

OFFICE OF SPECIAL MASTERS

(Filed: July 11, 2005)

BETHANY BRITTON,)	
mother and natural guardian of her son,)	
PIERS BRITTON,)	
)	
Petitioner,)	
)	
v.)	No. 02-0094V
)	DO NOT PUBLISH
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

DECISION ON ATTORNEYS' FEES, ATTORNEYS' COSTS AND PERSONAL EXPENSES¹

Petitioner, Bethany Britton (Ms. Britton), as natural guardian of her son, Piers Britton (Piers), seeks an award of attorneys' fees, attorneys' costs and personal expenses as defined by General Order No. 9, for an action that she pursued under the National Vaccine Injury Compensation Program (Program).² Ms. Britton requested initially \$33,298.81, including \$20,926.50 for charges related to her medical expert, J. Barthelow Classen, M.D. (Dr. Classen). *See* Application for Attorneys' Fees & Costs (Fee Petition), filed March 12, 2004, Exhibit 1. Ms. Britton revised twice her Fee Petition. In the first revision, Ms. Britton reduced to \$11,000.00 the charges related to Dr. Classen. *See* Amended Application for Attorneys' Fees & Costs--Fee Synopsis Only (Am. Fee Petition), filed May 26, 2004. In the second revision, Ms. Britton reduced to \$6,862.50 the charges

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

related to Dr. Classen. See Amended Application for Expert Witness Fees (Second Am. Fee Petition), filed November 2, 2004. Dr. Classen claims 27.45 hours for case-specific activities: 6.38 hours to “review” the “chart” and plan a “response;” 5.23 hours to prepare an “expert report;” .35 hours to consult by telephone with attorneys; 1.82 hours to edit the “expert report;” and 13.67 hours to “review respondent’s expert reports” and prepare a “response.” Second Am. Fee Petition at 1.³ Dr. Classen claims \$250.00 an hour. *Id.*

Ms. Britton did not receive Program compensation. Nevertheless, the statute enacting the Program accords discretion to the special master to “award an amount of compensation to cover” Ms. Britton’s “reasonable attorneys’ fees and other costs” as long as “the special master or court determines that” Ms. Britton possessed “a reasonable basis for the claim” and that Ms. Britton filed the petition “in good faith.” § 300aa-15(e)(1); see, e.g., *Di Roma v. Secretary of HHS*, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). As the United States Supreme Court has cautioned in cases involving other fee-shifting schemes, the special master’s “discretion is not without limit.” *Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989). Thus, absent “special circumstances,” the special master “should ordinarily” award attorneys’ fees and costs to an unsuccessful petitioner. *Id.*, citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

However, “[p]etitioners are not given a blank check to incur” attorneys’ fees and costs. *Perreira v. Secretary of HHS*, 27 Fed. Cl. 29, 34 (1992). A petitioner must support in all instances the reasonableness and the necessity of the fees, hours or costs. See, e.g., *Wilcox v. Secretary of HHS*, No. 90-0991V, 1997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997); *Wasson v. Secretary of HHS*, No. 90-0208V, 1991 WL 135015 (Cl. Ct. Spec. Mstr. July 5, 1991), *remanded* 24 Cl. Ct. 482 (1991), *aff’d* 988 F.2d 131 (Fed. Cir. 1993); *Crossett v. Secretary of HHS*, No. 89-0073V, 1990 WL 293878 (Cl. Ct. Spec. Mstr. Aug. 3, 1990). In reviewing a fee petition, the special master may invoke the special master’s experience to reduce aspects of the fee petition that are not reasonable. See, e.g., *Saxton v. Secretary of HHS*, 3 F.3d 1517 (Fed. Cir. 1993).

