

OFFICE OF SPECIAL MASTERS

No. 98-417V

Filed: July 12, 2005

ROBIN RENEE PRESLEY, *

*

Petitioner, *

*

v. *

NOT TO BE PUBLISHED

*

SECRETARY OF THE DEPARTMENT *

OF HEALTH AND HUMAN SERVICES, *

*

Respondent. *

Peter H. Meyers, George Washington University Law School, Washington, D.C., for petitioner.

Julia W. McInerney, U.S. Department of Justice, Washington, D.C., for respondent.

ATTORNEYS' FEES AND COSTS DECISION¹

GOLKIEWICZ, Chief Special Master

On May 1, 1998, petitioner filed her petition for compensation, alleging that she suffered a variety of lupus-like symptoms and related problems as a result of the Hepatitis B vaccination administered on May 22, 1995. An expert hearing was held in this case on April 5, 2002, at which Dr. J. Barthelow Classen and Dr. Mark F. Gourley testified for petitioner. Dr. Paul E. Phillips testified for respondent. On October 30, 2003, the parties filed a Stipulation upon which the undersigned based his November 10, 2003 Decision, awarding petitioner compensation for her vaccine-related injuries.

On June 29, 2004, petitioner filed her "Application for Attorneys' Fees and Costs,"

¹ 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.

requesting among other fees and costs, \$27,241.67 (108.97 hours at \$250.00 per hour)² in fees for expert witness, Dr. Classen.³ See Application for Attorneys' Fees and Costs ("P. Fee App."), filed Jun. 29, 2004. On July 20, 2004, respondent filed a "Request for Information," regarding the 108.97 hours Dr. Classen billed in this case. See Request for Information ("Request for Info."), filed July 20, 2004. Before filing a response to petitioner's petition for fees and costs, respondent requested that petitioner provide a detailed statement of the hours Dr. Classen billed, as he did "not provide any details or other information regarding the work he purportedly performed during the 108.97 hours he billed in this case."⁴ Request for Info. at 1.

On August 6, 2004, in response to the Court's Order of July 22, 2004, directing Dr. Classen to submit a detailed statement of the hours he billed, petitioner filed a "Supplement to Application for Attorneys' Fees and Costs." See Supplement to Application for Attorneys' Fees and Costs ("Supp. App."), filed Aug. 6, 2004. This invoice separates Dr. Classen's owed payments into "hourly rate" and "[a]pproximate time break down," requesting an hourly rate of \$250.00 per hour for 108.97 hours. Supp. App. at 1. In terms of the "approximate time break down," Dr. Classen separated his requests into the following blocks of time: 1) 44.12 hours for "[i]nitial review of chart, literature, and draft report"; 2) 12.6 hours for "[r]eview of additional information literature, 1 year later"; 3) 4.27 hours for "[i]nitial review of Government's expert opinion"; 4) 36.52 hours for [p]repare for trial, consult and several meetings with lawyers; 5) 10.75 hours for "[t]ravel, day of trial preparation and trial"; and 6) 0.75 hours for "[p]ost trial issues." Id. Attached to this invoice, Dr. Classen provided a date and time listing of "[e]stimate of activities performed." See id. at 2-6.

On October 21, 2004, respondent filed an opposition to petitioner's fee application. See Respondent's Opposition to Petitioner's Application for Fees and Costs ("R. Opp."), filed Oct. 21, 2005. In this response respondent reported that during informal discussions between the parties, respondent represented his objections to petitioner, who acceded to all but one. See R. Opp. at 1. The sole remaining issue is the amount of fees submitted by petitioner's expert witness, Dr. Classen. See id. Respondent stated his objection to Dr. Classen's hourly rate of \$250.00 per hour and the 108.97 hours expended as "unreasonable and lacking support." Id. at 2, 6.

² This information was provided by petitioner. The actual total amount for 108.97 hours at a rate of \$250.00 per hour is \$27,242.50.

³ It should be noted that petitioner's other expert witness in this case, Dr. Gourley, billed for 12 hours at a rate of \$400.00 per hour for a total of \$4,800.00. Dr. Gourley was responsible for the same undertakings as Dr. Classen, to review petitioner's medical records, consult with counsel, and testify at the hearing. See P. Fee App. at 4.

⁴ Respondent also requested that a thirty-day response time to petitioner's fee application be allowed following petitioner's filing of the additional information from Dr. Classen. The court granted this request.

On December 13, 2004, petitioner filed a reply to respondent's opposition to her application for attorneys' fees and costs, in which petitioner's counsel and Dr. Classen argue that "both Dr. Classen's hourly rate and the number of hours he worked on this case are quite reasonable, given the complex issues involved in this case, and Dr. Classen's fee of \$27,241.67 should be paid in full." See Petitioner's Reply to Respondent's Opposition to Application for Attorneys' Fees and Costs ("P. Reply"), filed Dec. 13, 2004, at 1.

