In the United States Court of Federal Claims

No. 99-533V
(Filed: November 22, 2011)

CASEY HOCRAFFER,	)
Petitioner,	)
v.	)
SECRETARY OF HEALTH and HUMAN SERVICES,	)
Respondent.	)

ORDER DENYING PETITIONER'S MOTION FOR REVIEW

Petitioner Casey Hocraffer ("petitioner") established that she was entitled to compensation under the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act"), 42 U.S.C. §§ 300aa-1 to -34 (2006), for injuries caused by a hepatitis B vaccination. Because petitioner was found entitled to compensation in this case, the Vaccine Act mandates an award for reasonable fees and costs. 42 U.S.C. § 300aa-15(e)(1). In a July 25, 2011 attorney's fees and costs decision, the special master awarded petitioner $124,343.30 in attorney's fees and $24,421.98 in costs. Now before the court is petitioner's motion for review of this decision. For the reasons discussed below, petitioner's motion for review is denied.

I. BACKGROUND

A. Litigation History

Petitioner filed a petition in the Vaccine Program at the United States Court of Federal Claims on July 29, 1999, seeking compensation for injuries allegedly caused by the administration of a hepatitis B vaccine received on November 7, 1996, and December 11, 1996. Hocraffer v. Sec'y of Dep't of Health & Human Servs. ("Hocraffer"), No. 99-533, 2011 WL 3705153, at *1 (Spec. Mstr. Fed. Cl. July 25, 2011). A decision denying compensation and dismissing the case was issued on March 11, 2004. Id. at n.2. Petitioner appealed this decision, and on January 26, 2005, this court reversed the special master's decision and remanded the case for a calculation of damages. Id. at *4. In the fourteen months following this court's remand, petitioner filed three memoranda on damages. Id. Then, on May 15, 2006, petitioner filed an amended damages notice withdrawing previous damages claims and requesting an opportunity to introduce an additional expert to present new evidence. Id.

The special master issued his first damages decision on February 28, 2007, denying petitioner the opportunity to present a new expert and other medical evidence, and awarding petitioner $5,841.50 in damages. Id. Petitioner subsequently filed a motion for review of the special master's decision, which this court granted-in-part on July 13, 2007, remanding the case for a second time to allow petitioner to present her additional evidence. Id. In his second damages decision of January 30, 2009, the special master rejected petitioner's new evidence, upholding the initial award of $5,841.50. Id. Petitioner filed a third motion for review on February 26, 2009, which this court denied.

Id. Petitioner then appealed to the Federal Circuit, which affirmed this court's ruling on February 16, 2010. Id.

On July 8, 2010, petitioner filed an amended petition for fees and costs in connection with the then eleven years of litigation surrounding this case, requesting $510,058.50 in attorney's fees—derived from a bill for 1,096.9 hours of attorney time at a rate of $465 per hour—for her attorney, Mr. Dannenberg. Id. at *1. Petitioner also requested $24,834.53 in costs. Id. The special master issued a final fees and costs decision on July 25, 2011, awarding petitioner $124,343.30 in attorney's fees, derived from a calculation of 661.7 hours at a rate of $163 to $200 per hour, and $24,421.98 in costs. Id. Petitioner asks the court to review this decision.

B. Petitioner's Motion for Review

Petitioner filed her Amended Motion for Review ("Pet.'s Mot.") with this court on September 2, 2011. Petitioner alleges three specific allegations of error. First, petitioner asserts that the special master's reduction in hours is punitive and based on the special master's disapproval of how petitioner's counsel handled the case, which petitioner argues is "a violation of the law of the case." Pet.'s Mot. at 3. Second, petitioner disputes the special master's decision to reduce Mr. Dannenberg's hourly rate from a requested $465 to $200 as "contrary to the weight of the evidence and clear error." Id. at 22. Finally, petitioner alleges that the special master abused his discretion and erred as a matter of law by failing to award paralegal rates to petitioner's counsel for work he performed that the special master deemed was administrative in nature. Id.

Respondent argues that the special master provided a thoughtful and well-reasoned explanation for his determination of reasonable attorney's fees and costs, which is entitled to deference. Resp't's Mem. in Resp. to Pet.'s Mot. ("Resp't Mem.") at 8. Respondent further argues that the special master's hourly rate determination was amply supported by a careful review of the record. Id. at 15. Finally, respondent contends that the special master's decision to cut attorney hours for tasks that were administrative in nature was consistent with the global—rather than line-by-line—approach the special master used in reducing Mr. Dannenberg's hours. Id. at 17, 18-19.

II. Standard of Review

This court has jurisdiction to review the decisions of a special master in a Vaccine Act case. 42 U.S.C. § 300aa-12(e)(2). Under the Vaccine Rules of the United States Court of Federal Claims ("Vaccine Rules"), an award of attorneys' fees and costs is "a separate decision" subject to review by one of the judges of this court. Vaccine Rules 13(b), 23(a). The court uses three distinct standards of review in Vaccine Act cases: Findings of fact are reviewed under the arbitrary and capricious standard, questions of law under the "not in accordance with law" standard, and discretionary rulings under the abuse of discretion standard. Munn v. Sec'y of Dep't of Health & Human Servs., 970 F.2d 863, 870 n.10 (Fed. Cir. 1992); Masias v. Sec'y of Dep't of Health & Human Servs., 634 F.3d 1283, 1287-88 (Fed. Cir. 2011).

