

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 04-210V

Filed: May 31, 2007

To be Published

PATRICIA SCHRUM, *

*

Petitioner, *

*

v. * Fees and Costs; Dr. Mark Geier

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SECRETARY OF THE DEPARTMENT *

OF HEALTH AND HUMAN SERVICES, *

*

Respondent. *

*

Clifford J. Shoemaker, Vienna, VA for petitioner.

Linda S. Renzi, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING ATTORNEY'S FEES AND COSTS¹

I. Procedural History

On February 17, 2004, Ms. Patricia Schrum (“petitioner”) filed a petition for compensation under the National Childhood Vaccine Act of 1986. *See* Petition, filed February 17, 2004. Ms. Schrum alleged that a hepatitis B vaccination administered on March 6, 2001 caused her polyarteritis nodosa (“PAN”). *See* Petitioner’s Affidavit at 1. A hearing was held on September 12, 2005. On March 31, 2006, the undersigned issued a Decision holding that

¹ The Court encourages the parties to review Vaccine Rule 18, which affords each party 14 days to object to disclosure of (1) trade secrets or commercial or financial information that is privileged or confidential, or (2) medical information that would constitute “a clearly unwarranted invasion of privacy.”

petitioner was entitled to reasonable compensation. On September 21, 2006, the undersigned issued a Damages Decision awarding petitioner \$291,484.75.

On March 30, 2007, petitioner's counsel filed an Application for Attorney's Fees and Costs ("P.App.") requesting a total of \$66,211.91 in attorney's fees and costs and \$821.77 in personal costs. On April 17, 2007, respondent filed an Opposition to Petitioner's Request for Attorney's Fees and Costs ("R. Opp.") objecting to the \$5,000 cost for services provided by Dr. Mark Geier. On May 3, 2007, petitioner filed a Reply to Respondent's Opposition to Petitioner's Request for Attorney's Fees and Costs ("P. Reply to R. Opp."). On May 3, 2007, petitioner also filed an Amended Application for Attorney's Fees and Costs ("P. Amend. App.") requesting an additional 2 hours in fees for reviewing Respondent's Opposition and preparing a response. On May 4, 2007, respondent spoke with the undersigned's law clerk and stated that she objected to Petitioner's Amended Application, but would not be filing a response.

II. Discussion

A. Consultation Fee for Mark Geier, M.D.

Petitioner requests \$5,000 in compensation for fees paid to Dr. Mark Geier. In support of this request, petitioner filed a one-page invoice describing 20 hours of work performed by Dr. Geier at a rate of \$250 per hour to "review case documents" and for a "literature search and review of articles." *See* P.App. at 35.

Respondent's Position

Respondent argues that petitioner has offered "no evidence to support that the hours expended by Dr. Geier or his hourly rate are reasonable" and that his "claimed hours are insufficiently documented." R. Resp. at 2. Respondent argues that Dr. Geier's participation in

this case is questionable since Dr. Joseph Bellanti, an immunologist, was petitioner's expert in this case and Dr. Bellanti requested \$10,650.00 in fees for more than 35 hours of work. *Id.* Respondent further argues that "petitioner has failed to justify the reasonableness of seeking Dr. Geier's alleged area of expertise (genetics), in their case" and that "[g]iven the acknowledged concerns with Dr. Geier's qualifications and expertise to serve as an expert witness, it follows that he is unqualified to serve as a litigation consultant." R. Resp. at 4. Although respondent acknowledges that in Ray v. Secretary of HHS, No. 04-184V, 2006 WL 10067587 (Fed. Cl. Spec. Mstr. Mar. 30, 2006), Dr. Geier was compensated for serving as a consultant rather than as an expert, respondent, in this case, argues that the consultation fee is not reimbursable because "petitioner has offered no evidence to explain how the work performed by Dr. Geier had any relevance to the injury at issue." R. Resp. at 5. Respondent concludes that "[n]o evidence exists here that Dr. Geier's 'consultation' was reasonable or necessary in this case." *Id.*

