

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-170V
Filed: April 7, 2011
Unpublished

SCOTT R. HAMMITT, as the Legal
Representative of his Minor Daughter,
RACHEL HAMMITT,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN
SERVICES,

Respondent.

Interim attorney fees and costs

Curtis R. Webb, Twin Falls, I.D., for Petitioner.

Althea Walker Davis, U.S. Department of Justice, Washington, D.C., for Respondent.

DECISION ON INTERIM ATTORNEY FEES AND COSTS¹

GOLKIEWICZ, Special Master.

The Petition in this case was filed on March 13, 2007. Scott Hammitt sought compensation on behalf of his daughter, Rachel, who suffers from Severe Myoclonic Epilepsy of Infancy (“SMEI”). Petitioner alleged a DTaP vaccination Rachel received was a substantial cause of her SMEI. Respondent denied the DTaP vaccination caused Rachel’s injury, alleging that the SMEI is caused by a mutation in Rachel’s SCN1A gene. On remand, the undersigned found, as was found in the initial decision, that respondent demonstrated by a preponderance of the evidence that Rachel’s SCN1A gene mutation more likely than not was the sole cause of her SMEI and denied compensation. Hammitt v. Sec’y of the Dept. of Health & Human Servs., No. 07-170V, 2011 WL 1848220 (Fed. Cl. Spec. Mstr. Mar. 4, 2011), appeal docketed, No. 07-170V (Fed. Cl. Mar. 25, 2011). Petitioner’s second Motion for Review on the underlying case is currently pending.

¹ The undersigned intends to post this decision on the website for the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). **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 a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or 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. Any motion for redaction must be filed by no later than fourteen (14) days after filing date of this filing.** Further, consistent with the statutory requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.

On November 19, 2010, petitioner filed a Petition for Interim Attorney Fees and Cost. P Petition for Interim Attorney Fees and Costs, filed November 19, 2010 [hereinafter “Interim Fee Petition” or “Fee Pet.”]. The Fee Petition states that petitioner requests “\$181,689.36 in interim attorney fees and costs. This represents \$151,228.00 in attorney fees and \$30,461.36 in costs.” Fee Pet. at 1. Petitioner requests a range of hourly rates for his attorney, between \$200 and \$240 per hour, and a total of 636 hours. Fee Pet. at 1. In petitioner’s brief, petitioner notes his counsel has been awarded these hourly rates in the past. Fee Pet. at 5. Petitioner also attached counsel’s affidavit, billing records and receipts to the Interim Fee Petition.

On December 6, 2010, respondent filed her Response in Opposition to Petitioner’s Petitioner for Interim Attorney Fees and Costs. R Response in Opposition to Petitioner’s Petitioner for Interim Attorney Fees and Costs, filed December 6, 2010 [hereinafter “Response” or “Resp.”]. On December 13, 2010, petitioner filed a Reply to Respondent’s Opposition. P Reply to Respondent’s Opposition to the Petition for Interim Fees and Costs, filed December 13, 2010 [hereinafter “Reply”]. Of note, respondent has not made objections to petitioner’s counsel’s hourly rate, nor does she object to many of the hours billed and costs requested. The following will track and discuss the parties’ contentions over this fee request.²

LEGAL BACKGROUND

Pursuant to 42 U.S.C. § 300aa-15(e) of the National Childhood Vaccine Injury Act,³ special masters shall award “reasonable” attorney fees as part of compensation on a petition. A petitioner may be awarded fees and costs even if a petitioner was unsuccessful on the merits of the case. §300aa-15(e)(1). In Avera v. Sec’y of the Dept. of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), the Federal Circuit found this to include an award for fees and costs on an interim basis. To determine reasonable attorneys’ fees, this court has traditionally employed the lodestar method, which involves “multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.” Blanchard v. Bergeron, 489 U.S. 87, 94 (1989)(quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Avera v. Sec’y of the Dept. of Health & Human Servs., 515 F.3d 1343, 1347-48 (quoting Hensley) (Fed. Cir. 2008); Saxton v. Sec’y of the Dept. of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993)). The resulting lodestar figure is an initial estimate of reasonable attorneys’ fees, which may then be adjusted if the fee is deemed unreasonable based upon the nature of the services rendered in the case. Blanchard, 489 U.S. at 94; Pierce v. Underwood, 487 U.S. 552, 581 (1988) (Brennan, J. et al., concurring); Blum, 465 U.S. at 897, 899; Hensley, 461 U.S. at 434. See also Ceballos v. Sec’y of the Dept. of Health & Human Servs., No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004).

