IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

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KIMBERLY GABBARD,	*	
	*	No. 99-451V
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	Filed: April 30, 2009
	*	
SECRETARY OF HEALTH	*	Attorneys' fees and costs,
AND HUMAN SERVICES,	*	timeliness of motion, sua sponte
	*	review, percentage reduction,
Respondent.	*	reply brief
* *		

Clifford J. Shoemaker, Esq., Shoemaker and Associates, Vienna, VA, for Petitioner;
Katherine C. Esposito, Esq., U.S. Department of Justice, Washington, D.C., for Respondent.

PUBLISHED DECISION ON ATTORNEYS' FEES ANDS COSTS[*]

Ms. Gabbard alleged that the hepatitis B vaccine caused her an adverse reaction. The parties eventually agreed to resolve this dispute and Ms. Gabbard received some compensation. She now seeks an award for her attorneys' fees and compensation. She is awarded $23,076.86 in attorneys' fees, $10,195.38 in attorneys' costs, and $479.84 in her own costs.

I. Procedural History

On February 11, 2009, Ms. Gabbard filed two documents. The first was captioned Application for Attorneys' Fees & Costs. It contained supporting documentation. However, this

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[*] Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa–12(d)(4) ; Vaccine Rule 18(b).

document contained a mathematical error. Thus, later on February 11, 2009, she filed a second document, captioned "Corrected Application for Attorneys' Fees and Costs." Citations to Ms. Gabbard's pleading will refer to the original application.

Respondent objected. As discussed below, respondent presented two general objections. Respondent objected to any award on the ground that Ms. Gabbard filed her application for attorneys' fees and costs outside of the time permitted by Vaccine Rule 13. Respondent also objected to specific requests.

Ms. Gabbard filed a reply. Pursuant to an order, she also clarified her position regarding the timeliness of her original application. Her application is now ready for adjudication.

II. Timeliness

Respondent objected to any award of attorneys' fees and costs on the ground that Ms. Gabbard filed her motion beyond the time provided in Vaccine Rule 13. Although respondent's objection is well founded, Ms. Gabbard will be awarded the otherwise appropriate attorneys' fees and costs.

Indisputably, the procedural history shows that Ms. Gabbard did not comply with Vaccine Rule 13. The decision adopting the parties' stipulation was issued on June 26, 2008. Pursuant to Vaccine Rule 11, on August 7, 2008, judgment was entered. The entry of judgment began the time provided by the rules to file an application for attorneys' fees and costs. Ms. Gabbard filed a statement that she elected to accept the judgment on August 11, 2008.

As part of his comprehensive response, respondent noted that Ms. Gabbard filed outside the time provided by Vaccine Rule 13. Respondent objected to any award of attorneys' fees and costs. Resp't Resp. at 1-3.

In reply, Ms. Gabbard urged that Vaccine Rule 13 not be enforced to prevent the award of attorneys' fees and costs. Ms. Gabbard claimed that there is general confusion about the deadline for when attorneys' fees and costs are due pursuant to Vaccine Rule 13. Ms. Gabbard stated that various people including special masters, the Clerk's Office, and other attorneys representing petitioners did not know when the attorneys' fees and costs were due.[1]

Vaccine Rule 13 states: "Any request for attorneys' fees and costs pursuant to 42 U.S.C. § 300aa-15(e) shall be filed no later than 180 days after the entry of judgment or the filing of an order concluding proceedings under Vaccine Rule 10(a) or 29." Contrary to Ms. Gabbard's argument, Vaccine Rule 13 is not ambiguous. Vaccine Rule 13 identifies the event to

[1] Ms. Gabbard did not identify the other petitioner's attorneys who are confused about the deadline. In any event, only Ms. Gabbard's attorney appears to have recurring problems with filing applications for attorneys' fees and costs on time.

be used as a starting point (the date of entry of judgment), and sets the relevant time period (180 days). A calculation shows that 180 days after the entry of judgment (August 7, 2008) is February 4, 2009. Ms. Gabbard did not file her application within the time provided.

Although not framed this way in the parties' briefs, the timeliness issue appears to contain two discrete questions. First, are special masters authorized to consider an application for attorneys' fees and costs outside of the time provided in Vaccine Rule 13? Second, assuming that the answer to the first inquiry is affirmative, should Ms. Gabbard's application be considered in this case?