Petitioner's Position

Petitioner argues that Dr. Geier was hired on an hourly basis "to perform a medical literature search and summary of the relevant articles" and that the two-line invoice included in the application for fees and costs detailed the specific work performed, the number of hours expended, and his hourly rate. P. Reply to R. Resp. at 1. Citing the Chief Special Master's Decision in Ray, 2006 WL 10067587, at *16, petitioner argues that, although Dr. Geier is an expert in genetics, he also has expertise in "vaccine literature." P. Reply to R. Resp. at 2. Petitioner argues that the Chief Special Master found Dr. Geier's hourly rate of \$250 to be reasonable in that case, and therefore the undersigned should do the same in this case. Petitioner states that Dr. Geier was not acting as an expert, but only as a researcher and reviewer of medical

literature. *Id.* Finally, petitioner states that Dr. Geier's work was not duplicative of any work performed by Dr. Bellanti. *Id.*

Applicable Case Law

The special masters' Guidelines provide that when applying for costs, a petitioner should explain the expenses "sufficiently to demonstrate their relation to the prosecution of the petition." Guidelines at 32. "The court reimburses petitioners for all of their documented expenses so long as they are *reasonable*." Barnes v. Secretary of HHS, No. 90-1101V, 1999 WL 797468, at *7 (Fed. Cl. Spec. Mstr. Sep. 17, 1999) (emphasis added). "It is incumbent upon petitioner to explain to the court why the hours spent on the case were reasonable." Wilcox v. Secretary of HHS, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). Therefore, petitioner must paint "a clear and complete picture . . . to enable the court to see and understand how and why the expert spent the claimed hours." *Id.* "The question is not whether [the expert] expended the number of hours claimed, but whether it was necessary or reasonable for him to do so." Wasson v. Secretary of HHS, No. 90-208V, 1991 WL 135015, at *3 (Fed. Cl. Spec. Mstr. July 5, 1991), remanded, 24 Cl. Ct. 482 (1991), aff'd, 988 F.2d 131 (Fed. Cir. 1993).

To determine the number of hours that an expert can reasonably expend, the court must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary" Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). A "special master is given reasonably broad discretion when calculating [attorney's fees and costs]." Wasson, 24 Cl. Ct. at 483. In the absence of sufficient proof, "the special master may rely upon both her own general experience and her understanding of the issues raised." *Id.* It is within the court's discretion to make adjustments up or down if "a fee charged is out of line with the nature of services rendered."

Barnes, 1999 WL 797468, at *2, citing Pierce v. Underwood, 487 U.S. 552, 581 (1988)

(Brennan, J., concurring). Therefore, in a situation where a medical expert is hired to provide research which does not relate to his area of expertise, but is more appropriate for an associate or paralegal, it is not reasonable to pay him at an expert's hourly rate. Kantor v. Secretary of HHS, No. 01-679V, 2007 WL 1042378, at *5 (Fed. Cl. Spec. Mstr. Mar. 21, 2007) citing Densmore v. Secretary of HHS, No. 99-588V, at 7 (Fed. Cl. Spec. Mstr. Aug. 14, 2006) (unpublished).²

Instead, the special master may use her discretion to reduce the costs "requested for medical experts where excessive hours are unsubstantiated in the evidentiary record." Kuperus v. Secretary of HHS, No. 01-0060V, 2006 WL 3499516, at *4 (Fed. Cl. Spec. Mstr. Nov. 17, 2006), citing Heckler v. Secretary of HHS, No. 01-319V, slip op. at 3, 6 (Fed. Cl. Spec. Mstr. Mar. 10, 2006).

Analysis

Reasonable Fee

Dr. Geier is a geneticist and an obstetrician. Weiss v. Secretary of HHS, No. 03-190V, 2003 WL 22853059, at *2 (Fed. Cl. Spec. Mstr. Oct. 9, 2003). Dr. Geier is not a rheumatologist or an immunologist. Respondent objects to Dr. Geier's fees because petitioner has failed to justify the reasonableness of engaging Dr. Geier's services since his areas of expertise are irrelevant to the petitioner's medical condition herein and because of the court's past concerns with Dr. Geier's qualifications to serve as an expert. R. Opp. to P. App. at 4. In other vaccine cases, Dr. Geier's testimony has been accorded little or no weight. Weiss, 2003 WL 22853059,

²This Decision is available at <http://www.uscfc.uscourts.gov/Unpublished%20Decisions/06/Abell.Densmore.pdf>.

at *2.

