OFFICE OF SPECIAL MASTERS

No. 96-194V

(Filed: June 11, 1999)

CANDACE CHILDERS, a minor, by MELISSA OVERHEU, her mother and guardian,	*	
Petitioner,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

J. Bradley Horn, Vienna, Virginia, for petitioner.

Mark Rogers, Department of Justice, Washington, D.C., for respondent.

RULING CONCERNING ASPECTS OF ATTORNEYS' FEES REQUEST

HASTINGS, ***Special Master***.

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), petitioner seeks, pursuant to § 300aa-15(e)[1], an award for attorneys' fees and costs incurred in attempting to obtain Program compensation in this case. Respondent has filed an opposition challenging the amount of the request in several respects. I will discuss several of these challenges below. A final "Decision," addressing other points raised by respondent, will follow by separate document.

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[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.).

I

ATTORNEY HOURLY RATE ISSUES

Respondent first challenges the hourly rates claimed for the work of attorneys J. Bradley Horn, Clifford Shoemaker, Mario Bezzini, and Jean Galloway.

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, 429-40 (1983).[2] 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.[3]

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 trial judge 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. J. Bradley Horn

In this case, petitioners request $150 per hour for the services of attorney J. Bradley Horn. The respondent argues that I should compensate Mr. Horn at a rate not greater than $135 per hour.[4] The background of Mr. Horn is well-described in the record of this case. He graduated from law

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[2]The Supreme Court has declared that "[t]he standards set forth in [*the Hensley*] opinion are generally applicable in all cases in which Congress has authorized an award of fees." *Hensley*, 461 U.S. at 433 n.7. In *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989), that Court reaffirmed its view that such approach is "the centerpiece of attorney's fee awards."

[3]Once a total, sometimes called the "lodestar," is reached by multiplying the reasonable hourly rate by the number of hours expended, it may then be appropriate in a few cases to adjust the lodestar upward or downward based on the application of special factors in the case. *Hensley*, 461 U.S. at 434; *see also Martin v. United States*, 12 Cl. Ct. 223, 227 (1987), *remanded in part on other issue*, 852 F.2d 1292 (Fed. Cir. 1988). However, the recent teaching of the courts has been that such adjustments are to be made only in the very exceptional case, on the basis of a specific and strong showing by the fee applicant. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 898-902 (1984); *Hensley*, 461 U.S. at 434 n.9; *Copeland v. Marshall*, 641 F.2d 880, 890-94 (D.C. Cir. 1980) (*en banc*). Here, petitioner has not requested any such adjustment of the "lodestar" figures.

[4]The last line of part B at p. 2 of respondent's opposition contains a typographical error. Respondent contacted my office by phone on May 28, 1999, to report that respondent in fact urges an hourly rate of $135 per hour, not $150.

school in 1994, served as a clerk to a special master of this court for two years, and has been in private practice, engaged chiefly in Program work, for the past three years.

In *Robertson v. Secretary of HHS*, No. 95-187V, 1997 WL 338601 (Fed. Cl. Spec. Mstr. June 4, 1997), Special Master Abell of this court found that Mr. Horn had performed admirably in Program proceedings, and awarded $135 per hour for his services. I awarded Mr. Horn the same rate in *Farnsworth v. Secretary of HHS*, No. 90-2049V, 1997 WL 739489 (Fed. Cl. Spec. Mstr. Nov. 13, 1997). As I stated in *Farnsworth*, my impression of Mr. Horn has been that he appears to be an exceedingly well-organized, energetic, and competent attorney, whose years of full-time work on the Program have clearly made him highly knowledgeable about the Program. His work is thorough and thoughtful, and he obviously spares no effort in zealously advancing his client's interests. Also, he works in the high-cost area around Washington, D.C.

Therefore, although I acknowledge that $150 is a relatively high hourly rate for an attorney so recently out of law school, I find that $150 per hour is a reasonable rate for Mr. Horn's services in this case. I do not believe that this result is inconsistent with *Farnsworth* and *Robertson*. When he provided most of his services in this case, Mr. Horn had considerably more actual experience as a petitioner's attorney than he did when he performed his services in those two cases. Moreover, his performance in this case, especially in light of the outstanding result that he achieved for his client, simply demonstrates to me that Mr. Horn is worthy of the requested rate.

C. Clifford Shoemaker

Petitioner requests $225 per hour for the services of Clifford Shoemaker, but respondent argues that I should award no more than $175.