On December 20, 2004, January 19, 2005, January 24, 2005 and February 2, 2005, the court held telephonic status conferences with the parties concerning how best to resolve this matter. The undersigned suggested that a live proceeding be held so that Dr. Classen could provide further explanation in-person regarding his billing practices. Respondent agreed to such a proceeding; Dr. Classen, via petitioner's counsel, stated his opposition to participating in a live proceeding.

After reviewing the parties' submissions, the undersigned discovered various issues which required further clarification from Dr. Classen regarding his fee petition. Thus, in an order, dated March 8, 2005, the undersigned outlined his questions and requests for further explanation from Dr. Classen. See Order, filed Mar. 8, 2005. In addition, while acknowledging that Dr. Classen "eschewed in the past" addressing the court's concerns at a live proceeding, the undersigned suggested, once again, as an alternative to a written response, an in-person hearing with Dr. Classen to allow him the opportunity to explain more fully how and why so much time was spent on this case. Id. at 3.

On April 11, 2005 in response to the Court's Order of March 8, 2005, directing Dr. Classen to provide additional information about the fees he requested, petitioner filed Dr. Classen's response and supplemental fee request for work done post-hearing on the case. See Petitioner's Response to Court Order ("P. Resp. to Order"), filed Apr. 11, 2005. Respondent filed a reply to petitioner's response on May 2, 2005. See Respondent's Response to Petitioner's Response to Court Order ("R. Resp. to P. Resp."), filed May 2, 2005.

On May 5, 2005, the undersigned issued an order, offering petitioner one last opportunity for Dr. Classen to explain his billing and to answer questions regarding the same. See Order, filed May 5, 2005. Petitioner filed a reply to this order on May 20, 2005. See Petitioner's Reply to Court Order, filed May 20, 2005. Petitioner reported that counsel sent a copy of the court's May 5, 2005 Order to Dr. Classen, who "informed undersigned counsel that he is willing to respond in writing to any requests for information from the Court, but he declines the opportunity to participate in the in-person hearing." Id. Thus, after many unavailing attempts to informally resolve this dispute, and multiple unsuccessful entreaties to Dr. Classen to engage in a dialogue regarding this billing, this fees issue is now ripe for decision.⁵

⁵ On October 28, 2004, the parties telephoned the court to memorialize their agreement as to fees and costs, excluding Dr. Classen's still disputed costs. Accordingly, respondent agreed not to object to \$36,166.70 in counsel's fees and costs and \$2,151.47 in expenses incurred by

Relevant Law

Pursuant to 42 U.S.C.A. § 300a-15(e), special masters may award “reasonable” attorney’s fees as part of compensation. Fees for experts are subject to the same reasonableness standards as fees for attorneys. Crossett v. Secretary of HHS, No. 89-73V, 1990 WL 293878, at *4 (Cl. Ct. Spec. Mstr. Aug. 3, 1990). To determine if an expert’s fee is reasonable, the special master may consider the following factors: the witness’ area of expertise; the education and training required to provide the expert insight that is sought; the prevailing rates for other comparably respected available experts; the nature, quality and complexity of the information provided; the cost of living in the particular geographic area; and any other factor likely to assist the court in balancing the interests implicated by the Vaccine Act. Wilcox v. Secretary of HHS, No. 90-991, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). In addition, “petitioners must substantiate the hourly rates claimed by their experts and the number of hours spent in providing services.” Baker v. Secretary of HHS, No. 99-653V, slip op. at 5 (Fed. Cl. June 21, 2005) (quoting Wilcox, 1997 WL 101572, at *4).

In assessing the number of hours reasonably expended, the court must exclude those “hours that are excessive, redundant, or otherwise unnecessary.” Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Special masters may rely on their experience with the Vaccine Act and its attorneys to determine the reasonable number of hours expended. Wasson v. Secretary of HHS, 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. Secretary of HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (citing Farrar v. Secretary of HHS, No. 90-1167V, 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. Secretary of HHS, 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. See also Ceballos v. Secretary of HHS, No. 99-97V, 2004 WL 784910, at * 12 (Mar. 25, 2004) (requested fees and costs of \$821,500.00 reduced to \$219,616.95, which included reducing requested hours from 1,643 to 750). Moreover, it is reasonable for the special master to apply her experience and background in Vaccine Act cases to determine the appropriate allotment of billable hours where only “broad estimations, inadequate records, and limited documentation” are provided. Baker, No. 99-653V, slip op. at 8. See also Ceballos, 2004 WL 784910, at *14 (denying the petitioner’s request for medical expenses

petitioner herself. Thus, the only figure the undersigned must decide is the appropriate amount of compensation for Dr. Classen.

without any documentation to substantiate the request); Wilcox, 1997 WL 101572, at *4 (“Caselaw consistently shows that the failure to document the claimed costs results in denial of that claim.” (citations omitted)).

