OFFICE OF SPECIAL MASTERS

No. 05-438V
Filed: November 21, 2007

NOT TO BE PUBLISHED

KERI LYNN KOOI,	*	
Petitioner,	*	
v.	*	Attorneys' Fees and Costs, Immediate Family Members Providing Legal Services
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Clifford J. Shoemaker, *Shoemaker and Associates, Vienna, VA, for petitioner*
Michael Milmoe, U.S. Department of Justice, Washington, D.C., for respondent

ATTORNEYS' FEES AND COSTS DECISION[1]

GOLKIEWICZ, Chief Special Master.

I. PROCEDURAL BACKGROUND

On February 12, 2007, petitioner filed her Application for Attorneys' Fees & Costs. See Petitioner's Application for Attorneys' Fees & Costs (hereinafter P. Fee App.), filed February 12, 2007. Respondent did not file a response. However, after a cursory review of petitioner's application, the number of hours requested appeared unreasonable. Petitioner submitted an invoice for the law firm of Shoemaker & Associates, the attorneys of record in this matter, for 48.7

[1]The undersigned intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" decision will be available to the public. Id.

hours. Petitioner also submitted an invoice for the Kooi Law Firm, specifically for Jeffrey Kooi, who is also petitioner's husband. The fee petition lists the invoice for the Kooi Firm as Exhibit 4, refers to the Kooi Firm as co-counsel and requests a total number of hours for Mr. Kooi of 66.1 hours. P. Fee App. at 2. After reviewing the documents, a Scheduling Order was filed by the court on March 6, 2007, requesting that the petitioner address the legal basis for awarding reasonable attorney's fees and costs to petitioner's spouse, Mr. Kooi, an attorney. In an Order filed March 6, 2007, the undersigned directed petitioner to explain why Mr. Kooi should be compensated for his extensive background research of the Vaccine Program and petitioner's medical condition when it appeared that Shoemaker & Associates, an experienced firm in the Vaccine Program, actually prosecuted the case. Petitioner filed her Brief in Support of her Application for Attorneys' Fees & Costs and Amended Fee Petition on March 21, 2007 (hereinafter Support Brief). Respondent filed a Response to petitioner's Support Brief on April 4, 2007. See Respondent's Response to Petitioner's Brief in Support of her Application for Attorneys' Fees (hereinafter Response), filed April 4, 2007.[2] The undersigned issued an Order on April 10, 2007, in which the undersigned wrote:

> Based upon respondent's brief, the undersigned is inclined to agree with respondent's argument that there is no legal basis for awarding legal fees to petitioner's spouse.

The Order stated that petitioner should file her reply, supported by citations to case law and statutes, to respondent's Response by April 24, 2007. See Order (hereinafter Order of April 10, 2007), filed April 10, 2007. Petitioner failed to file a reply to respondent's Response to petitioner's Support Brief.

II. ISSUE PRESENTED

The issue presented here is whether there is a legal basis for awarding legal fees and costs to petitioner's spouse, attorney Jeffrey Kooi. Mr. Kooi's request for legal fees are designated "co-counsel fee" in petitioner's Application for Attorneys' Fees and Costs submitted. See P. Fee App. at Exhibit 4.

Respondent's Position

While respondent did not file an objection to the fees and costs requested for work performed by Shoemaker & Associates, respondent does object to the entirety of Mr. Kooi's request for legal fees and costs as "co-counsel". Response at 2. Respondent asserts that petitioner's Support Brief, filed on March 21, 2007, fails to identify any legal basis for the awarding of fees and costs for Mr. Kooi, nor does the Support Brief cite a single case or statutory provision permitting legal fees to be awarded to a family member of petitioner. Id. Respondent

[2]Because respondent failed to file a timely response to petitioner's initial fee application, the March 6, 2007 Order limited respondent's response "to only the issues raised in [the March 6 Order] and addressed by petitioner in her brief."

notes that Mr. Kooi never entered an appearance in this matter, nor is he admitted to practice before the Court of Federal Claims. Id. Respondent asserts that there is nothing in the record which indicates Mr. Kooi represented his wife, nor was there an attorney-client relationship between the two of them. Id. Respondent argues that Mr. Kooi's research on the underlying condition of brachial neuritis and locating an experienced law firm to handle the case is "self-help". Id. at 3. Respondent cites to Riley v. Sec'y of HHS as instructive and argues that self-help is noncompensable, based on a rationale that the statutes governing attorneys' fees and costs compensate for "incurred" costs, and petitioner never "incurred" costs for the services provided by her husband. Id.; Riley v. Sec'y of HHS, No. 90-466V, 1992 WL 892300, at *5 (Fed. Cl. Spec. Mstr. Mar. 26, 1992).

