

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 12-309V

Filed: September 26, 2013

Not for Publication

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DOROTHY THOMAS,

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Petitioner,

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Attorneys' fees and costs decision

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v.

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SECRETARY OF HEALTH  
AND HUMAN SERVICES,

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Respondent.

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Dorothy Thomas, College Station, TX, for petitioner (pro se).

Melonie J. McCall, Washington, DC, for respondent.

**MILLMAN, Special Master**

### **DECISION AWARDING ATTORNEYS' FEES AND COSTS<sup>1</sup>**

On May 11, 2012, petitioner filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-10–34 (2012) (“Vaccine Act” or “Act”), alleging that she suffered a vascular injury after receiving flu vaccine on September 21, 2009. Pet. at 1. On May 7, 2013, petitioner’s counsel, Ronald C. Homer, of Conway, Homer & Chin-Caplan, P.C., filed a motion for extension of time, informing the court of his intention to withdraw from the case. On June 4,

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the special master’s action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims’s website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). 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.

2013, petitioner's counsel filed a Motion for Interim Attorneys' Fees and Costs. On July 12, 2013, petitioner's counsel filed a Motion to Withdraw, which was granted by the undersigned on July 15, 2013. On September 5, 2013, the undersigned issued a decision granting petitioner's oral motion to dismiss the case, on the grounds that petitioner failed to make a prima facie case of causation in fact. The parties' fees motions have been fully briefed and are now ripe for decision.

## **I. Background**

### **a. Factual History**

Petitioner was born on December 21, 1953.

On September 21, 2009, petitioner received flu vaccine. Med. recs. Ex. 4, at 1. On October 13, 2009, twenty-two days after receiving flu vaccine, petitioner was found unconscious in the Walgreens restroom at 6:00 p.m. Med recs. Ex. 2, at 21. She was hospitalized at St. Joseph's Regional Health Center Emergency Department. Id. She had right facial droop and right-sided weakness. Id. A CT scan showed a large left basal ganglia hemorrhagic cerebrovascular accident (CVA). Id. She had attendant right-sided hemiparesis, dysarthria, dysphagia, and elevated blood pressure of 200/100. Id. Petitioner's husband reported to doctors that she had no prior significant health problems. Id.

On April 19, 2010, petitioner saw Dr. C. Henry Prihoda at St. Joseph Regional Health Center, during which visit, Dr. Prihoda noted that petitioner had been smoking one-and-a-half packs of cigarettes per day for forty years. Id. at 30. Petitioner's husband reported that she had been trying to cut back on smoking within the previous several months. Id. at 21.

Petitioner's family history is positive for CVA, with her sister experiencing it during her fifties and her mother experiencing it during her nineties. Id. at 21. Additionally, petitioner's father had a history of myocardial infarction. Id. Dr. Charles Cole suspected that petitioner had undiagnosed chronic underlying hypertension. Id. at 23.

### **b. Procedural History**

On May 7, 2013, petitioner's counsel informed the court that he would no longer proceed with the entitlement portion of the case. Pet'r's Mot. for Extension of Time 1. Petitioner's counsel requested until July 8, 2013 to update the court regarding petitioner's search for alternative counsel. Id. at 2.

In her June 4, 2013 Application for Interim Attorneys' Fees and Costs, petitioner requested \$17,043.45, representing \$14,885.52 in attorneys' fees and \$2,157.93 in attorneys' costs. Pet'r's Appl. for Interim Att'ys' Fees and Costs, at 1.

Respondent filed an Opposition to Petitioner's Application for Interim Attorneys' Fees and Costs on June 21, 2013. In the opposition, respondent objected to an award of interim fees generally, arguing that Section 15(e)(1) of the Act does not allow interim fees absent a decision on entitlement or judgment. Resp't's Opp. To Pet'r's Appl. for Interim Att'ys' Fees and Costs 2–3. Additionally, respondent argued that fees should not be awarded because the petitioner lacked a reasonable basis in bringing the claim, as shown by the absence of medical records or opinions to substantiate the allegations. *Id.* at 5–7. Finally, respondent argued in the alternative that even if petitioner had a reasonable basis in bringing the claim, petitioner lacked reasonable basis to continue pursuing the claim after the December 7, 2012 status conference. *Id.* at 7.

