

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 11-424V

Filed: March 24, 2013

WILLIAM J. VOGLER,

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TO BE PUBLISHED

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Petitioner,

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Preapproval of Hourly Rate;

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Reasonable Hourly Rate;

v.

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Expert Rate

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SECRETARY OF HEALTH
AND HUMAN SERVICES,

*

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Respondent.

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Zane, Special Master.

Firooz T. Namei, McKinney & Namei Co., LPA, Cincinnati, OH, for Petitioner.

Lynn E. Ricciardella, US Dep't of Justice, Washington, DC, for Respondent.

RULING DENYING MOTION FOR PRE-APPROVAL OF EXPERT RATE¹

This matter is before the undersigned on Petitioner's Motion for Preapproval of Expert's Hourly Rate ("Motion for Pre-Approval of Rate"). Petitioner seeks pre-approval of the hourly rate of \$500 for his expert, Dr. David Axelrod. Having reviewed the record as a whole and as explained in detail below, Petitioner has failed to provide sufficient evidence to warrant the pre-

¹ Because this ruling contains a reasoned explanation for the Special Master's action in this case, the Special Master intends to post it on the website of the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 113 Stat. 2899, 2913 (Dec. 17, 2002). All decisions of the Special Master will be disclosed and made available to the public unless they contain trade secret or commercial or financial information that is privileged and confidential, or medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to redact such information before 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. 42 U.S.C. § 300aa-12 (d) (4); Vaccine Rule 18 (b). In the absence of a motion or should the Special Master disagree with the proposed redactions, the decision shall be disclosed in its entirety.

approval of the requested hourly rate of \$500. Petitioner's motion for pre-approval of Dr. Axelrod's hourly rate of \$500 is DENIED.

BACKGROUND

On June 27, 2011, Petitioner, William J. Vogler ("Petitioner"), filed a petition seeking compensation under the National Vaccine Injury Compensation Program ("Vaccine Program"), 42 U.S.C. § 300aa-10, *et seq.*, alleging that he suffered from meningitis as a result of the influenza ("flu") vaccination he received on November 5, 2008. After submission of the pertinent medical records, on July 9, 2012, Respondent filed a Rule 4(c) Report setting forth her position that compensation was not appropriate. Per undersigned's August 1, 2012 Order, a schedule was set for the filing of expert reports.

On December 7, 2012, Petitioner filed his Motion for Pre-Approval of Expert's Hourly Rate.² Petitioner requested a pre-approved rate of \$500 per hour for his expert, Dr. David Axelrod ("Dr. Axelrod"), attaching Dr. Axelrod's curriculum vitae ("CV").³ On December 20, 2012, Respondent filed an Opposition to Motion for Pre-Approval of Expert's Hourly Rate ("Opposition to Pre-Approval of Rate") arguing that Petitioner failed to provide evidence demonstrating that the requested rate was reasonable. In particular, Respondent attached a copy of an excerpt from Petitioner's expert's website that indicated he charged \$350 per hour. Exhibit A to Opposition to Pre-Approval of Rate. Respondent also argued, in a summary fashion, that advance approval of fees prior to a determination of entitlement absent a showing of a reasonable basis and good faith is inappropriate. Despite ample time to do so, Petitioner did not file a reply or in any manner present evidence to counter Respondent's allegations, especially in connection with the website.

APPLICABLE LEGAL STANDARDS

The Vaccine Act provides for the payment of attorneys' fees and costs, including fees to be paid to experts, that are "reasonable." 42 U.S.C. § 300aa-15(e). The Special Master has "discretion in determining the amount of a fee award" because of his or her "superior understanding of the litigation" *Saxton By and Through Saxton v. Sec'y of Health & Human Servs.*, 3 F.3d 1517, 1521 (Fed. Cir.1993)(quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). To determine the amount of reasonable fees, the Special Master initially applies the well-recognized lodestar method. *Avera v. Sec'y of Health & Human Servs.*, 515 F.3d 1343, 1347-48 (Fed. Cir. 2008). Under the lodestar method, an estimate is determined by "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Avera*, 515 F.3d at 1347-48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)).

² The deadlines for the expert reports were suspended upon the filing of Petitioner's Motion for Pre-Approval of Rate.

³ Petitioner's Motion for Pre-Approval of Rate further notes that Dr. Axelrod sought a minimum of 3.5 hours (\$1,750) to be paid in advance before drafting of an expert report. Petitioner's motion, however, does not seek payment of fees on an interim basis, and there does not appear a basis presented for payment of these costs in advance of their being incurred.