² Of note to petitioner, this fees and costs request did not contain a response to General Order #9, regarding costs incurred by petitioner himself. Petitioner is on notice that a response to General Order #9 will be required with petitioner’s final request for fees and costs in this matter.

³ This Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (West 1991 & Supp. 2002) (hereinafter “Program,” “Vaccine Act” or “the Act”). Hereafter, individual section references will be to 42 U.S.C. §§ 300aa of the Act.

The requirement that attorneys' fees be reasonable applies likewise to costs, for example, consultant and expert fee costs. "The conjunction 'and' conjoins both 'attorneys' fees' and 'other costs' and the word 'reasonable' necessarily modifies both. Not only must any request for attorneys' fees be reasonable, so must any request for reimbursement of costs." Perreira v. Sec'y of the Dept. of Health & Human Servs., 27 Fed. Cl. 29, 34 (1992), aff'd, 33 F.3d 1375 (Fed. Cir. 1994).

The burden lies with petitioner to provide adequate documentation at the time he submits his fee application that the fees and costs that petitioner is requesting are reasonable. Wasson v. Sec'y of the Dept. of Health & Human Servs., 24 Cl. Ct. 482, 484 fn. 1 (1991). The Federal Circuit, in examining the documentation requirements in other legal contexts, made clear that the documentation must be sufficiently detailed to enable the reviewing judge to determine its reasonableness.

The court needs contemporaneous records of exact time spent on the case, by whom, their status and usual billing rates, as well as a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and any other expenditures related to the case. **In the absence of such an itemized statement, the court is unable to determine whether the hours, fees and expenses, are reasonable for any individual item.**

Naporano, 825 F.2d at 404 (emphasis added)(citing St. Paul Fire and Marine Insurance v. United States, 4 Cl. Ct. 762, 771 (Cl. Ct. 1984)). The Vaccine Guidelines advise counsel to:

maintain detailed contemporaneous records of time and funds expended under the program. [The fee request should include] contemporaneous time records that indicate the date and specific character of the service performed, the number of hours (or fraction thereof) expended for each service, and the name of the person providing such service. Each task should have its own line entry indicating the amount of time spent on that task. Several tasks lumped together with one time entry frustrates the court's ability to assess the reasonableness of the request.

Regarding the Vaccine Guidelines, Judge Allegra stated, "[t]hese guidelines reflect the accumulated wisdom of numerous decisions emphasizing that fee records must be specific, avoid "mixed entries" that lump together several activities, and represent contemporaneous entries." Savin v. Sec'y of the Dept. of Health & Human Servs., 85 Fed. Cl. 313, 316 -317 (Fed. Cl. 2008)(citing Lipsett v. Blanco, 975 F.2d 934, 938 (1st Cir. 1992) (affirming reduction of hours where "several entries contain[ed] only gauzy generalities" too nebulous to allow the opposing party to dispute their accuracy or reasonableness); In re Donovan, 877 F.2d 982, 995 (D.C. Cir.1989) (confirming that the district court properly excluded hours with "vague description[s] such as legal issues," "conference re all aspects," and "call re status"); Tomazzoli v. Sheedy, 804 F.2d 93, 98 (7th Cir. 1986) (affirming reduction in hours where plaintiff listed hours spent on "research" without greater specificity); In re Meese, 907 F.2d 1192, 1203-04 (D.C. Cir. 1990)

(reducing the award by ten percent because numerous time records made no mention of the subject matter of the work performed); Cadena v. Pacesetter Corp., 224 F.3d 1203, 1215 (10th Cir. 2000) (“[I]f [prevailing parties] intend to seek attorney’s fees . . . [their attorneys] must keep meticulous, contemporaneous time records[.]”); In re Olson, 884 F.2d 1415, 1428 (D.C.Cir.1989) (disallowing entries that failed to identify the subject of a meeting, conference, or phone call and requiring contemporaneous records proving the reasonableness of hours and rates); Grendel’s Den v. Larkin, 749 F.2d 945, 952 (1st Cir.1984) (“in cases involving fee applications ... the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award, or in egregious cases, disallowance”).