In this connection, the Federal Circuit has made it clear that the special master's determination of reasonable attorneys' fees and costs in a Vaccine Act case is a discretionary ruling that is entitled to deference. Hall v. Sec'y of Health & Human

Servs., 640 F.3d 1351, 1356 (Fed. Cir. 2011), petition for cert. filed, 80 U.S.L.W. 3112 (U.S. Aug. 25, 2011) (No. 11-260) (citing Saxton v. Sec'y of Dep't of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993); Wasson v. Sec'y of Dep't of Health & Human Servs., 24 Cl. Ct. 482, 483 (1991), aff'd, 988 F.2d 131, 1993 WL 18492 (Fed. Cir. 1993) (table) (citing Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)). "However, the special master must provide sufficient findings and analysis in [his or] her opinion for the court, upon review, to determine whether there was an abuse of discretion." Wasson, 24 Cl. Ct. at 483 (citing Hensley, 461 U.S. at 437). Moreover, in the Vaccine Program, the special masters are "entitled to use their prior experience in reviewing fee applications." Saxton, 3 F.3d at 1521. "However, to permit this court to perform its review function and determine whether any abuse of discretion occurred, the special master must provide an appropriate description of the relevant experience and the reasoning that [he or] she used, based on that experience, to reach [his or] her conclusions." Wasson, 24 Cl. Ct. at 486. Upon its review of the decision of a special master, the court may (1) sustain the special master's decision, (2) set aside findings of fact or conclusions of law found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and issue its own findings, or (3) remand the petition to the special master for further action. 42 U.S.C. § 300aa-12(e)(2).

III. DISCUSSION

A. The special master's reduction in petitioner's requested number of hours was not arbitrary and capricious, an abuse of discretion, nor was it not in accordance with law.

Petitioner in this case requested a total of 1,096.9 hours of attorney time. Hocraffer, 2011 WL 3705153, at *1. As the special master noted, under 42 U.S.C. § 300aa-15(e) of the Vaccine Act, special masters may award reasonable attorney's fees as part of compensation. The process of determining a proper fee award begins with the "lodestar approach," in which a reasonable hourly rate is multiplied by a determination of a reasonable number of hours expended. Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008). In determining the amount of reasonable hours, a special master has discretion to exclude hours expended that are "'excessive, redundant, or otherwise unnecessary'" based on his or her experience or judgment. Saxton, 3 F.3d at 1521 (quoting Hensley, 461 U.S. at 434). A fee applicant has the burden to document reasonable hours expended. Hensley, 461 U.S. at 432; Gruber v. Sec'y of Health & Human Servs., 91 Fed. Cl. 773, 785 (2010). In determining what fee is "reasonable," the Supreme Court has offered the following guidance: "Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." Hensley, 461 U.S. at 433-34 (quotation omitted). Applying this standard to this case, the special master found many of petitioner's billing claims unreasonable, and reduced petitioner's allowable hours from 1,096.9 to 661.7.

Petitioner generally argues that the special master's reductions in hours were "unsupported," "drastic," and based on a "cursory review of the records." Pet.'s Mot. at

10, 18. Petitioner first alleges that these cuts were based on the special master's disapproval of petitioner and her counsel because petitioner "did not follow the special master's suggestions in processing this case." Id. at 4. Petitioner goes on to argue that the special master's decision violated this court's remand order allowing petitioner to present additional evidence on damages. Id. at 8. Finally, petitioner contends that specific cuts in hours were based on factual inaccuracies or are "unsupported." See id. at 10-18. The court will address these arguments in turn.

First, petitioner objects to the "tone of the rhetoric" used by the special master in laying "blame against petitioner and her counsel for prolonging these proceedings . . . ." Pet.'s Mot. at 5-6. In his fees and costs decision, the special master explained that the reductions in petitioner's hours were partly based on "petitioner's inefficient prosecution of this case [that] unnecessarily prolonged the ultimate resolution." Hocraffer, 2011 WL 3705153, at *2. The special master further explained that it was petitioner's failure to grasp the import of her own expert's testimony that generated much of the unproductive time, especially in the damages stages of the litigation, id., and noted that he "continuously explained to counsel the futility of [petitioner's] actions," id. at *2 n.9; see Pet.'s Mot. at 4-5. Based these statements, petitioner concludes that the special master's blame is "misplaced" and improperly rooted in his disapproval of petitioner's counsel. Pet.'s Mot. at 5-6.

However, the court agrees with respondent that the special master's critical observations were fully explained, consistent with his authority, and supported by the record. See Resp't Mem. at 5-6. The special master undertook a comprehensive analysis

of the extensive litigation in this case in drawing the conclusion that petitioner's prosecution of the case prolonged its resolution. See Hocraffer, 2011 WL 3705153, at *1-5. In doing so, the special master considered both petitioner's and respondent's arguments regarding the complexity and the nature of the opposition in this case, id. at *1, and ultimately came to the conclusion that petitioner, rather than respondent, "generated much unproductive process," id. at *2. The court finds that the special master examined the record and produced a rational basis for this conclusion, and therefore rejects this aspect of petitioner's objection.

Second, petitioner alleges that the special master violated this court's 2007 remand order, which allowed petitioner to present new damages evidence despite the fact that extensive damages proceedings had already taken place. See Hocraffer v. Sec'y of Health & Human Servs., No. 99-533, 2007 WL 5180525, at *4 (Fed. Cl. July 13, 2007) ("Although the court generally agrees with Respondent that Petitioner's attempt to add a new expert and submit other medical evidence at this late date is very problematic, the court is not prepared to find, in the unique circumstances of this case, that this new evidence should be excluded from consideration."). Petitioner claims that the special master violated this order by cutting fees specifically because of these further proceedings. Pet.'s Mot. at 8.