However, petitioner argues that Dr. Geier's credentials do not matter in this case because he was hired to do a medical literature search and review. In support of this position, petitioner cites to Ray, 2006 WL 10067587, at *16, where the Chief Special Master noted that Dr. Geier has an "expertise in vaccine literature" and found Dr. Geier's fees to be reasonable. In Ray, Dr. Geier was hired to review and assess a case in which petitioner alleged that the MMR and influenza vaccines caused her idiopathic thrombocytopenia (ITP). *Id.* at 1. Dr. Geier served as a consultant in the case. He requested and was awarded compensation for 6.5 hours at a rate of \$250 per hour.

Unlike Ray, in the present case, Dr. Geier's role was to "perform a medical literature search and summary of the relevant articles." This case did not necessitate an assessment by an obstetrician/geneticist, especially since petitioner retained Dr. Bellanti as an expert. Dr. Bellanti is an immunologist and is well-known to the undersigned as well as to petitioner's counsel. It is unclear why petitioner would hire Dr. Geier, at a rate of \$250 per hour, to perform a general literature search for articles relating to hepatitis B and PAN when a paralegal or an associate could have performed the same search for less money. Moreover, Dr. Bellanti provided medical literature to the court after the hearing.

More analogous to the present case is the decision awarding fees and costs in Densmore, No. 99-588V, at 6-7, where the special master addressed whether Dr. Geier's requested fees were reasonable and necessary. In that case, Dr. Geier served as a consultant to offer a review of medical literature. *Id.* at 6. The special master found that Dr. Geier, being familiar with the Vaccine program, would be useful to petitioners in performing a literature search and evaluation.

Id. However, in doing so, he was not acting as an expert, and therefore was not entitled to compensation at the rate of an expert, but, instead, at the rate of the highest-paid associate at the time he performed the service. *Id.* at 7. Thus, while it was not unreasonable for Dr. Geier to serve as a consultant, it was unreasonable for him to be reimbursed at an expert's hourly rate for doing work that was more appropriately done by an associate attorney or paralegal. The special master, therefore, awarded Dr. Geier \$175.00 per hour which was equivalent to the highest-paid associate attorney during the 2004-2005 period. *Id.*

In the present case, Dr. Geier is entitled to reasonable fees for the services he provided. He is not, however, entitled to be compensated at an expert's hourly rate when he is simply providing a literature search and review. Had Dr. Geier not performed the research, it would have been performed by an associate or research assistant. Renee Gentry, an associate of petitioner's counsel, during the September 2004 period was billing \$175.00 per hour. The undersigned will, therefore, reimburse Dr. Geier for his services at a rate of \$175.00 per hour.

Reasonable Number of Hours Expended

Dr. Geier states in his invoice that he spent 6.5 hours reviewing case documents and 13.5 hours searching literature and reviewing articles. With respect to the 6.5 hours reviewing case documents, petitioner states that case review was "necessary to define and refine the search." P. Rep. to R. Opp. at 1. Other than this short explanation, however, petitioner has not substantiated why this was reasonable or necessary. Dr. Geier simply performed a general literature search for articles on hepatitis B and PAN and/or vasculitis. Dr. Geier was not serving as an expert, assessing the case for petitioner, or offering his opinion as to what expert to hire. In order to provide a literature search on this issue, Dr. Geier did not need to comb through petitioner's

medical records. The undersigned understands that Dr. Geier would want to become familiar with the issue in the case, but it is excessive to expend 6.5 hours doing so when Dr. Bellanti had already been hired as an expert. Dr. Geier's 6.5 hours are excessive because Dr. Geier did not need to review the case documents, just the allegation in petitioner's affidavit.

For the reasons set forth above, the undersigned will compensate Dr. Geier for one hour of his time for document review. One hour is a reasonable amount of time to understand the nature of petitioner's claim in order to perform a literature search.

