In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 00-0047V
Filed: November 29, 2012

TO BE PUBLISHED[1]

Shae Feather, by her Mother and Next Friend, BETH FEATHER,	*	
	*	Vaccine Act Attorneys' Fees.
Petitioner,	*	Reasonable Basis for Claim.
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

DECISION AWARDING ATTORNEYS' FEES AND COSTS

HASTINGS, ***Special Master***.

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), Beth Feather ("Petitioner") seeks, pursuant to 42 U.S.C. § 300aa-15(e),[2] an award for attorneys' fees and litigation costs incurred in the course of Petitioner's attempt to obtain Program compensation. After careful consideration, I have determined to grant the request in part, for the reasons set forth below.

[1]Because I have designated this document to be published, this document will be made available to the public unless petitioner files, within fourteen days, an objection to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." See 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

[2]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2006). Hereinafter, for ease of citation, all § references will be to 42 U.S.C. (2006).

I

PROCEDURAL BACKGROUND

The Petitioner, Beth Feather, filed this petition on January 28, 2000, alleging that a vaccination injured her daughter, Shae Feather. On September 18, 2000, the Secretary of Health and Human Services ("Respondent") filed a document opposing the petition for compensation.

During the period after the petition filing, this case was assigned to Special Master Edwards, then reassigned in succession to Chief Special Master Golkiewicz, Special Master Abell, Special Master Campbell-Smith, and again to Special Master Abell, before finally being assigned to my docket on March 29, 2010, as a result of Special Master Abell's impending retirement. During the period when the case was before the previous special masters, Petitioner's counsel and the various special masters took several different approaches toward resolving both this case and other similar cases, as the record demonstrates.

On December 20, 2011, Petitioner filed an application for attorneys' fees and costs, seeking a total award of $80,529. (Hereinafter "Pet. App.") Respondent filed an "Opposition" to Petitioner's application on January 17, 2012 (hereinafter "Opp."), and Petitioner filed a reply document on January 27, 2012 (hereinafter "Reply"). Petitioner also filed a supplemental request on January 27, 2012, seeking another $1,755 in fees; Respondent filed no response to that supplementary request.

In the meantime, while the fees application was pending, the Petitioner and her counsel decided to end their pursuit of compensation for Shae's condition, by filing, on June 7, 2012, a motion requesting a decision dismissing the petition. In accord with that request, my final Decision dismissing the petition was filed on June 13, 2012. Judgment in accord with that Decision was entered on July 16, 2012.

II

LEGAL STANDARD FOR AWARDING ATTORNEYS' FEES AND COSTS

A. In general

Special masters have the authority to award "reasonable" attorneys' fees and litigation costs in Vaccine Act cases. § 300aa-15(e)(1). This is true even when a petitioner is unsuccessful on the merits of the case, if the petition was filed in good faith and with a reasonable basis. (*Id*.) "The determination of the amount of reasonable attorneys' fees and costs is within the special master's discretion." *Saxton v. Sec'y of HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993); see also *Shaw v. Sec'y of HHS*, 609 F.3d 1372, 1377 (Fed. Cir. 2010).

Further, as to all aspects of a claim for attorneys' fees and costs, the burden is on the *petitioner* to demonstrate that the attorneys' fees claimed are "reasonable." *Sabella v. Sec'y of HHS*, 86 Fed. Cl. 201, at 215 (Fed. Cl. 2009); *Hensley v. Eckerhart*, 461 U.S. 424, at 437 (1983);

Rupert v. Sec'y of HHS, 52 Fed.Cl. 684, at 686 (2002); *Wilcox v. Sec'y of HHS*, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). The petitioner's burden of proof to demonstrate "reasonableness" applies equally to *costs* as well as attorneys' fees. *Perreira v. Sec'y of HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd* 33 F.3d 1375 (Fed. Cir. 1994).

One test of the "reasonableness" of a fee or cost item is whether a hypothetical petitioner, who had to use his own resources to pay his attorney for Vaccine Act representation, would be willing to pay for such expenditure. *Riggins v. Sec'y of HHS*, No. 99-382V, 2009 WL 3319818, at *3 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009), *affirmed*, 40 Fed. Appx. 479 (Fed. Cir. 2011); *Sabella v. Sec'y of HHS*, No. 02-1627V, 2008 WL 4426040, at *28 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff'd in part and rev'd in part*, 86 Fed. Cl. 201 (2009). In this regard, the United States Court of Appeals for the Federal Circuit has noted that:

> [i]n the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.

Saxton, 3 F.3d at 1521 (emphasis in original), quoting *Hensley*, 461 U.S. at 433-34. Therefore, in assessing the number of hours reasonably expended by an attorney, 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." *Hensley*, 461 U.S. at 434; see also *Riggins*, 2009 WL 3319818, at *4.

III

SOME OF RESPONDENT'S ARGUMENTS HAVE BECOME MOOT

When Petitioner filed her initial application and supplement application for fees and costs, the petition for compensation for Shae's injury was still pending. Therefore, the application was for "interim fees." See *Avera v. HHS*, 515 F. 3d 1343, 1352 (2008). However, since then, as noted above, the petition has been dismissed and judgment entered on that dismissal. Therefore, parts A and B of Respondent's argument against the application, contained at pp. 6-12 of Respondent's Opposition, have become moot.