However, the special master's reductions in hours in light of the remand order were not "contrary to law." Id. The special master did not reduce all hours expended on litigating damages, instead finding "the efforts devoted to presenting of the [new damages] evidence . . . allowable." Hocraffer, 2011 WL 3705153, at *30. As to the

unallowable hours, the special master noted that "[c]ounsel's time records do not reflect the efforts devoted to this focused task of adding evidence from a pediatric neurologist, but amount to efforts seen in full-blown damages cases from start to finish." Id. The special master further found that petitioner's time sheets revealed "extensive efforts" for information gathering which "was already compensated." Id. at *31. In finding many of the billed hours unreasonable, the special master also compared petitioner's accumulated hours spent on damages alone to hours found reasonable for entire Vaccine Act cases. Id. at *30-31. In sum, the special master's decision indicates, in reducing petitioner's hours for the phases of the litigation following this court's order, that he thoroughly considered all of the evidence in the record, carefully reviewed the litigation history of the damages phase in this case, and appropriately compared the hours spent on damages with his past experience and other Vaccine Act cases. Id. Therefore, the court concludes that the special master's determination in this regard was reasonably based on the evidence and facts of this particular case, and petitioner has not demonstrated that this ruling was not in accordance with this court's remand order.

Finally, petitioner objects to several specific reductions in hours made by the special master, which petitioner alleges were based on factual inaccuracies or unsupported by any reasoning. See, e.g., Pet.'s Mot. at 8, 15. At the outset, the court concludes that many of petitioner's specific objections to the special master's factual statements are in fact supported by the record.[1] Likewise, the special master's reductions

[1] For example, petitioner objects to the following statement, pertaining to petitioner's experts, made by the special master: "Dr. Jacobson agreed with Dr. Heubi that mild cases of Reyes'

in hours for specific litigation phases were not an abuse of discretion.[2] In general, in making his fees and costs decision, the special master did not make specific line-by-line cuts in hours. Hocraffer, 2011 WL 3705153, at *20 (finding the line-by-line approach "unwieldy" given the number of hours claimed). Instead, the special master first established categories of non-compensable time derived from a careful examination of petitioner's fee application and the parties' respective arguments. Id. at *20. The special master then reviewed "the component parts of the proceedings . . . to determine the

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Syndrome recover uneventfully and the petitioner had a mild case." Hocraffer, 2011 WL 3705153, at *2. Petitioner argues that in fact, Dr. Jacobson testified that mild cases of Reyes' Syndrome can cause injury. Pet.'s Mot. at 8. However, the special master's statement clearly comports with his 2009 decision on damages, as upheld by this court. See Hocraffer, No 99-533V, 2009 WL 1955140, at *5 (Spec. Mstr. Fed. Cl. Mar. 4, 2009).

In addition, petitioner objects to the special master's reference to a call made in 1998 to petitioner's parents. The special master found that numerous calls made by petitioner's counsel to her parents were unreasonable because petitioner "is a competent adult." Hocraffer, 2011 WL 3705153, at *21. Petitioner contends that she did not become a competent adult until February 1999. Pet.'s Mot. at 9. Nevertheless, the special master only references extensive communications with petitioner's mother as one of the "overarching issues" of the case. Hocraffer, 2011 WL 3705153, at *21. He goes on to identify communications with petitioner's mother during the later stages of the litigation in providing a basis for decreasing petitioner's requested hours for those specific litigation phases. Id. at *31-33. Therefore, the court concludes that this complaint of factual error is unfounded in light of the method the special master employed in applying the identified "overarching issues" to the specific phases of litigation in this case to determine the overall reasonableness of petitioner's requested hours.

[2] For example, petitioner objects to the special master's reduction in hours for medical research, which the special master concluded was more appropriately performed by a medical expert. Pet.'s Mot. at 12. Petitioner argues that the medical research performed was "essential to the case." Id. However, "while it is generally accepted that the attorney may assist the expert 'by offering supervision, conducting research for the expert, or even by drafting portions of his or her report,' the ultimate question is reasonableness of the efforts and time claimed." Hocraffer, 2011 WL 3705153, at *27 (quoting Gruber, 91 Fed. Cl. at 792). The court finds that the special master's reduction in hours are consistent with this standard. The special master did not simply deduct all time performed on medical research. Instead, in reducing time allowed for medical research, the special master carefully analyzed Vaccine Program case law, petitioner's arguments, and the evidence before him to provide a rational and specific explanation for his reduction in hours. See Hocraffer, 2011 WL 3705153, at *27.

reasonableness of the hours spent during each segment of the case." Id.; see Fox v. Vice, 131 S. Ct. 2205, 2216 (2011) ("[T]rial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time."). In thoroughly examining each phase of the litigation, the special master applied these categories of non-compensable time, and based on this application, his experience, and a review of a number of cases for comparison purposes, reasonably reduced petitioner's hours. See Hocraffer, 2011 WL 3705153, at *21-27 (analyzing overarching issues); id. at *28-34 (examining each stage of the litigation); id. at 34-35 (comparing the hours expended here with other Vaccine Act cases); see also Wasson, 24 Cl. Ct. at 486 ("[T]he special master is entitled to and should rely upon [his or] her extensive experience in awarding reasonable fees and expenses.").

