

**OFFICE OF SPECIAL MASTERS**

No. 99-480V

Filed: June 30, 2005

Not for Publication

\* \* \* \* \*

NANCY GARDNER-COOK, \*

\*

Petitioner, \*

\*

v. \*

\*

SECRETARY OF THE DEPARTMENT \*

OF HEALTH AND HUMAN SERVICES, \*

\*

Respondent. \*

\*

\* \* \* \* \*

**DECISION AWARDING ATTORNEY’S FEES AND COSTS<sup>1</sup>**

On July 23, 2004, petitioner sued on her own behalf under the National Childhood Vaccine Injury Act of 1986, alleging that she suffered left-sided numbness following her first hepatitis B vaccination on August 12, 1994, and Guillain-Barre Syndrome and/or acute disseminated encephalomyelitis after her second hepatitis B vaccination on September 9, 1994. An entitlement hearing was held on June 19, 2002. The undersigned dismissed the petition on April 28, 2004, ruling that petitioner failed to prove a prima facie case that hepatitis B vaccine injured her neurologically or caused any illness whose *sequelae* lasted more than six months. The U.S. Court of Federal Claims affirmed the special master’s decision on July 25, 2003 and petitioner’s motion for reconsideration was denied. The U.S. Court of Appeals for the Federal

---

<sup>1</sup> 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.”

Circuit summarily affirmed, without opinion, the Court of Federal Claims' dismissal of the petition on May 11, 2004.

On July 12, 2004, petitioner filed an application for fees and costs. Petitioner requests \$219,425.00 in attorney's fees and \$75,571.11 in litigation costs. On January 4, 2005, respondent filed Respondent's Objections to Petitioner's Application for Attorney's Fees and Costs. On April 25, 2005, petitioner filed a Response to Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs.

### **1. Petitioner's Request for Attorneys Fees and Costs**

Petitioner requests attorney fees of \$219,425.00 for 877.70 hours of legal services rendered at a rate of \$250.00 per hour. Petitioner also requests \$75,571.11 in costs paid by petitioner's attorney. With the fee petition, petitioner provided an affidavit, in compliance with General Order #9, stating that petitioner paid no costs out of pocket. Of the costs paid by the petitioner's attorney, \$8,136.11 covered costs related to copying, postage and hotel expenses; \$1,160.00 covered travel costs for 11.60 hours of travel time charged at a rate of \$100.00 per hour; a \$400 fee was paid to Dr. Marcel Kinsbourne; \$1,275.00 was paid to Sheila Bastien, Ph.D., for a Neuropsychometric Evaluation and Written Report; and \$64,600.00 was paid to Dr. Byron Hyde for research, reports and testimony.

In support of the fee petition, petitioner filed: an 18-page invoice from Mr. Shertzer; a 15-page invoice from Dr. Byron Hyde; an invoice from Sheila Bastien, Ph.D.; an affidavit from George C. Werner, Jr., a Lancaster, PA attorney, practicing since 1980, asserting his familiarity with fees charged by attorneys in Lancaster County, and supporting Mr. Shertzer's request for a rate of \$250.00 per hour in light of the \$260.00 hourly fee that he (Mr. Werner) charges for

commercial litigation; and an affidavit from Richard P. Nuffort, a Lancaster, PA attorney, practicing since 1972, stating that he believes that a fee of \$250 per hour is reasonable, that he (Mr. Nuffort) charges \$195.00 per hour for general civil litigation, and that other attorneys charge \$225.00 per hour for the same services.

## **2. Respondent's Objections**

### **a. Hourly Rate**

On January 4, 2005, respondent filed Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs. Respondent's first objection is that petitioner failed to establish the reasonableness of the hourly rate of \$250.00. Resp. Obj. at 3. Respondent states that petitioner failed to provide reliable evidence of the prevailing market rate in Lancaster County, the relevant community. Resp. Obj. at 3-4. Respondent argues that proof of a prevailing market rate for lawyer's services may be demonstrated by "citation to prior precedent" and that an hourly rate has not been previously set for Mr. Shertzer. Resp. Obj. at 5. Respondent recognizes that Chief Special Master Gary Golkiewicz recently awarded an attorney with over 33 years of legal experience from Philadelphia, PA, an hourly rate of \$250.00. Ceballos v. Sec'y HHS, No. 00-97V, 2004 WL 784910, \*9 (Fed. Cl. Spec. Mstr. March 25, 2004). Respondent further argues that petitioner has not provided evidence that Lancaster is as "high cost" a geographic area as Philadelphia. Id. Respondent suggests \$175.00 as an appropriate hourly rate. Id. at 5-6.

On April 25, 2005, petitioner filed a Response to Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs. With regard to the requested hourly rate, petitioner states that Mr. Shertzer has more than 55 years of trial and appellate experience. Petitioner

argues that the cost of living in Lancaster is not substantially lower than that of Philadelphia. In support of this argument, Petitioner attached a printout of a cost of living index from June 1998, which showed that Philadelphia's cost of living index ("index") is 1.01, while Lancaster has an index of 0.97.