With respect to the number of hours expended by Dr. Geier for a literature search and review, the undersigned finds the requested 13.5 hours to be unreasonable. The articles filed by petitioner as Petitioner's Exhibit 10 consist of eight articles, case reports, and letters.³ The first article was written by Dr. Geier himself along with his son, David Geier, and Arthur Zahalsky. Dr. Geier was certainly aware of this article and would not have had to search for and review this article. It is a generalized review of hepatitis B reactions. The undersigned did not rely upon this article since Dr. Geier's credentials and methodology have been questioned in many cases in which he did give expert testimony. See Weiss, 2003 WL 22853059, at *11-12.

³ Mark R. Geier et al., *A Review of Hepatitis B Vaccination*, 2 EXPERT OPINION 113 (2003); M. Pennesi et al., *Glomerulonephritis After Recombinant Hepatitis B Vaccine*, 21 PEDIATRIC INFECTIOUS DISEASES J. 172 (2002); Claire Le Hello et al., *Suspected Hepatitis B Vaccination Related Vasculitis*, 26 J. RHEUMATOLOGY 191 (1999); J.F. Maillefort et al., *Rheumatic Disorders Developed After Hepatitis B*, 38 RHEUMATOLOGY 978 (1999); I. Grotto et al., *Major Adverse Reactions to Yeast-Derived Hepatitis B Vaccines - a Review*, 16 VACCINE 329 (1998); P. Cockwell et al., *Vasculitis related to Hepatitis B Vaccine*, 301 BRIT. MED. J. 1281 (1990); L. Beretta et al., *Churg-Strauss Vasculitis with Brain Involvement Following Hepatitis B Vaccination*, 19 CLINICAL & EXPERIMENTAL RHEUMATOLOGY 757 (2001); F. De Keyser et al., *Immune-mediated Pathology Following Hepatitis B Vaccination*, 18 CLINICAL & EXPERIMENTAL RHEUMATOLOGY 81(2000); M. Pirmohamed & P. Winstanley, *Hepatitis B Vaccine and Neurotoxicity*, 73 POSTGRADUATE MED. J. 462 (1997).

The remaining articles, while informative, are not difficult to locate or review. In fact, a simple internet search of PAN and/or vasculitis and hepatitis B provides the same articles that petitioner filed in just a few minutes. It is therefore difficult for the undersigned to understand why Dr. Geier spent 13.5 hours searching for and reviewing seven articles, none of which was longer than six pages. Dr. Geier has taken 13.5 hours to do a literature search that would likely have taken Dr. Bellanti or an associate attorney of petitioner's counsel much less time.

For the reasons stated above, the undersigned finds 13.5 hours to be excessive. Dr. Geier will be compensated for only those hours that are reasonable. Based on the undersigned's experience with the Vaccine Program, Dr. Geier will be awarded compensation for five hours of his time which is a reasonable, indeed generous, number of hours for a literature search and review of articles.

Therefore, the undersigned awards Dr. Geier a total of six hours for reviewing case documents and doing a literature research at a rate of \$175 per hour. Instead of the \$5,000 requested for Dr. Geier's services, petitioner shall receive \$1,050.

B. Amended Application for Attorney's Fees and Costs

With respect to the Amended Application for Attorney's Fees and Costs, petitioner's counsel now requests an additional \$430.00 for two hours expended reviewing Respondent's Opposition and preparing a response. P. Amend. App. at 1. Respondent objected orally, but did not file a response. The undersigned finds that two hours expended reviewing respondent's five-page Opposition and preparing a two-page reply that refers to only one case is excessive. In the undersigned's experience, this task should only have taken petitioner's counsel, at most, one hour. Therefore, the undersigned awards petitioner one hour at a rate of \$215 per hour.

III. Conclusion

The clerk shall enter judgment for petitioner and shall direct that the award be in the form of a check made payable to petitioner in the amount of \$821.77 and in the form of a check made jointly payable to petitioner and Mr. Clifford Shoemaker in the amount of \$62,476.91. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.⁴

IT IS SO ORDERED.

Dated: _____

Laura D. Millman
Special Master

⁴ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.