

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
No. 10-808V
(Not to be published)

*
DIANE CARPENTER, *
*
*
Petitioner, *
*
v. *
*
SECRETARY OF HEALTH AND *
HUMAN SERVICES *
*
Respondent. *

Filed: November 7, 2013

Decision on Attorney's
Fees and Costs

DECISION¹ AWARDING ATTORNEYS' FEES AND COSTS

HASTINGS, *Special Master.*

In this case under the National Vaccine Injury Compensation Program² (hereinafter "the Program"), I issued a Decision on January 18, 2013. On June 14, 2013, Petitioner filed an Application for Attorneys' Fees and Costs. After careful consideration, I have determined to grant Petitioner's request, for the reasons set forth below.

I

PROCEDURAL BACKGROUND

Petitioner filed her petition for compensation under the Program on November 22, 2010, and shortly thereafter filed extensive medical records. Respondent's "Rule 4 Report" was filed on February 22, 2011, rejecting petitioner's eligibility for an award of compensation under the Program. On

¹ The undersigned intends to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). 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.*

² The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et. seq.* (2006).

December 28, 2011, Petitioner filed the expert report of Carlo Tornatore, M.D., which opined that the influenza vaccine administered to Diane Carpenter on December 28, 2007, had caused her to develop acute disseminated encephalomyelitis (“ADEM”). Respondent filed the expert report of Peter Donofrio, M.D., on May 4, 2012, which opined that Petitioner more likely suffered from multiple sclerosis (“MS”), rather than ADEM, and that her condition probably was not related to the administration of the influenza vaccine.

An evidentiary hearing to determine the cause of Ms. Carpenter’s condition was scheduled for October 2, 2012. (*See Order*, June 20, 2012.) Pre-Hearing submissions were filed by Petitioner, on August 29, 2012, and by Respondent on September 7, 2012. However, on September 21, 2012, respondent’s counsel, Michael Milmoie, contacted a member of my staff by telephone to report that the parties had reached a tentative settlement in this case. (*See Order*, September 26, 2012.) Therefore, the hearing was cancelled, and the parties were allowed fifteen weeks to prepare a joint stipulation. The parties filed their Stipulation on January 17, 2013, stipulating that Petitioner should receive compensation of \$110,000 for all damages that would be available pursuant to 42 U.S.C. §300aa-15(a). On January 18, 2013, I issued a Decision granting Petitioner’s compensation in the amount stipulated, and judgment entered on January 23, 2013.

Petitioner filed an Application for Attorneys’ Fees and Costs (“Pet. App.”), on June 14, 2013, seeking a total of \$49,052.10, representing \$36,734.70 for attorneys’ fees, \$12,016.40 of attorneys’ costs, and \$301.00 for Petitioner’s own litigation expenses. On July 17, 2013, Respondent filed Objections to Petitioner’s Application (“Resp. Obj.”), arguing that the amount requested should be greatly reduced. Petitioner filed a Reply to those objections on August 2, 2013, along with a Motion for Supplemental Attorneys’ Fees, requesting an additional \$3,278.20 to cover the expenses related to litigation of Petitioner’s original application. The new total requested by Petitioner amounts to \$52,330.30.

II

LEGAL STANDARD FOR AWARDING ATTORNEYS’ FEES AND COSTS

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. HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993); *see also Shaw v. 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. HHS*, 86 Fed. Cl. 201, 215 (Fed. Cl. 2009); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Rupert v. HHS*, 52 Fed. Cl. 684, 686 (Fed. Cl. 2002); *Wilcox v. 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. HHS*, 27 Fed. Cl. 29, 34 (1992), *aff’d*, 33 F. 3d 1375 (Fed.Cir. 1994).

III

RESPONDENT'S ARGUMENTS

The issue to be resolved in this Decision is whether Petitioner's requested amount for attorneys' fees and costs, including the costs related to expert witnesses, is reasonable.

Respondent contends that Petitioner's claims for attorneys' fees are "unreasonable, excessive, redundant, duplicative, unexplained and/or undocumented." (Resp. Obj., p. 6.) In particular, Respondent notes that "Petitioner's firm uses multiple professionals in prosecuting this case leading to redundancy of effort." (*Id.*) An example is cited, illustrating that two of Petitioner's attorneys collaborated to draft Petitioner's original petition. According to Respondent, redundancy of effort is also illustrated by segments of Petitioner's pre-hearing submission that repeat large portions of Petitioner's petition and Dr. Tornatore's expert report.