Discussion

Hourly Rate

The reasonableness of an attorney’s fees must be calculated according to the prevailing market rates in the relevant community. Farrar v. Secretary of HHS, No. 90-1167V, 1992 WL 336502, at *2 (Fed. Cl. Spec. Mstr. Nov. 2, 1992) (quoting Blum v. Stenson, 465 U.S. 886, 896 (1984)). Fees for experts are subject to the same reasonableness standards as fees for attorneys. Crossett v. Secretary of HHS, No. 89-73V, 1990 WL 293878, at *4 (Cl. Ct. Spec. Mstr. Aug. 3, 1990). Petitioners in Vaccine cases, “must substantiate the hourly rates claimed by their experts and the number of hours spent in providing services.” Wilcox v. Secretary of HHS, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). An expert’s fee should be measured against not only the expert’s professional qualifications and whether the level of expertise was necessary, but the reasonableness of the request must be measured within the context of this Program, including the Program’s purpose and its limited available funds to pay awards to injured victims. Knox v. Secretary of HHS, 1991 WL 33242, at *6 (Cl. Ct. Spec. Mstr. Feb. 22, 1991).

Respondent points out that petitioner has failed to submit any documentation to substantiate Dr. Classen’s claim of a \$250.00 hourly rate. R. Opp. at 4. Respondent argues that Dr. Classen’s level of education, training and experience are pertinent to whether the hourly rate he seeks is justified. Id. Specifically, respondent objects to Dr. Classen’s claim of experience and expertise in the fields of autoimmunity and epidemiology. Id. at 5.

In Petitioner’s Reply to Respondent’s Opposition to Application for Attorneys’ Fees and Costs, Dr. Classen opposes respondent’s claim that he has no formal training in immunology in justification of why he should receive \$250.00 per hour. P. Reply to R. Opp., Tab 2 at 1. Dr. Classen reports that he has formal training in immunology and was a post-doctoral fellow in the Laboratory of Immunology, National Institutes of Allergy and Infectious disease. Id. Dr. Classen explains that he is not a clinical Immunologist, who is generally trained to treat allergies. Id. He argues, however, that he was asked to offer his opinion based on his scientific background as opposed to his clinical background, since the issue before the court was not a clinical matter but a scientific one. Id. Dr. Classen also states that he has “13.5 years of industrial employment in the field of pharmaceutical safety with particular expertise in vaccine safety.” Id. at 2. Further, Dr. Classen reports that he “has demonstrated his expertise in the related subject matter of vaccine induced autoimmunity by obtaining multiple US patents in the field of testing immunization schedules to determine if they cause autoimmune diseases including diabetes.” Id. Dr. Classen states that he has authored multiple papers pertaining to the etiology of autoimmune diseases and the effects of vaccines on autoimmune diseases. Id. Dr. Classen also notes that he

splits his time equally between research projects and clinic work. Id.

In the court's order, dated March 8, 2005, the undersigned indicated agreement in large measure with the criticisms and methodology used to resolve Dr. Classen's expert fees in Baker v. Secretary of HHS, No. 99-653V, 2005 WL 589431 (Fed. Cl. Spec. Mstr. Feb. 24, 2005), aff'd, No. 99-653V, slip op. (Fed. Cl. June 21, 2005). Thus, Dr. Classen was asked to explain why, in light of the Baker decision, the court should award any more than \$175.00 per hour.⁶

In Baker, petitioner filed a Motion for Attorney's Fees, requesting a total of \$163,899.71. Baker, 2005 WL 589431, at * 1. Of this total request, petitioner's attorney claimed \$62,415 in fees and costs. Id. Dr. Classen, petitioner's expert, claimed \$101,484.58 in fees and costs for 404.42 hours of work at a rate of \$250.00 per hour. Id. Respondent filed an Opposition to Petitioner's Application for Attorney's Fees and Costs, objecting to Dr. Classen's fees and costs and arguing that a substantial reduction was warranted. Id. On February 24, 2005, Special Master Millman issued a decision in this matter, finding that "a reasonable amount of hours for Dr. Classen's work in this case is 79.3 hours at an hourly rate of \$200 or \$15,860.00." Id. at * 7.

Subsequently, petitioner filed a motion for review of the special master's decision, claiming that "factual errors from interpreting Dr. Classen's experience led to a decision that was 'arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law.'" Baker, No. 99-653V, slip op. at 1 (Fed. Cl. June 21, 2005). Judge Futey denied petitioner's motion for review and affirmed the special master's decision, holding that Special Master Millman "properly examined the evidence before her and in combination with her experience in the Vaccine Program, acted within her discretion to reduce the hourly rate to one the market would sustain." Id. at 6. Moreover, Judge Futey affirmed Special Master Millman's reduction of Dr. Classen's compensable hours, in which she declined to compensate Dr. Classen for time he had previously spent on generalized research on vaccines and where he did not present contemporaneously-kept time records that documented his work with specificity. See id. at 7-9.