While the burden rests with petitioner to prove reasonableness, petitioner is not given a “blank check to incur expenses.” Perreira, 27 Fed. Cl. at 34. The Federal Circuit has stated “[i]t was well within the special master’s discretion to reduce the hours [expended in a matter] to a number that, in his experience and judgment, was reasonable for the work done.” Saxton, 3 F.3d at 1521; Sabella v. Sec’y of the Dept. of Health & Human Servs., 86 Fed. Cl. 201, 211 (“The special master . . . is not required to award fees and costs for every hour claimed, he need only award fees and costs that are reasonable. See 42 U.S.C. § 300aa-15(e).”).

In assessing the number of hours reasonably expended, the court must exclude those “hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.” Hensley, 461 U.S. at 434 (1983). In making reductions, the special master is not necessarily required to base his or her decisions on a line-by-line evaluation of the fee application. Wasson, 24 Cl. Ct. at 484 (affirming the special master’s general approach to petitioner’s fee request where the entries and documentation contained in the 82 page fee petition were organized in such a manner that specific citation and review were rendered impossible), aff’d, 988 F.2d 131 (Fed. Cir. 1993). Moreover, special masters may rely on their experience with the Vaccine Act and its attorneys to determine the reasonable number of hours expended. Wasson, 24 Cl. Ct. at 486, aff’d, 988 F.2d 131 (Fed. Cir. 1993). Just as “[t]rial courts routinely use their prior experience to reduce hourly rates and the number of hours claimed in attorney fee requests [v]accine program special masters are also entitled to use their prior experience in reviewing fee applications.” Saxton, 3 F.3d 1517, 1521 (Fed. Cir.1993) (citing Farrar v. Sec’y of the Dept. of Health & Human Servs., 1992 WL 336502, *2-3 (Cl. Ct. Spec. Mstr. Nov. 2, 1992) (requested fees of \$24,168.75 reduced to \$4,112.50)); Thompson v. Sec’y of the Dept. of Health & Human Servs., No. 90-530V, 1991 WL 165686, *2-3 (Cl. Ct. Spec. Mstr. Aug. 13, 1991)(requested fees of \$18,039.75 reduced to \$9,000); Wasson, 24 Cl. Ct. at 483 (1991), on remand, No. 90-208V, 1992 WL 26662 (Fed. Cl. Spec. Mstr. Jan. 2, 1992), aff’d, 988 F.2d 131 (Fed. Cir. 1993)(requested fees of \$151,575 reduced to \$16,500; the special master disregarded the claim for 698.5 hours and estimated what, in her experience, would be a reasonable number of hours for a case of that difficulty)).

Additionally, a special master may reduce an unreasonable fees and costs request *sua sponte*, regardless of whether respondent filed an objection to a particular request. In making such a reduction, a special master is not required to provide petitioner with an opportunity to explain the unreasonable request, as the burden lies with petitioner to provide an adequate description and documentation of all requested costs and fees in the first instance. Sabella, 86

Fed. Cl. at 208-09; Saunders v. Sec’y of the Dept. of Health & Human Servs., 26 Cl. Ct. 1221, 1226 (1992); Duncan v. Sec’y of the Dept. of Health & Human Servs., No. 99-455, 2008 WL 4743493, *1 (Fed. Cl., Aug. 4, 2008) (“the Special Master had no additional obligation to warn petitioners that he might go beyond the particularized list of respondent’s challenges.”); Savin v. Sec’y of the Dept. of Health & Human Servs., 85 Fed. Cl. 313, 317-19 (2008) (Order denying Motion for Review).

