

OFFICE OF SPECIAL MASTERS

No. 97-180V

(Filed: July 27, 1998)

RICHARD BERRY and CHRISTY BERRY, *
Parents and Next Friends of *
ADAM NEAL BERRY, *

Petitioners, *
*

v. * PUBLISH

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *
*

DECISION ON ATTORNEYS' FEES AND COSTS

Petitioners, Richard Berry and Christy Berry (the Berrys), as next friends of their son, Adam Neal Berry (Adam), seek an award of \$10,226.04 in attorneys' fees, attorneys' costs and personal expenses for an action that they pursued under the National Vaccine Injury Compensation Program (Program).⁽¹⁾

Application for Award of Attorneys' Fees and Reimbursement of Costs (Fee Application), filed June 1, 1998, at 1. Respondent does not contest that an award for attorneys' fees, attorneys' costs and personal expenses is reasonable and appropriate. See Respondent's Opposition to Petitioners' Application for Attorneys' Fees and Costs (Opposition), filed June 12, 1998. Nevertheless, respondent objects specifically to the hourly rate that the Berrys' medical expert, Marcel Kinsbourne, M.D. (Dr. Kinsbourne), has charged for his services and to reimbursement for facsimiles. Opposition at 1-2.

The special master has reviewed thoroughly the Berrys' Fee Application. The special master has considered carefully respondent's objections. The special master determines to reduce only nominally the Berrys' Fee Application.

In ratifying Dr. Kinsbourne's hourly rate in this case, the special master echoes concerns that Special Master Hastings expressed in *Hayden v. Secretary of HHS*, No. 91-0643V (Fed. Cl. Spec. Mstr. July 10, 1998): When special masters reduce a qualified medical expert's fee that falls within the range of what may be considered reasonable for that expert's specialty, special masters either "restrict[] the ability of petitioners to obtain competent expert assistance," or "force[] petitioners' counsel [or petitioners] to pay for the additional amounts . . . out of their own pockets." *Hayden*, No. 91-0643V, slip op. at 3-4. The special master concurs that Dr. Kinsbourne "is highly qualified to provide opinions in the area of pediatric neurology" and that Dr. Kinsbourne offers "routinely" testimony that is "cogent and helpful." *Hayden*, No. 91-0643V, slip op. at 5. Likewise, the special master finds that Dr. Kinsbourne has billed in this action a moderate number of hours, "as has routinely been the case with respect to his services." *Id.* Therefore, the special master concludes that Dr. Kinsbourne merits \$300.00 an hour in this case.

In *In re Hillsborough Holdings Corp.*, 127 F.3d 1398 (11th Cir. 1997), the United States Court of Appeals for the Eleventh Circuit ruled that if a law firm "bills on a 'user fee' basis, under which the hourly rate is set on the assumption that" certain expenses "will, in many instances be separately billed" to a client, *In re Hillsborough*, 127 F.3d at 1401, and if certain expenses "can adequately be linked to a law firm's representation of a particular client," *In re Hillsborough*, 127 F.3d at 1402, then the expenses may "avoid the 'overhead' label." *In re Hillsborough*, 127 F.3d at 1402. The reasoning of *In re Hillsborough* is sound. Indeed, special masters apply the rationale of *In re Hillsborough* by reimbursing attorneys for long-distance telephone charges, photocopying expenses and postage, including express delivery costs.

In the special master's view, facsimile expenses present a hybrid of traditional overhead costs--such as telephone lines, facsimile machine maintenance, equipment depreciation and electricity--and compensable costs--such as long-distance telephone charges for specific, outgoing facsimiles or paper expenses for incoming facsimiles analogous to photocopying expenses. Thus, the special master is amenable to extending the logic of *In re Hillsborough* to facsimile expenses. However, in this case, the special master is not satisfied that the Berrys have presented adequate evidence showing that their request for \$1.00 per page for outgoing facsimiles bears any relationship to the actual cost of the facsimiles. Rather, it appears to the special master that the Berrys' rate is merely arbitrary. Thus, the special master is constrained to deny the Berrys' facsimile expenses.⁽²⁾

In the absence of a motion for review filed under RCFC Appendix J, the clerk of court shall enter judgment in the Berrys' favor for \$10,209.04 in attorneys' fees, attorneys' costs and personal expenses.⁽³⁾ The plain language of the statute requires the special master to award compensation for attorneys' fees and costs in a lump sum to a petitioner. *See* § 300aa-15(f)(4)(A) (West Supp. 1998); *Newby v. Secretary of HHS*, No. 90-2250V (Fed. Cl. June 26, 1998). The special master cannot discern that the statute authorizes joint payment of compensation for attorneys' fees and costs to petitioners and to petitioners' counsel, even though petitioners may desire joint payment, and even though joint payment may be customary in traditional civil fora. *But see Heston v. Secretary of HHS*, No. 90-3318V (Fed. Cl. May 26, 1998). Therefore, the special master determines that the lump sum of \$10,209.04 for attorneys' fees, attorneys' costs and personal expenses must be payable directly to the Berrys, rather than to the Berrys and to their attorney of record, Richard Gage (Mr. Gage). The Berrys advanced \$1,144.52 to Mr. Gage. *See* Fee Application, Tab D. Thus, the judgment shall reflect that Mr. Gage may collect \$9,064.52⁽⁴⁾ from the Berrys. *See, e.g.,* § 300aa-15(e)(3).

John F. Edwards

Special Master

1. ¹ The statutory provisions governing the Vaccine Program are found in 42 U.S.C.A. §§ 300aa-1 *et seq.* (West Supp. 1998). For convenience, further reference will be to the relevant section of 42 U.S.C.A.

2. ² The special master will continue to deny facsimile expenses unless a petitioner establishes an appropriate method for calculating the actual expense attributable to a facsimile. For instance, the special master would entertain a claim for long-distance telephone charges related to *outgoing* facsimiles and for a per-page amount related to *incoming* facsimiles that is closely aligned to the rate that special masters allow for photocopies.

3. ³ \$10,226.04 - \$17.00.

4. ⁴ \$10,209.04 - \$1,144.52.