In response to the court's March 8, 2005 order requesting that Dr. Classen justify his hourly rate, Dr. Classen referred the undersigned to "[a] reply to the Baker vs. Secretary of HHS [] submitted to the court by Mr. Katarincic" which "addresses this issue." P. Resp. to Order, Tab 1 at 1. The undersigned can only assume that Dr. Classen is referring to Petitioner's Memorandum of Objections to Special Master Millman's February 24, 2005 Decision. As summarized in Judge Futey's Baker opinion, petitioner's memorandum argues that Dr. Classen should be paid an hourly rate of \$250.00, because evidence as to Dr. Classen's qualifications demonstrated such a rate in another case. Baker, No. 99-653V, slip op. at 5. Further, petitioner

⁶ In fact, Special Master Millman awarded Dr. Classen a rate of \$200.00 per hour. See Baker, No. 99-653V, 2005 WL 589431 (Fed. Cl. Spec. Mstr. Feb. 24, 2005). Petitioner contested this rate, and appealed the decision, asking for the same \$250.00 hour per hour rate that is requested in this case. The \$200.00 per hour rate was affirmed on appeal. See Baker, No. 99-653V, slip op. at 6 (Fed. Cl. June 21, 2005).

contends that “the special master ‘misstates and miscomprehends the training and professional experience of Dr. Classen.’” Id. at 6. Petitioner points to Dr. Classen’s three year fellowship at the Laboratory of Immunology, National Institutes of Allergy and Infectious disease and claims that a fellowship is analogous to a residency program for scientists. Id. Finally, petitioner distinguishes between Dr. Classen’s clinical experience, which would be applied in making medical diagnosis, and his scientific experience, which would apply in determining whether the vaccine caused petitioner’s injury. Id.

Citing supportive case law, Judge Futey found that the “mere production of evidence to attempt to claim a higher hourly rate, [d]oes not ensure that the requested rate will be awarded,” and the special master is not bound by a previously awarded hourly rate. Baker, No. 99-653V, slip op. at 5 (citations omitted). Further, Judge Futey did not find fault with the special master’s determination that Dr. Classen lacks formal training. Id. at 6. He noted that, “while a fellowship is commendable, it does not require the special master to award a higher hourly wage.” Id. Finally, as to petitioner’s argument distinguishing Dr. Classen’s clinical experience from this scientific experience, Judge Futey found that it is reasonable to examine the clinical experience. Id. “When ascertaining the qualifications of a **self-anointed** expert, both clinical experience and scientific experience should be considered.” Id. at 6 (emphasis added); See, e.g., Thelen v. Secretary of HHS, No. 90-22V, 1991 WL 38084, at *3 n.6 (Fed. Cl. Spec. Mstr. Mar. 6, 1991) (discrediting the doctor due to his lack of clinical experience).

It is petitioner’s burden to provide evidence of the market rate for an expert similar to Dr. Classen from his geographic area. Petitioner has not provided any evidence of this. Dr. Classen is not board-certified in any field. As Special Master Millman found in Baker, there is “no [known] market rate for an emergency care physician who holds himself out as an expert epidemiologist/immunologist even though he has not been formally trained in those fields, is not board-certified in anything, and has never been employed professionally as an epidemiologist/immunologist.” Baker, 2005 WL 589431 at *5. Concluding that, in the absence of petitioner providing proof of a market rate, it is within the special master’s discretion to rely on her reasoning and experience in the Vaccine Program to determine a market rate, Special Master Millman determined \$200.00 per hour to be the fair market rate for Dr. Classen. Id. (citing Wasson, Platt, and Saxton).

The undersigned agrees with the reasoning espoused by Special Master Millman and affirmed by Judge Futey, and based on the undersigned’s personal experience in the Vaccine Program, finds that Dr. Classen should receive a rate of \$200.00 per hour. Quite frankly, the undersigned sees this as a very generous award given Dr. Classen’s credentials, experience and the fact that experts of much higher quality have asked for and received the same hourly rate. The undersigned also notes that Dr. Classen’s self-professed expertise conflicts with his request for an extremely large number of hours expended. If in fact Dr. Classen does possess such a high level of expertise, it follows that he should require fewer hours to perform his review. See, e.g., Plott v. Secretary of HHS, No. 92-0633V, 1997 WL 842543, at *2 (Fed. Cl. Spec. Mstr. Apr. 23, 1997) (“Higher hourly rates are only granted because some attorneys’ experience serves to

minimize the number of hours expended in Vaccine Act cases.”) (citations omitted).

Number of Hours

In assessing the number of hours reasonably expended, the court must exclude those “hours that are excessive, redundant, or otherwise unnecessary.” Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). 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). “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.