In his July 11, 2013 reply to respondent's opposition, petitioner's counsel argued that interim fees were appropriate in light of congressional intent and several Federal Circuit cases, including *Avera v. Secretary of HHS*, 515 F.3d 1343 (Fed. Cir. 2008), *Shaw v. Secretary of HHS*, 609 F.3d 1372 (Fed. Cir. 2010), and *Cloer v. Secretary of HHS*, 675 F.3d 1358 (Fed. Cir. 2012). Pet'r's Reply to Resp't's Opp. to Pet'r's Appl. for Interim Att'ys' Fees and Costs 4–5. Petitioner's counsel also argued that petitioner had a reasonable basis to proceed with her claim “at each stage of counsel's evaluation.” *Id.* at 10. Petitioner's counsel argued that respondent's asserted meaning of “reasonable basis” conflates reasonable basis with proof of causation, an elevated burden contrary to clear congressional intent. *Id.* at 10–11. Petitioner's counsel asserted that, according to petitioner's husband, petitioner was active and generally healthy prior to her vaccine, began experiencing headaches two to three days after the vaccine, and three weeks later, suffered a stroke. *Id.* at 12. Petitioner's counsel argued that this evidence, along with no clear alternative cause for the stroke identified by petitioner's doctors, constituted reasonable basis to pursue the claim. *Id.* at 11–12.

On July 12, 2013, petitioner's counsel submitted an Application for Supplemental Interim Attorneys' Fees, requesting an additional \$4,843.20 in attorneys' fees. Pet'r's Appl. for Suppl. Interim Att'ys' Fees 1. Mr. Homer also withdrew as attorney of record on July 12, 2013. Mot. to Withdraw as Att'y of R.

On September 4, 2013, petitioner made an oral motion to dismiss the petition. On September 5, 2013, the case was dismissed.

On September 13, 2013, in light of the now final nature of attorneys' fees and costs, the respondent filed a supplemental response. Respondent again argued that the petition lacked reasonable basis, as shown by the lack of medical records and opinion, as well as petitioner's husband's statement during the September 4, 2013 status conference that petitioner's stroke was likely influenced by her family medical history and smoking history. Resp't's Renewed Opp. to Pet'r's Appl. for Atty's' Fees and Costs 2–3. Respondent also argued that the fees should be reduced where billing is excessive or redundant. *Id.* at 3–4.

## **II. Discussion**

The Vaccine Act permits an award of “reasonable attorneys’ fees” and other costs.” 42 U.S.C. § 300aa-15(e)(1) (2012). Even a non-prevailing petitioner may receive attorneys’ costs and fees so long as the claim was brought “in good faith and there was a reasonable basis for the claim.” *Id.* Special masters possess “wide discretion” in determining the reasonableness of fees and costs, Perreira v. Sec’y of HHS, 27 Fed. Cl. 29, 34 (Fed. Cl. 1992), aff’d 33 F.3d 1375 (Fed. Cir. 1994), and may use their prior experience with the Program in this determination. Saxton ex rel. Saxton v. Sec’y of HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993).

### **a. Entitlement to Fees and Costs**

#### **i. Good Faith**

“Good faith” is a subjective standard. Hamrick v. Sec’y of HHS, No. 99-683V, 2007 WL 4793152 at \*3 (Fed. Cl. Spec. Mstr. Nov. 19, 2007). A petitioner acts in “good faith” if he or she holds an honest belief that a vaccine injury occurred. Turner v. Sec’y of HHS, No. 99-544V, 2007 WL 4410030, at \*5 (Fed. Cl. Spec. Mstr. Nov. 30, 2007). Parties are “entitled to a presumption of good faith.” Grice v. Sec’y of HHS, 36 Fed. Cl. 114, 121 (Fed. Cl. 1996).

In this case, respondent has not argued that petitioner lacked good faith in bringing or pursuing the petition. Thus, the undersigned presumes that good faith was present.

