

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

No. 01-198V

Filed: September 11, 2012

(Not to be Published)

SEBASTIAN VIG, *
a minor, by his mother and *
natural guardian, *
EDITH VIG, *
Petitioner, *

Autism; Interim Attorneys' Fees and Costs

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES *
Respondent. *

Richard Gage, Esq., Cheyenne, WY, for petitioner.
Heather Lynn Pearlman, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS¹

Vowell, Special Master:

On April 4, 2001, petitioner filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*² [the "Vaccine Act" or "Program"], alleging that Sebastian Vig ["Sebastian"] was injured by a vaccine or vaccines listed on the Vaccine Injury Table.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), a party has 14 days to identify and move to delete medical or other information, that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

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

On June 22, 2012, petitioner's current counsel, Richard Gage, filed a motion for interim attorney fees and costs³ and a motion to withdraw as counsel. Mr. Gage filed a motion for interim attorney fees and costs on behalf of petitioner's former counsel, Thomas Gallagher, on July 2, 2012.⁴ Respondent filed her response to both interim fee motions on August 2, 2012. In her opposition to Mr. Gage's motion for interim fees and costs, respondent argues that Mr. Gage's total fees and costs are unreasonable in light of the work performed. Respondent, however, did not make specific, itemized objections. On August 11, 2012, Mr. Gage filed a reply brief addressing his motion for fees.

On August 21, 2012, I issued a decision addressing the interim fees and costs requested by Mr. Gallagher and an order deferring ruling on Mr. Gage's motion for interim attorney fees and costs. For the reasons outlined below, I find that an award of interim attorneys' fees and costs in the amount of \$7,418.47 is appropriate in light of the work performed by Mr. Gage and his firm.

I. Good Faith and Reasonable Basis Exist.

Petitioner alleged a table injury in her initial petition. In an entitlement hearing held on January 23, 2004, and on January 26, 2004, Special Master Edwards⁵ issued an order denying the table claim. Thereafter, in February 2004, this case was transferred into the Omnibus Autism Proceeding ["OAP"]. See Notice Regarding Omnibus Autism Proceeding, issued Feb. 12, 2004.

The OAP was created to deal efficiently and fairly with an unprecedented number of cases that threatened to overwhelm the bench and bar alike. See *generally* Autism Gen. Order #1, 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002). As a reasonable basis was found in each of the OAP test cases, it follows that the petitioner in the instant case likewise had a reasonable basis at least until the resolution of the test cases.⁶

³ Although procedurally an interim fee request, given the simultaneous filing of the motion to withdraw as counsel, the motion represents the final fees and costs request on behalf of Richard Gage.

⁴ Petitioner was initially represented by Clifford Shoemaker. Mr. Gallagher substituted in as counsel on August 10, 2001, and represented petitioner until his motion to withdraw was granted on May 19, 2011. Petitioner was without counsel and proceeding as *pro se* petitioner, until September 16, 2011, when Mr. Gage began to represent her. To date, Mr. Shoemaker has not sought attorney fees or costs in this case.

⁵ This case was reassigned from Special Master Edwards to Special Master Hastings on January 26, 2004. It was reassigned to me on February 8, 2007.

⁶ The OAP theory 1 test cases were *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), and *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The OAP theory 2 test cases were *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), and *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

Since the conclusion of the test cases, activity in this case has concerned determining whether there exists any alternative theory of recovery upon which to proceed, followed by Mr. Gage's motion to withdraw; activity which I find to have been undertaken in good faith and upon a reasonable basis.

II. An Interim Award is Appropriate at the Time.

Respondent believes that § 15(e)(1) does not permit an award of the interim attorney fees and costs sought by petitioner. Respondent's Response, filed Aug. 2, 2012, at 3. However, noting my past rejection⁷ of her position, respondent "elect[ed] not to raise or elaborate on her statutory objection . . . in response to this particular request for interim attorneys' fees and costs." Respondent's Response at 3.

