

OFFICE OF SPECIAL MASTERS

No. 94-770V

(Filed: January 17, 2001)

JUSTIN JAMES ISOM, a Minor, *
and MARC and JEANNE ISOM as *
Guardians Ad Litem for JUSTIN *
JAMES ISOM, *

Petitioners, *

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

TO BE PUBLISHED

Don Petersen, Esq., Provo, Utah, for Petitioners.

David Terzian, Esq., United States Department of Justice, Washington, D.C., for Respondent.

ATTORNEY’S FEES & COSTS DECISION

ABELL, Special Master:

I.

The issue before this Court is whether Petitioners’ Application for Attorney’s Fees and Costs contains reasonable fee and cost requests. Respondent’s objections to the fee request concern the issues pertaining to hourly rates, excessive billable hours, secretarial tasks, simple and redundant tasks, travel time, overhead expenses, and expert witness fees. In considering these issues, the Court has set forth detail based upon the record as a whole, the Court’s recollection of how Petitioners’ attorney conducted his client’s case, Respondent’s objections as contained in her response to the attorney’s fees and costs petition, and Petitioners’ subsequent reply. Respondent chose not to make a surreply.

II.

The Court may award attorney's fees and costs if a petition was brought "in good faith and there was a reasonable basis for the claim for which the petition was brought." 42 U.S.C. § 300aa-15 (e) (1) (West Supp. 2000). The good faith prong of the test is subjective; therefore, a Petitioner must have honestly believed that a legitimate claim for compensation existed. The reasonable basis prong is objective and does not depend on petitioner's state of mind. Any fee award is within the special master's discretion.

In the case *sub judice*, the Court granted Respondent's motion to dismiss the case (made during the entitlement hearing) because Petitioners failed to offer a reliable scientific theory which proved that Justin's Evans Syndrome was caused-in-fact by the DPT vaccinations. However, while a favorable outcome is probative in vaccine cases, it does not, of course, govern the fee application.

In their responsive application for fees, Petitioners' second set of attorneys have detailed the total amount of fees and costs in terms of uncontested and contested amounts. The total request amounts to \$34,449.85 (380.39 hours) in attorneys' fees. *See* Petitioners' Reply to Respondent's Objections to Petitioners' Application for Attorney Fees and Costs, Summary Exhibit A (hereinafter Petitioners' Reply). Respondent contests 54.95 hours or \$4,727.75 of that total. *See id.* In addition, Petitioners have also requested for their medical experts, a total amount of \$20,402.95. Of that amount, Respondent objects to \$17, 756.99. *See* Petitioners' Reply, Summary Exhibit D.

III.

Hourly Rate

As indicated by Respondent, the lodestar method is employed by this Court to determine reasonable attorney's fees. *See Blanchard v. Bergerson*, 489 U.S. 87 (1989); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." 489 U.S. at 94 (quoting *Blum*, 45 U.S. at 888). The court is given the discretion, however, to adjust the initial estimate if "a fee charged is out of line with the nature of the services rendered." *Pierce v. Underwood*, 487 U.S. 552, 581 (1988) (Brennan, J., concurring).

To determine the number of hours reasonably expended in a particular case, the Court must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434. The reasonableness of the attorney fee rate is "to be calculated according to the prevailing market rates in the relevant community . . ." *Blum*, 465 U.S. at 896. "The burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonable comparable skill, experience, and reputation." *Id.* at 896 n.11.

Mr. Don Peterson requests an hourly rate for his time and that of three other attorneys who worked on this case.¹ The hourly rates for the three attorneys range between \$90.00 and \$150.00 per hour from the year 1996 to the present. *See* Petitioners' Reply. The Court finds them reasonable and in accord with prevailing rates in that area. Based on the application for attorney's fees and costs, the requisite affidavits, Respondent's objections, and the entire record, the undersigned awards the hourly rates that Petitioners have requested.

Excessive Billable Hours

The Court reduces the hours of attorney F. Richard Smith, III, by 2.95 hours for a total reduction of \$368.75. The reason for this deduction is the apparent hours spent obtaining admission to the Court of Federal Claims. *See* Petitioners' Reply, Exhibit A.

