

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. [redacted]V

March 28, 2008

To be Published

(Reissued redacted: April 4, 2008)

JANE DOE/14,

*

*

Petitioner,

*

*

v.

*

Attorney's fees and costs

*

SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

*

*

*

Respondent.

*

Clifford J. Shoemaker, Vienna, VA, for petitioner.

Alexis B. Babcock, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

This case was one of four paradigm cases tried as part of the Hepatitis B-Neurological Demyelinating Omnibus Proceeding described in Stevens v. Secretary of HHS, No. 99-594V,

¹ Vaccine Rule 18(b) states that 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, petitioner has 14 days to identify and move to delete such information prior to 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. On April 1, 2008, petitioner moved to redact and the undersigned grants her motion.

2006 WL 659525, at *1-*3 (Fed. Cl. Spec. Mstr. Feb. 24 2006). For an overview of the proceedings, please see the first three pages of Stevens. This case was to represent those petitioners with multiple sclerosis (MS) who allege that hepatitis B vaccine caused or exacerbated their illness.

Petitioner in the instant action filed a petition on May 18, 1999, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that her first and second hepatitis B vaccinations caused her an unspecified injury, later specified as MS. The undersigned ruled in favor of petitioner in a published decision dated [redacted]. After respondent's proffer on award of compensation on October 16, 2007, the undersigned issued a decision on damages on October 17, 2007. Judgment was entered on November 20, 2007.

On January 18, 2008, petitioner filed her Application for Attorneys' Fees & Costs, requesting a total of \$70,638.38 in fees and costs, including \$16.11 in petitioner's costs. On January 28, 2008, petitioner filed her Amended Application for Attorneys' Fees & Costs to reflect a reduction of \$56.25 for her life care planner from \$28,350.00 to \$28,293.75 due to a mistake in the bill, for a grand total of \$70,582.13, including \$16.11 in petitioner's costs.

On February 1, 2008, respondent filed an Opposition to Petitioner's Request for Attorney's Fees and Costs.

On February 15, 2008, petitioner filed Petitioner's Response to Respondent's Opposition to Petitioner's Request for Attorney's Fees and Costs and Amended Application for Attorney's Fees and Costs. In Petitioner's Response, petitioner now requests a grand total of \$77,235.24, including \$16.11 in petitioner's costs. The new amount is based on remedying petitioner's omission of two totals that were included in petitioner's chart but not her synopsis for Mr.

Shoemaker's hourly total and for postage costs. The grand total reflects \$32,871.65 in attorney's fees and \$44,347.48 in attorney's costs.

II. Discussion

A. Compensation Requested for the Services of Dr. Mark Geier

Petitioner requests \$4,250.00 in compensation for fees paid to Dr. Mark Geier, representing 17 hours of work billed at \$250 per hour. In support of this request, petitioner filed Dr. Geier's invoices, which document the date of service, number of hours, and brief description of the services Dr. Geier contributed to petitioner's case. See P. Fee App. at 25-27.

Respondent's Position

Respondent objects to petitioner's request for fees for Dr. Geier, alleging that petitioner failed to offer evidence supporting whether Dr. Geier's expended hours were reasonable or whether the rates charged for those hours were reasonable. R. Resp. at 2. Respondent questions the retention of Dr. Geier as a litigation consultant given that Dr. Geier's genetics specialty was not implicated in the instant case. *Id.* at 3. Respondent argues that the majority of Dr. Geier's claimed hours were spent contributing to petitioner's motion for production of VAERS data, which respondent alleges is predominantly a legal function that did not require a geneticist's expertise or medical doctor's participation. *Id.* at 4. Further, respondent notes that petitioner's counsel, Mr. Shoemaker, is an established vaccine litigation attorney familiar with the VAERS system, who also personally billed 8 hours of time researching VAERS data. *Id.* Respondent alleges that Dr. Geier's efforts supplementing those of petitioner's own counsel are both superfluous and unnecessary. *Id.*

