OFFICE OF SPECIAL MASTERS

No. 90-3375V

(Filed: July 22, 1997)

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GEORGE PINEGAR and PAULA PINEGAR, Individually and as Natural Parents and Representatives of, VANESSA MONIQUE PINEGAR, a minor child,	*	
Petitioners,	*	
vs.	*	PUBLISHED
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

Norman J. Lerum, Esq., Chicago, Illinois, for petitioners.

Mark W. Rogers, Esq., United States Department of Justice, Washington, D.C., for respondent.

ATTORNEYS' FEES AND COSTS DECISION

ABELL, Special Master:

On 1 October 1990, petitioners filed a petition under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act)[(1)] for the alleged vaccine-related encephalopathy of their daughter, Vanessa Pinegar, as a result of a 27 May 1986 diphtheria-pertussis-tetanus (DPT) vaccination. On 24 March 1995 respondent filed her report, pursuant to Vaccine Rule 4(b), conceding that petitioners were entitled to compensation under the act. On 22 June 1996 the court granted a motion by petitioners' then counsel, Gia Surla, Esq., for leave to withdraw from the case. The court simultaneously granted Miss Surla's motion to intervene to recoup the expenses incurred and be paid a reasonable amount of attorney's fees. Subsequently, Norman J. Lerum, Esq., was retained as counsel for petitioners. Mr. Lerum has served in

that capacity to present.

A hearing on the issue of damages was held on 7 November 1996. At that hearing the parties sketched the outline for a settlement on the issue of damages. The parties continued to work diligently in structuring a settlement. On 2 December 1996, respondent filed a revised life care plan. On 17 December 1996, petitioners filed a statement indicating that they acquiesced in the terms contained in respondent's revised life care plan of 2 December 1996 and requesting that the court enter a decision pursuant to the terms and conditions in said life care plan. On 11 March 1997 the court entered a decision awarding compensation to petitioners. Judgment on that decision was entered on 30 April 1997. Petitioners elected to accept the judgment on 14 May 1997.

On 14 May 1997, petitioners filed their petition for attorney's fees and costs on behalf of Mr. Lerum in the amount of $26,254.97. The court issued an order to former counsel, Miss Surla, pursuant to her status as intervenor, to file a petition for attorneys fees and costs. Miss Surla filed a petition on 19 June 1997 requesting $21,520.85. Respondent filed her objections on 11 July 1997. The combined total of the requests of Miss Surla and Mr. Lerum exceeds $30,000. As this case is a "pre-act" case, the court can award a maximum of $30,000.[(2)] The task for the court, then, is to apportion a fair award within the statutory restrictions.

In *Baker v. Secretary of HHS*, No. 89-111V, 1992 WL 138379 (Cl. Ct. Spec. Mstr. May 29, 1992), the special master addressed the issue of apportionment of the statutory maximum $30,000 between a Vaccine Program attorney and prior counsel in a tort action for the same injury. The special master held that it is appropriate to first compensate petitioners' counsel in the Vaccine Program proceeding for the reasonable value of his or her services. *Id*. at *1. Then, if any funds remain under the $30,000 cap, the balance may be allocated to counsel from the prior tort action. *Id*. The court based its reasoning on the fact that Congress provided the award for attorney's fees and costs to enable Program petitioners to obtain the assistance of counsel in their Program petitions. *Id*. The special master's reasoning in *Baker* was sound. In the case at bar, however, a different twist is added to the dilemma of dividing a limited sum between parties whose total request exceeds the limitation. In this case, both attorney's incurred costs and fees during the prosecution of a Program petition. Thus, by the reasoning in *Baker*, each attorney would seem to be entitled to his or her reasonable fees and costs. However, the statutory maximum trumps in this case. Either one or both parties will be cut off at the $30,000 limit and receive less than otherwise would have been reasonably awarded.

To resolve this conundrum, the court will follow the following analysis. The first step is to ascertain the reasonableness of each attorney's request. The court will evaluate each petition, and any opposition thereto, and arrive at a reasonable amount for each attorney. If the total amount of court determined *reasonable* fees and costs for both attorneys remains in excess of $30,000, the court will apportion an award based upon the ratio of the respective reasonable amounts. If after applying those percentages to the $30,000 it becomes apparent that one party is being compensated beyond his or her contribution to the prosecution of the case, the court will make appropriate adjustments in the apportionment.

As the determination of reasonable attorney's fees is hardly an exact science, to ensure fairness, it will also be necessary for the court to evaluate the relative contribution of each attorney in bringing the case at bar to conclusion. The court endeavors to reward attorneys who capably perform their duty to their clients. The court will look unfavorably upon attorneys who withdraw from cases without good cause. Length of time in service of a client is not as important as the successful completion of duties during the most important stages of litigation. For example, gathering records is not as important as appearing at trial or resolving a case through negotiations.