Respondent also contends that costs claimed for the work performed by Petitioner's expert witnesses are neither reasonable, nor are these costs properly documented. Respondent asserts that the rate of pay requested for Dr. Tornatore (*i.e.*, \$400 per hour) is unreasonable, and should be reduced to \$350 per hour. (Resp. Obj., p. 8.) Further, Respondent argues that none of the services performed by Petitioner's second expert, Dr. Jeffrey Cohen, should be compensated because "he was not a part of this proceeding," and "[n]o report from Dr. Cohen was ever filed." (*Id.*, p. 9.)

IV

ANALYSIS

A. Attorneys' fees

Respondent objects to several time entries that are alleged to be "unreasonable," and suggests that "these entries should be stricken or reduced." (Resp. Obj., p. 6.) Respondent cites instances in 2010, when Petitioner's attorney of record, Ronald Homer, apparently delegated certain tasks to other attorneys within his firm. (*Id.*) Further, Respondent notes that billing records from August 2012 reflect the participation of three attorneys who together expended a total of "approximately ten hours" in the preparation of Petitioner's pre-hearing memorandum. (Resp. Obj., p. 7.)

1. Petitioner's use of multiple attorneys

Petitioner has provided a detailed summary of the time expended by the lawyers and paralegals who prepared Petitioner's case. (Pet. App., Tab A, pp. 1-42.) The tasks that were performed are identified, and the amounts of time expended are broken down into six-minute intervals. In reviewing this documentation, I note that, as Respondent claims, multiple attorneys did participate in formulating Petitioner's positions. However, Respondent's general allegation, that such collaboration is intrinsically duplicative, is unpersuasive. It appears from the billing record that the majority of hours expended by Petitioner's attorneys were spent by Joseph Pepper, at an hourly rate that is substantially lower than the other attorneys involved. According to Petitioner's Reply to Respondent's Objections ("Pet. Reply"), filed on August 2, 2013, when Mr. Pepper performed this work, he was a less experienced attorney who

needed some initial oversight by other counsel. (Pet. Reply, p. 4.) The fact that this law firm assigns more experienced attorneys to supervise and review work performed by less experienced attorneys and paralegals does not support the argument that their work is duplicative.

Respondent quotes extensively from a recent fees decision by a special master, *Caves v. HHS*, No. 07-443V, 2012 WL 6951286 (Fed. Cl. Spec. Mstr. Dec. 20, 2012), *aff'd* 111 Fed. Cl. 774 (2013), in support of various propositions. (Resp. Obj., pp. 7-9.) *Caves* is somewhat comparable to this case because the Conway, Homer & Chin-Caplan law firm represented petitioners in both cases, and some of the issues presented are similar. Thus, it is instructive to note that the special master in *Caves* opined that,

[T]he law firm's staffing model is reasonable. The use of multiple attorneys to review the case may have contributed to the attorneys' fees request being larger than the request another firm may have submitted, but the difference is not unreasonable. That is, Ms. Caves' attorneys have spent a reasonable amount of time on activities like case review and intra-office meetings. Consequently, [Respondent's] argument for reduction based on multiple attorneys writing memos and the like is rejected.

Caves v. HHS, 2012 WL 6951286, at *4. In short, the *Caves* decision explicitly rejects the argument presented by Respondent here. I agree. The decision by Petitioner's law firm to use several attorneys during the pre-hearing preparation of this case was reasonable.

2. *Petitioner's repetition of arguments*

Respondent also claims that that excessive and redundant time was spent by three of Petitioner's counsel in drafting their pre-hearing memorandum, because several arguments were repeated verbatim from previous pleadings. (Resp. Obj., p. 7.) The *Caves* opinion was cited to support this contention. However, I note that the specific quotation from *Caves* discusses reducing the 35.5 hours expended by counsel to prepare a post-hearing brief, including time spent in violation of instructions from the court. The quoted passage is not comparable to the circumstances in this case.

Here, Petitioner's pre-hearing memorandum constituted a final summary of the facts and expert opinion in Petitioner's case, which led to the negotiated settlement. In that light, it does not seem unreasonable for Petitioner's counsel to have expended approximately **ten** hours to formulate this document, nor does it seem unreasonable to have reiterated arguments from previous filings.

