

UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

No. 91-534V

(Filed: November 7, 2000)

CHERYL WOOD, as Guardian of *
the estate and person of *
KEITH WOOD, an incompetent person, *

Petitioner, *

PUBLISHED

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

Randall L. Ferguson, Esq., Pearland, Texas, for Petitioner,

Claudia Gangi, Esq., United States Department of Justice, Washington, D.C., for Respondent.

ATTORNEY’S FEES & COSTS DECISION

ABELL, Special Master:

I.

The issue before this Court is whether Petitioner’s Application for Attorney’s Fees and Costs contains reasonable requests for the hourly rates, paralegal tasks, travel, and costs. The exegetical detail set forth herein is based upon the record as a whole, the Court’s recollection of how Petitioner’s attorney conducted his client’s case, and Respondent’s objections as contained in her response to the attorney’s

fees and costs petition.

II.

The Court may award attorney's fees and costs if a petition was brought "in good faith and there was a reasonable basis for the claim for which the petition was brought." 42 U.S.C. § 300aa-15 (e) (1) (West Supp. 2000). The good faith prong of the test is subjective; therefore, a Petitioner must have honestly believed that a legitimate claim for compensation existed. The reasonable basis prong is objective and does not depend on petitioner's state of mind. Any fee award is within the special master's discretion.

In the case *sub judice*, the Court issued a damages award based on an annuity with a first year lump sum in the amount of \$49,242.89. Petitioner's application for reasonable fees and costs represents a request equal to more than 50% of the amount of the first year lump sum but less than a total amount of the annuity awarded. However, the Court does not use as its mete wand, the total amount of a vaccine award.

III.

Hourly Rate

As indicated by Respondent, the lodestar method is employed by this Court to determine reasonable attorney's fees. *See Blanchard v. Bergerson*, 489 U.S. 87 (1989); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." 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 the services rendered." *Pierce v. Underwood*, 487 U.S. 552, 581 (1988) (Brennan, J., concurring).

To determine the number of hours reasonably expended in a particular case, the Court must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434. The reasonableness of the attorney fee rate is "to be calculated according to the prevailing market rates in the relevant community . . ." *Blum*, 465 U.S. at 896. "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 reasonable comparable skill, experience, and reputation." *Id.* at 896 n.11.

Mr. Randall Ferguson requests compensation for his time based on an hourly rate ranging from \$100.00 to \$200.00.¹ The reason the rates differ is because Mr. Ferguson gradually raised his rates as he gained experience between the years of 1991 to the present. Respondent objected to the requested amounts, maintaining, *inter alia*, Mr. Ferguson has not had the requisite experience of a finely honed vaccine litigator and had “provided only his own affidavit stating that the requested rates are reasonable.” Respondent’s Opposition to Petitioner’s Request for Attorney’s Fees and Costs at 2 (Resp. Obj.)² Finally, Respondent specifies as a proper hourly rate, the amount of \$150.00. What this amount is based upon or whether it applies to all years in question is not to be found in Respondent’s objections.

Based on the application for attorney’s fees and costs, Respondent’s objections, and the record, the undersigned awards Mr. Ferguson the hourly rates as he has requested. That Mr. Ferguson may have been inexperienced with the intricacies of vaccine related litigation may have been true in 1991. The Court finds that is no longer the case and his hourly rate requests are reasonable under the lodestar approach. Mr. Ferguson has met his burden. As noted in Mr. West’s affidavit, Mr. Ferguson’s fees are in line with the market rates in his city in terms of his hour rates, billing practices, and similar work performed. And, before the instant special master, decisions concerning the market rate for attorneys practicing Program-wide during the years 1996 to the present ranges between \$135.00 to \$225.00 per hour. Therefore, based on the above considerations, a rate of \$200.00 per hour for the years ranging between 1998 and the present is a reasonable rate.

Paralegal Tasks

Respondent next objects to tasks that could have been performed by a paralegal. She points to certain entries that appear to be paralegal tasks. The Court has analyzed each of those objections and made deductions based on the record as follows:

¹

Year(s)	Number of Hours	Rate Requested
1991-1993	5.75	\$100.00 / hr.
1994-1995	16.00	\$125.00 / hr.
1996	9.75	\$165.00 / hr.
1997	13.0	\$180.00 / hr.
1998 - Present	91.3	\$200 / hr.

² A perfunctory examination of the original fee application revealed that Mr. Ferguson filed along with his application, the affidavit of Benjamin H. West, II, Esq., who attested to the respective rates, hours, and billing practices of Mr. Ferguson. Indeed, according to Mr. West, "the time expended and fees charged are reasonable for similar work performed in our locale during the time periods in which the fees were charged."