Respondent's basic argument has merit. In my view, an award of $225 for Mr. Shoemaker'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, 1992 WL 167257, at *6 (Cl. Ct. Spec. Mstr. June 30, 1992); *Scheuer v. Secretary of HHS*, No. 90-1639V, 1992 WL 13577, at *3 (Cl. Ct. Spec. Mstr. May 21, 1992); *Vickery v. Secretary of HHS*, No. 90-977V, 1992 WL 281073, at *6 (Cl. Ct. Spec. Mstr. Sept. 24, 1992); *Petrozelle v. Secretary of HHS*, No.
90-2215, 1992 WL 249782, at *1 (Cl. Ct. Spec. Mstr. Sept. 16, 1992); *see also Betlach v. Secretary of HHS*, No. 95-3V, 1996 WL 749707, at *3 (Fed. Cl. Spec. Mstr. Dec. 17, 1996). I still adhere to the *general principles* set forth in those 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*; *Zeagler v. Secretary of HHS*, 19 Cl. Ct. 151, 153 (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)).

I also note that in the above-mentioned decision in *Robertson, supra*, Special Master Abell awarded $175 per hour for Mr. Shoemaker's services in a Program case. In earlier published decisions, Mr. Shoemaker was awarded $150 per hour by Special Master Baird (*Borden v.*

Secretary of HHS, No. 90-1169V, 1992 WL 78691 (Cl. Ct. Spec. Mstr. March 31, 1992)) and $175 per hour by Special Master French (*Cousins v. Secretary of HHS*, No. 90-2052V, 1992 WL 58809 (Cl. Ct. Spec. Mstr. March 9, 1992)).

Another factor, however, is 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. In light of that factor, and taking into account of all the factors mentioned above, I find that a reasonable rate for the services of Mr. Shoemaker in this case is $190 per hour.

D. Mario A. Bezzini

Mr. Bezzini briefly represented petitioner in this proceeding before Messrs. Shoemaker and Horn took over the case. Mr. Bezzini simply states that "[m]y hourly rate is $195.00," without further elaboration. (Ex. 7, p. 3.) But without further information, I cannot accurately determine an appropriate hourly rate for his services. I will allow $125 per hour, as suggested by respondent.

E. Jean Galloway Ball

I will allow the hourly rate requested for Mr. Ball's services. The fact that the Fairfax County court found this rate reasonable indicates that it is a reasonable rate for her services.

II

GUARDIANSHIP FEES AND COSTS

Respondent also objects to the fees (hours of attorney Ball) and costs incurred in pursuing a guardianship for Candace Childers. However, this opposition did not discuss my previous analysis of a similar argument raised by respondent in *Velting v. Secretary of HHS*, No. 90-1432V, 1996 WL 937626 (Fed. Cl. Spec. Mstr. Sept. 24, 1996). As I explained in *Velting* (1996 WL 937626 at *2-3) my analysis is that in appropriate circumstances the expenses of setting up a guardianship in order to accept a Program award *should* be considered expenses "incurred in [a] proceeding on [a Program] petition." § 300aa-15(e)(1). I have rejected the argument that simply because the expenses also relate to proceedings in another court, such as a local probate court, the expenses thereby were not incurred in the "proceeding on [the Program] petition."

It appears in this case that the conservatorship was set up solely for the purpose of handling the Program award. In these circumstances, I cannot agree that the statute does not authorize compensation for the attorney time and costs expended on this task. While counsel's efforts did, of course, involve a "proceeding" in another court, they were *also* ultimately related to the "proceeding" on the Program petition. Surely, respondent would not argue that counsel must be compensated only for those hours in which he was physically appearing in a courtroom before a special master or judge of this court. To the contrary, when counsel spends time elsewhere--in a law library, at his own office, at a hospital seeking medical records--working through the steps necessary for his client to obtain a Program award, that time certainly is as compensable as time actually spent in a Court of Federal Claims courtroom. And if some of that time, spent on matters absolutely necessary for obtaining the Program award, happens to be spent in front of a local probate court rather than in a law library, I fail to see how such time is any less "incurred in the [the Program] proceeding." Accord: *Georges v. Secretary of HHS*, No. 90-1232V, 1992 WL 321167 (Cl. Ct. Spec.

Mstr. Oct. 21, 1992); *Thomas v. Secretary of HHS*, No. 92-46V, 1997 WL 74664 (Fed. Cl. Spec. Mstr. Feb. 3, 1997).