Petitioner's Position

Petitioner argues that Mr. Kooi's background research was helpful to the attorney of record, Clifford J. Shoemaker, a lawyer with much experience in the Vaccine Program. Support Brief at 1. Petitioner further asserts that Jeffrey Kooi's research on his wife's medical condition led him to advise his spouse that she "should find 'an experienced law firm'" to represent her in this matter. Id. Mr. Kooi's research led him to identify Shoemaker & Associates as one such firm. Support Brief at 1. Essentially, petitioner argues that Mr. Kooi's research on his spouse's medical condition and the collection of her medical records was the same type of tasks nearly any other attorney would have performed if hired as counsel for Keri Kooi. Id. at 2.

Analysis

The first issue to address is whether petitioner "incurred" costs payable to her husband, Jeffrey Kooi. The Vaccine Act provides in §300aa-11(e)(1), that in awarding compensation for a petitioner "the special master or court shall also award as part of such compensation an amount to cover (A) reasonable attorneys' fees, and (B) other costs, *incurred* in any proceeding on such petition". National Childhood Vaccine Injury Act of 1986 ("Vaccine Act"). See Pub. L. No. 99-660, 100 Stat. 3755 (1986) (codified as amended at 42 U.S.C.A. §§300aa-1 through -34 (West 1991 & Supp. 2001)) (emphasis supplied). As the analysis below will show, Mr. Kooi's requested fees were not "incurred" and therefore must be denied.

The court has had limited opportunities to discuss the issue of "incurred" costs. However, the court has addressed the meaning of "incurred" in another context. The meaning of "incurred" was analyzed in cases that dealt with whether petitioners "incurred" unreimbursable expenses in excess of $1,000, as required for claims under the Vaccine Act. Public Health Service Act, § 2111(c)(1)(D)(I), as amended, 42 U.S.C.A. § 300aa-11(c)(1)(D)(i). Each case that has analyzed the "incurred" issue has found the need for some legal obligation before finding that the cost was incurred. See Corrales v. Secretary of HHS, 1997 WL 759466 (Fed. Cl. Spec. Mstr. Nov. 20, 1997); Black v. Secretary of DHHS, 33 Fed.Cl. 546 (1995), ("One incurs an expense, therefore, at the moment one becomes legally liable..."), *aff'd*, 93 F.3d 781 (Fed.Cir. 1996); and Jessen v. Secretary of HHS, 1995 WL 571714 (Fed.Cl. 1995) (explaining that losing an opportunity to earn

money is not incurring an expense). In the absence of such a legal obligation, the costs were found not to be "incurred." In the context of attorneys' fees, a legal obligation can be established through an attorney-client, paying relationship.

The same conclusion was reached in analyzing a similar fee-shifting statute. In United States v. McPherson, an attorney acting as a *pro se* litigant was denied an award of attorney's fees and costs based on the rationale that actual fees and costs were not "incurred". United States v. McPherson, 840 F.2d 244 (4th Cir. 1988). In analyzing "incurred" costs, the court noted that the *pro se* attorney "did not pay any fees for legal services nor incur any debts which remain outstanding." Id. at 245. In addition, the court noted that similar to the accountant, or any taxpayer, who is required to "devote substantial time to the case, organizing records, attending depositions, and conferring with an attorney," the statute does not compensate for "self-help" or "lost opportunity costs." Id. at 245. The statute restricts the payment for attorneys' fees to those "actually" incurred. Id. at 244.