Dr. Classen requests reimbursement for the 108.97 hours he billed in this case.⁷ Respondent objects to Dr. Classen’s bill, “which apparently was based entirely upon ‘estimates,’ is inordinately vague, confusing, and patently unreasonable.” R. Opp. at 7. Moreover, respondent objects to Dr. Classen’s supplemental fee application, which consists of a cover sheet organized into blocks of time for multiple tasks and a “purported ‘billing ledger,’ similarly organized by ‘blocks’ of multiple tasks.” Id. Respondent finds both formats internally inconsistent and preclusive of “a line by line examination and comparison between a given task and actual time spent.” Id.

In addition, respondent objects to Dr. Classen’s assigning a global number of hours for blocks of tasks. R. Opp. at 7. Specifically, respondent objects to the 36.5 hours Dr. Classen billed for trial preparation and meeting with lawyers, and notes that the claim fails to corroborate with petitioner’s counsel’s billing records. Id. at 8. Respondent also objects to the 44.12 hours for initial review of chart and literature, as well as the 12.6 hours of review of additional literature one year later, without any explanation or justification. Id. at 7. Respondent notes that Exhibits 7-9, attached to Dr. Classen’s July 4, 2001 report, “appear to be unpublished papers authored by Dr. Classen, espousing his personal views on causation between ‘vaccines’ and Insulin Dependent Diabetes Mellitus (IDDM).” Id. at n.10. Respondent objects to any compensation related to Dr. Classen’s work related to IDDM and vaccines as irrelevant to the issues presented in petitioner’s case. Respondent also objects to and questions the relevancy of all of the literature submitted by Dr. Classen, given his failure to delineate the time and nature of his literature searches. Id.

Further, respondent objects to the vagaries of Dr. Classen’s billing practice, as evidenced by his inconsistent and confusing ledger, which provides an “estimate of activities performed.” Id. at 8-9. Moreover, respondent objects to Dr. Classen’s total number of hours, “nearly 110, as unreasonable, and lacking any justification.” Id. at 9.

⁷This does not include the additional 10.1 hours that Dr. Classen requested in his supplemental invoice of April 4, 2005.

In Petitioner's Reply to Respondent's Opposition to Application for Attorney's Fees and Costs, Dr. Classen states that "[i]t is important to review the DOJ's bill for the case to determine the hours spent by the DOJ's expert and the DOJ's lawyer." P. Reply to R. Opp. at 3. Dr. Classen refers to "the Baker case," and provides information from the Baker case regarding the fees of respondent's experts in that case. Id. Dr. Classen relates these fees to the instant case, arguing that the total expert fees in Presley are "about half" the fees respondent paid its experts in Baker. Id. at 4. Dr. Classen argues that his fees are in line with the fees DOJ paid to its experts in Baker. Id. Dr. Classen contends that the billing information he provided is "much more detail[ed] than that provided by the DOJ's experts in the Baker Case." Id.

Looking at the requested time, Dr. Classen's documentation and justification letter are patently inadequate. Dr. Classen appears to believe that references to the Baker case and respondent's experts are adequate justification. In reality, they are irrelevant. What is required is a reasonable explanation and substantiation of the time spent in Presley. As such, in the court's order of March 8, 2005, the undersigned questioned Dr. Classen's "estimate of activities performed." Specifically, if this list is as entitled, an "estimate," where are the actual time records or, if such records do not exist, how was this list constructed? Moreover, the undersigned noted three additional issues with Dr. Classen's records: 1) charging time on an unknown date; 2) "approximating time break down"; and 3) billing in one minute increments, stopping and starting again frequently and in very short amounts of time.⁸

In his April 4, 2005 response, Dr. Classen explains that he kept a log of hours, but "[y]ou did not instructed [sic] me to provide a line item description each time I made an entry into my time log." P. Resp. to Order, Tab 1 at 1. Accordingly, Dr. Classen reports that several years after the work was completed, at the request of the undersigned, he divided his time into the activities provided in his invoice. Id. Thus, he entitled the activities performed "estimates" because the division was made retrospectively. Id. As to the missing dates, Dr. Classen indicated that he "manually recorded" the dates on which he worked on the project. However, due to human error, he cannot guarantee that the date was always correct. Id. Dr. Classen justifies billing in one minute intervals as more accurate and based on the fact that he used a digital clock to place the readings in his logs. Id. Dr. Classen did not provide the original logs.

In the March 8, 2005 order, the undersigned pointed out that Dr. Classen claims he "has demonstrated his expertise in the related subject matter of vaccine induced autoimmunity by obtaining multiple US patents in the field of testing immunization schedules to determine if they cause autoimmune diseases including diabetes." P. Reply to R. Opp., Tab 2 at 2. In addition, in Dr. Classen's letter, found at Tab 2 in "Petitioner's Reply to Respondent's Opposition to

⁸ It should be noted that it is not the time period at issue, but the stopping and starting of Dr. Classen's efforts. Thus, for example, on 7/7/00, Dr. Classen bills from 9:12 to 9:30, stops for 4 minutes, bills until 9:49, picks up again at 11:27 to 11:56, 2:35 to 2:52, 3:01 to 3:17, and continues in this manner until 6:21. Such a sporadic work pattern is inherently inefficient and can only result in greater time needed to complete a task.