The first question regarding the special master's authority is obliquely raised in respondent's opposition. Respondent argues that "consistent with the notion of the Program as a limited waiver of sovereign immunity, Vaccine Rule 13 is limited in time to ensure that taxpayers are not forever responsible for petitioners' fees and costs." Resp't Resp., filed Feb. 25, 2009, at 2-3. By referencing "sovereign immunity," respondent seems to be arguing that Congress has limited the special master's authority.

To the extent that respondent is arguing that the principles of sovereign immunity support a narrow reading of Vaccine Rule 13 such that petitioners absolutely must comply with the time requirements, this argument is rejected. Congress waived the sovereign immunity for attorneys' fees when it enacted 42 U.S.C. § 300aa–15(e). This statutory provision does not state a deadline for filing the application for attorneys' fees. Thus, because the source of the timing requirement is a rule of procedure, created by judges of the United States Court of Federal Claims, Ms. Gabbard's case is distinguishable from cases involving a statute. See, e.g., United States v. Clintwood Elkhorn Min. Co., __ U.S. __, 128 S.Ct. 1511 (2008); John R. Sand & Gravel Co. v. United States, __ U.S. __, 128 S. Ct. 750 (2008); Bowles v. Russell, 551 U.S. 205 (2007).

Special masters possess the authority to consider applications for attorneys' fees and costs filed outside of the time provided in Vaccine Rule 13. Routinely, special masters grant enlargements of time to file applications for attorneys' fees and costs. Although Ms. Gabbard did not comply with Vaccine Rule 13 nor did she seek an enlargement of time to do so, Ms. Gabbard still requests that her application be considered.

Ms. Gabbard attempts to excuse her failure to comply with Vaccine Rule 13 arguing that she complied with the previous version of Vaccine Rule 13. The superceded version of Vaccine Rule 13 provided, in pertinent part: "Any request for attorneys' fees and costs pursuant to 42 U.S.C. § 300aa–15(e) shall be filed no later than six months following the filing of an election pursuant to Vaccine Rule 12." This version of Vaccine Rule 13 became effective on May 1, 2002. 51 Fed. Cl. XIII, CXXXV (2002).

However, the 2002 version of Vaccine Rule 13 is no longer effective. Vaccine Rule 13 was amended in 2005. 68 Fed. Cl. XIII, CXLIX. The 2002 version of Vaccine Rule 13 differs from the 2005 version of Vaccine Rule 13 in two respects. First, the operative amount of time

has changed from "six months" to "180 days." Second, the event that starts the running of the time has changed from "the filing of an election" to "the entry of judgment."

Ms. Gabbard seems to be arguing that the Clerk's Office misled her because the judgment issued by the Clerk's Office states: "As to attorneys' fees within six months of the above election, see Vaccine Rule 13." Judgment, issued August 7, 2008. Ms. Gabbard states that: "Counsel followed the wording regarding the filing of fees six months after the election in the Judgment issued by the Court in the instant case to calculate the timing for this case. Counsel calculated the six months based on the date of the judgment. Petitioner filed her election on August 11, 2008. On February 11, 2009, at the six month mark, Petitioner filed her application for fees and costs." Pet'r Resp. to Court Order, filed April 6, 2009.

Ms. Gabbard is correct that the judgment contains incorrect instructions. The judgment should not refer to the date that a petitioner elects to accept the judgment. This language comports with the 2002 version of Vaccine Rule 13. (The Clerk's Office has been informed about this error and will amend the language in its judgments.) Ms. Gabbard is also correct that by filing her application for attorneys' fees and costs on February 11, 2009, she acted within six months of the date she filed an election to accept the judgment, which was on August 11, 2008.