Petitioner has submitted documentation demonstrating that her attorneys' fees are reasonable. Accordingly, Petitioner shall receive an award that includes payment for all of the hours initially claimed for legal services, totaling \$36,734.40.

3. *Supplemental fees*

On August 2, 2013, Petitioner filed an Application for "supplemental" fees in this case, requesting an additional \$3,278.20 of legal fees. That pleading describes in detail approximately fourteen hours that Petitioner's counsel spent formulating a "Reply" to "Respondent's Objections." The work performed on the "Reply" by Petitioner's counsel was explicitly authorized by my Order, dated July 18, 2013, and the time spent by counsel appears reasonable. Therefore, the full amount requested will be awarded.

B. Costs for services provided by experts.

Respondent contends that the amounts claimed by Petitioner to pay for the services of her medical experts, Dr. Carlo Tornatore and Dr. Jeffrey Cohen, are unreasonable. Respondent argues that the hourly rate of payment for Dr. Tornatore should be reduced because his billing record is “vague” and it is, therefore, “impossible to evaluate its reasonableness.” (Resp. Obj., p. 8.) Further, Respondent objects to Dr. Cohen’s bill “in its entirety.” (*Id.*, p. 9.)

1. Payment for Dr. Tornatore’s services.

Petitioner presented the expert report (Ex. 21) of Dr. Carlo Tornatore, a neurologist at the Georgetown University Medical Center. His *curriculum vitae* notes that Dr. Tornatore has practiced medicine since 1986, was board-certified in neurology in 1991, and has been an Assistant Professor of the Neurology Department of Georgetown University Medical Center since 1996. He has also served as Director of the Multiple Sclerosis Clinic at Georgetown University Hospital since 2003. (Ex. 22, pp. 2-4.) Thus, it appears that Dr. Tornatore is an appropriate expert to opine on the causation of Ms. Carpenter’s injury, and whether or not that injury was caused by multiple sclerosis. In addition, he has testified before this court on numerous occasions.

The qualifications of Dr. Tornatore are not discussed in Respondent’s Objections, beyond acknowledging that he is an adult neurologist who specializes in multiple sclerosis. (Resp. Obj., pp. 8-9.) Thus, it was not Dr. Tornatore’s lack of education, experience or specialization that Respondent found objectionable. In fact, Respondent “does not object to an hourly rate of \$350.00 as reasonable for Dr. Tornatore’s work.” (*Id.*, p. 8.) Rather, Respondent asks for a reduction of his requested rate of pay, because his manner of billing contained an insufficient description of the work performed, such that “it does not allow a meaningful review by respondent or the special master.” (*Id.*)

Dr. Tornatore’s billing record briefly describes a total of 18.5 hours spent on “review of medical records, literature review, and preparation of initial report,” then two hours of preparation for the hearing. (Pet. App., Tab. B, p. 17.) I agree with respondent that this summary is inadequate. It would be optimal if the billing record had described the specific tasks performed in greater detail, and in much smaller intervals of time. However, despite this deficiency, I do not agree that it is impossible to evaluate the reasonableness of the claim.

My evaluation is based on much more than Dr. Tornatore’s invoice. The record of this case contains Petitioner’s thirty-six exhibits identified as medical records, and six items of medical literature. (*See* Pet. Pre-hearing Submission, filed on Aug. 29, 2012, pp. 17-20.) There are also ten exhibits identified as Respondent’s medical literature. (*See* Respondent’s Notice, filed on Sept. 7, 2012.) It is entirely credible that a medical specialist with Dr. Tornatore’s background could reasonably spend 18.5 hours in performing the necessary review of this substantial amount of material and producing an expert report. Likewise, it is reasonable that he would have expended two hours to prepare for the hearing, which was cancelled before he could testify.