Application for Attorneys' Fees and Costs," Dr. Classen argues that he "was asked to share an opinion based on his scientific as opposed to his clinical background" as the "issue before the court is not a clinical matter, i.e., was the correct diagnosis and treatment made. Instead the issue regards a scientific question...." Petitioner's Reply to Respondent's Opposition to Application for Attorneys' Fees and Costs ("P. Reply to R. Opp.") at Tab 2, p. 1. Accordingly, the undersigned asked why, given Dr. Classen's self-professed expertise in vaccine induced autoimmunity and his lack of expertise in clinical practice, he spent an estimated 44 hours to complete "initial review of chart, literature, and draft report"? Supp. App. at 1. Following the same reasoning, the undersigned asked Dr. Classen to provide an explanation of what additional literature was reviewed that justifies 12 additional hours of review. Finally, the undersigned requested that Dr. Classen explain and justify his expenditure of 36 hours preparing for trial.

The undersigned concluded the March 8, 2005 order, by explaining that of the blocks of time into which Dr. Classen categorizes his activities, there are two extensive blocks that, on their face, are unreasonable given both Dr. Classen's professed expertise and the five page report submitted in this case. The first unreasonable block of charged time is the 56 hours Dr. Classen spent preparing for his initial report.⁹ The undersigned questioned why, given Dr. Classen's expertise in vaccine-induced autoimmunity, was such substantial time needed to prepare his five page report? Moreover, the undersigned noted that Dr. Classen is not a clinician, thus minimal time should have been spent on reviewing Ms. Presley's file.¹⁰ Accordingly, in the absence of contemporaneous time records and a cogent explanation, the undersigned stated that he would allow 15 hours for the preparation this report.

The second apparently unreasonable block of charged time is the 36.52 hours spent preparing for trial. Again, in the absence of contemporaneous time records and a cogent explanation, the undersigned stated that he would allow 10 hours for trial preparation.

Finally, the undersigned stated that, although suffering the same documentary infirmities, the three remaining blocks of time appear reasonable and will be allowed. Thus, 4.27 hours to review the respondent's expert report, 10.75 hours for the hearing and 0.75 hours post-trial will be allowed.

Dr. Classen responded to the March 8, 2005 order, arguing that it is incorrect to state that his initial report was only five pages. P. Resp. to Order, Tab 1 at 2. He explained that the original report was much greater in length because of the many exhibits. *Id.* However, instead of including the text of the exhibits directly in the text of the report, Dr. Classen included it as

⁹ This block combines the 44.12 hours Dr. Classen spent on the "[i]nitial review of chart, literature, and draft report" with the 12.6 hours of "[r]eview of additional information literature, 1 year later."

¹⁰ In his response, Dr. Classen noted, "I am a clinician, though I have no clinical expertise other than urgent care. As a primary care clinician I am trained to read charts."

separate exhibits. Dr. Classen admitted that while the exhibits contain abstracts that he did write, he spent a lot of “discovery time” preparing the exhibits. Id. Further, because there was no “smoking gun,” Dr. Classen reported that he was “forced to support [his] opinion by a logical deduction which required an extensive review of the literature.” Id. He claims that this review took a lot of time. “While I have extensive experience in vaccine induced autoimmunity, my experiences were with vaccine induced diabetes. I needed to review the literature on the effect of vaccines and or immune stimulation on autoimmune diseases similar to what the patient had, which was lupus.” Id. Dr. Classen explained that he believes he proved that vaccines can cause a related autoimmune disease, diabetes. Id. Thus, he wanted to demonstrate that vaccines can also cause an autoimmune disorder similar to that which the patient suffered. Id. This required that Dr. Classen expend extensive time for the writing and discovery involved in drafting his primer, “Scientific Evidence Proving Vaccines Cause Autoimmunity Other Than Insulin Dependent Diabetes.” Id.