Before Ms. Gabbard filed her application for attorneys' fees and costs, special masters had noted that Ms. Gabbard's attorney did not file applications for fees and costs on time.[2] See Carrington v. Sec'y of Health & Human Servs., No. 99-495V, 2008 WL 2683632 *1 (Fed. Cl. Spec. Mstr. June 18, 2008) (noting that petitioner's counsel was required to file a motion to file a request for attorneys' fees out of time), aff'd 85 Fed. Cl. 319 (2008); Savin v. Sec'y of Health & Human Servs., No. 99-573V, 2008 WL 2066611 *1 (Fed. Cl. Spec. Mstr. April 22, 2008) (noting that petitioner's counsel was required to file a motion to file a request for attorneys' fees out of time), aff'd 85 Fed. Cl. 313 (2008); Turner v. Sec'y of Health & Human Servs., No. 99-544V, 2007 WL 4410030 *4 n.6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) ("petitioner's counsel is on notice that, notwithstanding the generous enlargements of time afforded in Program practice for the filing of attorneys' fee applications, late filed fee petitions are subject to challenge on the ground of untimeliness.").

As members of the bar of this Court, Ms. Gabbard's attorneys are charged with knowing the rules of practice. Ms. Gabbard's attorneys should not have to rely upon information provided by the Clerk's Office to determine deadlines.

On the other hand, the judgment issued by the Clerk's Office indicates that the fee application is due "within six months of the [petitioner's] election." Judgment, issued August 7,

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[2] The delay in filing for attorneys' fees and costs is unusual. Most attorneys file their applications for attorneys' fees and costs relatively soon after the judgment is issued. The attorneys, including Ms. Gabbard's counsel, have an incentive to file as soon as possible because the sooner they file, the sooner they are paid.

2008. This statement suggests that the Clerk's Office bears some responsibility for Ms. Gabbard's failure to file within the time provided by (the current version of) Vaccine Rule 13. See Bowles, 551 U.S. at 218-221 (Souter, J., dissenting) (discussing whether a litigant may fairly rely upon statements of members of the judiciary).[3]

This mistake by the Clerk's Office excuses – to some extent – Ms. Gabbard's failure to file her application for attorneys' fees and costs within the time provided by Vaccine Rule 13. Although special masters in Carrington, Savin, and Turner noted the requirement for Ms. Gabbard's attorney to file fee applications on time, these decisions did not explain how to calculate the deadline in Vaccine Rule 13. Arguably, detailed instructions should not be required to any attorney, let alone an experienced member of the bar. However, Ms. Gabbard has demonstrated some good reason for failing to comply with Vaccine Rule 13. Thus, the merit of her application will be adjudicated as set forth below.

This decision constitutes Ms. Gabbard's attorneys' final chance to comply with Vaccine Rule 13. Her attorney is placed on notice that failure to comply with Vaccine Rule 13 may result in the denial of applications for attorneys' fees and costs in their entirety.[4]

III. Attorneys' Fees

A. Standards for Adjudication

Petitioners in the Vaccine Program who receive compensation are entitled to an award for their attorneys' fees and costs. Like other litigation allowing a shift in attorneys' fees and costs, awards for attorneys' fees and costs in the Vaccine Program must be "reasonable." 42 U.S.C. § 300aa–15(e)(1) (2006).

Reasonable attorneys' fees are determined using the lodestar method – "'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)).

Here, one variable in the lodestar calculation is not disputed. The parties have agreed to the reasonable hourly rate for attorneys representing Ms. Gabbard. Thus, the remaining question is the reasonable number of hours.

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[3] Although the majority in Bowles did not agree with Justice Souter's reasoning, the majority opinion does not control the outcome in Ms. Gabbard's case because the majority opinion in Bowles rested upon a statute. Bowles, 551 U.S. at 213.

[4] Ms. Gabbard's attorney has erred in calculating deadlines before. Waller v. Sec'y of Health & Human Servs., 76 Fed. Cl. 321 (2005) (striking petitioner's motion for review that was filed one day late).

The second factor in the lodestar formula is the reasonable number of hours. Quoting a decision by the United States Supreme Court, the Federal Circuit has explained some of the limits of the number of hours for which compensation may be sought.

> The [trial forum] also should exclude from this initial fee calculation hours that were not "reasonably expended.". . . . Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority."

Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (emphasis in original) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)). One reason a trial court possesses discretion to reduce the number of hours is that a trial court "is somewhat of an expert in the time that is required to conduct litigation." Case v. Unified School Dist. No. 233, Johnson County, Kansas, 157 F.3d 1243, 1256 (10th Cir. 1998).