With regard to Dr. Tornatore’s hourly rate of pay, I conclude that his professional qualifications are sufficient to justify an hourly rate of \$400 per hour for work performed in 2011 and 2012. I have also reviewed several other recent decisions under the Vaccine Act that involved payment for his services. Petitioners in each case filed an application requesting \$400 per hour for services performed by Dr. Tornatore between 2009 and 2012, and each was awarded fees and costs that included the

amounts requested for expert services. *See Nelson v. HHS*, No. 09-73V, 2011 WL 839756 (Fed. Cl. Spec. Mstr. Feb. 8, 2011); *Davis v. HHS*, No. 09-295V, 2011 WL 5516913 (Fed. Cl. Spec. Mstr. Sept. 30, 2011); *W.C. v. HHS*, No. 07-456V (Fed. Cl. Spec. Mstr. Aug 26, 2013); *Harwell v. HHS*, No. 07-448 (Fed. Cl. Spec. Mstr. June 7, 2012). Respondent's argument in this case for reducing Dr. Tornatore's rate of pay is unpersuasive. Petitioner shall receive an award that includes payment for 20.5 hours of Dr. Tornatore's services, at \$400 per hour, totaling \$8,200.00.

2. Payment for Dr. Cohen's services

Petitioner's application for attorneys' fees and costs includes a billing record for services performed by Dr. Jeffrey Cohen. (*See* Pet. App., Tab B, p. 8.) That invoice claims that he performed 8.3 hours of work, at a rate of \$350 per hour, amounting to a total of \$2,905. The description of his work indicates that, following his initial review of the medical record and discussion with counsel, Dr. Cohen prepared a written expert report. He then conferred with Petitioner's counsel and produced a revision of his report. (*Id.*)

Respondent notes that Dr. Cohen's report was not filed, and that Petitioner "has provided no explanation justifying Dr. Cohen's participation in this case." (Resp. Obj., p. 10.) Petitioner explained, however, that Dr. Cohen had opined that Ms. Carpenter's influenza vaccination caused her to suffer from ADEM, but his report "did not conform to the legal requirements of the Program." (Pet. Reply, p. 11.) Following discussions with Dr. Cohen concerning the deficiencies of his report, Petitioner's counsel sought the opinion of a different expert, Dr. Tornatore. (*Id.*) Petitioner contends that her counsel made appropriate efforts to avoid unreasonable expenses, and that retaining a new expert under these circumstances "was not only reasonable, but mandatory." (*Id.*, p. 12.)

I conclude that Petitioner has the right to develop her own case, and that petitioner's counsel has an ethical obligation to be diligent in pursuit of his client's objectives. By declining to file an expert report that counsel considered deficient, counsel has reduced the time and expense that would be required to evaluate such a report. Thereafter, Petitioner's counsel had a professional duty to his client to seek a more persuasive report from a new medical expert. *See Nelson v. HHS*, No. 09-73V, 2011 WL 839756 (Fed. Cl. Spec. Mstr. Feb. 8, 2011). The efforts of Petitioner's counsel to properly represent his client under these circumstances were reasonable. Petitioner has effectively rebutted Respondent's allegation that "Dr. Cohen was not a part of this proceeding." (Resp. Obj., p. 9.) Accordingly, Petitioner shall receive an award that includes payment for 8.5 hours of Dr. Cohen's services, at \$350 per hour, totaling \$2,905.00.

C. Other costs

Petitioner has provided documentation for various costs involving medical record retrieval, copying, and similar expenses, totaling \$911.40. Respondent has not objected to these costs. I find that these costs are reasonable, and they will be included in the Petitioner's award.

Petitioner has also provided documentation for Petitioner's own litigation expenses, which amounted to a total of \$301.00. These costs are reasonable, and they will be included in Petitioner's award.

D. Summary of attorneys' fees and costs

Attorneys' initial fees	\$36,734.70	
Supplemental attorneys' fees	3,278.20	
Dr. Tornatore costs	8,200.00	
Dr. Cohen costs	2,905.00	
Other costs	911.40	
	<hr/>	
	\$52,029.30	
Petitioner's litigation costs	\$301.00	
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	\$52,330.30	Total

V

CONCLUSION

I find that this petition was brought in good faith and that there existed a reasonable basis for the claim. Therefore, an award for attorneys' fees and costs is appropriate at this time. Further, the proposed amounts seem reasonable and appropriate. Accordingly, I hereby award the following attorneys' fees and costs pursuant to 42 U.S.C. § 300aa-15(b) and (e)(1):

- a lump sum of \$52,029.30, in the form of a check payable jointly to Petitioner and Petitioner's counsel, Ronald C. Homer, on account of services performed by counsel's law firm.
- a lump sum of \$301.00, in the form of a check payable to Petitioner, which represents Petitioner's own litigation expenses in this case.

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.

IT IS SO ORDERED.

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