DISCUSSION

I. Authority to Award Interim Fees and Costs

First, respondent asserts that a fee award is only authorized as part of a petitioner’s compensation under the Vaccine Act or, if petitioner is denied compensation but the claim was brought in good faith and on a reasonable basis, when judgment has entered. R Resp. at 3-7. Respondent believes an award of interim fees is not authorized by the Act, or Avera, except in the very limited situation presented in Avera. Petitioner’s Reply embraces the language in Avera that was supportive of the special masters’ authority to award fees and costs on an interim basis. P Reply 3-6.

Respondent’s overarching argument that interim fees and costs are not authorized is unpersuasive. Respondent’s arguments have been recently considered in other cases involving interim fees. Paluck v. Sec’y of the Dept. of Health & Human Servs., No. 07-889V, slip op. (Fed. Cl. Spec. Mstr. Mar. 30, 2011); Hibbard v. Sec’y of the Dept. of Health & Human Servs., No. 07-446, slip op. (Fed. Cl. Spec. Mstr. Mar. 7, 2011); Whitener v. Sec’y of the Dept. of Health & Human Servs., No. 06-477V, slip op. (Fed. Cl. Spec. Mstr. Mar. 25, 2011). In essence, the special masters in these cases found interim fees and costs available in light of the Federal Circuit’s language allowing interim fee awards in Avera, which some may argue is *dicta*, and the subsequent, reinforcing decision in Shaw v. Sec’y of the Dept. of Health & Human Servs., 609 F.3d 1372 (Fed. Cir. 2010). *E.g.*, Paluck, No. 07-889V, slip op. at 3-6. The undersigned finds the analysis and outcome in the other special master decisions to be sound and convincing. Respondent raises no new arguments herein and thus, a lengthy discussion is not warranted. Based upon Federal Circuit’s discussions regarding interim fees and costs awards in Avera and Shaw, and upon the same analysis and reasoning utilized in Paluck, Hibbard and Whitener, the undersigned finds that an award of interim attorney fees and costs is available.

II. Meeting the Avera Factors for an Award of Interim Fees and Costs

Second, respondent argues that interim fees and costs ought to be rarely awarded and that petitioner in this instance has not satisfied the factors that support an interim award. As discussed in Avera v. Sec’y of the Dept. of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008), the Federal Circuit stated that an interim fees and costs award may be appropriate in certain circumstances: whether the case involved protracted proceedings, whether costly experts were utilized, and whether petitioner suffered undue hardship. Avera, 515 F.3d at 1352. Respondent argues that petitioner provided nothing to evidence petitioner’s undue hardship to justify an award. R Resp. at 7-8. Petitioner responds by noting the almost three year history of this case and the significant costs incurred by petitioner and petitioner’s counsel. P Reply at 8.

The undersigned noted the significance of petitioner's underlying causation case in the first decision denying compensation. Hammitt v. Sec'y of the Dept. of Health & Human Servs., No. 07-170V, 2010 WL 3735705 (Fed. Cl. Spec. Mstr. Aug. 31, 2010) [hereinafter "Hammitt I"], appeal granted, No. 07-170, slip op. (Fed. Cl. Dec. 22, 2010)(order remanding). Petitioner and respondent expressed agreement regarding this case's significance. P Fee Pet. at 3-4; R Resp. at 11. Respondent rightly does not challenge an award of interim fees and costs here based upon a lack of good faith or reasonable basis in bringing this award, which are the requisites for a fees and costs award when a petitioner is unsuccessful in the underlying claim. Such an objection would be easily dismissed in light of the complex and important causation issues confronted by the parties in the underlying claim. Respondent's objections go to the factors discussed by the Federal Circuit when the court declined awarding interim fees in Avera. The undersigned disagrees with respondent's contentions. As noted by petitioner, this proceeding began in March 2007 and is continuing on appeal presently. Further, the expert fees and other costs incurred in this case are not insignificant. In light of this case's importance, the time that has elapsed since its inception and the expert fees and costs already incurred, the undersigned finds an award of interim fees appropriate in this case.