The undersigned finds the hourly rate requested by Mr. Daniel Shertzer to be reasonable. Based on the affidavits provided by petitioner, the prevailing market rate for Lancaster is between \$190.00 per hour and \$260.00 per hour. The undersigned finds persuasive the cost-of-living index provided by petitioner. Given that the cost-of-living index in Lancaster is not much lower than that in Philadelphia, comparisons with the hourly rate awarded in Ceballos are relevant. Furthermore, Mr. Shertzer has nearly 22 more years of legal experience than the attorney in Ceballos. As stated in the Petitioner's Response to Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs, Mr. Shertzer's more than 55 years of trial and appellate experience includes personal injury, medical malpractice, and product liability cases. Given Mr. Shertzer's experience, the undersigned finds that the \$250.00 hourly rate requested is reasonable.

b. Number of Hours Expended

Respondent argues that petitioner seeks an excessive amount of attorney time compared to cases of "similar complexity and length of proceedings". Resp. Obj. at 7. Respondent cites that Mr. Shertzer spent 168.5 hours over a three-month period, "preparing, reviewing and correcting" appellate briefs to the U.S. Court of Federal Claims and the Federal Circuit, along with an additional 18 hours spent preparing for oral argument. Id. Respondent further states that the appeal was "meritless", and argues that appeals involving credibility determinations should

not be reimbursed. Id. Finally, respondent argues that many of the tasks performed by Mr. Shertzer were paralegal or secretarial in nature. Id. at 7. Based upon review of the petition, respondent estimates that at least 111 hours of the attorney time was spent on tasks such as preparing exhibits, tables of contents, appendices for legal briefs and filing of records, which are normally considered paralegal tasks. Resp. Obj. at 7. Respondent argues that these arguably non-legal tasks should not be considered legal in nature, simply because they have been carried out by an attorney. Id.

In petitioner's response, petitioner asserts that respondent's objections with regard to the number of hours expended are unjustified. Petitioner argues that this was a complex and hard fought case involving 15 physicians, with more than 2500 pages of medical and other reports and medical literature filed. Petitioner argues that respondent misunderstood the work that was performed as paralegal work. Finally, petitioner argues that petitioner's appeal was not based on factual matters and instead on the claim that the undersigned based her decision solely on the testimony produced at the hearing, and did not consider the medical literature submitted by both parties in reaching her decision.

In reviewing the petition, the undersigned finds respondent's objections to have merit. The undersigned finds that Mr. Shertzer does seek compensation for tasks that should not require so much time. For example, in May 2003, Mr. Shertzer claims to have spent 87.3 hours preparing a memorandum of objections, which was filed on May 28, 2003. It is not reasonable for Mr. Shertzer, an attorney whose legal experience exceeds 55 years, to spend over 87 hours preparing a 12-page memorandum. There are other such entries in Mr. Shertzer's billing statement. The special master is not necessarily required to base her decision on a line-by-line

evaluation of the fee application. Wasson v. Sec'y of HHS, Cl.Ct. 482, 484 (1991), aff'd, 988 F.2d 131 (Fed.Cir.1993). The undersigned reduces Mr. Shertzer's total hours by 30%, therefore awarding Mr. Shertzer a total of 622.51 hours.

c. Costs

Respondent objects to a number of the litigation costs requested by petitioner. First, respondent argues that the \$400.00 fee paid to Dr. Kinsbourne is a "retainer", given the lack of a receipt to indicate the costs he incurred, and the fact that Dr. Kinsbourne did not file a report. Resp. Obj. at 9-10. Respondent argues that as a "retainer", this fee is "irrelevant" to the current proceedings. Resp. Obj. at 10. In petitioner's April 25, 2005 response, petitioner addressed respondent's objections to the requested litigation costs. Specifically, petitioner argued that respondent mischaracterized Dr. Kinsbourne's fee as a retainer, and explained that Dr. Kinsbourne had not produced a report because, upon his review of petitioner's medical records, he concluded that he did not have the required expertise and recommended Dr. Hyde in his place.

Here, Dr. Kinsbourne's credentials show him to be unqualified to handle petitioner's case because he is a pediatric neurologist and petitioner is an adult. Plaintiff should not be compensated for fees that arise out of errors such as seeking medical advice from an expert, like Dr. Kinsbourne, who is not qualified to handle the specific case at hand. Therefore, the undersigned finds the requested \$400 for Dr. Kinsbourne to be unreasonable, and petitioner will not be compensated for it.

Respondent also objects to the hourly rates charged by Dr. Byron Hyde as excessive. Specifically, respondent argues that Dr. Hyde's hourly rate is unreasonable because his

credentials are “lacking” and his testimony was “neither credible nor helpful”. Resp. Obj. at 11. Petitioner argues that respondent improperly challenged Dr. Hyde’s credentials and that the doctor should not be excluded as an expert witness simply because he does not practice medicine in the traditional sense. The undersigned finds respondent’s arguments to be without merit and will consider Dr. Hyde an expert who is entitled to compensation at the requested rate of \$300 per hour.