For example, the special master made the largest cut in hours for the damages phases of the litigation. See Hocraffer, 2011 WL 3705153, at *29-31. Petitioner argues that these cuts were "punitive" and "drastic." Pet.'s Mot. at 15-17. However, in reducing petitioner's requested hours, the special master first analyzed the parties' arguments and his impression of the record to conclude that petitioner spent considerable unproductive time in the damages phases of the litigation. Hocraffer, 2011 WL 3705153, at *2-3. The special master then identified and analyzed general overarching concerns with petitioner's requested hours, including excessive time spent on administrative activities and review of medical research throughout the case. Id. at *21-27. Next, carefully examining the damages phases of this case, the special master first found that petitioner spent much unproductive time litigating a damages theory that would subsequently be

withdrawn months later. Id. at *29. The special master then compared the time billed on damages in this case—339 hours out of 580 hours total at that point—to a much more complex and highly-publicized case, which resulted in a total of 571 billed hours. Id. at *31. Finally, the special master applied many of his overarching concerns to this phase of the litigation, including extensive and inefficient communications, unnecessary research, and duplicative information-gathering. Id.

Presented with this thorough analysis, the court finds that the special master provided a rational basis for his conclusions, supported by the record and a careful, well-reasoned analysis. Ultimately, the special master does not need to determine the precise number of hours spent on inefficient or redundant tasks. Instead, the special master properly relied on his experience and judgment to conclude, after a careful analysis of the litigation history of this case, that petitioner spent a significant amount of unproductive time unnecessarily relitigating compensation and damages, and based the reduction of Mr. Dannenberg's requested hours on this conclusion. The special master's ruling is sufficiently grounded in his review of the case and his experience with past Vaccine Act cases. The court therefore finds no reason to overturn the special master's findings upon review.

B. The special master properly applied the "Davis exception."

Petitioner next challenges the special master's determination of Mr. Dannenberg's reasonable hourly rate. Petitioner initially requested an hourly "forum" rate of $465 for her counsel. The special master followed the "lodestar method," mentioned above, to determine a reasonable hourly rate. Under the "lodestar method," the reasonable hourly

rate is derived from the "prevailing market rate," defined as the rate prevailing in the community "for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984). In general, the prevailing market rate is based on the rate of the forum court rather than the rate of the geographic location where the attorney is based. Avera, 515 F.3d at 1348. In Vaccine Act cases, the relevant forum is Washington, DC. Id. However, this general rule is limited by the "Davis exception."[3] If the bulk of the requesting attorney's work is done outside the forum, the special master must determine the local rate for the attorney. Avera, 515 F.3d at 1347-49. If there is a "very significant difference" in compensation favoring the forum rate compared to the local rate, the Davis exception applies, and the local rate is awarded. Id. at 1349-50; Rodriguez v. Sec'y of Health & Human Servs., 632 F.3d 1381, 1384 (Fed. Cir. 2011), petition for cert. filed, 80 U.S.L.W. 3066 (U.S. July 27, 2011) (No. 11-129).

The burden rests on the fee applicant to provide satisfactory evidence of the reasonable hourly rate. Id.; see Wasson, 24 Cl. Ct. at 484 n.1. To establish the prevailing forum and local rate, the parties typically provide the special master with objective evidence of market rates for lawyers of differing skill levels, including affidavits of other attorneys or citations to prior precedents showing reasonable rate adjudications for the fee

[3] The Davis exception is derived from Davis County Solid Waste Mgmt. & Energy Recovery Special Servs. Dist. v. EPA, 169 F.3d 755 (D.C. Cir. 1999). The Davis exception has been adopted by the Federal Circuit for vaccine cases. See Avera, 515 F.3d at 1349 ("We think Davis represents a sound approach to setting the reasonable rate of attorneys' fees in Vaccine Act cases.").

applicant. Rupert v. Sec'y of Health & Human Servs., 52 Fed. Cl. 684, 688 (2002). The special master then determines the attorney's rate within that range based on his or her performance in the case. Id. Here, the special master, based on a finding of a $300 forum rate and a $200 local rate, applied the Davis exception, and awarded petitioner a rate of $200 per hour. Petitioner challenges the special master's determination of her attorney's local rate and forum rate, and the resultant imposition of the Davis exception. Pet.'s Mot. at 18.

1. The special master properly determined the forum rate.

The court turns first to petitioner's complaint that the special master improperly rejected petitioner's proposed forum rate. As noted above, the petitioner requested a $465 per hour forum rate. In support of her requested rate, petitioner submitted the Laffey Matrix,[4] a chart of hourly rates for attorneys based on years of practice maintained by the U.S. Attorney's Office for the District of Columbia, and an affidavit from Mr. Eisen, an attorney practicing commercial law, employment law, civil rights and other civil litigation in Washington, DC. Hocraffer, 2011 WL 3705153, at *8, *13.