This case is now over 11 years old. In March, 2011, petitioner was ordered to file an amended petition setting forth her new theory of causation, if she wished to continue to pursue this claim. On May 19, 2011, Mr. Gallagher withdrew as counsel, and petitioner elected continued to pursue this claim as a *pro se* petitioner until retaining Mr. Gage as counsel in September, 2011. Mr. Gage now explains that he is unable to effectively represent petitioner in this case, and that petitioner has requested he refer her to a new attorney. Motion to Withdraw, filed June 22, 2012, at 1.

III. A Partial Award for Interim Fees and Costs is Appropriate.

In her response to petitioner's application for interim fees and costs, respondent objects to the reasonableness of Mr. Gage's request. Respondent's Response at 4. Specifically, respondent argues that due to the absence of any substantive pleadings and additional medical records, the \$8,235.47 requested for reviewing the claim and moving to withdraw representation is "unreasonable." *Id.*

The Vaccine Act authorizes "reasonable attorneys' fees and other costs." § 15(e)(1). The Court of Federal Claims has recognized that it is within the discretion of the special master to determine the reasonableness of a request for attorneys' fees. *Rodriguez v. Sec'y, HHS*, 91 Fed.Cl. 453, 462 (Feb. 22, 2010) *aff'd*, 632 F.3d 1381 (Fed. Cir. 2011) *cert. denied*, 132 S. Ct. 758, 181 L. Ed. 2d 483 (U.S. 2011). The basic approach for determining a reasonable amount of attorneys' fees is to use the lodestar method in which a reasonable hourly rate is multiplied by the reasonable number of hours. *Avera v. Sec'y, HHS*, 515 F.3d 1343, 1347-48 (Fed. Cir. 2008). To determine a reasonable number of hours, "[a] special master is permitted and even expected to examine a law firm's time sheets and root out 'hours that are excessive, redundant, or otherwise unnecessary.'" *Davis v. Sec'y, HHS*, 07-451V, 2012 WL 2878612, at *10 (Fed. Cl. June 29, 2012) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); see also *Carrington ex rel. Carrington v. Sec'y, HHS*, 83 Fed. Cl. 319, 323 (2008) (noting that excessive hours should be excluded from an award).

⁷ See, e.g., *Lumsden v. Sec'y, HHS*, No. 97-588, 2012 WL 1450520 (Fed. Cl. Spec. Mstr. Mar. 28, 2012).

I have carefully reviewed Mr. Gage's interim fees application and time records (found at Tab C of Petitioner's Motion, filed June 22, 2012) in this case in light of my own experience with petitioner during the period in which she was unrepresented by counsel. I have also considered the billings filed by Mr. Gage in other cases in which he has assumed representation of a former *pro se* petitioner in the Omnibus Autism Program. Under these circumstances, the frequent and lengthy contact with petitioner by both Mr. Gage and his associate, Mr. Karz-Wagman,⁸ was warranted and is fully compensable.

That is not to say, however, that the entirety of the fees and compensation request is reasonable. Two areas of concern emerged during my review of the billing records. First, the 16.5 hours billed by Mr. Karz-Wagman, for reviewing pleadings and the filed medical records appears excessive. I have no doubt that the time sheets accurately reflect the time actually spent. However, based on my own review of these documents, I conclude that an attorney reasonably experienced in these matters, could have accomplished the necessary review faster. I thus reduce the 16.5 hours billed by 20%, and find the expenditure of 13.2 hours reasonable and appropriate.