Respondent also objects to the increase in Dr. Hyde’s hourly fee for the trial. Resp. Obj. at 9. It has been held that a medical expert should not be allowed to increase his or her fee for trial testimony. Plott v. Sec’y of HHS, No. 92-633V, 1997 WL 842543, \*6 (Fed. Cl. Spec. Mstr. April 23, 1997); Salimian v. Sec’y of HHS, No. 91-1140V, 1992 WL 185710, \*3 (Cl.Ct.Spec.Mstr. July 17, 1992); Gonzalez v. Sec’y of HHS, No. 91-905V, 1992 WL 92200, \*3 (Cl.Ct.Spec.Mstr. Apr. 10, 1992). Here, Dr. Hyde increased his fee from \$300 per hour for professional services to \$400 per hour for trial. Given that petitioner does not provide a reason for this increased fee, the undersigned will compensate petitioner’s counsel for Dr. Hyde’s 14 hours at trial at the rate of \$300 per hour.

Respondent also objects to the total number of work hours for Dr. Hyde, and argues that the 244 hours is excessive due to inefficiency and redundancy on his part. Resp. Obj. at 12. Specifically, respondent objects to Dr. Hyde’s claim that he spent a total of 3 hours drafting the same six-page letter for evaluation of petitioner by PET scan to three different individuals, with one hour spent on each letter, respectively. Resp. Obj. at 12. The undersigned agrees with respondent’s argument. It should not have taken Dr. Hyde so long to “draft” a letter, which he had already written. For this reason, the amount of time that Dr. Hyde claims for drafting these 3

letters is reduced to 1.5 hours. Respondent also objects to the 50 hours billed by Dr. Hyde for his travel time. Resp. Obj. at 13. The undersigned agrees with the respondent's argument that 50 hours is an unreasonable amount of travel time, and will reduce Dr. Hyde's travel time by 50% (25 hours).

Petitioner also does not provide sufficient documentation regarding the \$1,275.00 fee charged by Ms. Bastien for her services. Rather than including an hourly breakdown of Ms. Bastien's work and her hourly fee, petitioner provides only a letter from Ms. Bastien, dated July 22, 1998, which lists the owed balance of \$1275.00, but does not include any explanation as to how she arrived at that amount. Additionally, petitioner failed to address this issue in Petitioner's Response to Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs. Given that these fees are not properly documented, the undersigned cannot determine the proper rate at which petitioner's counsel should be reimbursed, and therefore the undersigned cannot compensate petitioner for this expense.

Finally, petitioner requests \$8136.11 in other litigation costs. In Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs, respondent objected to the absence of supporting documents such as invoices, receipts, and cancelled checks. Resp. Obj. at 13. Petitioner responded by providing supporting documents that accounted for only \$3622.25 of the \$8136.11 requested. While petitioner is entitled to reimbursement for reasonably incurred costs, she bears the burden of proving that these costs are, in fact, reasonable. Although petitioner explains that the remaining invoices were lost in 2002, when petitioner's counsel "remove[d] items in storage", the undersigned cannot compensate petitioner for these undocumented, and, therefore, unexplained expenses. Pet. Resp. at 7. Therefore, petitioner shall



receive \$3622.25.

### CONCLUSION

The undersigned reduces Mr. Shertzer's hours by 30% in light of the secretarial and paralegal nature of some of the work conducted. Petitioner's counsel will not be reimbursed for the fees paid to Dr. Kinsbourne and Ms. Bastien due to either inappropriateness or the lack of supporting documentation regarding the reasonableness of these fees.

For the purposes of compensation, Dr. Hyde's hourly trial rate has been reduced to \$300. Additionally, Dr. Hyde's travel hours have been reduced to 25 hours. With regard to the additional litigation costs, petitioner's counsel shall be reimbursed only for the \$3,622.25 that is reflected in the supporting invoices and cancelled checks.

The total award for reasonable attorney's fees and costs is:

Fee	622.51 hours x \$250.00	\$155,627.50
Travel Costs	11.6 hours x \$100.00	\$1,160.00
	Total Attorney's Fees and Costs	\$156,787.50

The total award of litigation costs is as follows:

Dr. Kinsbourne		\$0.00
Dr. Hyde		
Professional and		
Testimony Fee	192.5 hours x \$300.00	\$57,750.00
Travel Fee	25 hours x \$100.00	\$2,500.00
Ms. Sheila Bastien		\$0.00
Other Costs		\$3,622.25

Total Litigation Costs

\$63,872.25

The clerk shall enter judgment for \$220,659.75, and shall direct that the award be made in the form of a check payable to petitioner and Mr. Daniel Shertzer. 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.<sup>2</sup>

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Laura D. Millman  
Special Master

---

<sup>2</sup> 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.