Turning to the specific categories of hours, Dr. Classen’s explanations do not justify the 56 hours he claims for work on a five-page report and accompanying abstracts. Dr. Classen contends that 44 hours of this time was spent on “initial review of chart, literature, and draft report” were divided as follows: “3.4 hours: Review of Chart; 12.28 hours: Discovery, preparing of exhibits (1,3,3A,4); 9.83 hours: Writing initial 5 page opinion; 18.58 hours: Discovery/Writing ‘Scientific evidence’ primer, 13 page text and 69 references!” P. Resp. to Order, Tab 1 at 2-3. Dr. Classen’s breakdown of hours, given without reference to specific dates, appears to be composed arbitrarily. In addition, Dr. Classen bills a great amount of time as “discovery” and “research.” “[W]hile attorneys have an obligation to know the law, they also have an obligation not to bill for excessive amounts of research.” Plott, 1997 WL 842542, at *4. The same reasoning applies to Dr. Classen’s services. Moreover, the 18.58 hours Dr. Classen claims for work on his six-page, unpublished primer, “Scientific Evidence Proving Vaccines Cause Autoimmunity Other Than Insulin Dependent Diabetes ” will not be allowed.¹¹ The undersigned considers the time expended on this primer was spent in furtherance of Dr. Classen’s professional interests rather than as necessary for his testimony at trial. Moreover, Exhibits 8 and 9, filed with Dr. Classen’s report are both unpublished papers, authored by Dr. Classen, which discuss his views on causation between vaccines and Insulin Dependent Diabetes Mellitus. See Exs. 8, 9. Both papers were also filed in Baker and are irrelevant to the issues presented in this case.

In addition, Dr. Classen avers that 12.6 hours of the 56 hours spent in preparation of his report was “review of additional information literature, 1 year later,” and was spent updating his opinion between the dates of 7/4/01 and 7/9/01. P. Resp. to Order, Tab 1 at 3. Accordingly to Dr. Classen, this updated opinion contained additional exhibits, and he spent most of the 12

¹¹ In Dr. Classen’s time breakdown of the 44.12 hours spent on the “Initial review of chart, literature, and draft report,” he writes: “18.58 hours: Discover/Writing ‘Scientific evidence’ primer, 13 page text and 69 references!” P. Resp. to Order, Tab 1 at 3. In fact, the primer contains 6 pages of text and a 6 page list of 69 references.

hours looking for references to support his updated opinion. Id. As explained above, 12 hours of literature review is excessive, particularly when it was spent merely updating his opinion. The undersigned will not allow these 12 hours.

As previously noted, Dr. Classen was offered on multiple occasions the opportunity to explain fully in-person how and why so much time was spent on various tasks. He steadfastly declined. Dr. Classen's written responses fail to explain adequately or justify, what must be described as, his exorbitant number of hours. By contrast the two other experts in this case, Dr. Gourley and Dr. Phillips, billed only a **total** of 12 hours for the same activities.¹² Dr. Classen professes his expertise in vaccines and autoimmunity, however, the excessive number of hours he claims do not reflect such expertise. The undersigned will allow a total of 15 hours for the 56 hours Dr. Classen claims for preparing his expert report.

In further response to the March 8, 2005 order, Dr. Classen claims that the 36.52 hours he billed for trial preparation included preparing for two pretrial meetings and meeting with petitioner's counsel twice. P. Resp. to Order, Tab 1 at 3. Additionally, Dr. Classen contends that one of the student attorneys called him several times and "asked me to perform many tasks for her regarding scientific issues questions she had" and "wanted to prepare me for questioning in court." Id. Dr. Classen went on to provide a breakdown of the 36 hours he billed in trial preparation by date and number of hours. Id. First, Dr. Classen writes that on 2/19/02, he was replying to "attorney's request for information" for 4.4 hours. Id. It appears from the time records of Barbara Viniegra, the student attorney, that on 2/19/02, Ms. Viniegra charged 0.4 hours for "[c]all to Dr. Classen; reading over abstracts." P. Fee App., Ex. 3 at 2. Thus, the undersigned will allow the same 0.4 hours for Dr. Classen.

On 3/20/02, Dr. Classen indicates that he prepared for a meeting with the attorneys the next day for 4.1 hours. P. Resp. to Order, Tab 1 at 3. Dr. Classen provides no explanation for why he spent 4.1 hours preparing for a meeting with the attorneys. It is patently unreasonable to spend four hours preparing for a 2.9 hour meeting. Giving Dr. Classen the benefit of the doubt, the undersigned will award 1 hour for pre-meeting preparation. On 3/21/02, Dr. Classen bills for "[f]irst meeting with attorneys, and prepare for meeting" for 4 hours. Id. Peter Meyers, with whom Dr. Classen met on 3/21/02, billed 2.9 hours for his meeting with Dr. Classen. See P. App., Ex. 2 at 2. Accordingly, the undersigned will allow 2.9 hours of the 4 hours claimed by Dr. Classen.

On 3/27/02, Dr. Classen bills 4.4 hours for "[p]ost meeting tasks and begin new opinion letter." P. Resp. to Order, Tab 1 at 3. From 4/1/02 to 4/2/02, Dr. Classen bills 8.3 hours in preparing "a new opinion letter." Id. There is no record of this new opinion letter being filed. Moreover, billing for "post meeting tasks" is vague. Thus, the undersigned will not allow any of

¹² Specifically, respondent represents that his expert witness, Dr. Phillips, "spent a comparable amount of hours in this case as that of Dr. Gourley." R. Opp. at 6 n.8. Dr. Gourley sought compensation for twelve hours of work. Id. at 5 n.6.

the combined 12.7 hours.