#### **ii. Reasonable Basis**

Rather, respondent contends that the petition lacked a reasonable basis. “Reasonable basis” is not defined in the Vaccine Act or Program rules. It has been determined to be an “objective consideration determined by the totality of the circumstances.” McKellar v. Sec’y of HHS, 101 Fed. Cl. 297, 303 (Fed. Cl. 2011). In determining reasonable basis, the court looks “not at the likelihood of success [of a claim] but more to the feasibility of the claim.” Turner, 2007 WL 4410030, at \*6 (citing Di Roma v. Sec’y of HHS, No. 90-3277V, 1993 WL 496981, at \*1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993)). Factors to be considered include factual basis, medical support, jurisdictional issues, and the circumstances under which a petition is filed. Turner, 2007 WL 4410030, at \*6–\*9. Traditionally, special masters have been “quite generous” in finding reasonable basis. Turpin ex rel. Turpin v. Sec’y of HHS, No. 99-564V, 2005 WL 1026714, at \*2 (Fed. Cl. Spec. Mstr. Feb. 10, 2005). Special masters have found reasonable basis to file a claim absent medical records or opinions supporting vaccine causation. See Austin v. Sec’y of HHS, No. 10-362V, 2013 WL 659574, at \*8 (Fed. Cl. Spec. Mstr. Jan. 31, 2013) (citing Hamrick, 2007 WL 4793152; Lamar v. Sec’y of HHS, No. 99-583V, 2008 WL 3845165 (Fed. Cl. Spec. Mstr. July 30, 2008)).

A different level of scrutiny governs when determining whether there was a reasonable basis to proceed with a claim, as opposed to when a reasonable basis exists to file a claim. A petition may have reasonable basis at the time of filing but lack a reasonable basis at a later phase

if further development of the record shows that the claim lacks merit; for example, “if an expert report has not been filed for a prolonged time or an expert report is unsupported and deficient.” Sease v. Sec’y of HHS, No. 11-228V, 2012 WL 5921066, at \*6 (Fed. Cl. Spec. Mstr. Nov. 6, 2012) (citing Perreira v. Sec’y of HHS, 27 Fed. Cl. 29, 31–35 (Fed. Cl. 1992)). In cases where attorneys ultimately withdrew after determining there was no reasonable basis, special masters have awarded fees and costs up to the date when counsel “should have known” that the claim was legally insufficient. Perreira v. Sec’y of HHS, No. 90-847V, 1992 WL 164436, at \*2 (Fed. Cl. Spec. Mstr. June 12, 1992).

In creating the Vaccine Act, “Congress clearly contemplated that petitioners might not be able to meet the burden to demonstrate causation-in-fact by preponderance at the time the petition is filed.” Cloer v. Sec’y of HHS, 654 F.3d 1322, 1331 n.3 (Fed. Cir. 2011). As the Federal Circuit expressed in Avera v. Secretary of Health and Human Services, “one of the underlying purposes of the Vaccine Act was to ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims.” 515 F. 3d 1343, 1352 (Fed. Cir. 2008) (citing Saunders v. Sec’y of HHS, 25 F.3d 1031, 1035 (Fed. Cir. 1994)). In medical and scientific cases, causation-in-fact is often difficult to prove without expert testimony. Requiring attorneys to obtain medical opinion supporting causation before filing would be expensive, time-consuming, and very likely deter attorneys from pursuing a petitioner’s claim. See Austin v. Sec’y of HHS, No. 10-362V, 2013 WL 659574, at \*10 (Fed. Cl. Spec. Mstr. Jan. 31, 2013).

This case is more credible than the relatively few cases where special masters have concluded that a petition lacked reasonable basis. See, e.g., Moran v. Sec’y of HHS, No. 07-363V, 2008 WL 8627380 (Fed. Cl. Spec. Mstr. Dec. 12, 2008) (finding no reasonable basis when the medical records did not show that petitioner suffered from the alleged disorder); Brown ex rel. Brown v. Sec’y of HHS, No. 99-539V, 2005 WL 1026713 (Fed. Cl. Spec. Mstr. Mar. 11, 2005) (finding no reasonable basis when petitioner filed no medical records whatsoever); Carter v. Sec’y of HHS, No. 90-3659V, 1996 WL 402033, at \*3 (Fed. Cl. Spec. Mstr. June 28, 1996) (finding no reasonable basis when petitioner’s counsel failed to notice “quite obvious” alterations in the medical records). Albeit petitioner has not presented sufficient evidence of causation, petitioner filed extensive medical records showing that she received the vaccine in question and suffered from a hemorrhagic cerebrovascular accident.

