

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-73 V

Filed: February 8, 2011

For Publication

SHANNON NELSON, *

Petitioner, *

v. *

Decision on Attorneys' Fees and Costs;
Question of Duplicative Experts

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Ronald C. Homer, Boston, MA, for petitioner.

Voris E. Johnson, Jr., Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING ATTORNEYS' FEES AND COSTS¹

On December 22, 2010, Petitioner filed an application for attorneys' fees and costs, requesting \$36,217.80 in attorneys' fees, \$21,184.18 in attorneys' costs, and \$926.17 in petitioner's costs. On January 4, 2011, Respondent filed a Response to Petitioner's application. In her response, Respondent's sole objection to the application relates to a bill for \$9,200.00, submitted on behalf of Derek Smith, M.D. See Fee App., Tab B at p. 13.

On January 10, 2011, the undersigned held a telephonic status conference at which Petitioner was directed to file a report explaining the circumstances of using Dr. Smith as an expert in the case, along with his subsequent withdrawal and replacement by Dr. Tornatore. On January 13, 2011, Petitioner filed Dr. Smith's draft opinion as Ex. 37, and a response to the January 10,

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 delete 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 delete such material from public access.

2011 order detailing his explanation and argument for receiving full fees and costs.

Question of Duplicative Expert Reports

The sole contested issue in Petitioner's application for fees and costs is whether a petitioner's counsel may be reimbursed for the services of an expert that proved unsatisfactory to petitioner's case where petitioner subsequently retained the services of a second expert whose services did prove satisfactory to the petitioner's case.

Petitioner's first expert, Dr. Smith, forwarded a draft of his expert report to petitioner's counsel on September 12, 2009. In that report, Dr. Smith outlined several reasons that he was not comfortable in expressing the opinion that Shannon Nelson's vaccines were the probable cause of her injury. Specifically, Dr. Smith was unable to rule out Shannon's ptosis surgery as a factor in the development of her Guillain-Barre Syndrome ("GBS"). In order to continue pursuing the claim, Petitioner's counsel retained the services of a second expert, Dr. Tornatore.

Respondent correctly points out that "[d]uplicative work is presumptively unnecessary." *Riggins v. HHS*, No. 99-382V, 2009 WL 3319818, at *4 (Fed. Cl. Spec. Mstr. 2009), aff'd in unpub. order, No. 99-382V (Fed. Cl. 2009), aff'd, No. 2010-5078, 2011 WL 9834 (Fed. Cir. 2011) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). "The same principle restricts experts." *Riggins*, 2009 WL 3319818, at *4 (citing *Sabella v. HHS*, 2008 WL 4426040, at *28 (Fed. Cl. Spec. Mstr. 2008), aff'd in part and rev'd in part on other grounds, 86 Fed. Cl. 201 (2009)). Therefore, it is Petitioner's burden to demonstrate that the second expert report was necessary. Petitioner must provide proper substantiation for all fees and costs claimed with regard to experts by painting "a clear and complete picture" that enables the court to "see and understand how and why the expert spent the claimed hours." *Stott v. Secretary of HHS*, 2006 WL 2457404 at *5 (Fed. Cl. Spec. Mstr. 2006) (citing *Wilcox v. Secretary of HHS*, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. 1997)).

Petitioner posits that because Dr. Smith's report was equivocal, counsel had an ethical duty to consult another qualified expert neurologist for a second opinion. P. Resp. to Ct's Order, p. 2. Petitioner points out that this second consultation with a medical expert was successful, since the second expert, Dr. Tornatore, filed a favorable expert report that indicated Petitioner's vaccination was the probable cause of her injuries. Tornatore Report at p. 5. This report resulted in a settlement by the parties. The undersigned finds that petitioner's counsel's ethical duty to pursue diligently his client's objectives² was controlling.

In order to avoid any future difficulties resembling this one, the undersigned suggests that

² See Massachusetts Rule of Professional Conduct Preamble: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." "A lawyer acts as evaluator by examining a client's legal affairs and reporting them to the client or others." See also Massachusetts Rule of Professional Conduct 1.3(1): "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Since Mr. Homer is an attorney practicing in Massachusetts, the Massachusetts Rules of Professional Conduct apply to him.

petitioner's counsel speak with their experts before the experts draft a report in order to determine if the expert will be of assistance in proving petitioner's case. If the expert's opinion is equivocal, as in this case, counsel can then seek new expert assistance if the case warrants going further. By eliminating the production of an unfavorable expert written draft, counsel reduces time and expense and obviates further weighing upon the time of both the undersigned and respondent.

Petitioner has met her burden and successfully painted “a clear and complete picture” that has enabled the court to see why a second expert was used. The use of a second expert was compelled by the attorney’s professional duties. Therefore, the \$9,200.00 in objected-to fees for Dr. Smith was reasonable.

Conclusion

Petitioner has requested \$36,217.80 in attorneys’ costs. The undersigned finds this amount to be reasonable. Petitioner has requested \$21,184.18 in attorneys’ fees, including \$9,200.00 for Dr. Smith’s fee. The undersigned finds the entire \$21,184.18 to be reasonable.

The court awards a total of **\$57,401.98**, representing reimbursement for attorneys’ fees and costs. The award shall be in the form of one check made jointly payable to petitioner and the law firm Conway, Homer & Chin-Caplan, P.C. in the amount of **\$57,401.98**.

The court further finds Petitioner’s request for reimbursement for costs in the amount of **\$926.17** to be reasonable. The court awards **\$926.17**, which shall be in the form of one check made payable solely 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.³

IT IS SO ORDERED.

Dated: February 8, 2011

/s/ Laura D. Millman

Laura D. Millman
Special Master

³ 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.