Attorney Norman J. Lerum

Mr. Lerum requests compensation for 104.4 hours at the rate of $185 per hour. While respondent does not object to the number of hours expended, counsel objects to the rate requested as too high. Respondent suggests that an hourly rate in the range of $150-$160 would be more reasonable. This court has held that $175 per hour is the highest rate that will be awarded. *Betlach v. Secretary of HHS*, No. 95-3V, 1996 WL 749707 (Fed Cl. Spec. Mstr. Dec. 17, 1996). An hourly rate of $175.00 is considered a premiere hourly rate under the Program that should be reserved for the most experienced attorneys providing the best representation and practicing in high cost geographical areas. Mr. Lerum has considerable experience in the Vaccine Program, he practices in a high cost area, and he performed with distinction in this case. Accordingly, he will be compensated at the top hourly rate of $175 per hour. Simple lodestar multiplication yields a total of $18,270.00 for reasonable attorneys fees that the court will award subject to the $30,000 statutory limitation.

Mr. Lerum also claims $6,940.97 in costs. Respondent objects to the hourly rate for services rendered by petitioners' life care planner ($50 to $100 per hour). Respondent's objection is well taken considering the fact that the same life care planner charged less while under the employ of Mr. Kerensky and Miss Surla ($52 to $80 per hour). The total bill charged by the life care planner, Life Care Consultants, Inc., is $10,414.22 ($2,491.42 billed to Mr. Lerum and $7,922.80 billed to Miss Surla). This amount raises concerns with the court. On its face it appears unreasonably high. On the other hand, with adequate documentation and explanation, the court can envision granting such an award as requested. However, obtaining satisfactory explanations of life care expenses has proven near impossible in the Vaccine Program. The Chief Special Master recently addressed the issue of life care planning expenses in *Wilcox v. Secretary of HHS*, No. 90-991V, 1997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997).[(3)] This court is in complete accord with the views expressed therein.

In the case *sub judice*, to satisfactorily determine a reasonable amount to award for life care plan expenses, the court would have to embark on a tedious and time consuming process of discovery. However, it is obvious that in this case, the amount by which the court could possibly reduce the award for life care plan expenses would not reduce the total fee award below $30,000. Thus the court will not waste time in such discovery. The court remains concerned about the amount requested for life care plan expenses. In the future, under different circumstances, the court will investigate the reasonableness of these expenses regardless of the time and tedium required. If the attorney cannot adequately substantiate theses expenses, they will be partially or totally denied. All attorneys should be familiar with the standards outlined in *Wilcox*, and in accordance therewith, file clear, cogent and completely documented requests for life care planning expenses.

Rather than waste time on unprofitable investigations, the court will, solely for the purpose of establishing a workable ratio between the respective attorneys' requests, accept the life care planning expenses as stated. Thus, in order to establish the appropriate ratio, the total reasonable costs for Mr. Lerum amount to $6,940.97. Added to his reasonable attorney's fees of $18,270.00, Mr. Lerum's total reasonable fees and costs is $25,210.97.

Attorney Gia Surla

Miss Surla, in her capacity as intervenor, requests $4,369.25 in attorneys' fees and $17,151.60 in costs for

a total of $21,520.85. Respondent offered no objections to the attorney's rate or the number of hours. The court agrees that the request for $4,369.25 in fees is reasonable and would otherwise award that amount accordingly.

Respondent raised many issues with regard to Miss Surla's request for costs. Respondent objected to the request for $7,260 in life care plan expenses as clearly excessive. The court agrees that this amount is excessive on its face, but for reasons addressed *supra*, that amount will be accepted as requested, but solely for the purpose of setting the appropriate ratios in this case.

Respondent also objects to the costs for two expert witnesses. Her objection is grounded upon the fact that this case was a conceded case and that no expert testimony was necessary for the issue of entitlement. Respondent conceded this case in her Rule 4 report, which was filed on 24 March 1995. Petitioners filed the medical expert report of Dr. Karyl Norcross Nechay on 15 July 1991. Intervenor was billed $325 for Dr. Nechay's services. The court finds that expense to be eminently reasonable. Dr. Marcel Kinsbourne billed $1,000 for a retainer on 2 August 1993 and $425 for expert services on 4 April 1995, for a total of $1,425. No report from Dr. Kinsbourne was filed. On 23 May 1995, intervenor lists a $1,500 expense for Dr. John Menkes. Dr. Menkes was retained on 16 January 1994. No report from Dr. Menkes was filed.