Respondent also objects to Dr. Geier's requested hourly rate as being unreasonably high in relation to the nature of the work he performed. *Id.* at 5. Respondent maintains that because petitioner employed Dr. Geier in a non-medical capacity unrelated to Dr. Geier's expertise, it is unreasonable to request reimbursement at the same rate generally charged for medical expert testimony. *Id.* at 5. In the alternative, respondent requests that should this court find Dr. Geier's assistance justifiable, any compensation awarded Dr. Geier should be adjusted to reflect appropriately his participation as a non-medical expert. *Id.*

Petitioner's Position

Petitioner alleges that Dr. Geier researched literature relating to individual Hepatitis B-neurodemyelinating cases, including that of petitioner, and claims that the legal issues were directly related and partly dependent upon Dr. Geier's research. *Id.* at 3. Petitioner further alleges that research "could not have otherwise been simply delegated to a clerk." *Id.* at 4. Petitioner maintains that having Dr. Geier perform the research was a more targeted, efficient, and economical use of time and resources, given his medical expertise and familiarity with the research. Petitioner alleges that without Dr. Geier's participation, petitioner's counsel would have been forced to employ further time and resources, at cost to petitioner, in delegating additional parties to review the VAERS data research, whereas Dr. Geier's participation removed that level of review. *Id.*

Petitioner observes that the \$250 hourly rate being sought by Dr. Geier has been recognized and awarded previously in vaccine program proceedings. P. Resp. Br. at 4. Petitioner notes that Dr. Geier was not hired for his expertise in genetics, but rather as an expert consultant for VAERS and vaccine literature research and that Mr. Shoemaker's familiarity and

participation with the VAERS system in this case should in no way preclude him from hiring others to support petitioner's case. *Id.* at 6. Ultimately, petitioner avers that Dr. Geier's demanded sum, \$4,250.00, was sufficiently documented, justified, and reasonably evidenced by previous vaccine program awards for the undersigned to grant the sum demanded. *Id.* at 8.

Relevant Case Law

The special masters' Guidelines state that a petitioner's application for fees and costs should explain the expenses "sufficiently to demonstrate their relation to the prosecution of the petition." Guidelines at 32. "The court reimburses petitioners for all of their documented expenses so long as they are *reasonable*." Barnes v. Secretary of HHS, No. 90-1101V, 1999 WL 797468, at *7 (Fed. Cl. Spec. Mstr. Sep. 17, 1999) (emphasis added). "It is incumbent upon petitioner to explain to the court why the hours spent on the case were reasonable." Wilcox v. Secretary of HHS, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). Therefore, petitioner must paint "a clear and complete picture . . . to enable the court to see and understand how and why the expert spent the claimed hours." *Id.* "The question is not whether [the expert] expended the number of hours claimed, but whether it was necessary or reasonable for him to do so." Wasson v. Secretary of HHS, No. 90-208V, 1991 WL 135015, at *3 (Fed. Cl. Spec. Mstr. July 5, 1991), remanded, 24 Cl. Ct. 482 (1991), aff'd, 988 F.2d 131 (Fed. Cir. 1993).

To determine the number of hours that an expert can reasonably expend, the court must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary" Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). A "special master is given reasonably broad discretion when calculating [attorney's fees and costs]." Wasson, 24 Cl. Ct. at 483. In the absence of sufficient proof, "the special master may rely upon both her own general experience

and her understanding of the issues raised.” *Id.* It is within the court’s discretion to make adjustments up or down if “a fee charged is out of line with the nature of services rendered.” Barnes, 1999 WL 797468, at *2, citing Pierce v. Underwood, 487 U.S. 552, 581 (1988) (Brennan, J., concurring).

In a situation where a medical expert is hired to provide research which does not relate to his area of expertise, but is more appropriate for an associate or paralegal, it is not reasonable to pay him at an expert’s hourly rate. Kantor v. Secretary of HHS, No. 01-679V, 2007 WL 1042378, at *5 (Fed. Cl. Spec. Mstr. Mar. 21, 2007), citing Densmore v. Secretary of HHS, No. 99-588V, at *7 (Fed. Cl. Spec. Mstr. Aug. 14, 2006) (unpublished).² Instead, the special master may use her discretion to reduce the costs “requested for medical experts where excessive hours are unsubstantiated in the evidentiary record.” Kuperus v. Secretary of HHS, No. 01-0060V, 2006 WL 3499516, at *4 (Fed. Cl. Spec. Mstr. Nov. 17, 2006).