The undersigned determines that there was a reasonable basis to file the petition and to proceed with the petition, up until the point where it became clear that expert testimony to show causation could not be obtained. On December 7, 2012, the undersigned ordered petitioner to file an expert report within ninety days. Order 1, Dec. 7, 2012. On March 8, 2013, petitioner requested an additional sixty days to file the expert report, and the undersigned granted the extension. Mot. for Extension of Time 1, Mar. 8, 2013; Order 1, Mar. 11, 2013. Billing records show that after conducting medical research, petitioner’s counsel began to contact alternative counsel on March 22, 2013, apparently after concluding that an expert report could not be obtained. Pet’r’s Appl. for Interim Att’ys’ Fees and Costs, Tab A. On May 7, 2013, the deadline for the expert report, petitioner’s counsel informed the court that he would no longer proceed with the case. Mot. for Extension of Time 1, May 7, 2013. The undersigned concludes that

petitioner's counsel appropriately devoted his efforts to helping petitioner obtain alternate counsel and to winding up the case after he determined that an expert report could not be obtained. Thus, the undersigned finds that there was no point in time when petitioner's counsel proceeded with the case absent reasonable basis, and petitioner's counsel is therefore entitled to reasonable attorneys' fees and costs.

### **b. Reasonable Attorneys' Fees and Costs**

The Federal Circuit has approved the lodestar approach to determine "reasonable attorneys' fees" and costs under the Act. Avera v. Sec'y of HHS, 515 F.3d 1343, 1347 (Fed. Cir. 2008). 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)). Second, the court may make an upward or downward departure from the initial calculation of the fee award based on specific findings. Avera, 515 F.3d at 1348.

#### **i. Reasonable 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. (quoting Blum, 465 U.S. at 888). In Avera, the Federal Circuit found that in Vaccine Act cases, a court should use the forum rate, i.e., the District of Columbia rate, in determining an award of attorneys' fees. 515 F.3d 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 Cnty. Solid Waste Mgmt. & Energy Recovery Spec. Serv. Dist. v. U.S. Evtl. 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. Avera, 515 F.3d at 1349 (finding the market rate in Washington, DC to be significantly higher than the market rate in Cheyenne, Wyoming).

In this case, petitioner requests reimbursement for work performed in Boston, Massachusetts by several attorneys and non-attorneys at various hourly rates: Amy Fashano (\$208.00–\$223.00); Christina Ciampolillo (\$209.00–\$213.00); Joseph Pepper (\$213.00); Kevin Conway (\$346.00–\$353.00); Meredith Daniels (\$213.00); Ronald C. Homer (\$315.00–\$322.00); Sylvia Chin-Caplan (\$315.00); a law clerk (\$143.00); and paralegals (\$105.00–\$112.00).

Respondent does not object to petitioner's requested hourly rates. See Resp't's Opp'n to Pet'r's Appl. for Interim Att'ys' Fees and Costs. The undersigned reviewed the fee applications and finds that the requested hourly rates are reasonable and consistent with the rates at which these attorneys and staff have been compensated in past cases. See Calise v. Sec'y of HHS, No. 08–865V, 2011 WL 2444810, at \* 6 (Fed. Cl. Spec. Mstr. June 13, 2011); Soto v. Sec'y of HHS, No. 09–897V, 2011 WL 2269423, at \* 5 (Fed. Cl. Spec. Mstr. June 7, 2011). Accordingly, the undersigned will use the requested hourly rates to calculate an award for attorneys' fees.

## ii. Hours Reasonably 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 and indicate 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 v. Sec’y of HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (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.” Saxton, 3 F.3d at 1521. Furthermore, a 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); see also Savin, 85 Fed. Cl. at 315–19 (quoting Duncan v. Sec’y of HHS, No. 99-455V, 2008 WL 4743493, at \* 1 (Fed. Cl. 2008) (finding that “the Special Master has an independent responsibility to satisfy himself that the fee award is appropriate and not limited to endorsing or rejecting respondent’s critique”)).

Respondent argued that petitioner’s counsel engaged in excessive, duplicative, and redundant billing by assigning multiple attorneys and paralegals to work on one case and billing for multiple case meetings. Resp’t’s Renewed Opp. to Pet’r’s Appl. for Att’ys’ Fees and Costs 3. The undersigned has previously expressed concern at such practices. See Lilley v. Sec’y of HHS, No. 09-31V, 2012 WL 1836323, at \*5 (Fed. Cl. Spec. Mstr. Apr. 20, 2012).