Respondent objects to the fees from Dr. Kinsbourne as unreasonable in that they were unnecessary because the case was conceded before his report was filed. Dr. Kinsbourne's invoice is dated 30 March 1995 - six days after respondent's concession was filed. The court is somewhat concerned by the retention of Dr. Kinsbourne, which was not ordered. But it is reasonable to believe that his work was performed prior to the notice of concession. Thus the court would find these costs reasonable. However, the notation of the expense for Dr. Menkes' services is dated 23 May 1995 - almost two months after the notice of concession. The court is troubled by this delay after the concession. When were Dr. Menkes' services provided? The court can only speculate. In any event, why was a third medical expert retained in a case that was so strong it was conceded by respondent? Such an expense is not reasonable and will not be awarded.

Intervenor requests $1,704.26 for copying charges. Respondent objects to this amount as excessive. This court typically awards copying expenses at $.08 per page. There is no indication of the cost per page nor how many pages were copied. This was just an average size file. The copying charges appear excessive. The court would deduct $500 from the request.

For the purpose of setting an appropriate ratio, the court finds that $15,151.60 in costs, in addition to $4,369.25 in fees, for a total of $19,520.25, would be reasonable.

In sum, the court finds, solely for the purpose of setting an appropriate ratio, that $19,520.25 in fees and costs is reasonable for intervenor, and $25,210.97 is reasonable for petitioners' current counsel. The ratio is calculated as 56% for Mr. Lerum and 44% for Miss Surla. After a review of the proceedings in this case, and in consideration of the relative performance of both attorneys, the court is compelled to make an adjustment.

Mr. Lerum entered this case in the fall of 1996. By December 1996 the parties had reached an agreement and on 11 March 1997 a decision was entered bringing the case to a successful resolution. The process of negotiating to settle the damages portion of this case was the lion's share of the work. Mr. Lerum guided petitioners through the negotiations with diligence, competence and expedition. The court does not wish to disparage former counsel's efforts prior to withdrawal, but Mr. Lerum tackled the more significant part of the case. Upon the request of the court, counsel for respondent opined that Mr. Lerum should be allocated the greater portion of the award because he "accepted this case at the beginning of its most

difficult stage, and saw the matter through to its conclusion." Respondent's Opposition at 5. Respondent offered that, when entitlement to compensation is conceded, the most difficult part of the case comes after the life care plans are filed. That is when the parties must bear down and attempt to resolve differences or go to trial. The court agrees with respondent. Accordingly, the court will set the percentages at 60% for Mr. Lerum ($18,000) and 40% ($12,000) for intervenor.

Based on a review of petitioner's attorney's fee petition and accompanying documentation, the undersigned finds an award of $30,000.00 for attorney's fees and costs reasonable in this matter. The award is to be distributed as follows: $18,000 to Norman J. Lerum, Esq., and $12,000 to Gia Surla, Esq.

In the absence of a motion for review filed in accordance with RCFC Appendix J, the clerk of the court is directed to enter judgment in favor of petitioner in the amount of $30,000.00[(4)] for reasonable attorney's fees and costs. The award will be bifurcated into two checks. The first check is to be written in the amount of $18,000 and made payable jointly to petitioners and Mr. Norman J. Lerum, Esq. The second check is to be written in the amount of $12,000 and made payable jointly to petitioners and Gia Surla, Esq.

IT IS SO ORDERED.

Richard B. Abell

Special Master

1. [1] The statutory provisions governing the Vaccine Act are found in 42 U.S.C.A. §§ 300aa-1 *et seq*. (West 1991 & Supp. 1996). For convenience, further reference will be to the relevant subsection of 42 U.S.C.A. §300aa as so amended.

2. Compensation for lost earnings, pain and suffering and reasonable attorneys' fees and costs may not exceed a combined total of $30,000.00 in cases associated with the administration of a vaccine *before* the effective date of the Act. Section 15(b).

3. In *Wilcox*, the court outlined various factors and concerns to address when evaluating life care planning expenses. The Chief Special Master observed that the original guidelines Congress promulgated for these expenses have become anachronistic over time and upon changing circumstances. The court stressed the need for petitioners to submit evidence sufficient to justify the expenses claimed. Specifically, the court advised petitioners to summarize the relative difficulty of the damages claim, the problems in obtaining apposite information, the length of time spent in settlement negotiations and any other fact that would tend to assist the special master in determining the reasonableness of the claim. Of interest, in *Wilcox*, the Chief Special Master was rightfully troubled by the unexplained disparity in hourly rates requested by the life care planner.

4. This amount is intended to cover *all* legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. *See generally*, *Beck v. Secretary of HHS*, 924 F.2d 1029 (Fed. Cir. 1991).