IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 3-586V
Filed: December 29, 2010
To be Published

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DIANNE DOGGETT and GARY FAGELMAN, parents of Augie Fagelman, a minor,	*
Petitioners,	*
v.	*
SECRETARY OF HEALTH AND HUMAN SERVICES,	*
Respondent.	*

* *

ORDER SETTING FORTH FACTS PERTAINING TO ATTORNEY FEES AND COSTS[1]

Vowell, Special Master:

On March 14, 2003, petitioners filed a Short-Form Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ["the Program"],[2] on behalf of Augie Fagelman. By using the special "Short-Form" developed for the Omnibus Autism Proceeding ["OAP"], petitioners alleged that various vaccinations injured Augie Fagelman. As the result of proceedings thus far in the OAP, counsel for petitioners has indicated that this case is among the many in which there is inadequate evidence of causation to prevail upon the merits.

In anticipation of over 30 cases filed by this firm in which OAP petitioners will move to dismiss their claims and apply for an award of attorney fees and costs,[3]

[1] Because I have designated this order to be published, in accordance with Vaccine Rule 18(b), the parties have 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

[2] National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

[3] Section 300aa-15(e) permits an unsuccessful petitioner to recover compensation for reasonable attorney fees and costs, provided that the petition was filed in good faith and upon a reasonable basis.

counsel agreed to engage in informal efforts to resolve the attorney fees and costs awards in this case and the others. Based the process developed with respondent and five law firms representing over half the litigants in the OAP,[4] the parties agreed to employ a similar process for resolving fees and costs incurred by the Williams Love O'Leary & Powers, P.C. ["WLOP"] firm in 33 of its remaining OAP cases.

The process employed in the WLOP cases varied slightly, based on an agreement by the parties to a review of OAP fees applications previously filed. I reviewed six randomly selected fees applications and based on the fees and costs data therein, I determined a reasonable number of attorney and paralegal hours for cases in which a statement of completion had been filed, representing "Category D" cases.[5]

The parties have represented that they will attempt to resolve petitioner's fees and costs request based on this determination. The WLOP firm has also represented that it will reimburse petitioners for any personal litigation costs compensable under the Vaccine Act from the award it receives in this process, obviating the need for a Vaccine General Order #9 statement. It is anticipated that any agreement reached by the parties regarding costs in future cases will include this provision as well.

I. THE OMNIBUS AUTISM PROCEEDING

This case is one of more than 5,400 cases filed under the Program in which petitioners alleged that conditions known as "autism" or "autism spectrum disorders" ["ASDs"] were caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the OAP was set forth in the six entitlement decisions issued by three special masters

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[4] *See Hughes v. Sec'y, HHS*, No. 04-1115V (Fed. Cl. Spec. Mstr. Dec. 15, 2010) (published order setting forth methodology employed and hours deemed reasonable for the participating law firms).

[5] Most pending OAP cases fall into one of **four** general categories. These categories are based on where in the process of developing the case for resolution on the merits a particular case falls. **Category A** is comprised of cases in which no orders to file medical records were issued. **Category B** is comprised of cases in which petitioner filed a petition and some medical records, and respondent either did not respond, or responded with a statement regarding whether she believed the case should proceed in the OAP. If respondent filed such a statement, a petitioner in a Category B case did not respond to that statement. **Category C** is comprised of cases in which petitioner filed a petition and medical records, respondent filed a statement or motion necessitating a response, and petitioner filed a substantive response to that statement and may have filed additional medical records as a part of that response. **Category D** is comprised of cases in which petitioner filed a petition and medical records, whether in response to a Phase I order from the court or otherwise. Respondent, in turn, indicated that the case appeared to be properly and timely filed in the OAP, and thereafter petitioner filed more medical records and a Statement of Completion.

as "test cases" for two theories of causation litigated in the OAP and will not be repeated here.[6] However, a very brief summary of that history follows.