In this case, multiple attorneys had several case meetings. On August 28, 2012, Ms. Fashano and Ms. Chin-Caplan had a case meeting, each billing 0.20 hours to discuss case development. These hours are duplicative. The undersigned reduces the award by **\$63.00**, measured by Ms. Chin-Caplan’s billing entry.

On October 4, 2012, Ms. Fashano and Ms. Chin-Caplan had a case meeting, each billing 0.30 hours to discuss the research needed in the case. These hours are duplicative. The undersigned reduces the award by **\$94.50**, measured by Ms. Chin-Caplan’s billing entry.

On October 22, 2012, Ms. Fashano and Ms. Chin-Caplan again had a case meeting, each billing 0.30 hours to discuss the findings from medical articles. These hours are duplicative. The undersigned reduces the award by **\$94.50**, measured by Ms. Chin-Caplan’s billing entry.

On December 6, 2012, Ms. Fashano and Ms. Chin-Caplan once again had a case meeting, each billing 0.30 hours to discuss medical literature research and to prepare for the expert report deadline. These hours are duplicative. The undersigned reduces the award by **\$94.50**, measured by Ms. Chin-Caplan’s billing entry.

On March 11, 2013, Ms. Fashano and Mr. Conway had a case meeting, each billing 0.30 hours to discuss the expert selection and how to proceed. These hours are duplicative. The undersigned reduces the award by **\$103.80**, measured by Mr. Conway's billing entry.

On March 12, 2013, Ms. Fashano and Ms. Chin-Caplan had a case meeting, each billing 0.30 hours to discuss research. These hours are duplicative. The undersigned reduces the award by **\$94.50**, measured by Ms. Chin-Caplan's billing entry.

On July 9, 2013, Ms. Fashano, Mr. Homer, and Mr. Conway had a case meeting, each billing 0.30 hours to discuss the reply. These hours are duplicative. The undersigned reduces the award by **\$172.80**, measured by Mr. Conway's and Ms. Fashano's billing entries.

The undersigned finds several other billing entries by paralegals to be excessive. On October 1, 2012, a paralegal billed 0.60 hours to email the client regarding possible missing records. The undersigned finds it hard to believe that it would take 36 minutes to draft an email. Thus, the undersigned reduces the award to **\$33.00**, representing 18 minutes of the paralegal's hourly rate.

From September 21, 2012 to September 28, 2012, a paralegal spent 19 hours reviewing and summarizing Exhibits 1 through 7 of the medical records. The undersigned finds this to be an excessive amount of hours for this task. Exhibit 1 contains five volumes, totaling 2,133 pages of records. Many of these pages contain little text. Exhibits 2 through 6 contain a total of 1,015 pages of records. Exhibit 7 contains 80 pages of medical records from Texas Home Health. Exhibit 7 is not relevant to the entitlement stage of the case; rather, home health records would relate to damages. The undersigned determines 10 hours to be a reasonable amount of time to spend reviewing and summarizing Exhibits 1 through 6, and thus reduces the award by **\$990.00**.

### **III. Conclusion**

The undersigned concludes that there was a reasonable basis for petitioner's claim throughout petitioner's counsel's representation. Petitioner is entitled to attorneys' fees and costs. Using the requested hourly rates and incorporating the reductions in hours mentioned above, the undersigned calculates the following award for Conway, Homer & Chin-Chaplan:

Total Requested Fees and Costs in Original Fee Application	\$17,043.45
Total Requested Fees and Costs in Supplemental Fee Application	\$4,843.20
Total Reductions from Discussion Above	\$1,740.60
Reasonable Attorneys' Fees and Costs for Conway, Homer & Chin-Caplan	<b>\$20,146.05</b>

Accordingly, the undersigned awards **\$20,146.05**, representing reimbursement for attorneys' fees and costs. The award shall be in the form of a check payable jointly to petitioner and Conway, Homer & Chin-Caplan, P.C. in the amount of **\$20,146.05**.

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.<sup>2</sup>

**IT IS SO ORDERED.**

Dated: September 26, 2013

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

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<sup>2</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party, either separately or jointly, filing a notice renouncing the right to seek review.