A decision by a special master to reduce the number of hours is entitled to deference because special masters are familiar with the litigation. Saxton, 3 F.3d at 1521 (reversing decision of a judge of the Court of Federal Claims ruling that the special master acted arbitrarily in reducing number of hours); Guy v. Sec'y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997).

B. Determination

In her February 11, 2009 application, Ms. Gabbard requested $25,560.29 in attorneys' fees. Respondent generally objected to the number of hours charged by Ms. Gabbard's attorneys (Mr. Shoemaker and his associates) as unreasonable. Respondent cited to several specific examples. Resp't Resp., filed Feb. 25, 2009, at 4-5. In reply, Ms. Gabbard conceded that five specific entries were improper in some respect and reduced the request for attorneys' fees by $186.00. Ms. Gabbard also seeks $840 for preparing the reply brief on the attorneys' fees issue. Pet'r Reply, filed March 11, 2009. The amount sought for attorneys' fees, therefore, is $26,214.29.

1. Activities Spent Prosecuting Ms. Gabbard's Case

Respondent has challenged some tasks as unreasonable and/or excessive. Due to these objections, and due to the undersigned's own observations, the amount of attorneys' fees requested is reduced by ten percent (10%).

Special masters possess the authority to reduce the amount requested sua sponte. "The Vaccine Act compels each special master to determine independently whether a particular request is reasonable. This obligation is not suspended - nor the sound discretion and common sense that underlie it rendered inoperable - merely because respondent failed to object to a particular fee item." Savin v. Sec'y of Health & Human Servs., 85 Fed. Cl. 313, 318 (2008).

The undersigned's review indicates that some tasks for which Ms. Gabbard's attorneys seek compensation are not reasonable. In this regard, the undersigned may be better positioned to identify entries that are repetitive (and therefore, unreasonable) across cases. A few examples suffice to demonstrate this point.

For work performed on February 15, 2000, Mr. Shoemaker has an entry of 0.30 hours for "review pleading, prepare status report." This entry appears to be reasonable on its face.

However, thorough experience with Mr. Shoemaker suggests that the appearance of this time entry is deceiving. The only pleading that Mr. Shoemaker could be reviewing is an order, entered on February 14, 2000, which denied a motion that Mr. Shoemaker filed on behalf of more than 125 petitioners. This order was entered in all cases, including Ms. Gabbard's case, but there is no reason for Mr. Shoemaker to charge Ms. Gabbard's case individually. It is the same order.

Similarly, it is doubtful that Mr. Shoemaker spent even ten minutes preparing the status report that he filed on behalf of Ms. Gabbard on February 15, 2000. The text of this motion appears in many, if not all, the cases in which Mr. Shoemaker represented petitioners claiming compensation for harm allegedly caused by the hepatitis B vaccine. In a case pending before the Chief Special Master, Mr. Shoemaker has sought compensation for his general work in prosecuting these cases. Mr. Shoemaker's request in that case, Riggins v. Sec'y of Health & Human Servs., No. 99-382V, includes one hour for work on February 14, 2000, to prepare a status report. A reasonable inference is that Mr. Shoemaker spent some amount of time preparing the text of the status report, which is one paragraph. Mr. Shoemaker will receive compensation for this task in Riggins. But, the task of copying the text into different cases with different captions is purely a clerical function for which attorneys are not compensated.

It would be difficult for respondent's attorney to recognize the problems below the surface of Mr. Shoemaker's entry for February 15, 2000. An attorney who is not familiar with the numerous hepatitis B cases in which Mr. Shoemaker has sought fees would not recognize the unreasonableness of requesting 0.3 hours to review an order and to prepare a status report.

Another example is Mr. Shoemaker's entry on May 30, 2006 for "review excel chart and update information, transfer information needed for SC to laptop." Mr. Shoemaker sought 0.5 hours for this work. After respondent questioned this item, Ms. Gabbard agreed to reduce the request by 0.1 hours.

The chief special master has already rejected the reasonableness of this activity performed in a different case on the same date. Melbourne v. Sec'y of Health & Human Servs., No. 99-694V, 2007 WL 2020084 *7 (Fed. Cl. Spec. Mstr. June 25, 2007). Given the previous rejection of this item, a reasonable question is why has Mr. Shoemaker continued to seek compensation for it.