In a case with close parallels to this one, Special Master French concluded that compensation for time spent on a Program case by a petitioner, who was also an attorney, functioning in the "role of the responsible attorney" should not be compensated for those efforts. Riley v. Secretary of HHS, No. 90-466V, 1992 WL 892300, at *5 (Fed. Cl. Spec. Mstr. Mar. 26, 1992). In that case, a father sought to recover attorney's fees and costs for representing his son for proceedings under the Vaccine Act. Id. Special Master French, citing McPherson, found the petitioner-father's time to be in the nature of "self-help" and "lost opportunity costs" and not "incurred" costs. Id. Special Master French also examined the policy reasons for not awarding fees to attorneys functioning in a non-representative capacity. Special Master French relied on the Supreme Court's conclusion in Kay v. Erhler, 499 U.S. 432 (1991), in which *a pro se* litigant, who was also an attorney, was found not entitled to attorney's fees in Civil Rights cases brought under 42 U.S.C. 1988.[3] After noting that the dictionary definition of "attorney" "assumes an agency relationship," Kay, 499 U.S. at 436 (footnote omitted), the Court found that the "overriding concern is an interest in obtaining independent counsel for victims of civil rights violations." Id. at 437. The Court also noted that:

> [e]ven a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure the reason, rather than

[3]The Court noted that there was agreement among the Circuit Courts that a non-lawyer pro se is not entitled to attorney's fees. That has also been the finding under the Vaccine Act. See Long v. Secretary of HHS, No. 94-310V, 1995 WL 1093129 (Fed. Cl. Spec. Mstr. Oct. 27, 1995). But see In re Hudson, 345 B.R. 477, 7 (Bankr. N.D.N.Y. 2006) (*Pro se* attorney litigants are not disqualified from receiving fees based solely on their *pro se* status).

> emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.

Id. at 437-38.

The decision in Kay reflects the Court's view that fee-shifting statutes were enacted to provide petitioners access to legal assistance of an attorney, established through an attorney-client agency relationship. Id. In Riley, Special Master French decided against awarding the petitioner-father attorney's fees, applying the Court's rationale in Kay, by stressing the importance of objectivity and detachment of legal representation under the fee-shifting provision . Riley, 1992 WL 892300, at *7; see also S.N. ex rel. J.N. v. Pittsford Cent. School District, 2005 WL 4131503, *3 (W.D.N.Y. 2005) (agreeing with Kay that attorney fee provisions assume a paying attorney-client relationship, are intended to assist litigants who could not otherwise afford to retain independent counsel, and finding the purpose is ill-served by awarding attorney fees to attorney-parents who choose not to retain counsel).

The cases interpreting the word "incurred" as used in the Vaccine Act have found that proof of an actual obligation must exist to be considered an "incurred"cost. Similarly, other courts interpreting other fee shifting statutes reimbursing for paid or incurred costs require "actual" payments, United States v. McPherson, 840 F.2d 244 (4th Cir. 1988), or "a paying relationship between an attorney and a client." Kay, 499 U.S. at 435 (citing Falcone v. IRS, 714 F.2d 646 (6th Cir. 1983)). Petitioner has provided no persuasive argument for deviating from these rulings. In fact, petitioner has failed to cite any supportive case law. See Support Brief. The absence of a representative agreement or actual paying relationship between Mr. Kooi and petitioner is dispositive of the issue presented in this case.

Although the undersigned in not aware of any prohibition against an attorney-spouse acting on behalf of a spouse, the relationship to be categorized as an attorney-client relationship for purposes of "incurred" costs must be evidenced by a formal, established relationship. Petitioner does not contend, much less argue, that such a formal, established relationship existed. See Support Brief. This is critical, because without some evidence of a business relationship it cannot be said that petitioner "incurred" a cost for her husband's work. In this case, there is no evidence that Keri Kooi entered into a paying, attorney-client relationship with her husband, Jeffrey Kooi. Mr. Kooi's assistance to his spouse was of the personal nature and did not stem from an attorney-client relationship, and is thus properly characterized as "self-help." See Riley v. Secretary of HHS, No. 90-466V, 1992 WL 892300, at *5 & n.10 (Fed. Cl. Spec. Mstr. Mar. 26, 1992) (citing United States v. McPherson, 840 F.2d 244 (4th Cir. 1988)). Mr. Kooi never filed a Notice of Appearance with regard to this matter, nor is he admitted to practice before the United States Court of Federal Claims. Additionally, there was no representation agreement submitted to the Court for review. Without a paying attorney-client relationship, under existing precedent, Keri

Kooi did not incur costs or fees payable to her husband Jeffrey Kooi. The absence of any "incurred" cost or a paying, attorney-client relationship between Keri Kooi and her spouse, Jeffrey Kooi, requires the denial of an award of attorney's fees and costs to Mr. Kooi.