The second area of concern involves billing for consultation between Mr. Gage and Mr. Karz-Wagman. My review is hampered by the "lumping" of these conferences with several other tasks, which makes it more difficult to determine what is reasonable. See Guidelines for Practice under the National Vaccine Injury Compensation Program, § XIV.A.3 ("Each task should have its own line entry indicating the amount of time spent on that task. Several tasks lumped together with one time entry frustrates the court's ability to assess the reasonableness of the request."); see also *Carrington ex rel. Carrington v. Sec'y, HHS*, 99-495V, 2008 WL 2683632, at *9 (Fed. Cl. Spec. Mstr. June 18, 2008) (recognizing that "[l]umping dissimilar activities is not a proper billing practice"); *Lamar ex rel. Lamar v. Sec'y, HHS*, 99-584V, 2008 WL 3845157, at *9 (Fed. Cl. Spec. Mstr. July 30, 2008) (noting the problem of "lumping"); *Savin ex rel. Savin v. Sec'y, HHS*, 85 Fed.Cl. 313, 316-17 (2008) (recognizing lumped tasks as "defects" which "constitute[] an independent basis for reducing hours claimed"). While some consultation between attorneys is expected, I reduce the time billed by Mr. Karz-Wagman for these consultations by one hour.

This results in a deduction of 4.3 hours of Mr. Karz-Wagman's billed hours. Although respondent has objected to the amount of fees and costs Mr. Gage has requested, she did not interpose any objections to the hourly rates claimed. They appear to be reasonable. Applying Mr. Karz-Wagman's hourly rate (\$190.00 per hour), this results in a net deduction of \$817.00.

Although respondent has objected to Mr. Gage's bill for services in this case, she

⁸ No information pertaining to Mr. Karz-Wagman's legal experience was filed, but during status conferences in this and other of Mr. Gage's Omnibus Autism Program cases, Mr. Gage indicated that Mr. Karz-Wagman was new to Vaccine Act litigation.

did not point to any specific instances of overbilling, simply indicating that because the work did not involve any substantive pleadings or additional medical records, the bill was unreasonable. Over the last year, Mr. Gage has ably represented many OAP petitioners who were formerly *pro se*, including many whose original counsel withdrew from representation. Based on his review and advice, a substantial number of these cases have been dismissed. In others, his “second look” has resulted in a decision to move forward on new theories of causation. In at least one case, he secured an award of compensation, albeit for a condition other than the autism spectrum disorder originally alleged. Mr. Gage’s efforts on behalf of these petitioners are commendable, and he deserves compensation for his work. In these cases, a cookie cutter approach to fees and costs based on filings alone is not appropriate. The time required for client contact and the acquisition of new or updated medical records varies considerably from case to case.

Just as I carefully review the billing records submitted by petitioners’ counsel, I carefully consider objections respondent may interpose to those records. When respondent does not interpose specific objections, or otherwise indicate how many hours she considers to be reasonably incurred, I treat their general objections in the same manner as I often treat petitioners’ “lumping” of disparate tasks. Both make the review of fees and costs applications more time-consuming and more difficult. In the future, I am unlikely to give generalized objections by respondent much weight.

I find that petitioner is entitled to a partial award of interim attorney fees and costs under the facts of this case.

IV. Conclusion

I hold petitioner is entitled to reasonable attorneys’ fees and costs pursuant to §§ 15(b) and (e)(1), as I find that the petition was brought in good faith and upon a reasonable basis.

Pursuant to § 15(e), I award a lump sum of \$7,418.47⁹ to be paid in the form of a check payable jointly to the petitioner and petitioner’s counsel, Richard Gage. The interim award check shall be mailed directly to Richard Gage, located at 1815 Pebrican Avenue, P.O. Box 1223, Cheyenne, WY 82001.

⁹ This amount is intended to cover all legal expenses incurred by Mr. Gage in this matter. This award encompasses all charges by the attorney against a client, “advanced costs” as well as fees for legal services rendered. Furthermore, § 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. Sec’y, HHS*, 924 F.2d 1029 (Fed. Cir.1991).

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.¹⁰

IT IS SO ORDERED.

s/Denise K. Vowell

Denise K. Vowell
Special Master

¹⁰ Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.