III. Objections to the Number of Attorney Hours Billed

Third, respondent makes objections more specific to the hours billed by counsel. Respondent notes four areas in which petitioner's counsel billed significant amounts of time: medical literature research, preparing for the hearing, drafting the post-hearing brief, and preparing the Motion for Review arguments. R Resp. at 9-10. From the Fee Petition, respondent estimates petitioner's counsel spent more than 100 hours conducting medical literature research, more than 100 hours drafting post-hearing briefs and nearly 60 hours preparing the Motion for Review. R Resp. at 10-11. Further, respondent objects to petitioner's counsel's hours spent on work on an appeal of a related case, Stone v. Sec'y of the Dept. of Health & Human Servs., No. 04-1041V.⁴

Petitioner defends the amount of time counsel spent researching medical literature due to the complex and important nature of the medical issues in the underlying case. P Reply at 9-10. Petitioner agrees that having such work done by an expert would have been desirable but notes petitioner was unable to find a geneticist willing to do such research and further petitioner did not have the funds to finance such an expert. Id. In response to respondent's objections about time spent on post-hearing briefs and the Motion for Review, petitioner contends the case merited an extraordinary amount of effort. Further, petitioner states that all hours claimed for work on the Motion for Review were attributable to work on this case, not on the Stone case. Id. at 10.

Regarding counsel's time spent on medical research, the undersigned agrees with respondent that this amount of time is excessive. Petitioner claims his inability to secure a genetic expert required counsel's numerous hours of medical research to properly litigate this

⁴ Stone v. Sec'y of the Dept. of Health & Human Servs., No. 04-1041, slip op. (Fed. Cl. Spec. Mstr. Jan. 20, 2011) appeal docketed, No. 04-1041V (Fed. Cl. Feb. 22, 2011). For expediency, when these cases were originally litigated, testimony was taken at the same time. The instant case and the Stone case presented the same issue regarding the relationship of the SCN1A gene mutation to SMEI. However, different counsel represented petitioners in these cases.

case.⁵ The undersigned is convinced that counsel actually expended this time as he states; however, the question is whether great number of hours counsel expended on this task was reasonable. Although an attorney must review and understand medical literature to prosecute a case, most attorneys are not qualified to actually conduct the research on medical issues. “In most cases, attorneys are not medical doctors or experts in the particular field at issue and vice versa.” Gruber v. Sec’y of the Dept. of Health & Human Servs., 91 Fed.Cl. 773, 795 (Fed. Cl. 2010). The benefit parties receive from medical experts is their qualification to analyze their case, conduct a review of the relevant medical literature and to provide the supportive evidence. Counsel’s medical research is understandably inefficient given the lack of expertise. No client should, nor should the Vaccine Program, pay for such inefficiency.

Petitioner did present the expert testimony of a neurologist, Dr. Kinsbourne. The entire amount of time billed by petitioner’s expert is 32.7 hours. Although Dr. Kinsbourne’s testimony related to the neurological issues presented here was unpersuasive and his testimony regarding the genetic aspects bordered upon being unqualified given his lack of training and experience in genetics, the undersigned does not find Dr. Kinsbourne unqualified to perform medical literature research. In fact, at hearing, Dr. Kinsbourne addressed for petitioner the genetic issues presented in the case. With an expert qualified to perform medical literature research, the more than 100 hours spent by counsel conducting such research is excessive and unreasonable. Petitioner did not explain why Dr. Kinsbourne could testify to genetic issues but could not assist with literature research. A reduction will be made to the attorney hours claimed for this task; the overall bill is reduced by 50 hours. The undersigned finds the allowed time, still over fifty hours not including time block billed with other tasks, to be a generous award for counsel’s appropriate efforts to review and understand the literature, as identified by the expert as pertinent to issues at hand. This reduction is taken at counsel’s lowest hourly rate as the hours spent on medical literature research spanned petitioner’s three requested hourly rates.