A separate issue is the work performed by one of Mr. Shoemaker's associates, Ms. Knickelbein. Previous decisions have refrained from compensating all of Ms. Knickelbein's work at the rate typically paid to an attorney because some of her work could have been performed by a paralegal. Turpin v. Sec'y of Health & Human Servs., No. 99-535V, 2008 WL 5747914 *5-7 (Fed. Cl. Spec. Mstr. Dec. 23, 2008). Some of Ms. Knickelbein's work in this case is appropriately characterized as a paralegal. A non-exhaustive list of some tasks includes: e-mailing client for information about medical providers and witnesses (10/30/2003, 7/30/2004), preparing subpoenas (11/7/2003, 6/23/05), preparing an exhibit for filing and filing the exhibit (6/4/04, 8/25/05).

In light of the above findings, the original request for attorneys' fees for prosecuting the case will be reduced by ten percent. Special masters are permitted to reduce the claimed number of hours to a reasonable number of hours by means of a bulk reduction. Special masters are not required to assess fee petitions on line-by-line. Saxton, 3 F.3d at 1521 (approving special master's elimination of 50 percent of the hours claimed); see also Guy v. Sec'y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997) (affirming special master's reduction in the number of hours from 515.3 hours to 240 hours); Edgar v. Sec'y of Health & Human Servs., 32 Fed. Cl. 505 (1994) (affirming special master's awarding only 58 percent of the numbers of hours for which compensation was sought). When the trial court uses a percentage reduction, the trial court should provide a "'concise but clear' explanation of its fee reduction." International Rectifier Corp. v. Samsung Electronics, Co., 424 F.3d 1235, 1239 (Fed. Cir. 2005) (quoting Gates v. Deukmejian, 987 F.2d 1392, 1400 (9th Cir. 1993) and following Ninth Circuit law). In reducing the number of hours allowed, a trial court is not required to explain how many hours are appropriate for any given task. Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1259 (10th Cir. 2005); Mares, 801 F.2d at 1202-03 (10th Cir. 1986) (affirming district court's reduction in the number of hours claimed for pre-trial preparation by 77 percent). In other contexts, judges at the Court of Federal Claims have reduced the number of hours in requests for attorneys' fees by percentages. See, e.g., Town of Grantwood Village v. United States, 55 Fed. Cl. 481, 489 (2003) (reduction of 30% for supplemental fee petition); Presault v. United States, 52 Fed. Cl. 667, 681 (2002) (reduction of 20%).

The initial application was for $25,560.29 from which Ms. Gabbard voluntarily deducted $186.00, leaving $25,374.29. A ten percent reduction is $2,537.43. A reasonable amount of compensation for prosecuting Ms. Gabbard's action is **$22,836.86**.

2. Time Spent on the Reply Brief in Support of Attorneys' Fees and Costs

Ms. Gabbard seeks $840 for preparing her reply brief in support of the application for attorneys' fees. Ms. Gabbard claims 3.5 hours at $240 per hour. A portion of this time is appropriate.

A significant portion of the 3.5 hours was dedicated to repairing mistakes in the fee application. Ms. Gabbard forthrightly states that her attorney spent 0.5 hours on the issue of timeliness. Because Ms. Gabbard's attorneys are responsible for filing the fee application on time, the attorneys could have prevented the need for additional briefing by simply complying with Vaccine Rule 13.

Ms. Gabbard's attorney also spent some time reviewing specific entries to which respondent had objected. For some entries, Ms. Gabbard conceded that the time entry was improper, such as being a duplication. For other entries, Ms. Gabbard provided additional information in the reply brief to explain their reasonableness. In either case, if the attorneys had recorded their time with greater accuracy, the dispute about the entries would not have arisen and Ms. Gabbard would not have been required to file a reply brief.

In short, most of the efforts for the reply brief were activities that benefit the attorneys, in the sense that the reply brief attempted to correct and/or to address a problem that the attorneys created. The consequence should be borne by the attorneys and not Ms. Gabbard or the Vaccine Injury Compensation Trust Fund.