The special master first considered petitioner's submission of the Laffey Matrix, which set an attorney rate between $465 and $686 for attorneys with Mr. Dannenberg's years of experience. Id. at *13. The special master noted that the Federal Circuit

[4] The Laffey Matrix is based on the hourly rates allowed by the U.S. District Court for the District of Columbia in Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, 371 (D.D.C.1983), rev'd on other grounds, 746 F.2d 4 (D.C. Cir. 1984) (rejecting use of the matrix rates in that particular case), and later approved by the Court of Appeals for the District of Columbia Circuit, see, e.g., Covington v. District of Columbia, 57 F.3d 1101, 1109 (D.C. Cir. 1995). The Laffey Matrix has been held not to apply to vaccine litigation. See Rodriguez, 632 F.3d at 1385.

recently affirmed in Rodriguez v. Secretary of Health and Human Services that vaccine litigation is not analogous to complex federal litigation and that, therefore, Laffey Matrix rates do not apply in Vaccine Act cases. Rodriguez, 632 F.3d at 1385. The special master also reviewed the use of the Laffey Matrix in Vaccine Act cases, and found that with one pre-Rodriguez exception (Walmsley v. Sec'y of the Dep't of Health & Human Servs., No 06-270, 2009 WL 4064105 (Fed. Cl. Spec. Mstr. Nov. 6, 2009)), every Vaccine Act decision had rejected the Laffey Matrix rate. Id. at *9. Based on this history, the special master declined to use the Laffey Matrix in this case. Id. at *8-9, *14 (citations omitted). In response to this finding, petitioner argues that "finding other litigation does not compare to vaccine program work is a very convenient excuse to disregard relevant evidence of forum rates." Pet.'s Mot. at 20. However, the court agrees with respondent that the special master's decision not to apply the Laffey Matrix is not an abuse of discretion. Resp't Mem. at 12. In fact, the special master grounded his decision in an extensive review of relevant precedent.

The special master then examined the 2009 Eisen affidavit submitted by petitioner in support of a $465 forum rate. Hocraffer, 2011 WL 3705153, at *13. In his affidavit, Mr. Eisen stated that his rate for litigation was $400 per hour. Id. at *8. The special master compared Mr. Dannenberg's experience and practice under the Vaccine Act with Mr. Eisen's affidavit. Id. at *8, *13. The special master found "no comparison" between Mr. Eisen's practice of complex federal litigation and thirty three years of experience as compared to Mr. Dannenberg's Vaccine Act practice and twenty four years of experience, noting that petitioner did not submit any additional evidence to liken the skill

and reputation of her attorney to Mr. Eisen. Id. at *8 (finding "that the areas of law practiced by Mr. Eisen do not appear to compare to practice under the Vaccine Act" and noting that "[p]etitioner makes no effort to justify the comparison to Mr. Eisen's practice areas and rate"). Petitioner's objection to the rejection of Mr. Eisen's affidavit echoes her objection to the rejection of the Laffey Matrix. See Pet.'s Mot. at 20. However, the court again agrees with respondent that the special master reasonably concluded and provided sound reasons for his decision that, based on the evidence before him, Mr. Eisen's affidavit did not support petitioner's requested forum rate.

Finding no other evidence submitted by petitioner as to the forum rate, the special master then examined Schueman v. Secretary of the Department of Health and Human Services, No. 04-693, 2010 WL 3421956 (Fed. Cl. Spec. Mstr. Aug. 11, 2010), to establish a forum rate for Mr. Dannenberg. Schueman was a prior case litigated by Mr. Dannenberg where the special master faced a similar lack of evidence as to the forum rate. Id. at *14. The special master in Schueman determined that the forum rate for Vaccine Act cases ranged between $275 and $360 per hour. Id. at *4. Here, the special master, after examining Schueman and other recent Vaccine Act cases analyzing the proper forum rate, concluded that the forum rate for petitioner's attorney would be $300 per hour. Id. at *14 (citations omitted). The court concludes that the special master's careful analysis of the evidence before him and prior precedent to establish a $300 forum rate was not an abuse of discretion.

2. The special master properly determined the local rate.

Having upheld the special master's determination of petitioner's forum rate, the court now turns to petitioner's objections regarding Mr. Dannenberg's local rate. Petitioner submitted four affidavits as evidence of her counsel's local rate:

> Regarding his local rates, petitioner proffered Mr. Dannenberg's 2010 affidavit (alleging a rate of $300 with no explanation or support concerning his "skill, experience, or reputation" beyond his present practice area and 1986 entry into law), Mr. Spink's [2007] affidavit (alleging a rate of $1[8]5 to $263 [footnote omitted], his practice area of general tort litigation and mediation and his entry into law in 1980), Mr. Kohn's [2010] affidavit (alleging a rate of $195 to $225, his practice area of litigation primarily on behalf of plaintiffs and his entry into law in 1972), and Mr. Troy's affidavit (alleging an hourly rate of $325, his practice areas of intellectual property matters and his entry into law in 1986).

Hocraffer, 2011 WL 3705153, at *16. The special master analyzed each affidavit in turn, noting that many of the affidavits were "devoid of information" allowing a comparison of skill, experience, and reputation, except as to the attorneys' years in practice. Id.

First considering Mr. Troy's affidavit, the special master noted that "Mr. Troy's areas of practice [(intellectual property law)] do not appear comparable to the work Mr. Dannenberg performs under the Vaccine Act." Id. He went on find that, other than "conclusory assertions that Mr. Troy and Mr. Dannenberg both perform 'federal complex litigation,'" petitioner provided no additional evidence to equate Mr. Troy and Mr. Dannenberg. Id. The special master thus concluded that Mr. Troy's affidavit "carrie[d] little persuasive value." Id.

The special master similarly examined Mr. Kohn and Mr. Spink's affidavits "mindful that the legally appropriate comparison is between counsel of comparable skill,

experience, and reputation." Id. The special master noted that Mr. Spink and Mr. Kohn have six and fourteen years more experience, respectively, than Mr. Dannenberg. Id. at *10. As a result, the special master found that "based upon years of experience alone," Mr. Dannenberg's local rates should be placed at the lower end of the spectrum established by petitioner's affidavits, which started at $185 per hour. Id. The special master also held that based on his apparent skill level in this case, Mr. Dannenberg's local rate would similarly fall on the lower end of the spectrum. Id.; see Rupert, 52 Fed. Cl. at 688.

