

In the United States Court of Federal Claims

OFFICE OF THE SPECIAL MASTERS

No. 10-672V

Filed: September 1, 2011

LUKE G. ANDERSON,)	
)	TO BE PUBLISHED
Petitioner,)	
)	
v.)	Pre-Approval of
)	Expert Fees
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

Lisa Annette Roquemore, Broker & Associates, P.C., Irvine, CA, for Petitioners.
Chrysovalantis Panagiotis Kefalas, U.S. Dep't. of Justice, Washington, DC, for Respondent.

Order Granting Motion for Pre-Approval of Expert Fees¹

On October 5, 2010, Petitioner filed for compensation under the National Childhood Vaccine Injury Act (the "Vaccine Act" or the "Act"), alleging that he developed aplastic anemia and avascular necrosis as a result of receiving an influenza vaccination on October 28, 2008. Pet. at 2, 7-8. An expert report from M. Eric Gershwin, M.D., an internal medicine specialist, immunologist and rheumatologist, was filed on October 21, 2010, by the Petitioner. Pet'r. Ex. 2. The Secretary filed her Rule 4(c) Report on March 1, 2011, along with the expert report of Kenneth L. McClain, M.D., Ph.D., who is a hematologist/oncologist. Resp't Ex. A. Petitioner responded on April 6, 2011, with a supplemental expert report from Dr. Gershwin, see Pet'r Ex. 5.

Petitioner also sought to present the expert opinion of a hematologist, Dr. Stephen Coutr . To facilitate Dr. Coutr 's participation, Petitioner on June 22, 2011, sought pre-approval of a \$500.00 hourly rate for Dr. Coutr 's services in this matter as

¹ Because this order contains a reasoned explanation for the action in this case, I intend to post it on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347,   205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C.   3501 note (2006)). In accordance with Vaccine Rule 18(b), Petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from the published order.

an expert. For the reasons stated below, I grant Petitioner's motion for pre-approval of Dr. Coutré's hourly rate (the "Motion").

I. STATUTORY PROVISIONS

The Vaccine Act provides for reasonable attorneys' fees and costs to be awarded to successful petitioners. 42 U.S.C. §300aa-15(e)(1). In addition, petitioners who do not obtain compensation also may receive attorneys' fees and costs if the petition was brought in good faith and there was a reasonable basis for the claim. Id.; see generally Avera v. Sec'y of Dep't of Health & Human Servs., 515 F.3d 1343, 1347 (Fed. Cir. 2008). The amounts incurred in retaining experts to prepare and present medical opinion testimony traditionally are included in the award of attorneys' fees and costs. Although special masters have ruled on similar requests in other cases, no binding authority has been cited by either party on the pre-approval of hourly rates for experts.

II. PARTIES' ARGUMENTS

Petitioner argued that preapproval of the expert's rate was both necessary and appropriate. Mot. at 6. Anticipating that the Secretary, after the case is decided, would balk at approving the rate of \$500.00 an hour, Petitioner argued that advance determination of the hourly rate will prevent prejudice to the Petitioner "after the fact." Id. at 7. Petitioner listed the hourly rates of several other experts who have testified in the Vaccine Program, as well as the rates of other expert hematologists in the California region. These rates, Petitioner maintained, are comparable to the \$500.00 per hour sought for Dr. Coutré. Id. at 7-9.

In a Declaration submitted with the Motion, counsel for Petitioner stated that following resolution of a claim "hourly rates of experts are routinely subject to objection and decreased by \$25 to \$75 an hour." Roquemore Decl. at 3. According to counsel, the result is a deficiency that must be covered by the attorney for Petitioner, since the expert must be paid at the agreed rate regardless of the rate that ultimately is approved. Id.² Establishing the hourly rate before the expert's services have been rendered "obviates unnecessary litigation and prejudice to the Petitioner and his law firm." Id.³

Respondent opposed the Motion on the following grounds:

Pre-approval of the hourly rates constitutes "an opinion . . . on the propriety of an element of future compensation that is inappropriate at this stage of the proceedings." Resp't's Resp. To Pet'r's Mot. at 2. The reasonableness of the rate cannot be

² Section 300aa-15(e)(3) prevents an attorney from charging or collecting fees or costs that would be in addition to the amount awarded by the special master. See generally Beck v. Sec'y of Dep't of Health & Human & Services, 924 F.2d 1029 (Fed. Cir. 1991).

³ The purpose of reimbursing petitioners for their attorneys' fees and costs is to encourage attorneys to accept representation of injured vaccinees. See, e.g., Avera v. Sec'y of Dep't. of Health & Human Servs., 515 F.3d at 1352. Assuming that the fees and costs meet the statutory criteria, they should be reimbursed, consistent with the Vaccine Act. This decision holds only that, if the hourly rate is reasonable, it makes no difference whether the rate is approved sooner rather than later.

determined in advance of presentation of the evidence. Id. at 2-3. An expert's fee must reflect his area of expertise, education and training, the rate for other comparable experts, and the geographic cost of living. Id. at 3. In addition, the "nature, quality and complexity of the expert opinion provided" must be taken into account in determining the appropriate rate of expert reimbursement. Id. (emphasis in original). The Secretary maintained that, without having examined Dr. Coutré's "work product," the special master cannot determine "what, if any, value Dr. Coutré will add to the analysis of the case." Id.