On the other hand, respondent raised some objections that did not originate with actions by the attorney. The two issues relating to costs are examples in which there can be some dispute between petitioners and respondent. Therefore, one hour of time (**$240**) will be awarded to Ms. Gabbard's attorney for work on the reply brief.

The total amount of attorneys' fees awarded is **$23,076.86** ($22,836.86 + $240).

IV. Costs

A. Standards for Adjudication

Ms. Gabbard is entitled to an award for the reasonable costs incurred by her attorneys. 42 U.S.C. § 300aa–15(e). The reasonable amount of an expert's compensation is determined using the same lodestar method used to determine the reasonable amount of compensation for an attorney. Simon v. Sec'y of Health & Human Servs., No. 05-941V, 2008 WL 623833 * 1 (Fed. Cl. Spec. Mstr. Feb. 21, 2008); Kantor v. Sec'y of Health & Human Servs., No. 01-679V, 2007 WL 1032378 *4-8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).

"Reasonableness" may be evaluated from a paying client's perspective. The United States Supreme Court stated that "[h]ours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority." Hensley, 461 U.S. at 433-34 (emphasis in original). If a hypothetical yet reasonable client would be willing to pay for an expert's report, then it is appropriate to award compensation for that expert's report. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections, 522 F.3d 182, 184 (2d Cir. 2008) (stating a trial court "must act later to ensure that the attorney does not recoup fees that the market would not otherwise bear. Indeed, the district court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively"); Goos v. National Ass'n of Realtors, 68 F.3d 1380, 1386 (D.C. Cir. 1995) (phrasing the question as "would a private attorney being paid by a client reasonably have engaged in similar time expenditures"); Norman v. Housing Authority of the City of Montgomery, 836 F.2d 1292, 1302 (11th Cir. 1988) (recognizing that "in the private sector the economically rational person engages some cost benefit analysis."); Presault v. United States, 52 Fed. Cl. 667, 680 (2002). The client must be pictured hypothetically because individual attributes of Ms. Gabbard (for example, her wealth or poverty) should not determine whether the cost is reasonable. Furthermore, it must be assumed that the client would have to pay for the expert because the client's self-interest would lessen the likelihood that the client would invest money into the expert needlessly.

One aspect of the general rule that costs must be reasonable to be compensable is that costs are not awarded for work that is not necessary work. Duplicative work is presumptively unnecessary. Attorneys are not entitled to compensation for performing work that is not necessary. Hensley, 461 U.S. at 434. The same principle restricts experts. Kantor, 2007 WL 1032378 *4-8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).

As the party requesting an award of costs, petitioners bear the burden of establishing their reasonableness. Presault, 52 Fed. Cl. at 670. When petitioners fail to meet their burden of proof, such as by not submitting appropriate documentation, special masters have refrained from awarding compensation. See, e.g., Gardner-Cook v. Sec'y of Health & Human Servs., No. 99-480V, 2005 WL 6122520 *4 (Fed. Cl. Spec. Mstr. June 30, 2005). This practice is consistent with how the Federal Circuit and the Court of Federal Claims, two courts that review decisions of special masters, have interpreted other fee-shifting statutes. See Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987) (the Equal Access to Justice Act); Presault, 52 Fed. Cl. at 679 (the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970). On the other hand, special masters have also compensated experts when the petitioner failed to submit information about the expert's hourly rate. See, e.g., English v. Sec'y of Health & Human Servs., No. 01-61V, 2006 WL 3419805 *16 (Fed. Cl. Spec. Mstr. Nov. 9, 2006). These principles are the basis for evaluating whether the cost of a specific person is reasonable in the following sections.

B. Determination

Ms. Gabbard seeks $12,195.38 in attorneys' costs. Pet'r Appl. at pdf page 30. She also requests $742.88 in her own costs.

Respondent has objected to two items of cost. First, respondent objected to reimbursing Ms. Gabbard for clothing that she, apparently, purchased to attend a hearing in this case. Second, respondent objected to reimbursement for Dr. Greenspan.

1. Clothing

Ms. Gabbard seeks reimbursement for $263.04 for clothing that she purchased to attend a hearing. Pet'r App'n at pdf page 4 and 8. According to Ms. Gabbard's credit card statement, she purchased items from a store on February 27, 2008. Id.