Recently, this court issued a decision in another case, Carpenter v. Secretary of HHS, involving the same petitioner’s attorney, and the same expert, Dr. Geier. Carpenter v. Secretary of HHS, No. 99-463V (Fed. Cl. Spec. Mstr. Dec. 17, 2007) (unpublished), vacated, No. 99-463V (Fed. Cl. April 2, 2008). There, petitioner alleged that he suffered an unspecified adverse reaction to hepatitis B vaccine. Despite petitioner’s failure to make a prima facie case due to his inability to find expert medical confirmation of his assertion that hepatitis B vaccine significantly aggravated his pre-existing multiple sclerosis, petitioner had Dr. Geier engage in 42.5 hours work on the general question of whether hepatitis B vaccine causes MS. Ultimately, on February 28,

²This Decision is available at <http://www.uscfc.uscourts.gov/Unpublished%20Decisions/06/Abell.Densmore.pdf>.

2007, petitioner moved for a ruling on the record, admitting he could not obtain an expert opinion to support his allegation of causation in fact. The undersigned dismissed his case on February 23, 2007. Petitioner then filed an Application for Attorneys' Fees and Costs, to which respondent objected, in part due to the fees and hours requested by Dr. Geier.

In the ensuing fees and costs decision in Carpenter, the undersigned found Dr. Geier's total number of submitted expenditure hours (42.5) to be insufficiently justified given his involvement and the posture of the case.³ Carpenter, at 9. The undersigned held that it would be unreasonable to award petitioner fees for Dr. Geier's submitted expert hourly rate of \$200.00 "when he [was] simply providing a literature search and review." *Id.* at 6-7. As a result, the court awarded Dr. Geier a reduced billing rate of \$175.00, charged by one of petitioner's counsel's associates who would have performed the search absent Mr. Geier's involvement, for 1.5 hours of work. *Id.* at 7.

Analysis

Reasonable Fee

Dr. Geier is a geneticist and an obstetrician. Weiss v. Secretary of HHS, No. 03-190V, 2003 WL 228553059, at *2 (Fed. Cl. Spec. Mstr. Oct. 9, 2003). Respondent objects to the hours expended by Dr. Geier and the reasonableness of the rates charged. R. Opp. at 2. Respondent objects to the reasonableness of committing Dr. Geier with his "medical area of genetics" to the tasks for which he billed, namely VAERS data research and subsequent work associated to the VAERS motion. R. Opp. at 3. Respondent alleges that petitioner has failed to provide a

³ Among other details, the Court found portions of Dr. Geier's fee submission to be foundationally lacking and insufficiently explained. *Id.* at 9.

justification linking Dr. Geier's role as a geneticist to the functions for which he billed.

Additionally, respondent believes that Dr. Geier's requested hourly rate is unreasonable and, alternatively, one that should be lowered if the court finds that Dr. Geier is entitled to an award.

R. Opp. at 5.

However, petitioner argues that the rates and expenses charged by Dr. Geier are reasonable and justified. P. Resp. at 2. Petitioner maintains that Dr. Geier's invoices are sufficiently detailed enough for the court's determination whether Dr. Geier's efforts were justified, thus meeting the reasonableness standard for experts' fees articulated in the Kaseman decision. Kaseman v. District of Columbia, 329 F.Supp. 2d 20, 26 (D.D.C. 2004). *Id.* Petitioner believes that Dr. Geier's invoices detailing the nature of the hours billed are sufficient to allow this court to award the fees requested. *Id.* at 7.

The difference in the postures of Carpenter and the instant case is significant. In this case, which is an important paradigm case, petitioner, after presenting a prima facie case at the Omnibus hearing, used Dr. Geier for research that required some medical expertise. Dr. Geier's familiarity with the Vaccine program was useful to petitioner in searching the VAERS and VSD databases, particularly since the VSD data comes from hospitals and the medical community rather than from the general public, which is the source of the VAERS data. In Carpenter, Dr. Geier performed a general literature search even though petitioner never made a prima facie case or offered an expert opinion in support of petitioner's allegations, which would then have justified Dr. Geier's general research on whether hepatitis B vaccine can cause MS. Petitioner in Carpenter moved for a ruling on the record because he could not prove causation.