Petitioner's March 21, 2007 Support Brief attempts to justify Mr. Kooi's efforts. Again, it must be noted that the Support Brief contains not one legal citation. As noted earlier, petitioner failed to file a Reply Brief, which was to include citations to legal support, in compliance with the undersigned's April 10, 2007 Order. The Support Brief is a prime example why "the judgment of an independent third party" is preferable to an attorney representing himself or a family member in "formulating legal arguments, and in making sure that reason, rather than emotion" is used in handling the matter. Kay v. Erhler, 499 U.S. 432, 437-38 (1991). **Jeffrey Kooi, not counsel of record, prepared petitioner's Support Brief in response to the concerns expressed in the undersigned's March 6, 2007 Order.** Support Brief at 5. The essence of the response is that attorney Jeffrey Kooi "provided the same or similar services as would have been provided by any other attorney from which petitioner would have been required to seek counsel had her husband not been an attorney." Id. at 2. However, a review of the time records, the file in this case and petitioner's Support Brief show without doubt that Mr. Kooi provided services that would not be compensated to a representative counsel. In addition, assuming the time was compensable, much of it would be denied as excessive or duplicative of the time compensated to the attorney of record, Mr. Shoemaker.

Prior to commenting on Mr. Kooi's time requests, it should be noted that this was a very straightforward case. Respondent conceded petitioner's right to entitlement, damages were eventually settled without a hearing and the amount of compensation was, in relative terms, extremely low. Despite Mr. Kooi's statement that "an experienced law firm" was needed to prosecute this case, it is questionable whether the Shoemaker's firm's services were necessary, especially given that it appears Mr. Kooi did most of the work anyway. Mr. Kooi spent over 53 hours researching vaccine injuries, drafting a Vaers report for the hospital, researching brachial neuritis, researching the Vaccine Fund and working on the Petition for this case, prior to the filing of the Petition on April 4, 2005. Mr. Kooi spent 20.6 of those hours preparing the Petition. At the same time, Ms. Gentry, an associate with Mr. Shoemaker and extremely familiar and experienced with vaccine cases, billed for and will be compensated for 9 hours of work on the Petition. The Petition in this case is one and one-half pages, doubled spaced consisting of ten paragraphs. The undersigned cannot fathom how so much time was spent on drafting the Petition. Mr. Kooi discussed in the Support Brief that he spent time "gathering, reading and summarizing medical records, drafting pleadings, collecting and summarizing lost wage statements, researching case law, and verdict reports. . ." Support Brief at 2. Again, the need for detachment and objectivity is clear; Mr. Kooi spent this time because of his lack of knowledge and because his wife was petitioner. The straightforward nature of this case, the representation by the extremely experienced firm of Shoemaker & Associates did not require Mr. Kooi's work efforts.

Consistent with the court's observations in McPherson, the undersigned finds that the time Mr. Kooi spent is aptly described as "self-help," and is thus non-compensable. United States v. McPherson, 840 F.2d 244 (4th Cir. 1988). Mr. Kooi's research on this claim was to assist his