As for Mr. Orton's practice of billing in quarter hour increments, the Court agrees in part with Respondent's specific objections and therefore reduces Mr. Orton's hours by those specific objections. *See* Respondent's Opposition to Petitioners' Request for Attorney's Fees and Costs at 4. The Court finds reasonable, a reduction of .5 hours or \$75.00.

Secretarial Tasks

Respondent next objects to tasks that appear to be secretarial in nature and are thus subsumed in the attorney's hourly rate. She points to certain entries labeled "File work."² Petitioners' reply, however, shows that the ambiguous phrase "File work" in Mr. Smith's hourly log refers to conferences regarding the substance of the case and not administrative conferences. The Court is satisfied with Petitioners' explanation and therefore grants those hours as requested. As for tasks denoted as filing and photocopying, the Court agrees in part with Respondent (*see* Respondent's Opposition at 5) that those tasks are subsumed under overhead expenses. Upon reviewing the contested entries, the Court finds that a reduction of \$675.00 is warranted and reasonable.³

Simple and Redundant Tasks

Respondent objects to what appear to be "ministerial" tasks. That is, Respondent claims that hours billed for reviewing orders and drafting notices should be disallowed. The Court disagrees with this characterization *in toto* since many of the Court's orders require more than a perfunctory

¹ The Court finds that Petitioners' Reply is meticulous and meets Respondent's objections in this area. By way of perspective, Attorney Kenneth Parkinson, the fourth attorney, billed 1.5 hours amounting to \$135.00. This amount represents the low end range of attorney fee awards in the program.

² *See, e.g.*, Respondent's Opposition notes 3, 4, at 5.

³ *See* Respondent's Opposition, note 3. Specifically, the Court deducts the amounts listed in the entries dated as follows: 08/08/97 on page 7; 11/12/97 and 11/21/97 on page 8; 02/13/98 on page 9; 05/04/98 on page 11; and 09/18/98 and 09/21/98 on page 12.

glance. Therefore, after a review of those entries and the explanation in the Petitioners' Reply, the Court deems it reasonable to grant the requested amount because the tasks are not necessarily ministerial.

Travel Costs

As regards travel periods, the Court reduces Mr. Don Peterson's hourly rate by half. In any case, the per se reduction rule for billable time spent in travel would normally be 50% or in this case, \$1,192.50. However, regarding the entry dated 06/13/96 (*see Fee App* at 19), the Court cannot simply discount the entry as pure travel time since the records clearly reflect that attorney Don Peterson was engaged in a conference with regarding this case during travel time. So it is not that Mr. Peterson billed for travel time here but normal time. The fact that he happened to be in the act of traveling is somewhat irrelevant as regards this period of conference—that is, whether he was traveling or in his office, he would have conducted this conference. Therefore, the Court finds reasonable, an award for this entry that reflects one hour of Mr. Don Peterson's hourly rate. The total deducted from the overall travel request amounts to \$1,042.50.

IV. COSTS

Kinko's Copying Center

Respondent next objected to costs that she characterized as overhead. Again, this Court agrees in part. Expenses billed for faxing, a total amount of \$108.00, are not awarded. Regarding copying or binding services performed at Kinko's Copy Center (*see Fee App* at 13 and 14), the Court finds that those expenses are not subsumed under overhead.

Medical Experts

The Court finds that Respondent's reliance upon two cases to support an award of \$200 per hour for medical experts is simply misplaced. A perfunctory search of cases reveals that the Court has awarded as much as \$300 per hour for medical expert testimony. *See, e.g., Yeoman v. Secretary of HHS*, 90-1049V, 1994 WL 387855 (Fed. Cl. Spec. Mstr. July 11, 1994) (In granting a \$300 per hour award in 1995 to Dr. Kinsbourne, the Court recognized that "it has become clear that medical experts who are qualified to testify in this Program are typically [and] considerably more expensive than originally envisioned." Slip op. at 7.); and *Hayden v. Secretary of HHS*, 91-643V, 1998 WL 211914 (Fed. Cl. Spec. Mstr. July 10, 1998).