Respondent does not contest an award of \$12,003.50 in attorneys’ fees, \$711.98 in attorneys’ costs and \$202.16 in personal expenses in this case. See Joint Status Report, filed May 9, 2005.⁴ But, respondent objects to even the revised amount that Ms. Britton requests for charges related to Dr. Classen. See *id.*; see also Response to Petitioner’s Application for Attorney’s Fees and Costs (Opposition), filed June 14, 2004. In particular, reciting substantial portions of *Baker v. Secretary of HHS*, No. 99-0653V, 2003 WL 22416622 (Fed. Cl. Spec. Mstr. Sept. 26, 2003), an entitlement

³ Dr. Classen’s billing method is not entirely clear. It appears that in some instances, Dr. Classen is charging for *fractions* of *minutes*. For example, 6.38 hours equates to 6 hour, 22 minutes, 48 seconds; 5.23 hours equates to 5 hours, 13 minutes, 48 seconds; 1.82 hours equates to one hour, 49 minutes, 12 seconds; and 13.67 hours equates to 13 hours, 40 minutes, 12 seconds.

⁴ The parties have accounted for additional attorneys’ fees generated during proceedings on Ms. Britton’s Fee Petition.

decision containing Special Master Laura Millman's sharp criticisms of Dr. Classen's credentials, respondent contends that Dr. Classen's hourly rate is "excessive." Opposition at 8-9.

In *Baker v. Secretary of HHS*, No. 99-0653V, 2005 WL 589431 (Fed. Cl. Spec. Mstr. Feb. 24, 2005), *reconsideration denied*, 2005 WL 834647 (Fed. Cl. Spec. Mstr. March 23, 2005), a decision on attorneys' fees and costs, Special Master Laura Millman addressed an appropriate hourly rate for Dr. Classen and an appropriate number of hours for Dr. Classen's participation in a Program case alleging vaccine-related insulin-dependent diabetes mellitus (IDDM) that proceeded to a hearing on medical issues in February 2003. Special Master Millman deemed \$200.00 an hour to be "a fair market rate" for Dr. Classen. *Baker v. Secretary of HHS*, No. 99-0653V, 2005 WL 589431, at *5. Special Master Millman reasoned that Dr. Classen is essentially a "part-time, untrained, uncertified epidemiologist/immunologist," *id.* at *3, who is not "recognized by professionals" in the fields in which "he holds himself out as an expert." *Id.* at *5. Special Master Millman granted only 79.3 hours out of 404.42 hours that Dr. Classen asserted. *See id.* at *1, 7. At the outset, Special Master Millman reasoned that Dr. Classen did not substantiate a vast number of his hours. *See id.* at *2. Then, noting that Dr. Classen "has attempted to make his thesis of vaccine causality of medical injuries the basis for remuneration through the licensing of patents that he has obtained," Special Master Millman reasoned that Dr. Classen sought payment for many activities that were "independent of his attempt to help petitioner prevail." *Id.* at *5; *see also id.* at *6 n.10 (describing certain "manuscripts as part of Dr. Classen's professional interest rather than as work necessary for" trial testimony). Further, Special Master Millman reasoned that a major portion of Dr. Classen's claim was "not credible." *Id.* at *6. Exercising her inherent discretion, Special Master Millman approved 25 hours for general "review" of "an area to which [Dr. Classen] has devoted half of his professional life;" 19 hours for the compilation of several reports, numerous letters to counsel and some charts; 9.8 hours for telephone conferences with counsel; and 25.5 hours for trial preparation and testimony. *Id.* A judge of the United States Court of Federal Claims affirmed Special Master Millman's decision. *See Baker v. Secretary of HHS*, No. 99-0653V, slip op. (Fed. Cl. June 21, 2005).

Because the initial medical issues in *Baker* and in the instant case were virtually identical, the special master finds that Special Master Millman's attorneys' fees and costs decision in *Baker* is especially instructive. By August 2002, when Dr. Classen "estimated" that he commenced his review of Piers's medical records, Fee Petition, Exhibit 7, filed August 6, 2004, at 3, Dr. Classen had submitted already in *Baker* two reports and an affidavit regarding his opinion that vaccines cause IDDM that totaled 10 pages, as well as several exhibits. *See Baker v. Secretary of HHS*, No. 99-0653V, 2005 WL 589431, at *6. Indeed, Special Master Millman allowed 25 hours for Dr. Classen's literature research. *See id.* Regardless, Dr. Classen maintains that he spent over 13 hours reviewing Piers's medical records, "planning" his report, writing his report and editing his report. Second Am. Fee Petition at 1. Yet, Piers's medical records are scant, consisting of fewer than 350 pages. *See generally* Petitioner's exhibits (Pet. ex.) 1-5, 7. And, Dr. Classen's exceptionally brief summary of Piers's "pertinent history" reflects hardly any significant assessment of Piers's clinical course. Pet. ex. 6 at 1; *see also* Pet. ex. 6 at 2. Moreover, Dr. Classen's three-page report reflects hardly a lucid explanation for a proposition that Piers's vaccines caused Piers's IDDM. The special master notes