In the instant case, petitioner's attorney used Dr. Geier to bolster a prima facie case which included expert testimony from other doctors at trial. Although Dr. Geier's specialty as a geneticist does not qualify him *per se* to give expert testimony on epidemiologic matters, he appears to be petitioner's attorney's medical expert of choice when seeking to advance an epidemiologic argument before the court. Accordingly, the undersigned finds that using Dr. Geier was not unreasonable in the instant action, given the tenor of the case and the functions Dr. Geier was asked to perform. This finding is congruent with previous cases involving Dr. Geier as a medical consultant performing a vaccine literature search. See Ray v. Secretary of HHS, No. 04-184V, 2006 WL 1006587 (Fed. Cl. Spec. Mstr. Mar. 29, 2006) (finding it "reasonable for petitioner's counsel to have consulted with Dr. Geier in his review and assessment" of the case; the chief special master held that Dr. Geier's \$250 hourly fee request for 6.25 hours of vaccine literature research was reasonable in light of other expert fees awarded in the program, although Dr. Geier never testified as an expert. *Id.* at *12).

As to the actual fees charged by Dr. Geier in the instant case, the undersigned finds such fees to be reasonable. Petitioner has provided the undersigned with the invoices detailing the 17 hours Dr. Geier contributed to petitioner's case. P. App. Fees & Costs, at 24-26. Relying on her own experience and noting that this court has awarded Dr. Geier the requested fee rate in previous cases, the undersigned finds the \$250 hourly rate to be reasonable in light of the posture of the instant case and the functions Dr. Geier performed. See Ray, *supra*, at *12.

The undersigned will, therefore, reimburse Dr. Geier for his services at a rate of **\$250.00 per hour** for the requested sum totaling **\$4,250.00.**⁴

B. Petitioner's Life Care Planner

Petitioner requests compensation for 233.38 hours for the services of Ms. Terry Arnold, a life care planner, plus Ms. Arnold's expenses for a total of \$29,516.01. Ms. Arnold spent 37.5 hours on research, 37.25 hours developing the life care plan, and an additional 14.25 hours in its production.

Respondent's Position

Respondent objects to Ms. Arnold's hours, claiming they are excessive, specifically focusing on the hours Ms. Arnold lists for "research" and development of petitioner's life care plan. R. Resp. at 6. This is in addition to other entries in which Ms. Arnold spent time gathering information for the life care plan. Respondent acknowledges petitioner's complicated medical situation, but alleges that the experienced background of petitioner's life care planner should have permitted her to address the instant case's complexity with greater efficiency. *Id.*

Petitioner's Position

Petitioner states that the hours requested for petitioner's life care planner are reasonable. P. Resp. at 8-9. Petitioner notes that even with Ms. Arnold's extensive life care planning experience, the increasingly complex nature of damages in the Vaccine Program has complicated

⁴ Petitioner's objection stating that reducing or striking the fees billed by Dr. Geier is tantamount to improper interference in counsel's ability to prosecute a case as he sees fit misses the point. While it is true, as petitioner notes, that the role of the undersigned is not to second-guess the trial strategy of counsel, it is the role of this court to be a proper steward of the funds to be allocated for fees and costs. Accordingly, a special master may use her discretion to reduce the costs "requested for medical experts where excessive hours are unsubstantiated in the evidentiary record." Kuperus, 2006 WL 3499516, at *4.

the role of the life care planner. *Id.* at 9. Given petitioner's condition, petitioner highlights the steps of Ms. Arnold, pointing out that as a result of both petitioner's and respondent's life care planners' concerted efforts, the parties agreed to an award based on respondent's proffer less than two years after the entitlement hearing. P. Resp. Br. at 10. Petitioner states that Ms. Arnold's extensive involvement as a life care planner in the Vaccine program has been rewarded in similar proceedings. See Hill v. Secretary of HHS, No. 03-619V (Fed. Cl. Spec. Mstr. July 23, 2007)(unpublished)(Ms. Arnold's billing totaled \$30,606.32). Petitioner maintains that respondent's lack of objection in that case is justification for upholding the lesser sum submitted in the instant case.

