In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09–426 V
February 29, 2012
To be Published

DAVID A. BROWN,	*	
	*	
Petitioner,	*	Attorneys' Fees and Costs;
	*	Interim Award; Reasonable Hours
v.	*	
	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

Lisa A. Roquemore, Irvine, CA, for petitioner.
Lara A. Englund, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS[1]

On June 9, 2009, petitioner filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa–10-34, alleging that flu vaccine caused his acute disseminated encephalomyelitis ("ADEM"). While the parties were pursuing a formal litigative track, they were also trying to settle the case. During a telephonic status conference on July 7, 2010, petitioner's counsel informed the undersigned that she had made a demand on respondent's counsel. Respondent's counsel stated she was evaluating the demand. The parties failed to settle the case, and it went to hearing on September 1 and 2, 2010, and November 4, 2010. On February 10, 2011, petitioner filed his post-hearing brief. On March 14, 2011, respondent filed her post-hearing brief. On March 24, 2011, petitioner filed his post-hearing reply brief. On September 30, 2011, the undersigned issued a Ruling on Entitlement in favor of petitioner, and the case proceeded to damages.

[1] Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

I. Procedural History of Interim Fee Application

On November 16, 2011, petitioner filed an application for interim attorneys' fees and costs ("Fee App.").[2] On December 12, 2011, respondent filed her response to petitioner's application for interim attorneys' fees and costs ("Opp'n"). On December 19, 2011, petitioner filed a reply to respondent's response ("Reply").[3]

In the application for attorneys' fees and costs, petitioner requests $241,033.75, comprised of $236,234.00 in attorney fees and $4,799.75 in costs for the period of August 1, 2008 to September 30, 2011. Petitioner also requests expert fees and costs of $47,727.00, comprised of $43,000.00 in fees and $4,727.00 in costs for the period of June 2009 through February 28, 2011. Lastly, petitioner requests his own costs of $8,428.85. The total amount that petitioner requests for interim fees and costs is **$297,189.60**.

II. Awarding Attorney's Fees and Costs

A. In General

The Vaccine Act permits an award of "reasonable attorneys' fees" and "other costs." 42 U.S.C. § 300aa–15(e)(1). A petitioner need not prevail on entitlement to receive a fee award as long as petitioner brought the claim in "good faith" and with a "reasonable basis" to proceed. Id. Good faith and reasonable basis are presumed when a petitioner prevails as petitioner did in the instant case. The special master has "wide discretion in determining the reasonableness" of attorneys' fees and costs. See Perreira v. Sec'y of HHS, 27 Fed. Cl. 29, 34 (1992), aff'd, 33 F.3d 1375 (Fed. Cir. 1994); see also Saxton ex rel. Saxton v. Sec'y of HHS, 3 F.3d 1517, 1519 (Fed. Cir. 1993) ("Vaccine program special masters are also entitled to use their prior experience in reviewing fee applications").

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[2] With his fee application, petitioner filed numerous exhibits in support of his request. See Fee App., Ex. A (CV of petitioner's counsel, Lisa A. Roquemore); Ex. B (counsel's billing invoice); Ex. C (declaration of petitioner and petitioner's counsel); Ex. D (firm costs); Ex. E (petitioner's expert's invoice); Ex. F (CV of petitioner's expert, Dr. Lawrence Steinman); Ex. G (report supporting hourly rate of Dr. Eric Gershwin); Ex. H (CV of Dr. Paul Utz); Ex. I (CV and invoice for Dr. Norman Latov); Ex. J (CV and invoice for Dr. Andrew Saxon); Ex. K (Ms. Roquemore's billing invoice for another client, Brian Glasser); Ex. L (documentation for petitioner's costs); Ex. M (petitioner's motion and Special Master Lord's Order Granting Motion for Pre-Approval of Expert Fees in Anderson v. Sec'y of HHS, No. 10–627V).

[3] With his reply, petitioner filed additional exhibits in support of his fee request. See Reply, Ex. N (Ms. Roquemore's billing invoice for another client, North Shore 1, LLC); Ex. O (an hourly fee rate survey submitted to the U.S. Bankruptcy Court for the Central District of California); Ex. P (debtor's application to substitute counsel in the U.S. Bankruptcy Court for the Central District of California, which includes counsel's hourly rates); Ex. Q (decision issued by the U.S. Court of Appeals for the Ninth Circuit, Moreno v. City of Sacramento, 534 F.3d 1106 (9th Cir. 2008)); Ex. R (e-receipt for Dr. Steinman's November 3 and November 4, 2010 flights).

B. On an Interim Basis

The Federal Circuit in Avera v. Sec'y of HHS, 515 F.3d 1343 (Fed. Cir. 2008), interpreted the Act's fee provision to allow special masters to award fees on an interim basis. 515 F.3d at 1351 ("There is nothing in the Vaccine Act that prohibits the award of interim fees."). The court suggested that interim fees would be "particularly appropriate in cases where proceedings are protracted and costly experts must be retained" or where petitioners established that they "suffered undue hardship." Id. at 1352.

III. Analysis

A. The Appropriateness of an Interim Award

Notably, in respondent's Opposition to petitioner's Application for Attorneys' Fees and Costs, respondent does not object to the award of interim fees and costs in this case, although she states generally that fees may be awarded only after compensation is paid or judgment entered. Opp'n 1 n.1.

The undersigned finds that an interim fee award is appropriate at this time. Petitioner has prevailed on entitlement after proceeding to hearing, having incurred substantial attorneys' fees and costs after retaining an expert. Moreover, the case has continued for nearly three years and will not conclude for some time as the parties are in the initial phases of determining damages. Based on the guidance and illustrative factors provided in Avera, see 515 F.3d at 1352, the undersigned holds that an interim award is appropriate.

B. Reasonable Attorneys' Fees

The Federal Circuit has approved the lodestar approach to determine "reasonable attorneys' fees" and costs under the Act. Id. at 1347. The lodestar approach involves a two-step process. First, a court determines an "initial estimate . . . by 'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" Id. at 1347-48 (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). Secondly, the court may make an upward or downward departure from the initial calculation of the fee award based on specific findings. Id. at 1348.

1. Ms. Roquemore's Hourly Rate

A reasonable hourly rate is "the prevailing market rate defined as the rate prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Id. (citation and quotation omitted). In Avera, the Federal Circuit found that in Vaccine Act cases, a court should use the forum rate, i.e., the DC rate, in determining an award of attorneys' fees. Id. at 1349. At the same time, the court adopted the Davis County exception to prevent windfalls to attorneys who work in less expensive legal markets. Id. (citing Davis County Solid Waste Mgmt. & Energy Recovery Spec. Serv. Dist. v. U.S. Envtl. Prot. Agency, 169 F.3d 755 (D.C. Cir. 1999)). In cases where the bulk of the work is completed outside the District of Columbia, and there is a "very significant difference" between the forum hourly rate and the local hourly rate, the court should calculate an award based on local hourly rates. Id. (finding the

market rate in Washington, DC to be significantly higher than the market rate in Cheyenne, WY).

Petitioner submits that his counsel should be compensated at an hourly rate of $345.00 for work performed in 2009, 2010, and until July 2011, and $355.00 for work performed after July 2011. Fee App. 8. Respondent mentions that petitioner's counsel billed $395.00 an hour for 15.7 hours from October 2008 to January 22, 2009, although conceding this might be an error on petitioner's counsel's part. Opp'n at 4 n.3. Petitioner's counsel admits in her reply brief that this was an error. Reply 2 n.1. Petitioner's fee request is **reduced by $785.00**.

Respondent objects to petitioner's counsel's hourly rate of $345.00 as excessive. Opp'n 3. Respondent admits, however, that petitioner's counsel has been paid this amount in other cases, citing Torday v. Sec'y of HHS, No. 07–372V, 2011 WL 2680687 (Fed. Cl. Spec. Mstr. April 7, 2011); Mueller v. Sec'y of HHS, No. 06–775V, slip op. (Fed. Cl. Spec. Mstr. May 27, 2010); and Broekelschen v. Sec'y of HHS, No. 07–137V, 2008 WL 5456319 (Fed. Cl. Spec. Mstr. May 27, 2008) (in which respondent did not object to petitioner's requested hourly rate). Opp'n 4 & n.2.

Petitioner's counsel notes the high cost of living in California where she practices as a consideration for her hourly rate. However, under the Federal Circuit's decision in Avera, she receives the forum rate, not the local geographic rate. The forum is the District of Columbia. Avera, 515 F.3d at 1348–49. The forum rate applies whenever the counsel's geographic hourly rate is not very significantly below the forum hourly rate. See id., 515 F.3d at 1349 (citing Davis County, 169 F.3d 1755). The hourly rate for attorneys working in Orange County, California is not very significantly below the forum rate.

In Rodriguez v. Sec'y of HHS, 632 F.3d 1381, 1383 (Fed. Cir. 2011), the Federal Circuit affirmed the special master's awarding petitioners' counsel an hourly rate of $335.00 for attorneys' fees in 2009. Petitioner's counsel's requested hourly rates of $345.00 in the instant action for work performed from 2009 to July 2011 and $355.00 for work performed after July 2011 are reasonable in the context of Rodriguez.

The paralegal hourly rate of $125.00 is also reasonable. Broekelschen, ___ Fed. Cl. ___, 2011 WL 5600217, at *3 (Fed. Cl. Oct. 31, 2011) (affirming inter alia award of $340.00 an hour to petitioner's counsel and $125.00 an hour to counsel's paralegal).

2. Reasonable Hours Expended

The lodestar approach requires that the reasonable hourly rate be multiplied by the number of hours "reasonably expended on the litigation." Avera, 515 F.3d at 1347-48 (quotation and citation omitted). Counsel must submit fee requests that include contemporaneous and specific billing entries, indicating the task performed, the number of hours expended on the task, and who performed the task. See Savin ex rel. Savin v. Sec'y of HHS, 85 Fed. Cl. 313, 315–18 (Fed. Cl. 2008). Counsel must not include in their fee request hours that are "excessive, redundant, or otherwise unnecessary." Saxton, 3 F.3d at 1521 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). It is "well within the special master's discretion to reduce the hours to a number that,

in [her] experience and judgment, [is] reasonable for the work done." Id. Furthermore, the special master may reduce hours *sua sponte*, apart from objections raised by respondent and without providing petitioner notice and opportunity to respond. See Sabella v. Sec'y of HHS, 86 Fed. Cl. 201, 208–09 (Fed. Cl. 2009).

Much of respondent's opposition is devoted to criticism of the number of hours petitioner's counsel billed for her work and some questionable items. Petitioner's counsel has been criticized in other cases for billing an excessive number of hours. In Torday, the special master stated, "Ms. Roquemore spends far greater hours than her contemporaries handling her cases." 2011 WL 2680687, at *3. The special master continued, "[T]he Vaccine Act does not provide a 'blank check,'" citing Perreira, 27 Fed. Cl. at 34. He concludes, "It is clear that counsel crossed the line in some instances in this case." 2011 WL 2680687, at *3. After reviewing the billing entries from petitioner's counsel in this case, the undersigned agrees that the hours billed by counsel in some instances are excessive and unreasonable. The undersigned will address respondent's objections in turn.

a. Post-Hearing Brief

Respondent criticizes petitioner's counsel for billing approximately 80.5 hours to draft and complete the post-hearing brief, which amounts to 10 full working days. Respondent's counsel recommends compensation for 40 hours or five working days to complete petitioner's post-hearing brief. Opp'n 5, 6. Additionally, respondent objects to the hours billed by counsel and her paralegal to summarize the transcript and outline the briefing. Opp'n 7. Respondent contends that this time should be reduced to a generous 8 hours. Opp'n 7.

In response, petitioner argues that hours expended to prepare the post-hearing brief were not excessive given the complexity of the facts, the length of the 721-page transcript counsel reviewed, and the need to address the possible alternative causes respondent asserted at the hearing. Reply 9. Petitioner also notes that the special master in Broekelschen reduced petitioner's claim of 130.5 hours for writing a post-hearing brief by 20 percent when the hearing in Broekelschen lasted 12 hours and included one fact witness and two experts. Reply 9. In the instant case, petitioner emphasizes that the hearing lasted three days and involved two fact witnesses and three expert witnesses. Reply 9–10.

According to a review of the billing entries, petitioner's counsel expended 13.6 hours reviewing the transcript, 24.8 hours summarizing the transcript and outlining the post-hearing brief, 55.6 hours drafting the post-hearing brief, 19.8 hours revising, and 5 hours drafting and revising a table of contents and table of authorities. Fee App., Ex. B, at 65–67. In addition, a paralegal billed 15 hours to review and summarize the transcript and 4 hours to draft and revise the table of contents and table of authorities. Fee App., Ex. B, at 61, 65–66. In total, petitioner's counsel billed 118.8 hours and her paralegal billed 19 hours for work related to the post-hearing brief. The undersigned finds this total to be unreasonable. Although petitioner filed an 84-page brief, it should not take 55.6 hours to draft a brief after the paralegal spent 15 hours summarizing the transcript and counsel spent 38.6 hours reading the summary and outlining the brief.

Accordingly, the undersigned reduces the award by 25 attorney hours or **$8,625.00**, which is approximately a 20 percent reduction.

b. Post-Hearing Reply Brief

Respondent objects to the 28.95 hours billed to research, draft, and complete the reply brief, 26.0 of which were attorney hours. Respondent suggests awarding 16 hours, or two full days, for writing the reply brief. Opp'n 7. Petitioner replies that the almost 29 hours is reasonable and cites Torday, 2011 WL 2680687, at *6, in which the special master found 27 hours billed for an 18-page reply brief to be reasonable. Reply 11–12.

In the instant case, petitioner submitted a 21-page post-hearing reply brief, responding mostly to respondent's argument that a factor unrelated to the vaccination caused petitioner's injury. Given that petitioner used the reply wisely to respond to respondent's arguments, the undersigned cannot say that these hours were unreasonable. Moreover, the hours billed for work on the reply brief herein included research and writing whereas the special master in Torday awarded 11 hours for the reasonable time petitioner's counsel spent on research and 27 hours billed for drafting the reply. See 2011 WL 2680687, at *6. The undersigned finds the approximately 29 hours to research and draft the reply brief to be reasonable.

c. Hearing preparation

Respondent objects to petitioner's counsel claiming 106.3 hours for preparation for the first expert hearing which lasted two days, September 1 and 2, 2010, recommending an award of 30 hours. Opp'n 7–8. Petitioner argues that the first two days of the three-day hearing involved preparations for two fact witnesses and one expert witness, not to mention preparing cross-examination of two experts for respondent. Reply 12–13. The undersigned appreciates the complexity and intensity of the issues in this case. The hours expended by petitioner's counsel preparing for hearing, however, are excessive. Based on the undersigned's experience, a reasonable amount of time for preparation would be four hours for the fact witnesses, 10 hours for petitioner's expert, six hours to prepare for cross-examination of respondent's experts, 15 hours to go over the medical records, and 15 hours to go over the medical literature, amounting to 50 hours.[4] Using 95.1 hours[5] as the amount of time expended to prepare for the first two days of hearing, petitioner's fee request is **reduced** by 45.1 hours or **$15,559.50**.

[4] In Broekelschen v. Sec'y of HHS, No. 07–137V, 2008 WL 5456319 (Fed. Cl. Spec. Mstr. Dec. 17, 2008), Special Master Moran found that Ms. Roquemore spent more than 32 hours preparing the examinations of one fact witness and two experts for a hearing that lasted 12 hours. 2008 WL 5456319, at *7. Special Master Moran considered 32 hours in addition to the hours billed for reviewing medical articles, reviewing medical records, and preparing her opening statement to be unreasonable and reduced the hours by 10 percent. Id. at *7–8. The 72 hours permitted for the preparation of two fact witnesses and three expert witnesses and review of the medical records and medical literature is generous.

[5] Respondent objects to 106.3 hours billed for trial preparation and lists the entries used in calculating this total. Opp'n 7 & n.9. The undersigned added the entries listed in note 9 several times and

Respondent objects to petitioner's billing 45.3 hours for preparation for the third day of testimony on November 4, 2010, suggesting half the hours are reasonable. Opp'n 8. Petitioner replies that counsel had to review two days of transcripts and revise her cross-examinations of respondent's experts, as well as prepare for rebuttal testimony by a fact witness and petitioner's expert. Reply 13–14. A reasonable amount of time for preparation would be one hour for the fact witness, four hours for petitioner's expert, eight hours for reading the transcripts, five hours to review the medical records and literature, and four hours to review recently filed medical records, amounting to 22 hours. Using 38.4 hours[6] as the amount of time expended to prepare for the third day of hearing, the undersigned **reduces** petitioner's fee request by 16.4 hours or **$5,658.00**.

d. Research Tasks

Respondent objects to petitioner billing 2.3 hours for researching when the undersigned's term of appointment would expire. Opp'n 7 n.8. Petitioner explains that this was necessary because the expiration of the special master's "contract" would determine the timing of the filing of the post-hearing brief. Petitioner was concerned that the undersigned might not be the special master deciding the case and would, therefore, have to make the brief as comprehensive as possible if another special master was assigned to the case. Reply 11 n.4. The undersigned cannot comprehend what kind of research petitioner's counsel could do concerning the likelihood *vel non* of the undersigned's reappointment. As for the timing of the post-hearing briefs, the dates for petitioner's post-hearing brief, respondent's response, and petitioner's reply were set by Order

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arrived at 107.1 hours. Additionally, respondent included in her sum 12 hours billed on August 30, 2012 for travel time. See Opp'n 14. The undersigned will address travel time separately. Accordingly, the undersigned will use 95.1 hours for the amount of time petitioner's counsel expended on preparation for the first two days of the hearing.

[6] Respondent objects to 45.3 hours preparing for the last day of testimony. Opp'n 8 & n.10. Upon review of petitioner's fee application, respondent does not include all of the billing entries relating to trial preparation. The undersigned considers the following entries to be hours expended in preparation for the last day of hearing: 2.5 hours on trial preparation (9/14/10); 0.2 hours e-mailing Dr. Steinman and Mrs. Brown (9/14/10); 1.0 hour on trial preparation and 0.7 hours conferencing with Dr. Steinman regarding Dr. Leist's opinion (9/15/10); 0.8 hours conferencing with Dr. Steinman regarding Dr. Leist's and Dr. Wientzen's testimony (9/17/10); 0.6 hours conferencing with Dr. Steinman regarding Dr. Wientzen's testimony (9/28/10); 0.5 hours conducting research regarding Dr. Leist's prior testimony (10/21/10); 0.5 hours on review of cross-examination notes (10/21/10); 1.5 hours on review of transcript and notes on rebuttal and cross-examination (10/23/10); 1.0 hour on review of transcript and notes on rebuttal and cross-examination (10/24/10); 4.5 hours on review of transcript and notes on rebuttal and cross-examination (10/25/10); 4.0 hours on review of transcript and notes on rebuttal and cross-examination (10/28/10); 0.2 hours e-mailing Dr. Steinman (10/28/10); 1.0 hour on transcript review (10/29/10); 1.5 hours on further trial preparation (10/29/10); 7.4 hours on further trial prep and telephonic conference with Dr. Steinman (11/1/10); 9.8 hours on trial prep (11/3/10); and 0.7 hours on telephonic conference with Dr. Steinman (11/3/10). The undersigned does not include the 9.5 hours billed for travel on November 2, 2010; travel time will be considered separately. Thus, the total amount of preparation for the third day of hearing, using these entries, is 38.4 hours.

dated November 19, 2010. The undersigned's term did not expire until May 30, 2011, over six months later. Meanwhile, the parties submitted their post-hearing briefs on February 10, 2011, March 13, 2011, and March 24, 2011. Respondent's objection is well-taken. There is no conceivable way for petitioner's counsel to determine the likelihood of the undersigned's reappointment, and since that reappointment occurred after the filing of the post-hearing briefs, its occurrence would have no effect on the thoroughness of petitioner's briefs. The undersigned excludes the 2.3 hours requested, **reducing** the fee amount by **$793.50**.

Respondent objects to petitioner's counsel's billing for the same non-case specific tasks in numerous cases. She billed 21.2 hours on tasks for which she billed in other cases. Opp'n 8–11. Petitioner replies that it is her duty to stay abreast of the law. Reply 14–16. Petitioner argues that her review of cases is not a "continuing education" but a review of the case in light of a particular client with particular facts. Reply 14. Petitioner also admits that her review of various cases was billed to other cases as well, but contends that "the amount attributed to this case was fair and reasonable." Reply 16.

Petitioner's counsel may not bill for educating herself in the law. She would not be able to bill her client for keeping herself professionally current, and she is similarly not entitled under the Vaccine Program to compensation for educating herself. See Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) ("Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.") (citation omitted). In addition, special masters have denied compensation for duplicate entries upon discovery of the improper billing practice. See Drost v. Sec'y of HHS, No. 01–502V, 2010 WL 3291933, at *3–5 (Fed. Cl. Spec. Mstr. July 30, 2010); Carrington ex rel. Carrington v. Sec'y of HHS, No. 99–495V, 2008 WL 2683652, at *7–9 (Fed. Cl. Spec. Mstr. June 18, 2008) (describing a "disturbing pattern"). Petitioner's counsel will not be compensated in this case for researching other decisions for which she billed in other cases. Petitioner's fee request is **reduced** by the entire 21.2 hours or **$7,314.00**.

e. Fees for Fees

Respondent objects to petitioner's billing 31.3 hours to write the application for interim attorneys' fees and costs, suggesting the time should be reduced to eight hours. Opp'n 11. Petitioner responds that these approximately four days of time were necessary to include the appropriate evidence in support of the fee application. Reply 16–20. The undersigned finds that nearly 32 hours to prepare a fee application is excessive. A reasonable amount of time to prepare the fee application is two days or 16 hours. Petitioner's fee request is **reduced** by 15.3 hours at the hourly rate of $345.00, or **$5,278.50**.

f. Objections to *de Minimis* or Clerical Tasks

Respondent objects to hours billed for tasks that are *de minimis*, i.e., tasks that take only a few minutes, and contends that these tasks are not billable attorney work. Opp'n 12. Petitioner argues that it is counsel's responsibility to insure that all deadlines are monitored and scheduled matters are properly documented. Reply 20–22. It is not unreasonable for petitioner's counsel

to review notices from the court, court orders, and filings by respondent. The undersigned will not deduct hours for these tasks. As for "conferences" with a paralegal about filing exhibits, the undersigned considers this time compensable so long as counsel does not redundantly bill for both the attorney's time and the paralegal's time, which petitioner's counsel did not do in this case.

Concerning "docketing" conferences or deadlines, the undersigned finds this billing practice to be excessive. Throughout the billing invoices, petitioner's counsel billed from 0.1 hours to 0.5 hours for "docketing" dates after reviewing a one-page court order or scheduling a conference, for example. Beyond the fact that this is clerical work billed at an attorney's rate, the undersigned cannot imagine how it takes 0.1 hours or six minutes, amounting to $34.50 in fees, to enter a date, or even three dates, on one's calendar. Accordingly the entries for docketing[7] will be deducted from the fee award, amounting to a reduction of 2.8 hours or **$966.00**.

Respondent objects to additional tasks she argues are "clerical" in nature and argues that these tasks are more appropriately billed at a paralegal's rate. Opp'n 13–14. Petitioner asserts that the tasks respondent lists as clerical were in fact sensitive tasks that required the attention of petitioner's counsel. Reply 22–23.

Generally, clerical or administrative tasks that a paralegal can properly handle should be billed at a paralegal's rate rather than an attorney's rate. See Riggins v. Sec'y of HHS, No. 99–382V, 2009 WL 3319818, at *25 (Fed. Cl. Spec. Mstr. June 15, 2009) ("If counsel elects to have an attorney perform [clerical] activities, it is in counsel's discretion. However, the time spent by an attorney performing work that a paralegal can accomplish should be billed at a paralegal's hourly rate, not an attorney's."). The undersigned has reviewed the billing entries respondent characterizes as "clerical" and finds that the hours attributed to drafting the disbursement authorization, troubleshooting the computer problems, and drafting a new retention agreement were properly billed at an attorney's rate. It was not unreasonable for petitioner's counsel to spend time addressing the computer problems after both experts had difficulty opening the files on a disc. See Reply 22. It also was not unreasonable for petitioner's counsel, and not a paralegal, to make changes to the client's account. However, 0.4 hours billed on 11/13/09 for obtaining a FedEx box and 0.3 hours billed on 02/19/10 for downloading exhibits should have been billed at a paralegal's rate. These were administrative tasks that did not require counsel's

[7] The docketing entries deducted from the fee award include: 0.1 hours for docketing dates (4/30/09); 0.1 hours for "Docket" (7/2/09); 0.1 hours for docketing status conference (7/30/09); 0.1 hours for "Docket" (8/13/09); 0.1 hours for "Docket" (9/17/09); 0.1 hour on docketing all dates (9/23/09); 0.1 hours for docketing all new dates (12/8/09); 0.2 hours on docketing various dates (1/22/10); 0.1 hours on docketing new dates (2/24/10); 0.5 hours on docketing all dates and action items (3/10/10); 0.3 hours on docketing all dates (3/26/10); 0.1 hours on docketing all new dates (4/29/10); 0.1 hours on docketing new dates (5/18/10); 0.1 hours for docketing all dates (5/27/10); 0.1 hours on "docket" (7/14/10); 0.1 hours on docketing all dates (7/22/10); 0.2 hours on docketing new trial dates and travel dates (9/14/10); 0.1 hours on docketing all new dates (11/8/10); 0.1 hours on docketing all dates; and 0.1 hours on docketing a meeting (12/27/10).

time or attention. Accordingly, the undersigned reduces 0.7 hours at the attorney's rate to 0.7 hours at the paralegal's hourly rate of $125.00, resulting in a reduction in the award of **$154.00**.

g. Travel Time

Respondent objects to the number of attorney hours billed for travel and notes that attorneys are generally awarded 50 percent of hours billed for travel time. Opp'n 14. Petitioner argues that all of petitioner's counsel's time spent traveling should be compensable and that counsel's law practice consistently charges clients 100 percent of travel time. Reply 24. Petitioner also cites Burgess v. Sec'y of HHS, No. 07–258, slip op. at 3 (Fed. Cl. Spec. Mstr. Jan. 3, 2011), in which Special Master Lord awarded petitioner 100 percent of the four hours requested for travel time. Reply 24–25.

The Vaccine Program traditionally compensated attorneys for travel time at 50 percent of their hourly rate. See Gruber ex rel. Gruber v. Sec'y of HHS, 91 Fed. Cl. 773, 778 (Fed. Cl. 2010) (citation and quotation omitted). The Court of Federal Claims called this practice into question in Gruber, cautioning against the use of an automatic rule when the Act requires special masters to review fee applications based on the flexible standard of reasonableness. Id. at 791. The court contemplated that a special master could award full compensation for an attorney's travel time if the attorney filed sufficient documentation. Id. On the other hand, the court indicated that "even an automatic 50% award may be too high for an undocumented claim, given the possibility that an attorney may use the travel time to work on another matter or not to work at all while traveling." Id. Ultimately, the court instructed that "each case should be assessed on its own merits." Id. (citation and quotation omitted).

In the instant case, petitioner's counsel billed 12 hours for travel and trial preparation on August 30, 2010, traveling to Washington, DC, and 6.5 hours on September 2, 2010, traveling back to Los Angeles. Fee App., Ex. B, at 53, 55. Petitioner does not state how many of the hours billed on August 30, 2010 were spent working on the case as opposed to driving to the airport, flying on the plane, and taking transportation to the hotel. On September 2, 2010, however, petitioner's counsel billed 6.0 hours for the second day of the hearing, 0.3 hours for a telephone conference with her expert and 2.0 hours for making and reviewing notes on respondent's expert's testimony. It is difficult to conceive that counsel spent another 6.5 hours that same day working on the plane. The undersigned will reimburse petitioner's counsel for 50 percent of the 12.0 hours spent traveling to Washington, DC, some of which counsel stated was spent on trial preparation. The undersigned will not reimburse petitioner for the 6.5 hours petitioner's counsel spent flying back to California on September 2. This amounts to a reduction of 12.5 hours or **$4,312.50** in the fee award.

For the third day of the hearing held on November 4, 2010, petitioner's counsel billed 9.5 hours on November 2, 2010 for travel to Washington, DC and 9.5 hours on November 5, 2010 for travel back to Irvine, CA. Fee App., Ex. B, at 60. Petitioner states that counsel spent 7.0 of 9.5 hours billed on November 2 working on the cross-examination of Dr. Leist and other trial preparation. Similarly, petitioner states that counsel spent 2.5 hours of the 9.5 hours billed on November 5, 2010 for drafting post-trial notes. The undersigned will reimburse petitioner for the

7.0 hours and 2.5 hours counsel worked on the case during travel days. This amounts to a reduction of 9.5 hours or **$3,277.50** in the fee award.

h. Objections to Time Spent Reviewing the Case File

Respondent objects to the billing entries, mostly at the beginning of each month, for "reviewing" the status of the case, contending that the case was active and ongoing for two years and a review of its status each month was unwarranted. Opp'n 14. Petitioner asserts that it is reasonable and necessary for counsel to assess a case and discern what needs to be done in order to insure the case proceeds appropriately and in a timely fashion. Reply 20. The undersigned considers the generalized entries in which petitioner's counsel billed for "review filed regarding status of case and strategy," see e.g., Fee App., Ex. B, at 10, to be unreasonable. It is difficult to comprehend why counsel billed for a general review of the case file at the start of each month when she was actively involved in the case. Accordingly, the undersigned deducts for the following entries: 0.2 hours (2/2/09); 0.3 hours (3/5/09); 0.2 hours (4/2/09); 0.2 hours (5/1/09); 0.3 hours (6/3/09); 0.2 hours (10/6/09); 0.1 hours (11/4/09); 0.3 hours (12/1/09); 0.2 hours (1/21/10); 0.3 hours (4/13/10); 0.2 hours (7/5/10); 0.2 hours on (12/6/10); 0.2 hours (3/1/11); 0.2 hours (4/1/11); and 0.1 hours (5/19/11). This amounts to a total reduction in the award of 3.1 hours or **$1,069.50**.

C. Reasonable Costs

As an initial matter, petitioner states in his reply that based on the language of section 15(e) in the Vaccine Act, the term "reasonable" qualifies "attorneys' fees," not "costs." See Reply 15. Thus, petitioner contends that "reasonableness" is not the standard by which to assess petitioner's costs, and, therefore, all claimed costs are reimbursable. Id. This novel view is an incorrect interpretation of the Vaccine Act, i.e., that it mandates reimbursement of all claimed costs. Contrary to petitioner's view, both fees and costs must be reasonable. See Perreira, 27 Fed. Cl. at 34 ("The conjunction 'and' conjoins both 'attorneys' fees' and 'other costs' and the word 'reasonable' necessarily modifies both. Not only must any request for reimbursement of attorneys' fees be reasonable, so also must any request for reimbursement of costs."). Using reasonableness as the standard, the undersigned will address respondent's objection to costs incurred by petitioner.

1. Petitioner's Counsel's Costs

Respondent objects to petitioner's counsel's routine use of Federal Express and argues it is excessive. Opp'n 14. Petitioner replies that counsel did not routinely use Federal Express, but only for time-sensitive filings and for shipping MRI films and angiogram scans, which were large and unusual in size. Reply 25. The undersigned has reviewed petitioner's counsel's Federal Express charges in Exhibit D of the Fee Application, and the charges are reasonable. Petitioner used Federal Express to ship CDs containing medical records to the court, angiogram scans, and the petition, which are reasonable uses of the service. Compare Fee. App, Ex. D, at 16–22 with ECF Docket. Petitioner will be reimbursed for these costs.

Respondent objects to the $541.78 in costs for petitioner's counsel's meals during the first trip to Washington, DC. Respondent states that this amount for meals and incidentals is unreasonable and suggests an amount based on the federal per diem allowance for a four-day trip to Washington, DC, which is $248.50. Opp'n 15 & n.14. Petitioner replies that $71.00 a day does not cover meals at a hotel in Washington, DC, and that counsel should not be held to a "federal rate." Reply 26. While the cost incurred for meals by petitioner's counsel is high, it is not unreasonable given the area and the hotel where petitioner's counsel stayed. The undersigned will reimburse petitioner for these costs. Petitioner's counsel, however, should exercise careful judgment in incurring costs for lodging and food in the future.

2. Expert Fees

Petitioner requests reimbursement for $45,727.00 in fees and costs for petitioner's expert, Dr. Lawrence Steinman, a well-known neurologist. Fee App. 12–14. Respondent objects to Dr. Steinman's hourly rate of $500.00 and suggests that Dr. Steinman be compensated at the hourly rate of $425.00, which the special master awarded in Broekelschen. Opp'n 15 (citing Broekelschen, 2008 WL 5456319, at *10–11). Respondent also objects to the number of hours Dr. Steinman billed working on the case, arguing that 86 hours is excessive. Opp'n 15. Petitioner responds that Dr. Steinman's hourly rate of $500.00 is reasonable, given his credentials and experience. Reply 26–27.

a. Reasonable Hourly Rate

After reviewing the evidence petitioner submitted in Broekelschen, Special Master Moran found that a reasonable hourly rate for Dr. Steinman was $400.00 for work performed in 2007 and $425.00 for work performed in 2008. See 2008 WL 5456319, at *10–11. In the instant case, petitioner cites to an order issued by Special Master Lord in Anderson v. Sec'y of HHS, No. 10–672V, 2011 WL 4537783 (Fed. Cl. Spec. Mstr. Sept. 1, 2011), in which Special Master Lord preapproved the hourly rate of $500.00 for a hematologist from Stanford University with similar credentials to Dr. Steinman's. Fee App. 13. Petitioner argues that the Order supports the reasonableness of Dr. Steinman's requested hourly rate of $500.00. Fee App. 13. In the Anderson Order, however, Special Master Lord preapproved an hourly rate of $500.00 for work to be performed in 2011 and 2012. 2011 WL 4537783, at *2–4. Relying on both Broekelschen and Anderson as guidance, the undersigned finds the following hourly rates to be reasonable for Dr. Steinman's work as an expert: **$450.00 for work performed in 2009, $475.00 for work performed in 2010, and $500.00 for work performed in 2011**.

b. Reasonable Hours

Respondent objects to the total number of hours Dr. Steinman billed. Opp'n 15–16. In total, Dr. Steinman expended 86 hours through February 20, 2011. See Fee App., Ex. E. Dr. Steinman's hours break down to the following increments for various tasks: 15 hours to review the medical records, compile medical literature, and draft the initial report; 14.5 hours to prepare three supplemental expert reports; 12 hours for preparation and travel involving the first two days of

hearing; 14 hours testifying during the first two days of hearing; 14 hours to prepare for the third day of hearing; 8 hours testifying during the third day of hearing; and 8.5 hours for work on the post-hearing briefs.

The undersigned considers most of Dr. Steinman's hours to be reasonably expended. The eight hours spent preparing for his rebuttal testimony during the third day of hearing is excessive, however, especially on top of the five hours Dr. Steinman billed on October 14 and 15, 2010 to review the transcript. The undersigned will reduce award by four hours in 2010 or **$1,900.00**.

Using the reasonable hourly rates from above, and taking into account the reduction of four hours in 2010, the undersigned awards the following for Dr. Steinman's fees:

Table A: Dr. Steinman's Fees			
Year	Hourly Rate	Hours Billed	Total
2009	$450.00	21	$9,450.00
2010	$475.00	55	$26,125.00
2011	$500.00	6	$3,000.00
			$38,575.00

c. Reasonable Costs Incurred by Dr. Steinman

Respondent does not object to the amount of $4,213.88 for Dr. Steinman's travel expenses for the September hearing. Opp'n 16. Respondent does object, however, to a $13.07 charge for an in-room movie at the Sofitel Hotel. Opp'n 16. The undersigned finds this charge to be unreasonable and deducts **$13.07** from the award.

Respondent objects to the hotel and meal expenses Dr. Steinman incurred for the November 4 hearing, arguing that petitioner has not submitted any documentation supporting reimbursement of the costs. Opp'n 16. Petitioner requests $700.00 for Dr. Steinman's stay at the Willard Hotel and meal expenses, but the undersigned cannot find a receipt for the Willard Hotel in petitioner's Exhibit E or any other filings related to the interim fee motion. The undersigned will not reimburse petitioner for this cost in the interim award. Accordingly, **$700.00** will be deducted from the request for reimbursement for Dr. Steinman's costs. Petitioner, however, may include the documentation in the final fee application and will be reimbursed at that time.

Taking into account the reductions of $13.08 for the in-room movie and $700.00 for the undocumented hotel and meal costs, petitioner will be reimbursed a total of **$4,013.93** for Dr. Steinman's costs. Again, petitioner may submit documentation in the final fee application for the unreimbursed hotel expenses.

3. Petitioner's Costs

Petitioner requests reimbursement for $8,428.85 in out-of-pocket litigation and travel costs. Fee App. 3. Respondent does not object to reimbursement of $250.00 for filing fees, $3,878.85 in travel costs, and $4,000.00 in retainers paid to Dr. Steinman and Liz Holakiewicz. Opp'n 16. Respondent does object to reimbursement of $300.00 for MRI and angiogram films, contending that petitioner has not provided any documentation in the fee application. Opp'n 16. The undersigned reviewed petitioner's Exhibit L, which includes petitioner's costs, and petitioner's Exhibit D, which includes the firm's costs, and cannot find documentation for $300.00 in costs relating to MRI or angiogram films. Thus, the undersigned will not reimburse petitioner for this expense in the interim fee award. Petitioner may include the appropriate documentation in the final fee application and will be reimbursed at that time.

Taking into account the $300.00 reduction for the undocumented MRI and angiogram film expenses, the undersigned reimburses petitioner for a total of **$8,128.85** for out-of-pocket costs incurred pursuing the petition.

IV. Conclusion

In sum, despite the reductions, petitioner's interim fee application involves one of the highest amounts of fees awarded in the undersigned's experience. Petitioner's counsel should keep in mind the distinction between hours expended and hours reasonably expended. The Vaccine Act permits payment only of the latter. The following tables represent the amounts of attorneys' fees and costs and petitioner's costs through September 30, 2011 that the undersigned awards petitioner:

Table B: Attorney's Fees and Costs	
Attorneys' Fees Requested	$236,234.00
Reductions	– $53,793.00
Attorneys' Fees Awarded	**$182,441.00**
Attorneys' Non-Expert Costs Awarded	**$4,799.75**
Expert Fees & Costs Requested	$47,727.00
Expert Fees Awarded	**$38,575.00**
Expert Costs Awarded	**$4,013.93**
Total Attorneys' Fees and Costs	**$229,829.68**

Table C: Petitioner's Costs	
Petitioner's Costs Awarded	**$8,128.85**

The undersigned awards petitioner interim attorneys' fees and costs in the following amount:

a. **$229,829.68**, representing reimbursement for $182,441.00 in attorneys' fees and $47,388.68 in attorneys' costs. The award shall be in the form of a check made payable jointly to petitioner and the Law Offices of Lisa A. Roquemore; and

b. **$8,128.85,** representing reimbursement for petitioner's costs. The award shall be in the form of a check made payable to petitioner.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.[8]

IT IS SO ORDERED.

Dated: February 29, 2012

s/ Laura D. Millman
Laura D. Millman
Special Master

[8] Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.