OFFICE OF SPECIAL MASTERS
No. 92-260V
(Filed: April 2, 1998)

SHARON MANDEL,	*	
Petitioner,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

James R. Filenbaum, Suffern, New York, for petitioner.

Linda Renzi, Department of Justice, Washington, D.C., for respondent.

DECISION (ATTORNEYS' FEES)

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 obtaining Program compensation in this case. Respondent has filed an opposition challenging the amount of petitioner's request in two respects.

I

ENTITLEMENT TO FEES AND COSTS GENERALLY

Pursuant to § 300aa-15(e)(1), a special master may make an award of attorneys' fees and costs even when, as in this case, the petitioner is not found to qualify for a Program award, if the petition was filed in "good faith" and upon a "reasonable basis." In this case, it appears to the undersigned that this petition was filed in good faith and upon a reasonable basis. Therefore, an award of fees and costs is appropriate.

II

HOURLY RATE ISSUE

Respondent first challenges the hourly rate claimed for the work of attorney James R. Filenbaum.

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 courts 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. Resolution

In this case, petitioner requests $200 per hour for the services of attorney Filenbaum. The respondent suggests that I award $150 per hour. Mr. Filenbaum graduated from law school in 1974, and has practiced law since 1975. In recent years, some of his practice has been on a contingent fee basis, while in other cases his standard hourly rate is $200.

The fact that Mr. Filenbaum routinely charges $200 per hour is strong evidence that this figure is a reasonable rate for his services. However, respondent's argument that $200 per hour is excessive for work in *Program* cases has some merit. In my view, an award of $200 for Mr. Filenbaum's work in this case would be excessive in the context of the 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 special masters expressed the view that counsel under the Program ordinarily should not be awarded hourly rates in excess of $175. *See, e.g., 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). And while general inflation since 1992 has caused some slight loosening of that $175 "cap" by some of these special masters, I still adhere to the *general principle* set forth in those decisions--*i.e.*, that it may not be appropriate to use the tax dollars involved in the *Program* to compensate counsel at some of the very high hourly rates that some counsel charge in non-Program settings. I note the comment of one judge of this court 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); *see also Zeagler v. Secretary of HHS*, 19 Cl. Ct. 151, 153 (1989).

Taking into account of all these factors, as well as the fact 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, I find that a reasonable rate for the services of Mr. Filenbaum in this case is $190 per hour.

III

COSTS

Respondent challenges the expert fee paid to Dr. Thomas J. Lehman, who charged petitioner $250 per hour for his services. Respondent argues that no more than $200 per hour is appropriate for the services of any medical expert.

This presents a difficult issue. I begin by noting that in *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 a pediatric neurologist who sought $300 per hour, 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 and rheumatologists, $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. Those experts have also represented, as does Dr. Lehman in this case, that they routinely receive $250 or more per hour for their services in non-Program settings. In these circumstances, it seems to me that it is reasonable for Program counsel to pay such rates for the services of such experts, 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 am restricting the ability of petitioners to obtain competent expert assistance, and in others I am simply forcing petitioners' counsel to pay for the additional amounts to these experts out of their own pockets.[(4)]

A second factor is closely related to the first. That is, while in earlier Program cases the respondent provided affidavits asserting that respondent routinely paid medical experts $200 per hour, no such affidavits have been provided by respondent in this case, or (to my knowledge) in any Program case over the last several years. Indeed, in one recent case (*i.e.*, *Lincoln v. Secretary of HHS*, No. 90-2046V) the respondent *specifically declined* to provide information as to what respondent's medical experts have been paid in recent years, despite my specific request that respondent do so. Therefore, another chief premise upon which I based my reasoning in earlier decisions, such as *Mandell*, has been called into serious question.

Third, in this case the resume of Dr. Lehman indicates that he is highly qualified in the area of rheumatology, and I found his testimony to be cogent and helpful. Also, the number of hours that Dr. Lehman billed on this case, given the services that he performed, seems quite reasonable.

Finally, I note that a number of my colleague special masters have reached similar conclusions. Published decisions awarding $250 or more per hour for the services of medical experts 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); and *Plott v. Secretary of HHS*, No. 92-633V, 1997 WL 842543 (Fed. Cl. Spec. Mstr. Wright,

April 23, 1997).[(5)]

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 at the rate of $250 per hour for the services of Dr. Lehman.

IV

SUMMARY AND CONCLUSION

The following amounts are allowable for fees and costs:

Attorney (58.9 hours x $190) $11,191.00

Costs $ 2,874.00

Total $14,065.00

Accordingly, my decision is that fees and costs are to be awarded in the total amount of $14,065.00 pursuant to § 300aa-15(e).

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George L. Hastings, Jr.

Special Master

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.).

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 to a 'prevailing party.'" *Hensley*, 461 U.S. at 433 n.7. Most recently, that Court in *Blanchard v. Bergeron*, 489 U.S. 87 (1989), reaffirmed its view that such approach is "the centerpiece of attorney's fee awards." *Id*. at 94.

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*, 465 U.S. at 898-902; *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 adjustment of the "lodestar" figure.

4. 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.

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.

5. On the other hand, the most recent published opinions of two 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).