Respondent points to the decision in *Siegfried v. Secretary of HHS*, 19 Cl. Ct. 323, 325 (1990), in which a Claims Court judge upheld on review a special master's ruling denying compensation for attorney time spent on matters related to the estate of the petitioners' deceased daughter. But I find this decision to be distinguishable. In *Siegfried*, the court noted that the Vaccine Act attorney fee award was not intended "to cover the myriad legal implications of establishing *or administering* an estate." *Id*. at 325 (emphasis added). The amount cited for estate-related legal work was a hefty $6,150, and thus, perhaps (the opinion does not indicate), some of the attorney work related to estate matters other than those necessary simply to accept the award.

Thus, it is first unclear that *Siegfried* stands for the general proposition that in no circumstances may Program funds be awarded for the expenses of creating a decedent's estate. Second, if *Siegfried* does stand for such a proposition, I would respectfully disagree with it. I will, accordingly, compensate the time and costs incurred in establishing the guardianship in this case.

III

MEDICAL EXPERT HOURLY RATES

Respondent next notes that two of petitioner's medical experts charged petitioner more than $200 per hour for their time, and urges that I compensate petitioner only for $200 per hour for the services of such experts. This raises a difficult issue, but ultimately I cannot agree with respondent.

As I explained in *Mandel v. Secretary of HHS*, No. 92-260V, 1998 WL 211914 (Fed. Cl. Spec. Mstr. April 2, 1998), and in *Hayden v. Secretary of HHS*, No. 91-643V, 1998 WL 430081 (Fed. Cl. Spec. Mstr. July 10, 1998), the issue of how much to allow for reasonable compensation of petitioners' expert witnesses in Program cases has been a difficult one. As noted in those opinions, in many earlier Program decisions, such as *Mandell v. Secretary of HHS*, No. 90-2853V, 1995 WL 715511 (Fed. Cl. Spec. Mstr. Nov. 21, 1995), I declined to award more than $225 per hour for the services of expert witnesses, indicating generally that I saw no justification for expert hourly rates exceeding the $225-per-hour figure. However, my reasoning concerning this general issue has changed since that time. One reason for this change concerns the fact that at the time of such decisions as *Mandell*, respondent supplied affidavits asserting that respondent routinely paid her medical experts, including many very distinguished pediatric neurologists, $200 per hour. Based on this assumption, my reasoning was that if the respondent could obtain competent expert assistance for $200 per hour, petitioners probably could do so as well. My perception since that time, however, has changed; I now believe that in fact it is an exceedingly difficult task for *petitioners* to obtain expert assistance with respect to Program cases. It appears that relatively few qualified medical experts are willing even to *consider and evaluate* these cases for petitioners. And some of those few experts who are willing to do so have consistently charged petitioners well in excess of $225 per hour for their services. Some of those experts have represented that they routinely receive $250 or even more per hour for their services in non-Program settings. In these circumstances, it now seems to me that it is reasonable for Program counsel to pay such rates for medical expert services, even though such hourly rates still strike me intuitively as very high. Indeed, I have come to worry that in declining in the past to compensate petitioners for more than $225 per hour for expert assistance, in some cases I have restricted the ability of petitioners to obtain

competent expert assistance, and in others I have simply forced petitioners' counsel to pay for the additional amounts to these experts out of their own pockets.[5]

Indeed, in this case, in his reply filed on May 26, 1999, petitioner's counsel explained that the experts contacted by petitioner simply refused to lower their rates to $200 per hour. Thus, petitioner's counsel was in effect required to pay the rates requested, or forego very important testimony that would aid his client's case. Petitioner's counsel paid the requested rates, and did so reasonably, in my view.

Finally, as also pointed out by petitioner's counsel in his reply, a medical expert who testified for *respondent* in a recent case before me did explain that at $200 per hour, he was in effect receiving substantially less per hour for his time that he could expect to receive for his other medical

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[5]In this regard, consider the following testimony, by an attorney who has represented many Program petitioners, before the Advisory Commission on Childhood Vaccines, a commission that reviews the administration of the Program:

> * * * There are directives that are given to petitioner's counsel that you are unable to pay an expert witness more than $200 per hour. I do not know that they initially came from a Special Master or whether it was in the Department of Justice brochure that you put out in terms of applying for attorney's fees. I am not sure if it is in that handbook. But, at some point throughout the pendency of the litigation, there is a directive to a petitioner's counsel that you may only pay expert witnesses $200 per hour.
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> With regard to that provision, I cannot dictate, as a petitioner's counsel, to a treating pediatric neurologist that that neurologist may only bill me $200 per hour. I can get one of two responses. "Fine, I will bill you $200 per hour and keep my time accordingly," or "My rate is $300 an hour," or "My rate is $1,000 per day of testimony whether I am there one hour or all day because I have to cancel all my patients to be there to listen to the testimony that goes on." So, if I have an expert witness that charges me $350 an hour and the Department of Justice takes the position that I should only be able to be reimbursed for that expense at a rate of $200 per hour, the additional $150 per hour has to come from somewhere. It cannot come from the petitioner's award, so it comes out of my pocket. If a family has advanced the money, it comes out of their pocket. So, what this recommendation with respect to expert witnesses hopes to accomplish is that there is an ability by expert witnesses contacted and utilized either by respondent or petitioner to charge what is reasonable and appropriate in their locality and given their practice, so that we are not bound by a $200 per hour rate. Certainly, some doctors charge less than that. But to pick an arbitrary rate of $200 per hour for any specialist, with any type of practice, in any locality in the country, or every case the petitioners file, is not workable. With all due respect to you, Mr. Euler, I do not know that you only pay your experts $200 per hour because we are not privy to receipts and canceled checks that the Department of Justice writes the way the Department of Justice is privy to my receipts and my canceled checks.

See the transcript of Commission proceedings on September 11, 1996, pp. 80-82.

duties. See *Lewis v. Secretary of HHS*, No. 95-728V, transcript of hearing held on April 28, 1999, p. 194. Thus, although respondent does seem able to continue to obtain high-quality expert assistance for $200 per hour, it may be unreasonable to expect *petitioners* also to find experts willing to work for less than they could otherwise earn for their time.

Finally, I note that a number of my colleague special masters have reached similar conclusions. Published decisions awarding $300 per hour for medical expert services include *Lindsey v. Secretary of HHS*, No. 90-2586V, 1995 WL 715513 (Fed. Cl. Spec. Mstr. French, Nov. 21, 1995); *Woodcock v. Secretary of HHS*, No. 90-1030, 1990 WL 329300 (Cl. Ct. Spec. Mstr. Baird, Oct. 23, 1992); *Yeoman v. Secretary of HHS*, No. 90-1049V, 1994 WL 387855 (Fed. Cl. Spec. Mstr. Abell, July 11, 1994); *Plott v. Secretary of HHS*, No. 92-633V, 1997 WL 842543 (Fed. Cl. Spec. Mstr. Wright, April 23, 1997), and *Berry v. Secretary of HHS*, No. 97-0180V, 1998 WL 481882 (Fed. Cl. Spec. Mstr. Edwards, July 27, 1998).[6]

In short, for the reasons set forth above, I now conclude that it may be appropriate in some circumstances for the Program to reimburse petitioners for medical expert fees at hourly rates in excess of $225 per hour. I conclude that in this case, it is appropriate that I compensate petitioner for the hourly rates at which her counsel in fact compensated the two medical experts in question.

IV

REMAINING ISSUES

As noted above, the remaining issues raised by petitioner's application for fees and costs will be addressed in a separate "Decision," which will follow very shortly.

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George L. Hastings, Jr.
Special Master

[6]On the other hand, the most recent published opinions of two other of my colleague special masters indicate that they may continue to adhere to a general limit of $200 per hour for the services of medical expert witnesses. *See* opinions of Chief Special Master Golkiewicz (*Knox v. Secretary of HHS*, No. 90-33V, 1991 WL 33242 (Cl. Ct. Spec. Mstr. Feb. 22, 1991); *Wilcox v. Secretary of HHS*, No. 90-991V, 1997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997); *Scoutto v. Secretary of HHS*, No. 90-3576V, 1997 WL 588954 at *6 (Fed. Cl. Spec. Mstr. Sept. 5, 1997)) and Special Master Millman (*Sims v. Secretary of HHS*, No. 90-1514V, 1993 W 277090 (Fed. Cl. Spec. Mstr. July 9, 1993); *Pearson v. Secretary of HHS*, No. 90-998V, 1993 WL 346876 (Fed. Cl. Spec. Mstr. Aug. 27, 1993)). One recent decision of a judge of this court suggests the same. *Guy v. Secretary of HHS*, 38 Fed. Cl. 403, 407 (1997).