that in the report, Dr. Classen relies predominantly upon his own publications to support his opinion. *See e.g.*, Pet. ex. 6 at 8-31; *see also* Pet. ex. 6 at 5 (references 9 & 10). Thus, in the special master's view, Dr. Classen's report should have taken no more than five hours to prepare.

Likewise, by February 2003, when Dr. Classen "estimated" that he commenced his review of respondent's Rule 4 report and medical opinions, Fee Petition, Exhibit 7 at 4-5, Dr. Classen had encountered already in *Baker* similar medical opinions from the same experts. *See, e.g., Baker v. Secretary of HHS*, No. 99-0653V, 2005 WL 589431, at *2, 6. Indeed, it appears that Dr. Classen's "analysis of experts" in this case, Fee Petition, Exhibit 7 at 4-5, coincided with Dr. Classen's supposed intensive trial preparation in *Baker*. *See, e.g., Baker v. Secretary of HHS*, No. 99-0653V, 2005 WL 589431, at *6 (Dr. Classen declared "nearly 120 hours" preparing for hearing scheduled for February 20-21, 2003). The special master recognizes that the special master contemplated eventually a reply from Dr. Classen to respondent's medical opinions. *See Britton v. Secretary of HHS*, No. 02-0094V, Order of the Special Master (Fed. Cl. Spec. Mstr. Feb. 13, 2003). However, under the circumstances, Dr. Classen's preliminary evaluation of respondent's Rule 4 report and medical opinions in this case should have taken no more than five hours.

Dr. Classen represents that he spent .35 hours on telephone conferences with Ms. Britton's attorneys. Second Am. Fee Petition at 1. However, Dr. Classen is not sure apparently about the dates of the telephone conferences. *See* Fee Petition, Exhibit 7 at 2. The special master has examined the attorneys' time records. The attorneys' time records do not contain entries that correspond to the dates that Dr. Classen "estimated" for the telephone conferences. Fee Petition, Exhibit 7 at 1. Nevertheless, the attorneys' time records contain entries for telephone conferences and other communication with Dr. Classen for which Dr. Classen did not account. *See, e.g.*, Fee Petition, Exhibit 3 (11/23/00; 9/26/01; 2/1/02; 2/10/03; 2/12/03). The special master appreciates naturally that attorneys and their experts must confer during proceedings on a petition. Therefore, based upon his experience, the special master grants conservatively 2.5 hours for Dr. Classen's various consultations with Ms. Britton's attorneys.

Based upon *Baker*, the special master awards \$200.00 an hour for Dr. Classen's work in this case. In addition, based upon his experience, the special master determines that 12.5 hours are reasonable for Dr. Classen's work in this case. Therefore, Ms. Britton shall receive \$2,500.00 for Dr. Classen's charges.

Ms. Britton is entitled to an award of \$15,417.64 in attorneys' fees, attorneys' costs and personal expenses.⁵ In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment in Ms. Britton's favor for \$15,417.64. The judgment shall reflect that

⁵ \$12,003.50 in attorneys' fees + \$711.98 in attorneys' costs + \$2,500.00 for Dr. Classen's charges + \$202.16 for Ms. Britton's personal expenses.

Ms. Britton's attorney of record, Clifford J. Shoemaker, Esq. (Mr. Shoemaker), may collect \$15,215.48 from Ms. Britton.⁶

Under Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

The clerk of court shall send Ms. Britton's copy of this decision to Ms. Britton by overnight express delivery.

John F. Edwards
Special Master

⁶ \$15,417.64 - \$202.16 for Ms. Britton's personal expenses.