Analysis

In Wilcox v. Secretary of HHS, No. 90-911V, 1997 WL 101572 (Fed. Cl. Spec. Mastr. Feb. 14, 1997), the chief special master noted that the life care planner "is called upon to provide the initial information, to continually update that information, and to support every item requested through a combination of their own experience and supporting information from a care provider. All in all, a much greater burden has been place[d] on this professional. Accordingly, the court and respondent cannot complain when faced with the billings from a quality professional who spent the necessary time providing the information ordered by the court and expected by respondent." *Id.* at *3. However, the chief special master cautioned that such latitude does not give life care planners a "blank check." *Id.* Noting the rising costs of creating life care plans, he stated that petitioner's submitted costs must "still be reasonable." *Id.*

Applying that rationale to the present case, the undersigned holds that the fees petitioner's life care planner, Ms. Arnold, seeks are entirely reasonable. Respondent concedes that

petitioner's medical condition is "complicated." R. Resp. at 6. Ms. Arnold has worked at length in the Vaccine Program, has a good reputation, and works well with respondent's life care planner, Ms. Suzanne Lubansky. As such, it should be the objective of the special masters to encourage the life care planners to work well and receive appropriate compensation. There is nothing in the record indicating that Ms. Arnold is claiming an unjustified number of hours or billing at an unreasonable rate.

Therefore, the undersigned will allow Ms. Arnold's claimed expenses totaling **\$29,516.01**.

C. The reasonability of printing costs claimed by petitioner

Petitioner requests reimbursement for 2,375 pages of copying and 10,346 pages of printing. P. Fee App. at 2.

Respondent's Position

Respondent first argues that printing costs should be considered "overhead expenses" and disallowed under the Vaccine Program. R. Resp. at 7. Next, respondent argues that over 12,500 pages of printing and copying expenses are excessive. *Id.* Respondent notes that the records "are not especially voluminous" and that the case was converted to electronic format (ECF) in 2006. *Id.*

Petitioner's Position

Petitioner first explains counsel's system for copying and printing, namely, that petitioner's counsel scans and then prints out PDF documents in order to avoid making multiple hard copies. P. Resp. at 11. Petitioner points out that the large majority of printing and copying was performed before the case's ECF designation, four months after the undersigned's decision

on entitlement. *Id.* Consequently, petitioner notes that the majority of exhibits, pleadings, and literature had already been printed. *Id.* Petitioner's counsel maintains that the costs derived from the printing and copying are reasonable. *Id.* at 11-12.

Analysis

It is not necessary for plaintiffs "to explain the purpose of every photocopy produced and every expenditure that is made in connection with the litigation." Laffey v. Northwest Airlines Inc., 572 F. Supp. 354, 383 (D.D.C. 1983). The undersigned issued a decision on entitlement on May 26, 2006. At that point in the litigative process, petitioner had yet to file for electronic conversion. Petitioner did so on August 31, 2006. This was seven years after petitioner filed her petition.

Special masters may rely on their own experience to determine the reasonableness of an attorney's request for fees and costs, including other fee decisions involving the same attorney. See Slay v. Secretary of HHS, No. 00-289V, 2001 WL 1168103, at *2 (Fed. Cl. Spec. Mstr. Sep. 13, 2001). The undersigned has worked with Mr. Shoemaker on numerous occasions. Taking into account the longevity of this case before it was converted to ECF in 2006, the undersigned does not find petitioner's requested sum for copying and printing to be unreasonable.

Therefore, the undersigned awards Shoemaker & Associates **\$1,272.10** for printing and copying.

Conclusion

In compliance with General Order #9, petitioner states that she has incurred **\$16.11** in costs. The clerk shall enter judgment for petitioner and shall direct that the award be in the form of one check made payable to petitioner in the amount of **\$16.11** and one check made jointly

payable to petitioner and Mr. Clifford Shoemaker in the amount of **\$77,235.24**. 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.⁵

IT IS SO ORDERED.

March 28, 2008 (reissued redacted April 4, 2008)
DATE

s/ Laura D. Millman
Laura D. Millman
Special Master

⁵ 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.