Therefore, the Court finds it improper to apply a per se rule of \$200.00 per hour without further consideration. *See, e.g., Corder v. HHS*, No. 97-125V, 1999 WL 1427753 (Fed. Cl. Spec. Mstr. December 22, 1999) (citing that it is "not uncommon for the [C]ourt to award medical experts more than \$200.00 per hour." Slip at 12.) That an expert fee request is higher than \$300 per hour is also of no great moment because vaccine cases have seen a complex evolution of sorts regarding medical expert testimony. To what end they will evolve is yet unknown. What is certain, however,

is that while an award of \$300.00 per hour might have been considered excessive at one time, the complexity of vaccine litigation has steadily increased on both sides of the aisle. Indeed, between the base of filing a petition and the summit of a favorable result, there yawns a vast chasm of causation. Crossing that expanse with qualified experts would be almost impossible if petitioners were subject to a *per se* cap on expert fees.⁴ The short of this is, that whatever fee is requested, it must be reasonable.

This is not to say that the Court has determined today that \$200.00 per hour is always reasonable and that \$500.00 per hour is excessive. It depends on the facts of the individual case and the attendant circumstances. For instance, if the prevailing market rates support what appear to be a high hourly request, if the total amount requested is not unreasonable in comparison to other cases of similar complexity, and if the medical expert’s professional opinion is given to objectivity rather than vapid circumlocutions, this Court is not loath to award what appears to be a high hourly fee.

A word of caution is in order, however, to petitioner attorneys. That is, this Court notes that a petitioner attorney has a duty to monitor expenses *ab initio*. Any aberrant or unforeseen expenses should be brought to the Court’s attention before they are incurred. In the instant case, the Court notes that Petitioners have already paid one doctor (Marcel Cafavant, M.D.) at his requested rate of \$500 per hour. This is not a normal hourly fee. Were it not for the fact that the total amount this doctor requested is reasonable in comparison to other cases, the Court would make a reduction in the hourly rate. Upon review of the complexity of the instant case and its history, the testimony of each doctor, their hourly request and their total request, along with the supporting documentation, this Court finds the following hourly rates reasonable:

Doctor	Hourly Rate	Hours Requested	Total Award
Marcel Cafavant, M.D.	\$500.00	7.5	\$3,750.00
Denis Miller, M.D.	\$350.00	35.25	\$16,637.00
Alan Levin, M.D. ⁵	\$300.00	10	\$3000.00
			\$18,387.00

⁴ This rationale serves to explain fees for medical experts who lack experience in the program.

⁵ Dr. Levin was the medical expert hired by the prior counsel. The Court is satisfied based on the material provided in Petitioners’ Reply, that they have met their burden and substantiated their claim for reimbursement of Dr. Levin’s fees. As for Dr. Levin’s fees, the Court finds that the \$500 per hour amount requested is not reasonable in light of the work product produced by Dr. Levin. Though an award of \$300 is high, the total amount of costs billed for all doctors in this case are not out of the expected range in vaccine cases requiring ongoing and complex litigation.

V. CONCLUSION

The total reduction made to Petitioners' attorneys' fee request is \$2161.25. The total amount of the attorneys' fees awarded is \$32,288.60. The total reduction to Petitioners' requested amount for expert witness costs is \$2,108.00. The total costs awarded amount to \$18,387.00.

Pursuant to §15(e) and Vaccine Rule 13, the Court awards the following as reasonable compensation for attorney's fees and costs in this matter: \$32,288.60 in attorneys' fees and \$18,387.00 in costs totaling \$50,675.60. In the absence of a motion for review filed in accordance with RCFC Appendix J, the Clerk of the Court is directed to enter judgment in favor of Petitioners in the amount of **\$50,675.60**⁶ for reasonable attorney's fees and costs. A check for **\$49,271.33** shall be paid to Petitioners and Petitioners' counsel jointly and one check for **\$1,404.27** shall be paid solely to Petitioners.

IT IS SO ORDERED.

Richard B. Abell
Special Master

⁶ 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. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. See generally, *Beck v. Secretary of HHS*, 924 F.2d 1029 (Fed. Cir. 1991).