As to the hourly rate, the Special Master decides this on a case-by-case basis. *Blum*, 465 U.S. at 895 n.11 (“[T]he burden is on the fee applicant to produce satisfactory evidence. . . that the requested rates are in line with those prevailing in the community for similar services by [those] of reasonably comparable skill, experience and reputation.”). Factors recognized as appropriate to consider are the expert’s education, training and experience, including academic affiliations, publications and experience in the Vaccine Program,⁴ and the expert’s area of expertise, including board certifications, and rates traditionally charged by comparable experts in the Program and the prevailing market rates for comparable experts. *Simon v. Sec’y of Health & Human Servs.*, No. 05-941V, 2008 WL 623833, at * 2 (Fed. Cl. 2008) (citing *Wilcox v. Sec’y of Health & Human Servs.*, No. 90-991V, 1997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997)).

DISCUSSION

In support of his Motion for Pre-Approval of Rate, the only evidence Petitioner presented was Dr. Axelrod’s CV. Dr. Axelrod’s CV does not present sufficient information to warrant the preapproval of a \$500 hourly rate. First, although Dr. Axelrod’s CV indicates he has expertise in a pertinent area, *i.e.* immunology, it does not indicate that he has testified or had previous expert experience in the Vaccine Program. Second, with regard to the specific issue in this case, a potential causal connection between meningitis and the flu vaccination, he does not appear to have much experience in this particular area. Indeed, his CV indicates that any specific experience is limited to a single, isolated case report. And, given that case report involved a meningococcal meningitis secondary to Sjogren’s Syndrome, not a vaccination-related injury, it has limited applicability here. Finally, there is no indication as to what his hourly rate has been on occasions when Dr. Axelrod has served as an expert and as an expert in the Vaccine Program.

Moreover, Petitioner has failed to offer any evidence demonstrating that a \$500 hourly rate is consistent with the rate awarded to other experts with comparable credentials, expertise, and credibility. Indeed, other experienced expert witnesses in the Vaccine Program, including those with expertise in immunology, are generally paid less than \$500 per hour. *See Gruber ex rel. Gruber v. Sec’y of Health & Human Servs.*, 91 Fed. Cl. 773 (2010)(awarding at rate of \$350); *Sabella v. Sec’y of Health & Human Servs.*, 86 Fed. Cl. 201 (2009)(awarding a rate of \$350); *Barber v. Sec’y of Health & Human Servs.*, No. 99-434V, 2008 WL 4145653 (Fed. Cl. 2008)(awarding a rate of \$300); *Doe ex rel. Estate of Doe v. Sec’y of Health & Human Servs.*, 2010 WL 529425 (Fed. Cl. 2010) (awarding a rate of \$300); *Warfle ex rel. Guffey v. Sec’y of Health & Human Servs.*, No. 05-1399V, 2012 WL 4845635 (Fed. Cl. 2012)(awarding a rate of \$325); *Kuperus v. Sec’y of Health & Human Servs.*, No. 01-0060V, 2006 WL 3499516 at *1 (Fed. Cl. 2006)(awarding a rate of \$350 to an expert with 35 years of experience and who “is one of the only doctors in the world, not to mention the course of human history” with his credentials).

Finally, Dr. Axelrod’s own website, an excerpt of which was submitted by Respondent in her Opposition to the Motion for Pre-Approval of Rate, undermines the argument Dr. Axelrod

⁴ In considering the expert’s experience with the program, special masters look to and frequently adopt the rate a particular expert has been awarded previously in the program absent some particular evidence that merits the award of a different rate in a specific case.

should be paid a \$500 hourly rate. Respondent's Exhibit A to Opposition to Pre-approval of Rate. On his own website, Dr. Axelrod identifies himself as an expert in the Vaccine Program whose hourly rate is \$350.⁵ Given the foregoing, especially the fact that Petitioner's expert himself identifies an hourly rate substantially less than sought, there is no apparent reason for the payment of the higher requested rate here.

Petitioner asserts in his Motion for Pre-Approval of Rate that Dr. Axelrod should be paid a higher rate because he is the only expert who agreed to participate in the case on Petitioner's behalf. However, Petitioner has not explained how this should result in payment of a higher rate. Certainly, there are instances where the amount of fees paid may be higher. For example, where the issues raised are more complex, the amount of time expended may be greater which would result in the total amount of fees paid being greater. Yet, because the hourly rate charged is based on the experience and training of the particular individual performing the tasks, that rate would be constant. *See Blum*, 465 U.S. at 898-99 ("Neither complexity nor novelty of the issues ... is an appropriate factor in determining whether to increase the basic fee award."). Petitioner has not explained how somehow his background and training should mean that he should get a higher rate for this particular case or why the issues raised in the case would justify a higher hourly rate than he otherwise may charge. Petitioner has failed to provide sufficient evidence justifying the award of a \$500 hourly rate for his expert.

CONCLUSION

For the foregoing reasons, Petitioner has failed to provide sufficient evidence to justify the pre-approval of a \$500 hourly rate for his expert, Dr. Axelrod. Petitioner's motion is DENIED.

IT IS SO ORDERED.

/s/ Daria J. Zane
Daria J. Zane
Special Master

⁵ Petitioner has not disputed or provided further evidence showing otherwise to dispute what has been presented by Respondent regarding Dr. Axelrod's website.