The special master then reviewed recent Federal Circuit precedent concerning the complexity of Vaccine Act cases to conclude that "it is mistaken to summarily state that the Vaccine Act is tantamount to complex federal litigation; significant differences abound." Hocraffer, 2011 WL 3705153, at *12-13, *16 (citing Rodriguez, 632 F.3d at 1384-85). Based on this precedent, the special master found that petitioner could not show that Mr. Dannenberg is entitled to an hourly rate identical to Mr. Troy, who practices complex federal litigation, and Mr. Spink or Mr. Kohn, who practice "traditional litigation with more stringent legal standards and procedural rules." Hocraffer, 2011 WL 3705153, at *16. Finally, relying on prior Vaccine Act cases, the special master considered "rates awarded to much more skilled attorneys who also practice in lower cost areas comparable to counsel at issue." Id. at *17 n.24. In light of this analysis, the special master awarded petitioner's counsel a local rate of $200 per hour.

Petitioner takes exception to the finding of the special master that Vaccine Act litigation is not comparable to the "traditional litigation" practiced by Mr. Spink and Mr. Kohn or the "complex federal litigation" practiced by Mr. Troy. Pet.'s Mot. at 20-22. Petitioner cites a 1999 decision by the special master which found that "the argument that [Vaccine] Program litigation is uncomplicated and requires less expertise or preparation than traditional tort litigation is no longer valid." Erickson v. Sec'y of Dep't of Health & Human Servs., No. 96-361V, 1999 WL 1268149, at *4 (Fed. Cl. Spec. Mstr. Dec. 10, 1999). Petitioner argues that the special master erred in finding that "Vermont general practice is more complex than vaccine injury litigation." Pet.'s Mot. at 21.

Nonetheless, the special master here was tasked with a local fee determination based on the specific evidence in this case. As the special master noted, petitioner provided no showing through any of the affiants that would warrant the high fees claimed by petitioner. Hocraffer, 2011 WL 3705153, at *16 (finding the affidavits from the Vermont attorneys as "devoid of information allowing [a comparison between counsel of comparable skill, experience, and reputation], except as to the attorneys' years in practice"). After concluding that Mr. Troy's intellectual property practice did not compare to petitioner's Vaccine Act practice, the special master was left with the affidavits of Mr. Spink and Mr. Kohn, who practice general litigation, to establish a local rate for petitioner's Vermont practice. These affidavits establish a fee spectrum ranging from $185 to $263 per hour. Even if this court concludes that Vaccine Act litigation can be "quite comparable with the traditional tort system," Erickson, 1999 WL 1268149, at

*4, this does not compel an award at the top end of this fee spectrum determined by the affidavits of Mr. Spink and Mr. Kohn.

Instead, the special master permissibly determined a local rate that falls within the fee spectrum that petitioner's affidavits established. Furthermore, the rate determined by the special master in this case, $200, is similar to the highest rate charged by Mr. Kohn, $225. Notably, Mr. Kohn's affidavit established that he has "substantial litigation experience, particularly on behalf of plaintiffs," and has fourteen years more experience than Mr. Dannenberg. See Hocraffer, 2011 WL 3705153, at *9. Ultimately, the burden rests on petitioner to demonstrate satisfactory evidence of a reasonable hourly rate, Wasson, 24 Cl. Ct. at 484 n.1, and the special master provided rational conclusions as to why the evidence before him mandated a local rate of $200. Accordingly, the court finds no error in the special master's local fee determination.

3. The special master properly applied the Davis exception.

The special master next turned to the application of the Davis exception. He explained that the Federal Circuit has held that "setting a rule as to what constitutes a very significant difference between local and forum hourly rates would be stifling and impractical. . . . Special masters should, as in this case, continue to rely on the evidence before them and their own trial experience in similar litigations in making such a determination." Hall, 640 F.3d at 1357; see Hocraffer, 2011 WL 3705153, at *11. Applying this rule in comparing the forum rate, $300, to the local rate, $200, the special master found the 50% difference between the two to be very significant. Hocraffer, 2011 WL 3705153, at *17. The special master further explained that a 46% difference had

been held in another Vaccine Act case to constitute a very significant difference, Sabella v. Sec'y of Health & Human Servs., No. 02-1627, 2008 WL 4426040 (Fed. Cl. Spec. Mstr. Sept. 23, 2008), rev'd on other grounds, 86 Fed. Cl. 201 (2009), and that the Federal Circuit had referenced cases evidencing "significant differences" ranging from 46% to 60%, Hall, 640 F.3d at 1357. He therefore applied the Davis exception in this case, concluding that a reasonable hourly rate for petitioner would be $200. Hocraffer, 2011 WL 3705153, at *16. The special master discounted this rate using the Consumer Price Index to award a rate appropriate for the then eleven years during which this case has been litigated.[5] As a result, petitioner was awarded a range of hourly rates from $163 to $200. Id.