Beginning in 1998, certain theories were publicly advanced suggesting that the measles-mumps-rubella ["MMR"] vaccine, and/or a mercury-based preservative known as "thimerosal" contained in several childhood vaccinations, might be causing ASDs. The emergence of those theories led to a large number of claims filed under the Program, each alleging that an individual's ASD was caused by the MMR vaccine, by thimerosal-containing vaccines, or by both. To date, more than 5,400 such cases have been filed with this court, and most of them remain pending.

To deal with this group of cases involving a common factual issue – *i.e*., whether these types of vaccinations can cause autism – the Office of Special Masters ["OSM"] devised special procedures. On July 3, 2002, the Chief Special Master, acting on behalf of the OSM, issued Autism General Order #1[7] establishing the OAP. A group of counsel selected from attorneys representing petitioners in the autism cases, known as the Petitioners' Steering Committee ["PSC"], was charged with obtaining and presenting evidence on the general issue of whether those vaccines can cause ASDs, and, if so, in what circumstances. The evidence obtained in that general inquiry was to be applied to the individual cases. Autism Gen. Order #1, 2002 WL 31696785, at *3, 2002 U.S. Claims LEXIS 365, at *8.

Ultimately, the PSC elected to present two different theories on the causation of ASDs. The first theory alleged that the measles portion of the MMR vaccine could cause ASDs. That theory was presented in three separate Program "test cases" during several weeks of trial in 2007. The second theory alleged that the mercury contained in thimerosal-containing vaccines could directly affect an infant's brain, thereby substantially contributing to the causation of ASD. That theory was presented in three additional "test cases" during several weeks of trial in 2008.

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[6] The Theory 1 cases are *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Hazlehurst v. Sec'y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec'y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

[7] Autism General Order #1 is published at 2002 WL 31696785, 2002 U.S. Claims LEXIS 365 (Fed. Cl. Spec. Mstr. July 3, 2002) ["Autism Gen. Order #1"]. I also note that the documents filed in the Omnibus Autism Proceeding are contained in a special file kept by the clerk of this court, known as the "Autism Master File." An electronic version of that file is maintained on this court's website. This electronic version contains a "docket sheet" listing all of the items in the file, and also contains the complete text of most of the items in the file, with the exception of a few documents that are withheld from the website due to copyright considerations or due to § 300aa-12(d)(4)(A). To access this electronic version of the Autism Master File, visit this court's website at www.uscfc.uscourts.gov. Select the "Vaccine Info" page, then the "Autism Proceeding" page.

Decisions in each of the three "test cases" pertaining to the PSC's first theory rejected the petitioners' causation theories. *Cedillo*, 2009 WL 331968, *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst*, 2009 WL 332306, *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder*, 2009 WL 332044, *aff'd*, 88 Fed. Cl. 706 (2009).[8] Decisions in each of the three "test cases" pertaining to the PSC's second theory also rejected the petitioners' causation theories, and petitioners in each of the three cases chose not to appeal. *Dwyer*, 2010 WL 892250; *King*, 2010 WL 892296; *Mead*, 2010 WL 892248. Thus, the proceedings in these six "test cases" are concluded. Petitioners remaining in the OAP must now decide to pursue their case, and submit new evidence on causation, or take other action to exit the Program. The WLOP firm has represented that petitioners do not intend to pursue this claim.

Because the Vaccine Act permits the award of attorney fees and costs to unsuccessful litigants who brought their claims in good faith and upon a reasonable basis (*see* § 300aa-15(e)(1)), resolving the issue of attorney fees and costs in thousands of pending OAP cases presents a significant logistical challenge for both parties as well as the court. It would also require considerable expense, as additional attorney and paralegal fees for time spent documenting, filing, and resolving fees and costs in each case would be necessary. For these reasons, counsel for the parties in the WLOP cases agreed to explore alternative methods for resolving the issue of fees and costs without the need for costly and time-consuming case-by-case adjudication. My determination of a reasonable number of hours and costs for Category D cases will guide the parties in that process.