Hourly Rate	Entry Date	Task as characterized by Respondent	Expended Hours	Deduction by Court
\$165.00	01/28/96	Review of medical records and preparation of Notice of Filing Documents	1.0	.5
\$200.00	05/01/99	Review of medical records and preparation of Notice of Filing Documents	5.0	1.0
\$180.00	03/20/97	Preparation of Notice of Filing Documents	Entry does not show any time expended	0
\$180.00	06/16/97	Preparation of Notice of Filing Documents	.25	.25
\$200.00	04/30/98	Preparation of Notice of Filing Documents	.5	.5
\$200.00	12/07/98	Preparation of Notice of Filing Documents	.75	.75
\$200.00	05/15/99	Preparation of Notice of Filing Documents	.75	.5
Total Deductions by Court				3.5
Total Hours (135.8) less deductions:				132.3

In some of the entries objected to by Respondent, it is apparent that Mr. Ferguson took time to familiarize himself with the record and the facts therein. The Court finds this reasonable. After taking Respondent's objections into account and reviewing other record entries *sua sponte*, the Court finds reasonable, a total award of 132.3 hours. (This also takes into account Mr. Ferguson's most recent supplemental fee application.) In U.S. currency, the total reduction taking into account the relevant years and differing hourly rates amounts to \$677.50.

Travel Costs

As for travel periods, the Court reduces Mr. Ferguson's hourly rate by half. Of the three travel entries objected to by Respondent, the entry dated 1/8/99 requires a 50% reduction of \$1000.00 dollars. A second and third entry dated 1/9/99 and 1/10/99 lists a total of 10.0 hours for each day. Part of those two entries, however, are times traveling and times conferring with the client. For the 19/99 entry, Mr. Ferguson recorded that he had traveled from Little Rock Airport to Jonesboro, Arkansas, and met with Petitioner's family for case related matters. The Court takes judicial notice of the fact that the drive to and from Jonesboro is three hours and therefore limits application of the 50% hourly reduction to one point five hours on 1/9/99. As for 1/10/99, the Court presumes that the entire time was taken up with travel and therefore applies the 50% rule to the 10 hours requested. Ergo, the total award is reduced further by the travel reductions in the amount of \$1633.33.

IV. COSTS

Respondent next objected to the fact that the fee application in the instant case did not have, pursuant to General Order No. 9, “a statement signed by the petitioner and counsel which clearly delineates which costs were borne by counsel and which costs were born by petitioner, including the amount of any retainer that has been paid.” Mr. Ferguson faxed to the Court a statement asserting that he had born all the costs. This Court finds in such a circumstance that there is no need to apply General Order No. 9 where a petitioner has not born any costs and there is no confusion. That is, Petitioner has fulfilled a purpose for which General Order No. 9 was promulgated.

Finally, Respondent objects to Mr. Ferguson’s request for a movie expense incurred during travel. That expense, located on his Embassy Suites receipt dated 1/8/99 was in the amount of \$9.50. The Court agrees with Respondent on this point and therefore reduces from Petitioner’s application, the cinematic experience of \$9.50.

V. CONCLUSION

Pursuant to §15(e) and Vaccine Rule 13, the Court awards the following as reasonable compensation for attorney’s fees and costs in this matter:

Year(s)	Number of Hours Awarded	Rate Awarded
1991-1993	5.75	\$100.00 / hr.
1994-1995	16.00	\$125.00 / hr.
1996	9.75	\$165.00 / hr.
1997	13.0	\$180.00 / hr.
1998 - Present	91.3	\$200.00 / hr.

The total amount award requested, \$24,783.75 (which amount includes the supplemental application) is reduced by the following amounts: \$677.50 for paralegal tasks, \$1633.33 for travel, and \$9.50 for the movie watched in the hotel. The total costs requested by Mr. Ferguson amounted to \$3,795.52 for the filing fee, obtaining records, printing costs, and life care plan work. The Court finds those costs reasonable and within the range of other cases. Based on a review of Petitioner’s attorney’s fee petition and accompanying documentation and Respondent’s objections, the undersigned finds as a reasonable award in this matter, the amounts of \$22,463.32 for attorney’s fees and \$3,786.02 in costs for a total award of **\$26,249.44**.

In the absence of a motion for review filed in accordance with RCFC Appendix J, the Clerk of the Court is directed to enter judgment in favor of petitioner in the amount of **\$\$26,249.44**³ for reasonable attorney's fees and costs. A check for **\$\$26,249.44** shall be paid to Petitioner and Petitioner's counsel jointly.

IT IS SO ORDERED.

Richard B. Abell
Special Master

³ This amount is intended to cover *all* legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs," as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. See generally, *Beck v. Secretary of HHS*, 924 F.2d 1029 (Fed. Cir. 1991).