On 4/2/05, Dr. Classen bills 3 hours for “meet with the attorneys second time.” P. Resp. to Order, Tab 1 at 3. There is no indication in any of the attorneys’ time records that such meeting took place. Thus, the undersigned will not allow these hours.

Finally, between 4/3/02 and 4/4/02, Dr. Classen bills 7.5 hours for “[r]eview all exhibits, opinion letters including those of the experts for respondents and be prepared to testify in court and be cross examined.” P. Resp. to Order, Tab 1 at 3. The undersigned finds this a reasonable amount of time to expend in preparing to testify at hearing. Thus, of the total 36.52 hours Dr. Classen requests in trial preparation, 11.8 hours will be allowed.

In addition, Dr. Classen submitted a supplemental invoice, dated April 4, 2005, for charges incurred “responding to the most recent court order and previous responses to my bill.” P. Reply to Order at Tab 2. Dr. Classen charges \$250.00 per hour for 10.1 hours, totaling \$2,525.00. Id. The invoice gives a “time break down” as follows: “[p]repare of new Bill (11/17/04 - 12/13/04): 4.2 hours” and “[r]espond to Special Master’s Order (4/2/05-4/4/05): 5.9 hours.” Id. Dr. Classen did not submit a time sheet to accompany this invoice. Further, it is unclear as to what “new bill” Dr. Classen is referring. Id. The undersigned will not allow reimbursement for the hours Dr. Classen spent remedying his incorrect billing practices. If he had correctly and contemporaneously recorded his time, there would be no need for his extra efforts. The court should not pay Dr. Classen for time spent correcting his error.

The 119.17 hours billed by Dr. Classen is grossly disproportionate to the 12 hours billed by each of the other experts appearing in the case. Comparing the experts’ bills demonstrates the excessiveness of Dr. Classen’s request. It is within the undersigned’s discretion to rely on his experience and determine the reasonable number of hours expended. Wasson, 24 Cl. Ct. at 486. This includes excluding “hours that are excessive, redundant, or other wise unnecessary.” Hensley, 461 U.S. at 434. The court repeatedly offered Dr. Classen the opportunity to explain in-person the reasoning behind his billing. However, Dr. Classen declined and the undersigned was forced to make a decision based on Dr. Classen’s written explanations discussed above. Thus, based on an evaluation of the record, Dr. Classen is awarded a total of 42.57 hours for his work in this case at an hourly rate of \$200.00, for a total of \$ 8,514.00.

It is appropriate to comment at this point on the experts’ hourly rates and hours, as well as counsel’s responsibility to monitor those fees. Without a doubt, experts’ fees in Vaccine cases are increasing. Much of the increase is quite understandable, as the issues of causation have become more complex, cases require more research, more detailed reports and longer trials. Similarly, the undersigned commented years ago regarding increases seen in the cost of life care plans for calculating damages that: “the amount of process involved in resolving the damages in a Vaccine case has increased dramatically ... which in turn has increased the fees and costs claimed by life care planners.” Martson v. Secretary of HHS, No. 91-0355, 1998 WL 719493, at * 6 (Fed. Cl. Spec. Mstr. Sept. 29, 1998) (quoting Wilcox v. Secretary of HHS, No. 90-991V,

1997 WL 101572, at * 3 (Fed. Cl. Spec. Mstr. Feb. 14 1997)). However, these programmatic justifications do not relieve counsel of the responsibility of monitoring their expert's expenses. Perriera v. Secretary of HHS, No. 90-847V, 1992 WL 164436, at * 4 (Cl. Ct. Spec. Mstr. June 12, 1992), aff'd, 27 Fed. Cl. 29 (Fed. Cl. Oct. 30, 1992), aff'd, 33 F.3d 1375 (Fed. Cir. Aug. 31, 1994). The expert is not given a blank check for his services and the special masters will not sanction inflated hourly rates and limitless hours spent investigating potential medical or scientific theories of causation. See Wilcox v. Secretary of HHS, No. 90-991V, 1997 WL 101572, at * 3 (Fed. Cl. Spec. Mstr. Feb. 14 1997).

It should be noted that a physician providing expert testimony:

Should 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. A review of Drs. Gourley and Phillips supports the above view, each having spent a total of twelve hours on such activities. In contrast, Dr. Classen inexplicably billed nine times that amount. The ineluctable conclusion is that Dr. Classen either improperly billed for hours spent on attaining basic information, or Dr. Classen did not have the expertise to testify. Dr. Classen was criticized similarly in Baker, and the undersigned concurs.

Accordingly, petitioner is awarded a total of **\$46,832.17** in fees and costs. The award shall be made payable jointly to petitioner and her attorney. The Clerk shall enter judgment accordingly.¹³

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master

¹³ 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 HHS, 924 F.2d 1029 (Fed. Cir. 1991).