The Secretary claimed that a showing of hardship was required. Petitioner must show "that he cannot locate and retain a hematologist to opine on his case absent rate pre-approval." Id. at 4 n2.

The Secretary questioned the amount of the proposed rate, arguing that \$500.00 is too high for Dr. Coutré's services because he has not previously testified in the Vaccine Program. Id. at 5. The Secretary cited a special master's decision denying reimbursement of the fees of an expert with "impressive credentials" who produced testimony that was "ever-shifting, poorly explained, and ultimately proved to be outside of his area of expertise." Id. at 4, citing and quoting Chen Bou v. Sec'y of Dep't of Health & Human Servs., No. 04-1329V, 2007 WL 924495, at *7 (Fed. Cl. Spec. Mstr. Mar. 9, 2007). The Secretary questioned whether Dr. Coutré's credentials and experience were commensurate with those of other experts who have been retained at a comparable rate. Id. at 5. The Secretary also disputed whether the hourly rates of other hematologists in California could be used to support the rate requested for Dr. Coutré. Id. at 5-6. The Secretary questioned whether the rates obtained for other physicians were those actually charged. Id. at 6. "Petitioner has offered no valid reason to permit Dr. Coutré to expend an undetermined amount of hours at such a high rate[,]" the Secretary concluded. Id.

In a memorandum responding to the Secretary's opposition, Petitioner pointed out that he does not seek a determination of the reasonableness of any amounts to be incurred by Dr. Coutré at this stage. He seeks only approval of the hourly rate that will apply to the hours expended by the expert. Pet'r's Reply at 1-2.

III. DISCUSSION

First, I find that \$500.00 per hour is a reasonable rate for a specialist with Dr. Coutré's qualifications. Dr. Coutré is well qualified, based on his résumé. His services as a hematologist are necessary to respond to the Secretary's Rule 4(c) report. Other experts in the California region receive comparable hourly rates, as set forth in the pleadings by Petitioner and counsel.

Second, I am not persuaded that experience testifying in the Vaccine Program equates with the "value" of an expert's testimony. My conclusion in this respect is based upon my experience hearing vaccine cases and evaluating the testimony of

numerous experts, some with a great deal of experience testifying in these proceedings and some with no previous experience.

Third, I reject the notion that I must wait until I have had an opportunity to evaluate the “the nature, quality and complexity of the expert opinion provided” before deciding on his hourly rate. If I find, after the case is concluded, that the expert’s opinion was worthless, I will authorize no payment for it. If I find that the expert’s opinion or testimony was in any significant respect shoddy, irrelevant, incoherent, unreliable, biased or otherwise unworthy of consideration, I will diminish accordingly the amount awarded for the expert’s services. I will do so not by lowering the hourly rate, but by reducing compensation for hours billed that do not result in informed, professional expert testimony addressing the facts in this case. If the expert engaged in activities that are not properly compensable, I will deduct from his compensation for the hours spent on those activities at the rate of \$500.00 per hour. Thus, counsel plainly retains an obligation and an interest in monitoring the activities of the expert so that the expert’s hours are spent appropriately and his efforts are directed to providing high-quality evidence.

Fourth, I am mindful of the need to avoid satellite litigation over attorneys’ fees. I do not believe that requiring Petitioner to incur attorneys’ fees to demonstrate that no other suitable hematologist could be found would constitute an economy for the Vaccine Program. Similarly, I do not wish Petitioner’s counsel to expend Vaccine Program funds to prove to this Court that the rates apparently charged by California hematologists reflect their actual charges. I therefore decline to require the factual showing advocated by the Secretary as a prerequisite to approval of the hourly rate. Moreover, I am persuaded by Petitioner’s arguments and the Declaration of counsel that the inability to offer a firm rate for the expert’s services does in fact hamper Petitioner’s ability to retain a qualified expert in this instance.⁴

Based on these considerations, I see very little harm in approving the rate of \$500.00 an hour for Dr. Coutré. If Dr. Coutré’s work contributes to the appropriate resolution of this case (and Respondent has provided no cogent reason why it would not), he will have received an appropriate rate of compensation for services rendered. On the showing made by Petitioner, that rate is consistent with the rate charged by other experts in the Vaccine Program, in the field of hematology, and in California. Cf., e.g., Saxton v. Sec’y of the Dep’t of Health & Human Servs., 3 F.3d 1517, 1520 (Fed. Cir. 1993) (“The determination of the amount of reasonable attorneys’ fees is within the special master’s discretion.”) I do not wish to restrict the ability of petitioners to obtain quality expertise by forcing them to find individuals who will work at discount rates.

⁴ In this regard, I am uncertain the extent to which this opinion assists Petitioner, since I retain the right and the obligation to review the reasonableness of the fees incurred and, depending on the outcome, the basis for the claim. But if it assists Petitioner to take the hourly rate “off the table” as a potential source of dispute, I see no persuasive reason to refuse his request, especially if the result is to facilitate the prompt resolution of attorneys’ fees and costs, without adversarial proceedings. See 300aa-12(d)(2) (special masters are charged with providing “less-adversarial, expeditious, and informal” proceedings).

If, in the course of this litigation, there appears to be abuse of the Vaccine Program, that will come to my attention. I will not hesitate to take appropriate action to remedy the situation, if the need arises. I see no evidence of such abuse on the facts before me.

Accordingly, the Petitioner's Motion is GRANTED.

IT IS SO ORDERED.

s/Dee Lord
Dee Lord
Special Master