This process is not expected to resolve all cases filed by this firm. Respondent has lodged objections to certain cases, based on timeliness or other issues, and pending appellate decisions may impact whether certain cases are timely filed. However, for the purpose of facilitating resolution of the many pending cases, respondent has agreed that OAP cases filed within 54 months of the vaccinee's birth present close factual issues under the Vaccine Act's statute of limitations. On a litigative risk basis, respondent has suggested that it will not interpose statute of limitations challenges to attorney fee applications filed with motions to dismiss for insufficient proof or for rulings on the record in cases falling within this 54 month window.

[8] Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

II. ATTORNEY FEES AND COSTS[9]

A. The Legal Framework.

My determination of the hours reasonably expended and costs reasonably incurred is guided by the legal framework for awarding attorney fees and costs in Program cases. This court applies the lodestar method to any request for attorney fees and costs. *Avera v. Sec'y*, *HHS*, 515 F.3d 1343, 1347-48 (Fed. Cir. 2008); *see also Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989). "Using the lodestar approach, a court first determines an initial estimate of a reasonable attorneys' fee by 'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" *Avera,* 515 F.3d at 1347-48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)).[10] This standard is "generally applicable in all cases in which Congress has authorized an award of fees." *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983). An award of costs must also be reasonable. *Perreira v. Sec'y, HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994).

The burden lies with petitioner to provide adequate documentation at the time he submits his fee application that the requested fees and costs are reasonable. *Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 484 n.1 (1991). The burden rests with petitioner to prove reasonableness, and petitioner is not given a "blank check to incur expenses." *Perreira*, 27 Fed. Cl. at 34. The Federal Circuit has stated that it is "well within the special master's discretion to reduce the hours [expended in a matter] to a number that, in his experience and judgment, [is] reasonable for the work done." *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993); *see also Sabella v. Sec'y, HHS*, 86 Fed. Cl. 201, 211(2009) (citing 42 U.S.C. § 300aa-15(e)) ("The special master . . . is not required to award fees and costs for every hour claimed, he need only award fees and costs that are reasonable.").

In determining the number of hours reasonably expended, a court must exclude 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." *Hensley,* 461 U.S. at 434. In making reductions, the special master is not necessarily

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[9] This firm has applied for and received reasonable attorney fees and costs for their work on the general causation issues in the OAP in separate decisions. *See Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 4205702 (Fed. Cl. Spec. Mstr. Oct. 1, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 3584449 (Fed. Cl. Spec. Mstr. Aug. 20, 2010); *Snyder v. Sec'y, HHS*, No. 01-162V, 2010 WL 272924 (Fed. Cl. Spec. Mstr. Jan. 6, 2010); *King v. Sec'y, HHS*, No. 03-584V, 2009 WL 2252534 (Fed. Cl. Spec. Mstr. July 10, 2009); *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 811449 (Fed. Cl. Spec. Mstr. Mar. 11, 2009).

[10] The reasonable hourly rate is "the prevailing market rate," which is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 896 n.11.

required to base his or her decisions on a line-by-line evaluation of the fee application. *Wasson*, 24 Cl. Ct. at 484 (affirming the special master's general approach to petitioner's fee request where the entries and documentation contained in the 82 page fee petition were organized in such a manner that specific citation and review were rendered impossible), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993). Special masters may use their experience in Program cases to determine whether the hourly rate and the hours expended are reasonable. Just as "[t]rial courts routinely use their prior experience to reduce hourly rates and the number of hours claimed in attorney fee requests . . . . [v]accine program special masters are also entitled to use their prior experience in reviewing fee applications." *Saxton*, 3 F.3d at 1521 (citing *Farrar v. Sec'y, HHS*, No. 90-1167V, 1992 WL 336502, at *2-3 (Fed. Cl. Spec. Mstr. Nov. 2, 1992) (requested fees of $24,168.75 reduced to $4,112.50); *Thompson v. Sec'y, HHS*, No. 90-530V, 1991 WL 165686, at *2-3 (Cl. Ct. Spec. Mstr. Aug. 13, 1991) (requested fees of $18,039.75 reduced to $9,000); *Wasson*, 24 Cl. Ct. at 483, *on remand*, No. 90-208V, 1992 WL 26662 (Cl. Ct. Spec. Mstr. Jan. 2, 1992), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993) (requested fees of $151,575 reduced to $16,500; the special master disregarded the claim for 698.5 hours and estimated what, in her experience, would be a reasonable number of hours for a case of that difficulty)).

