 28.95 hours after that date. While petitioner's counsel relies on his ethical obligation to represent his client's interest, even in the face of his client's request to dismiss, there is no indication in these billing entries of substantive work being performed on behalf of the client. Instead, the entries contain an assortment of unproductive efforts and communication between members of the same firm discussing what the client requested - dismissal of his case. After hours of apparently useless effort, that is what counsel did - dismiss the case. Without some explanation of how the time spent benefitted the client, it is unreasonable to bill the client, and thus the Program, for the numerous hours spent effectuating the client's request to dismiss his claim.

After a thorough review of petitioners' fee application and respondent's objections, petitioners are awarded **$7037.90 in attorneys' fees** and **$115.66 in attorneys' costs**. The award shall be made payable jointly to petitioners and their attorneys. Additionally, petitioners are awarded **$150.00 in petitioners' costs**. The award shall be made payable solely to petitioners.

Accordingly, pursuant to Vaccine Rule 13, petitioners are hereby awarded a **total of $7303.56 in attorneys' fees and costs.**[8] In the absence of a motion for review filed pursuant to RCFC, Appendix B, the Clerk is directed to enter judgment according to this decision.[9]

IT IS SO ORDERED.

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

[8]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. Sec'y of Health and Human Servs., 924 F.2d 1029 (Fed. Cir. 1991).

[9]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.