spouse, an immediate family member, and was personal in nature. An example of this is the block of time Mr. Kooi spent collecting his spouse's medical records. The collection of medical records is frequently performed by petitioners. When medical record collection is done by petitioners it is non-compensable self-help. When the collection of medical records is done by the petitioners' attorneys it is considered compensable. Given the lack of evidence of a paying, attorney-client relationship between the petitioner and her spouse, Mr. Kooi's collection of his spouse's medical records is non-compensable self-help. Mr. Kooi also spent numerous hours researching his spouse's medical condition. This is the type of research one might expect an individual to perform upon learning that their spouse is diagnosed with a medical condition. It is hard to imagine an individual incurring an actual legal obligation to pay their spouse for time the spouse spent researching the individual's medical condition. The court also notes that the type of research Mr. Kooi performed for his spouse is similar to the types of research other resourceful petitioners have engaged in. Researching the Program, finding an experienced law firm to represent a claim and maintaining involvement in one's claim are the type of activities that are routinely performed by lay petitioners and are deemed non-compensable self-help. Mr. Kooi's research did not extend beyond the scope of self-help activities many savvy petitioners have engaged in. The undersigned has reviewed and considered petitioner's arguments in her Support Brief and considered and evaluated the time spent by Mr. Kooi. The time must be denied as not "incurred." However, even if legally permissible, much of the time would be denied as either excessive or duplicative of Mr. Shoemaker's time.

Pursuant to 42 U.S.C.A. § 300aa-15(e), special masters may award "reasonable" attorneys' fees as part of compensation. This is true even if petitioner was unsuccessful on the merits of the case. § 300aa-15(e)(1). To determine reasonable attorneys' fees, this court has traditionally employed the lodestar method which involves "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blanchard v. Bergeron, 489 U.S. 87, 94 (1989); Blum v. Stenson, 465 U.S. 886, 888 (1984); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The resulting lodestar figure is an initial estimate of reasonable attorneys' fees which may then be adjusted if the fee is deemed unreasonable based upon the nature of the services rendered in the case. Blanchard, 489 U.S. at 94; Pierce v. Underwood, 487 U.S. 552, 581 (1988) (Brennan, J. et al., concurring); Blum, 465 U.S. at 897, 899; Hensley, 461 U.S. at 434. See also, Ceballos v. Sec'y Dept. of Health and Human Servs., No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004).

In assessing the number of hours reasonably expended, the Court must exclude those "hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." Hensely v. Eckerhart, 461 U.S. 424, 434 (1983). Petitioner argues that the services provided by her spouse were the same type of services that any other attorney would have provided if hired as counsel for petitioner. Support Brief at 2. Petitioner retained Shoemaker & Associates as counsel, a firm with extensive experience in the Vaccine Program. Shoemaker & Associates' hourly rates reflects this experience. Mr. Shoemaker's efforts to build up Mr. Kooi's services is not persuasive. This was a very straightforward case that was conceded and damages were settled. Even if Mr. Kooi's efforts could legally be compensated most of his efforts were duplicative of Mr. Shoemaker's

efforts. Mr. Shoemaker's argument fails to persuasively distinguish his efforts from Mr. Kooi's. If Mr. Kooi's attorney's fees were legally permissible and were found to be reasonable, then the time billed for Shoemaker & Associates cannot be reasonable. Shoemaker & Associates are eminently familiar with the law and medicine of the Vaccine Program and are compensated as such. Therefore, Mr. Kooi's time spent in this matter, for example researching the Program, is redundant, excessive, and thus non-compensable.

Accordingly, the undersigned finds that there is no legal basis for awarding Mr. Kooi's attorney's fees, and even if there was a legal basis most of the time would be denied as excessive and duplicative of the time awarded Shoemaker & Associates.

However, petitioner's costs can be compensated. Mr. Kooi claimed $283.24 for copying. A review of the bill shows Mr. Kooi is charging $1.00 per page. That is excessive; $.25 per page will be awarded. Petitioner is awarded $70.81 for costs.

III. CONCLUSION

After a thorough review of petitioner's amended fee application and respondent's objections, petitioner is awarded a **total of $10,439.22 in attorneys' fees and costs.** The award of **$10,170.00** in attorneys' fees and **$198.41** in attorneys' costs shall be made payable jointly to petitioner and petitioner's counsel Shoemaker & Associates. The award of **$70.81** in petitioner's costs shall be made payable solely to petitioner.

Accordingly, pursuant to Vaccine Rule 13, petitioner is hereby awarded a **total of $10,439.22 in attorneys' fees and costs.**[4] In the absence of a motion for review filed pursuant to RCFC, Appendix B, the Clerk is directed to enter judgment according to this decision.[5]

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master

[4]This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C.A. §300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally, Beck v. Secretary of HHS, 924 F.2d 1029 (Fed. Cir. 1991).

[5]Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.