Ms. Gabbard's request is highly unusual in two respects. First, the request to reimburse a petitioner for clothes to wear to a hearing appears to be unprecedented. While Ms. Gabbard's sentiment in displaying appropriate decorum is admirable, purchasing a new outfit is not necessary. Second, when Ms. Gabbard purchased the clothes (February 2008), there was almost no chance of the case actually going to a hearing. The parties had reached a tentative settlement months earlier. Order, filed Oct. 31, 2007. Thus, Ms. Gabbard could not have reasonably believed that a hearing was necessary. If there were any doubt about the need for a hearing, these doubts were eliminated when Ms. Gabbard signed the stipulation, which was filed on March 4, 2008.

Consequently, Ms. Gabbard's request for reimbursement of this item is denied. Therefore, she is awarded **$479.84** ($742.88 - $263.04).

2. Dr. Greenspan

Ms. Gabbard seeks an award of compensation for work performed by Dr. Mark Greenspan. Dr. Greenspan is both an attorney and a doctor, who specialized in surgery. Ms. Gabbard seeks compensation for eight hours of Dr. Greenspan's work at an hourly rate of $250 per hour, for a total request of $2000. Pet'r App'n at pdf 34-35. Ms. Gabbard's request is denied.

Ms. Gabbard has not met her burden of establishing the reasonableness of Dr. Greenspan's services. Dr. Greenspan's record-keeping in this regard is not helpful. A majority of his entries say that Dr. Greenspan was communicating (either by e-mail or by telephone) with someone (Mr. Shoemaker, another attorney, or Dr. Shoenfeld). However, Dr. Greenspan's entries do not explain what is happening in this case. Although Ms. Gabbard asserted that Dr. Greenspan's work "did not represent a duplication of efforts," Pet'r Reply at 7; Ms. Gabbard provided no evidence to confirm this statement. Without more details from Dr. Greenspan

and/or Ms. Gabbard's attorney, it is not possible to evaluate how Dr. Greenspan is contributing to Ms. Gabbard's case.[5]

It appears that adding Dr. Greenspan to the mix did not increase the efficiency. For example, Dr. Greenspan would spend time communicating with an expert, then spend roughly the same amount of time communicating with Mr. Shoemaker. Ms. Gabbard's case could have been litigated more efficiently if Mr. Shoemaker communicated with the expert directly. Dr. Greenspan's work did not save any time and, by adding another layer of staffing, may have actually added time unnecessarily.

Within the past year, Ms. Gabbard's attorneys have frequently sought compensation for work performed by Dr. Greenspan. Special masters – and, occasionally, judges at the Court of Federal Claims – have generally rejected these requests. Sabella v. Sec'y of Health & Human Servs., __ Fed. Cl. __, 2009 WL 539880 *27 (Feb. 10, 2009) (affirming denial of a portion of Dr. Greenspan's fees); Savin, 85 Fed. Cl. 313 (affirming denial of a portion of Dr. Greenspan's fees); Wadie v. Sec'y of Health & Human Servs., No. 99-493V, 2009 WL 961217 *7-8 (Fed. Cl. Spec. Mstr. Mar. 23, 2009) (denying most of charges sought by Dr. Greenspan). Ms. Gabbard has offered no persuasive reason why the outcome in her case should differ from these earlier decisions.

Therefore, Ms. Gabbard's attorney is awarded **$10,195.38** ($12,195.38 - $2,000) in costs.

V. Conclusion

Ms. Gabbard has established that some portion of her requested attorneys' fees and costs are reasonable. She is awarded $23,076.86 in attorneys' fees, $10,195.38 in attorneys' costs, and $479.84 in her own costs.

IT IS SO ORDERED.

S/ Christian J. Moran
Christian J. Moran
Special Master

[5] Additionally, Dr. Greenspan has recorded his time in quarter-hour increments. The preferred practice is to divide time into tenths of an hour. Broekelschen v. Sec'y of Health & Human Servs., No. 07 -137V, 2008 WL 5456319 *4-5 (Fed. Cl. Spec. Mstr. Dec. 17, 2008) (citing cases). If Dr. Greenspan had provided more information about his activities, then the time could have been adjusted.