Petitioner complains that the rate determined by the special master in this case departs from the rate determined for her attorney in Schueman. In Schueman, petitioners requested a $300 per hour rate for Mr. Dannenberg. As noted above, the special master there determined that the forum rate for Vaccine Act cases ranged from $275 to $360 per hour. Schueman, 2010 WL 3421956, at *4. The same evidence of the local rate before the special master in this case was considered by the special master in Schueman. Id. at *4 n.11. However, the special master in Schueman, persuaded by Mr. Troy's affidavit—stating a $325 per hour standard rate for intellectual property matters in Vermont—found

[5] The petitioner was awarded the following hourly rates: 2008-2010 at $200 per hour; 2005-2007 at $191 per hour; 2002-2004 at $174 per hour; and 1999-2001 at $163 per hour. Hocraffer, 2011 WL 3705153, at *17. The special master used the deflated rate in the last year of each of the three years; e.g., awarding petitioner the 2010 rate for years 2008, 2009, and 2010; awarding the 2007 rate for 2005, 2006, and 2007, etc. Id. at *17 n.25.

that "[t]he evidence in the record supports the award of rates between $195.00 and $325.00 per hour as the local market rate." Id. at *4 n.13. She accordingly held that the requested local rate of $300 per hour did not significantly differ from the forum rate range she had established, and awarded Mr. Dannenberg $300 per hour. Id. at *5.

While the decisions of other special masters about reasonable hourly compensation are relevant to a fees inquiry, they are not binding. See, e.g., Rodriguez v. Sec'y of Health & Human Servs., No. 06-559, 2009 WL 2568468, at *23 n.57 (Fed. Cl. Spec. Mstr. July 27, 2009), aff'd 632 F.3d 1381 (Fed. Cir. 2011), petition for cert. filed, 80 U.S.L.W. 3066 (U.S. July 27, 2011) (No. 11-129) (noting that "[b]ecause a special master's determination of what constitutes a reasonable hourly rate would ordinarily be a factual, not a legal, determination, a decision that a particular hourly rate was appropriate would not bind other special masters or judges"); Friedman v. Sec'y of Health & Human Servs., 94 Fed. Cl. 323, 332 (2010). Moreover, petitioner herself refers the court to a 2010 Vaccine Act fees decision awarding "a range of $200-250 an hour as an appropriate rate range for Mr. Dannenberg." Pet.'s Mot. at 22 (citing Langland v. Sec'y of Health & Human Servs., No. 07-0036, slip op. at 4 (Fed. Cl. Spec. Mstr. Oct. 21, 2010)). This range clearly comports with the special master's determination of a $200 local rate for Mr. Dannenberg in this case.

Furthermore, the "special master here was tasked with determining the appropriate rate of compensation for this [p]etitioner's counsel based on the work in this case." Friedman, 94 Fed. Cl. at 332. A fee determination can be based not only on the specific evidence before the special master, but also on counsel's specific work in the case at

hand. Rupert, 52 Fed. Cl. at 688 ("In the typical lodestar analysis, the parties present a range of market rates for lawyers of differing skill levels, and the court interpolates the prevailing market rate by assessing and applying the skill demonstrated in the instant case to that range.") (citing Norman v. Hous. Auth. of Montgomery, 836 F.2d 1292, 1300 (11th Cir. 1988)). Here, the special master explained that "despite having no evidence of the affiants' comparable skill level and reputation, Mr. Dannenberg's skill level as evidenced before the undersigned would also place him at the lower end of this range." Hocraffer, 2011 WL 3705153, at *16 (citing Adde v. United States, 98 Fed. Cl. 517, 527 (2011) (discussing attorneys' "lack of understanding of this court's rules, an inattention to the court's directives, . . . failure to discern pertinent statutory, regulatory and precedential authority" in determining their hourly rates)). The court therefore concludes that, despite the departure from Schueman, the special master supplied a rational basis for his decision, founded on the evidence before him, comparable Vaccine Act decisions, his prior experience, and his experience with petitioner's counsel in this case.

In sum, this court has reviewed the evidence before the special master in this case, the decision of the special master, and the determination of Mr. Dannenberg's rates in Schueman. Based on this review, the court finds that the special master's determination of petitioner's counsel's local and forum rates, and the application of the Davis exception, were not, as petitioner contends, "punitive, contrary to the weight of the evidence and clear error." Pet.'s Mot. at 22. Nor was the decision arbitrary, capricious, or an abuse of discretion. The special master, in determining Mr. Dannenberg's hourly rates, thoughtfully reviewed the record before him in light of prior decisions and his own

experience. His ruling was thorough and gave competent reasons for his conclusions based on the facts of this particular action. In these circumstances, the court does not find a valid reason to overturn this decision on review.

C. The special master did not err in failing to award a paralegal rate to petitioner's counsel for administrative work he performed.

Finally, petitioner objects to the special master's deduction in hours for work considered paralegal in nature, for which the special master awarded no paralegal fees. Pet.'s Mot. at 22. Petitioner first argues that "simply because a paralegal could perform a specific task" does not mean an attorney cannot perform the task and bill it at an attorney rate. Id. at 23. Alternatively, petitioner contends that if the court does find that legal work should have been performed by a paralegal, it should not be eliminated all together, but awarded at a paralegal rate. Id. at 24. Petitioner complains that there is "no way to know from the [special master's d]ecision" how much time was deducted for either paralegal or administrative tasks. Id. at 27. Petitioner therefore concludes that "to the extent that the special master deducted time from services he deemed could have been performed by a paralegal, the decision is contrary to law, arbitrary and capricious, and an abuse of discretion." Id. at 28. Petitioner requests that the court award paralegal rates for the approximately 435 hours disallowed by the special master in this case. Id.