Two of Respondent's arguments remain for consideration. First, Respondent argues that Petitioner has failed to demonstrate that her petition had a "reasonable basis." (Opp. at 13-15.) Second, Respondent argues that the amount claimed is excessive in certain aspects. (Opp. at 15-20.)

IV

"REASONABLE BASIS" ISSUE

Respondent's argument concerning "reasonable basis" was a half-hearted effort at best. (Opp. at 13-15.) Most of respondent's discussion consisted of "boilerplate" re-statement of the *general case law* concerning "reasonable basis" in Vaccine Act cases. Respondent *never* actually even stated the position--much less provided any supporting argument--that Petitioner did not have a reasonable basis for *initially filing* the claim.

The closest thing to an "argument" in these pages of Respondent's Opposition was a suggestion at page 15 that the Petitioner might not have a "reasonable basis" for *continuing* the prosecution of the petition after that point in time (*i.e.*, January 17, 2012). But, of course, it subsequently turned out that Petitioner did *not* further pursue her claim, instead abandoning that claim by filing her above-described request for a decision against her on June 7, 2012.

After reviewing the record, I conclude that Petitioner *did* have a reasonable basis for filing a claim, and for pursuing it to the point at which she abandoned the claim. Petitioner was in fact able to obtain the supporting opinion of a board-certified pediatric cardiologist, Dr. Thomas Connor, supporting her claim. Petitioner also had support from the opinion of another specialist physician, Dr. George Lucier, for her *general causation* theory. There was also additional circumstantial evidence supporting her claim, as detailed in Petitioner's Reply at pp. 9-12. In fact, after Petitioner filed that argument in support of a reasonable basis (Reply at pp. 9-12), Respondent did *not* attempt to file any argument in response. For the reasons stated by the Petitioner, I find the Petitioner's argument to be persuasive on this point.[3]

V

AMOUNT OF THE AWARD

A. Initial application

Respondent challenges the amounts claimed in Petitioner's initial application in several respects. The specifics of Petitioner's claim for fees in this regard are contained at Tab A of that application, pp. 1-51.

First, as Petitioner acknowledges (Reply at 14), one time entry for reviewing an Order of July 20, 2008, was erroneous, so $28 will be deleted.

[3] I note that in a recently-filed opinion, one special master of this court seems to have adopted a standard for showing a "reasonable basis" that is more strict than the relatively liberal "reasonable basis" standard generally employed by special masters during the nearly 24-year history of the Vaccine Act. See *Silva v. Secretary of HHS*, No. 10-101V (2012 WL 2890452 at *9) (Fed. Cl. Spec. Mstr. June 22, 2012). I note that, despite my very high regard for that special master's work in general, I disagree strongly with the reasoning and result of that opinion.

Second, concerning the challenge (Opp. at 18) to the time entries relating to reviewing my Order dated April 3, 2006, Petitioner's response (Reply at 15) is persuasive, so no reduction will be made.

Third, Respondent challenges (Opp. at 18), time spent on a motion to change the caption but the $52.40 (see Tab A, p. 50) claimed seems reasonable to me, for the reasons articulated by Petitioner (Reply at 15).

Fourth, Respondent complains (Opp. at 18) of a case meeting, but does not supply the *date* of the meeting, so I will make no reduction.

Fifth, Respondent challenged 23.8 hours expended by senior attorneys to review and "edit" Dr. Connor's expert report. (Opp. at 18 and fn. 12.) For some reason, however, Petitioner's Reply did not respond to this particular point. Further, at any rate, these entries (Tab A, pp. 26-28) are not well explained. Accordingly, after reviewing these entries I will subtract six hours at Ms. Chin-Caplan's hourly rate ($280) and four hours at Mr. Conway's rate ($309). The total reduction concerning this point is $2,916 (6 x $280 plus 4 x $309).

Finally, Respondent challenges the amount of compensation for Dr. Connor, for his report preparation. (Opp. at 19-20.) Respondent's challenge on this point was detailed and persuasive. In contrast, Petitioner's response on this point (Reply at 15-16) was vague, and less than persuasive. For one thing, Petitioner's response did not make it clear whether Dr. Connor "double-billed" certain hours--that is, billed the *same time* in both this case and the *Kolakowski* case. After reviewing Dr. Connor's submitted changes, I will subtract 15 hours at Dr. Connor's hourly rate of $ 300 per hour; the reduction, thus, is $4,500.

B. Supplemental application

Respondent did not challenge the supplemental application, which I find to be reasonable.

C. Summary of reductions

Reductions of $28 plus $2,916 plus $4,500 equal a total reduction of $7,444 from the initial claim. $80,529 less $7,444 equals $73,085.

VI

CONCLUSION

For the reasons set forth above, I award Petitioner $73,085 in fees and costs for her original application, plus $1,755 for her supplemental application. The total awarded is $74,840. The award shall be made in the form of a check payable jointly to Petitioner and Petitioner's counsel.

/s/ George L. Hastings, Jr.
George L. Hastings, Jr.
Special Master