Additionally, a special master may reduce an unreasonable fees and costs request *sua sponte*, regardless of whether respondent filed an objection to a particular request. In making such a reduction, a special master is not required to provide petitioner with an opportunity to explain the unreasonable request, as the burden lies with petitioner to provide an adequate description and documentation of all requested costs and fees in the first instance. *Sabella*, 86 Fed. Cl. at 208-09; *Saunders v. Sec'y, HHS*, 26 Cl. Ct. 1221, 1226 (1992); *see also Duncan v. Sec'y, HHS*, No. 99-455V, 2008 WL 4743493, at *1 (Fed. Cl. Aug. 4, 2008) ("the Special Master had no additional obligation to warn petitioners that he might go beyond the particularized list of respondent's challenges"); *Savin v. Sec'y, HHS*, 85 Fed. Cl. 313, 317-19 (2008) ("it is clear that the Special Master had every right to insist upon receiving accurate bills in the first instance and was not obliged to offer petitioners' counsel a second chance to do what he should have done *ab initio*").

In this case, the parties have already agreed to reasonable hourly rates for the attorneys and paralegals in the firm representing petitioners, and thus I do not address that issue. This order concerns my evaluation of a reasonable number of hours for OAP cases, which will inform future agreements by the parties on the attorney fees and costs to be awarded, using the lodestar method. The factual findings set forth below regarding reasonable hours and costs should, absent highly unusual circumstances,[11] apply to other cases resolved through this ADR process.

[11] "Highly unusual circumstances" may include cases filed before the establishment of the OAP in which substantial work was performed prior to joining the OAP, cases that initially proceeded outside the OAP and joined it after substantial case-specific work was performed, and the so-called "grey area" cases prepared for a factual hearing to resolve statute of limitations issues.

B. The Process for Determining a Reasonable Number of Hours and Costs.

1. The Evaluation Process.

The WLOP firm's cases to which this ruling appears applicable are all Category D cases. After reviewing the time and costs actually expended in the selected cases, I determined a reasonable number of attorney and paralegal hours, as well as the reasonable costs.

In reviewing the billing records provided, I considered time spent in the following ways to be reasonable expenditures of attorney and paralegal time: client contact; record collection; case management; review of court and respondent filings; drafting, revising, reviewing, and filing of petitioners' exhibits, motions, and responsive filings; and legal or medical research. However, this should not be viewed as approval of each hour claimed on such tasks.

I considered costs to obtain records, copy and transmit records, make long distance telephone calls, and conduct legal or medical research to be reasonable. Filing fees were also reasonable and compensable, **but are not reflected in the costs computed for each firm**, as the filing fee varied based on the date of filing. In most OAP cases, it was $150.00 per case, but the exact amount paid is easily ascertainable from the court docket.