Respondent contends that the special did not err in not compensating petitioner's counsel for administrative tasks. Resp't Mem. at 16. Respondent argues that although the special master reviewed the fee application in detail, the "determination of reasonable hours was made based on experience and comparison to other cases." Id. at 17 (quoting

Hocraffer, 2011 WL 3705153, at *27). Based on this global level of analysis, respondent states, the special master's award need not be scrutinized line-by-line, but should be evaluated for overall reasonableness. Resp't Mem. at 18-19 (citing Fox v. Vice, 131 S. Ct. 2205, 2216 (2011)). This award, respondent concludes, must be given substantial deference. Resp't Mem. at 19 (citing Fox, 131 S. Ct. at 2216 ("[A]ppellate courts must give substantial deference to [fee] determinations.")).

In his decision, the special master correctly noted that paralegal or administrative work cannot be billed at an attorney's rate and that administrative work has been found to be non-compensable in Vaccine Act litigation. Hocraffer, 2011 WL 3705153, at *21. The special master also analyzed prior precedent to identify tasks that are paralegal or administrative in nature. Id. at *21-24. As petitioner suggests, the special master also notes that many individual billing entries put forth by petitioner in her ninety pages of submitted billing reports are "efforts appropriately performed by a paralegal or secretary." Id. at *30. However, the court agrees with respondent that the special master's comments must be viewed in light of his overall "reasonableness" determination.

As discussed above, the special master did not engage in a line-by-line analysis of the substantial billing record submitted by petitioner, but instead analyzed petitioner's fee application for categories of unreasonable time, and then applied these overarching categories to specific stages of the litigation. Id. at *20. The special master identified as one of the "overarching" billing issues in the case "excessive time spent on drafting and mailing status reports and letters;" it was the analysis of this issue that included a

discussion of paralegal and administrative tasks. Id. at *21. As an illustrative example, the special master described a status report filed three times by petitioner, containing nearly exactly the same language, for which petitioner billed a total of 1.6 hours of time. Id. at *23. The special master noted that the record was replete with such duplicative efforts. Id. ("There were twenty-one such status reports filed in this case by December 5, 2001."). It is clear from the special master's analysis of the remaining stages of litigation that deductions in hours were not taken for paralegal tasks as such, but for tasks that were unreasonable given their inefficient, consistent, administrative, or extensive nature. See id.; see also id. at *30 ("Throughout this time, one sees the billing in tenths of an hour, efforts appropriately performed by a paralegal or secretary, and trust review time; all of which appear inconsequential as individual entries, but quickly adds up to substantial unreasonable time given the consistent and extensive nature of these billings."). Therefore, although not awarding petitioner paralegal time for specific billing entries, the special master properly deducted hours for time spent on what he considered unnecessary or inefficient, and therefore unreasonable, administrative or paralegal efforts. The special master is entirely within his discretion to do so. See Gruber, 91 Fed. Cl. at 785 (holding that "a special master has discretion to exclude hours expended that are 'excessive, redundant, or otherwise unnecessary. . . .'" (quoting Saxton, 3 F.3d at 1521) (internal quotations omitted)); see also Saxton, 3 F.3d at 1521 ("It . . . [is] well within the special master's discretion to reduce the hours to a number that, in his [or her] experience and judgment, was reasonable for the work done.").

Petitioner's demand that the special master comb the massive billing records in this case to separate paralegal and administrative time from attorney time is not supported. The Supreme Court has cautioned against such an approach. In Fox v. Vice, the Supreme Court recently held that, in establishing reasonable fees, "trial courts need not, and indeed should not, become green-eyeshade accountants. . . . So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." 131 S. Ct. at 2216. The Supreme Court has also warned that "the determination of fees 'should not result in a second major litigation.'" Id. at 2216 (quoting Hensley, 461 U.S. at 437). Following these guidelines, the special master properly used a global—rather than line-by-line—approach to determine the reasonable number of hours expended in this case. The special master conducted an analysis of petitioner's fee application in order to estimate unproductive time. The special master then applied this analysis, along with his "overall sense" of the case, in reducing the allowable hours for each stage of the litigation. See Fox, 131 S. Ct. at 2216. The special master further bolstered his reasonableness determination with comparison of the present litigation to past, and in the special master's experience, more complex, litigation. See Hocraffer, 2011 WL 3705153, at *34-35 ("There is no comparison between the case at hand and these [four Vaccine Act cases.] . . . These four cases presented, by multiples, far more complex legal, factual and medical issues. Yet counsel in those cases claimed and were awarded the same amount of hours petitioner is being awarded herein."). The court therefore finds that the special master did not err in applying the law, nor did he abuse his

discretion in reducing petitioner's hours for inefficient or redundant tasks, and thus rejects petitioner's third objection.

D. Petitioner is awarded the requested fees for preparation of this motion for review.

The special master awarded a total of $124,343.30 in attorney's fees and $24,421.98 in costs. Petitioner requests an additional 49.8 hours for work spent on preparing this motion for review. Under Vaccine Rule 34(b), this court may award additional fees relating to a motion for review. The special master upheld a similar expenditure of hours on petitioner's past three motions for review. See Hocraffer, 2011 WL 3705153, at *29 (allowing 44.9 hours for petitioner's first motion for review); id. at *30 (allowing 35.8 hours for petitioner's second motion for review); id. at *31 (allowing 40 hours for petitioner's third motion for review). The court therefore increases petitioner's award by $9,960 in attorney's fees, derived from 49.8 hours multiplied by a $200 per hour rate. Petitioner is awarded a total of $134,303.30 in attorney's fees, and $24,421.98 in costs.

IV. CONCLUSION

For the foregoing reasons, petitioner's motion is **DENIED**. The Clerk shall enter judgment in the amount of $134,303.30 in attorney's fees, and $24,421.98 in costs.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge