

**OFFICE OF SPECIAL MASTERS**

**No. 00-289V**

**(Filed: September 13, 2001)**

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HARRISON BRYCE SLAY, a minor by \*  
his mother and natural guardian, \*  
MELYNDA SLAY, \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

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**TO BE PUBLISHED**

**DECISION AWARDING FEES AND COSTS**

**Millman, Special Master**

**I. Procedural Background**

Petitioner’s counsel, Clifford Shoemaker, filed a petition on May 15, 2001 for \$8,164.25<sup>1</sup> in attorney’s fees and costs in this case. On June 28, 2001, respondent filed a motion for an extension of time to respond to petitioner’s fee petition. The court held a telephonic status conference with both parties on June 29, 2001 to discuss the issues respondent raised. In the following weeks, petitioner filed exhibits 10-14 which were affidavits and retainer agreements in non-vaccine cases attesting to the reasonableness of the hourly rates requested. On August 10, 2001, petitioner filed

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<sup>1</sup> This amount is comprised of \$7,668.35 in attorney’s fees and \$495.90 in costs associated with this case.

a replacement fee petition for \$10,993.43 in attorney's fees and costs.<sup>2</sup> On August 24, 2001, respondent filed his opposition to petitioner's application for attorney's fees and costs. On September 5, 2001, petitioner faxed a reply to respondent's opposition and requested compensation for additional time spent on the case.<sup>3</sup>

## **II. Attorney's Fees**

Pursuant to 42 U.S.C.A. § 300aa-15(e), the special master may award "reasonable" attorney's fees as part of compensation. To determine reasonable attorney's fees, the court employs the lodestar method. Blanchard v. Bergeron, 489 U.S. 87 (1989); Blum v. Stenson, 465 U.S. 886, 887 (1984); Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). "[T]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on litigation times a reasonable hourly rate." Blanchard, 489 U.S. at 94 (quoting Blum, 465 U.S. at 888). "The court is given the discretion, however, to adjust the initial estimate if 'a fee charged is out of line with the nature of services rendered.'" Pierce v. Underwood, 487 U.S. 552, 581 (1998) (Brennan, J., concurring).

To calculate an appropriate attorney's fee award, the court reviews the hourly rates charged by the attorney(s) as well as the amount of time he or they expended on the litigation.

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<sup>2</sup> This amount is comprised of \$10,433.35 in attorney's fees and \$560.08 in costs associated with this case.

<sup>3</sup> In petitioner's reply, she requests compensation for an additional 1.9 hours spent by Mr. Horn in reviewing respondent's opposition and drafting the reply. Accordingly, petitioner requests an additional \$332.50 in attorney's fees for a total of \$10,765.85 in attorney's fees associated with this case.

## **A. Hourly Rates**

### **1. Mr. Brad Horn**

Petitioner requests that Mr. Horn be compensated at an hourly rate of \$175.00. In support of this rate, petitioner provided affidavits from three attorneys practicing in the same regional area including one attorney who has handled a vaccine case. P. Exs. 10, 11, and 14. Additionally petitioner provided retainer agreements for cases handled by Mr. Horn. P. Exs. 12 and 13.

Respondent objects to the hourly rate requested by Mr. Horn. Respondent asserts that \$150.00 is an appropriate hourly rate for the work performed by Mr. Horn in this case.<sup>4</sup> Respondent argues that the affidavits and retainer agreements provided by petitioner are insufficient to justify the increase from the hourly rate of \$150.00 that the court has previously awarded Mr. Horn.

“The burden is on the fee applicant to demonstrate that the rate claimed is appropriate,” Edgar v. Secretary, HHS, No. 90-711V, 1994 WL 256609, at \*2 (Fed. Cl. Spec. Mstr. May 27, 1994), aff’d, 32 Fed. Cl. 506 (1994) (citing Blum, supra, at 895). To determine whether counsel has met this burden, the court essentially embarks on a two-step analysis.<sup>5</sup> First, the court evaluates whether counsel has provided persuasive evidence of the requested rate. “The burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney’s own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” Blum, at 896 n.11. Second, the court

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<sup>4</sup> R. Objections at 2.

<sup>5</sup> This two-step analysis is also employed when evaluating the amount of time that counsel expended as well as the amount of costs that counsel accrued. At first glance, it may seem that the burden of “sufficient documentation” is encompassed by the ultimate burden of proving that the requested rate or cost is reasonable. While this holds true in cases where the fee applicant has provided sufficient evidence, it is untrue in cases where the undersigned finds the fee applicant’s proof to be lacking.

determines whether the rate itself is reasonable. The reasonableness of a requested attorney fee is “to be calculated according to the prevailing market rates in the relevant community...” Id. at 896.

Nevertheless, the analysis must start with the basic premise that fees awarded under the Program should not imitate those awarded in traditional tort litigation. Edgar v. Secretary, HHS, 32 Fed. Cl. 506, 509 (Fed. Cl. 1994) (citing Blum, supra, at 888). Although these cases may be complex medically, the straightforward nature of the proceedings reflects that “Congress did not intend large legal fees” for Program cases. See Hines v. Secretary, HHS, No. 89-90V, 22 Cl. Ct. 750,753 (Cl. Ct. 1991) (citing Pusateri v. Secretary, HHS, 18 Cl. Ct. 828, 829 (Cl. Ct. 1989)).

Furthermore, in recent years, this court has been inclined to award lower fees than those awarded in the early stages of the Program. Frangakis v. Secretary, HHS, No. 90-1979V, 1992 WL 397565, at \*2 (Fed. Cl. Spec. Mstr. Dec. 22, 1992). “[S]pecial masters have concluded that the general ‘scale’ set in many of the earlier decisions was, viewed in retrospect, inappropriately high.” Id. (citations omitted). However, the hourly rate of \$175.00 that Mr. Horn requests is less than the hourly rate charged by Ms. Jean Galloway Ball and Ms. Susan Pollack, the two attorneys whose affidavits were submitted by petitioner. P. Exs. 10 and 11.

While these general notions provide an initial basis for analysis, the most important tool for evaluating these awards is the court’s discretion to employ its own, past experience. Edgar, supra, at \*3. The Federal Circuit has “strongly endorsed the special masters’ use of past experience in awarding attorneys’ fees.” Id. (citing Saxton v. Secretary, HHS, 3 F.3d 1517 (Fed. Cir. 1993)).

The court finds that evidence provided by petitioner supports an hourly rate of \$175.00 for Mr. Horn. Additionally, in an unpublished decision involving the same attorneys but for another petitioner, the Chief Special Master also found this rate reasonable. Perales v. Secretary, HHS, No. 97-175V (Fed. Cl. Spec. Mstr. Aug. 6, 2001). Although the decision in Perales is not binding, the

undersigned finds the holding persuasive. Furthermore, in this case petitioner has provided additional support for this hourly rate. Accordingly, the court compensates Mr. Horn at an hourly rate of \$175.00.

## **2. Mr. Clifford Shoemaker**

Petitioner requests that Mr. Shoemaker be compensated at an hourly rate of \$195.00. Respondent objects to this amount and suggests that Mr. Shoemaker be compensated at an hourly rate of \$175.00.<sup>6</sup> Respondent objects on the basis that petitioner did not provide sufficient evidence to support this hourly rate.

Although specific evidence was not provided to support Mr. Shoemaker's hourly rate, as mentioned above, petitioner provided evidence to support Mr. Horn's hourly rate. The court recognizes that Mr. Shoemaker has far more experience in the Program than Mr. Horn. Accordingly, he should be compensated at a higher hourly rate. Additionally, Mr. Shoemaker has been compensated at hourly rates of \$190.00 and \$200.00 by other special masters. See Childers v. Secretary, HHS, 1999 WL 514041 (Fed. Cl. Sp. Mstr. June 11, 1999); Erickson v. Secretary, HHS, No. 93-0102V (Fed. Cl. Spec. Mstr. April 9, 1998); Perales, supra. Accordingly, the court compensates Mr. Shoemaker at an hourly rate of \$195.00.

## **3. Ms. Ghada Anis**

Petitioner requests that Ms. Anis be compensated at an hourly rate of \$150.00. Respondent objects to that hourly rate for an attorney who has been in practice for only five months.<sup>7</sup> There is only one case where Ms. Anis' hourly rate was at issue. In that case, the Chief Special Master found \$135.00 to be a reasonable hourly rate. See Perales, supra, slip op. at 7. As discussed above, while

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<sup>6</sup> R. Objections at 9, 15.

<sup>7</sup> R. Objections at 17-18.

Perales is not binding, the undersigned finds it to be persuasive.

In petitioner's memorandum in support of the reasonableness of hourly rates requested for Ms. Anis, petitioner cites the Equal Access to Justice Act ("EAJA") and 42 U.S.C. § 1988. Furthermore, petitioner asserts that it is "highly inappropriate...to permit a female attorney to be paid below market rates and below the inflation-adjusted EAJA rate."<sup>8</sup> In determining what hourly rate is reasonable for an attorney, the undersigned does not take the gender of the attorney into account. Although the two statutes cited by petitioner may provide some guidelines in determining a reasonable hourly rate, the undersigned does not find them to be useful in the instant case, and finds Perales more helpful. The court compensates Ms. Anis at an hourly rate of \$135.00.

## **B. Time Expenditure**

### **1. Civil Remedies**

Petitioner has requested compensation for 2.7 hours spent researching petitioner's "civil remedies." Respondent objects to compensating those hours from the Vaccine Injury Trust Fund. Respondent asserts that time spent considering civil remedies does not fall within the scope of "proceedings on the petition" as required by the Act.<sup>9</sup> Petitioner asserts that "[p]etitioner's counsel in Vaccine Act cases always consider the civil law consequences of their actions.... It is incumbent upon counsel to determine what the civil rights might be and to inform the client of the various options available." P. Reply at 2.

After careful review of the issue, the undersigned finds it reasonable to compensate petitioner for the time in question. In this particular case, petitioner filed an election to reject judgment and presumably will file a civil action. Accordingly, petitioner's counsel acted appropriately in

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<sup>8</sup> P. Mem. at 6.

<sup>9</sup> R. Objections at 26-28.

researching petitioner's civil remedies.

## **2. Challenging and Responding to Respondent's Motion**

Petitioner has requested compensation for 3.7 hours spent on June 29, 2001 working on issues related to the fee petition.<sup>10</sup> Respondent objects to that time, categorizing it as time spent "challenging respondent's motion for an extension of time."<sup>11</sup> Respondent asserts that these hours were excessive and unnecessary.<sup>12</sup> Petitioner asserts that this time was spent in order to avoid further litigation on the matter and notes that a formal opposition to respondent's motion was never filed. P. Reply at 2.

After careful review of the entry dated June 29, 2001, the undersigned finds it reasonable to compensate petitioner for the 3.7 hours spent trying to resolve the disputed issues. This time was not spent simply challenging respondent's motion as indicated by respondent. Rather it includes conferences with other attorneys and e-mails about the fee petition. Accordingly, the court compensates petitioner for the full 3.7 hours.

## **III. Conclusion**

Accordingly, the court awards \$11,249.43<sup>13</sup> in attorney's fees and costs associated with this case.<sup>14</sup> A check for \$221.48 shall be made payable to petitioners. A check for \$11,027.95 shall be

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<sup>10</sup> P. Ex. 16 at 4 (entry dated 6/29/2001).

<sup>11</sup> R. Objections at 28-29.

<sup>12</sup> Id.

<sup>13</sup> This amount is comprised of \$1,565.85 in attorney's fees incurred by Mr. Shoemaker, \$8,435.00 in attorney's fees incurred by Mr. Horn, \$688.50 in attorney's fees incurred by Ms. Anis, and \$560.08 in costs.

<sup>14</sup> This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against the client, "advance costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or

made payable jointly to petitioner and Mr. Clifford Shoemaker. In the absence of a motion for review filed pursuant to RCFC Appendix J,<sup>15</sup> the clerk of the court is directed to enter judgment in accordance herewith.

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_

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Laura D. Millman  
Special Master

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collecting fees (including costs) which would be in addition to the amount awarded herein. See Beck v. Secretary, HHS, 924 F.2d 1029 (Fed. Cir. 1991).

<sup>15</sup> 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.