III. FINDINGS ON REASONABLE NUMBER OF HOURS AND REASONABLE COSTS

The WLOP firm's business model was a reasonable approach to handling the OAP cases. In general, attorney involvement was most concentrated early in the case as potential OAP litigants were screened and their cases evaluated. Other attorney hours involved review of court and respondent's filings, and while the review was appropriate and reasonable, the practice of billing 12-24 minutes of time for reading routine filings[12] was not. Small deductions of attorney hours were taken for these activities, recognizing that, in addition to reading these routine filings, the attorney also annotated the client's file. Hours claimed for such tasks as reading medical records were fully compensated. This firm sent letters to petitioners providing an update on the status of their case, but based on the unanimity in the dates the updates were sent (March 2006 and February 2007), it appeared that these were mass mailings. Some

[12] Such routine filings included notices of appearance by a new respondent's counsel, standard OAP orders, and other matters not specific to that particular case. In most cases reading the Rule 4 report is important and petitioners' counsel are fully compensated for reviewing it. In the OAP cases, the Rule 4 report was largely a *pro forma* and virtually identical document containing no substantive case information that merely noted the absence of any medical records and respondent's objections to the short-form petitions. Compensation for a very brief perusal of the Rule 4 reports filed in response to short-form petitions by one firm attorney and one paralegal was considered appropriate and time for such perusal was included in the hours deemed reasonable.

deductions in the time claimed were taken for these mailings. Finally, a review of the time claimed to close out the cases resulted in some deductions, as no responses to motions to dismiss are anticipated in the settlement of these cases. Likewise, no hours were awarded for filing fees and costs applications, although a small amount of time for filing the anticipated motions to dismiss and stipulations regarding fees and costs is included.

To aid the parties in applying the appropriate hourly rate, about half the attorney hours awarded represent tasks performed in the year in which the case was filed. About one-third of the attorney hours awarded represent tasks performed in the year in which the file was prepared for dismissal, and the remaining one-sixth of the attorney hours represent tasks performed during the pendency of the litigation, and are largely concentrated in the year in which the statement of completion was filed.

In computing a reasonable number of hours expended by the WLOP firm's paralegals, I considered nearly all the tasks performed to be reasonable and appropriate. There were occasional instances of clerical errors resulting in double billing, and some entries that did not specify a task performed. These generally involved very short periods of time. The firm's paralegals had different hourly rates; about 80% of the entries were made by "LAS." The paralegal hours were spread throughout the period after filing the petition, with slightly more hours occurring in the time period in which records were filed and during close out of the case prior to dismissal.

The total reasonable hours also include calculation of a small number of attorney and paralegal hours required to file motions to dismiss, stipulations regarding fees and costs, notices regarding appellate review, and notices regarding the filing of a civil action.

The process of determining a reasonable number of hours expended involved, of necessity, a line-by-line review of the hours contained in all billing records selected and examined. Although a line-by-line analysis was performed, this factual ruling does not reflect the analysis in each case. *See Wasson*, 24 Cl. Ct. at 484 (affirming the special master's general approach to petitioner's fee request where the entries and documentation contained in the 82 page fee petition were organized in such a manner that specific citation and review were rendered impossible), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993). Instead, it reflects a review of the files and a determination of what this firm's business model dictated, constrained by a determination of what tasks were reasonably performed. It does not represent an average of the hours billed in the selected files.

The files examined reflected very few hours for case-specific research, either medical or legal. Based on the posture of these cases and what transpired in the OAP, this is not surprising. The WLOP firm received compensation for general medical and legal research in the test cases.

Although decisions of special masters tend to be fact-specific, and are not binding in other cases on the same special master or other special masters, these factual conclusions represent what other special masters and I are likely to award in similarly postured cases. Based on the firm's business model and review of the sample records submitted, I have determined that the following hours and costs are reasonable and should be compensated.

Category	**Attorney Hours**	**Paralegal Hours**	**Costs (not including filing fee)**
D	10	25.5	$680

IV. CONCLUSION

The factual determinations set forth in this order are intended to guide the parties in an informal resolution of attorney fees and costs, in this case as well as in others that fit the agreed categories. The parties shall discuss these findings and shall file a joint status report by no later than **Friday, January 28, 2011**, advising me as to whether they expect to reach an informal resolution.

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master