Respondent also objected to the amount of time counsel spent preparing briefs at different stages of this proceeding. Petitioner’s first Post-Hearing Brief consisted of a thirty-one substantive pages of briefing, P Post-Hearing Brief, filed August 19, 2009; petitioner also filed a Reply Brief, filed September 25, 2009, that was approximately twenty-three pages of substantive briefing. The memorandum for petitioner’s Motion for Review, filed September 28, 2010, was approximately nineteen substantive pages. In light of the undersigned’s experience with cases in the Program and the import of Rachel’s underlying case, the amount of time spent preparing post-hearing briefs and the Motion for Review is large but not shocking. Further, petitioner’s counsel explained that work on the Motion for Review was directly related to this case, not on the related case, Stone. The cases were similar in that they shared the same experts and were based on similar medical theories. Petitioner’s counsel here was reasonable in assuming the cases would have similar outcomes and anticipating arguments for appeal is not unwarranted. Overall, due to the enormous import of this case and the complexity of medical and legal issues present, time for preparing briefs and preparing for the Hearing will not be reduced.

Fifty hours at the rate of \$200 per hour is deducted from petitioner’s request, resulting in a reduction of \$10,000. Petitioner is awarded \$141,228.00 in attorney fees.

⁵ However, see the discussion regarding fees for Dr. Melnyk, page 8 infra.

IV. Objections to Certain Costs Requested

Fourth, respondent objects to some costs requested by petitioner as being inappropriate or insufficiently documented. R Resp. at 12.

A. Costs Not Related to Experts

In her objections, respondent noted a lack of documentation for hotel and airfare and costs for unexplained travel to Boston, Massachusetts. In his Reply, petitioner stated that the hotel bills were misplaced but he was able to supply them, attached to the Reply. P Reply at 11, 13-14. Petitioner advised that \$751.21 should be deducted from his request for costs as the costs for travel to Boston should not have been billed in this case. P Reply at 11. The undersigned finds the remaining non-expert costs reasonable and awards petitioner these costs, minus the \$751.21 mistakenly billed to the case. Petitioner is awarded \$11,765.15 in non-expert-related costs.

B. Dr. Melnyk

Respondent also objects to bills for Dr. Melnyk, a geneticist consulted by petitioner, because the bills are vague and do not adequately explain the work he performed. Respondent also notes petitioner provided no support for Dr. Melnyk's hourly rate.⁶ Petitioner explains that Dr. Melnyk was consulted as a medical geneticist in this case. P Reply at 11.⁷ Petitioner notes, "[i]t seems strange that the Respondent should both urge that [counsel] should rely more upon experts and object to paying them."

Considering the genetic issues involved in Rachel's case, the undersigned finds it was reasonable for petitioner to consult with Dr. Melnyk, as an expert in genetics, and will award petitioner costs related to Dr. Melnyk. In fact, petitioner was encouraged to utilize a geneticist to rebut Dr. Raymond's testimony during the development of the case. However, petitioner has failed to provide any evidence – for example, a curriculum vitae or any other evidence relevant to Dr. Melnyk's qualifications and thus his hourly rate – upon which to evaluate the costs incurred with Dr. Melnyk. Further, as noted by respondent, the bills for Dr. Melnyk only provide vague descriptions of the services provided by Dr. Melnyk. Petitioner's Reply only discusses how Dr. Melnyk and the associated service, TASA, do not negotiate their fees. As noted previously, the burden lies with petitioner to provide adequate documentation at the time he submits his fee application that the fees and costs petitioner is requesting are reasonable. Wasson v. Sec'y of the Dept. of Health & Human Servs., 24 Cl. Ct. 482, 484 fn. 1 (1991). The undersigned awards petitioner \$300.00 per hour, a common rate for experts utilized in this Program, for costs related to Dr. Melnyk's six hours of service. Petitioner is awarded \$1,800.00 for Dr. Melnyk's hours, plus the \$175.00 in administrative fees for the service associated with Dr. Melnyk, totaling \$1,975.00 for Dr. Melnyk.

⁶ Respondent discusses a total of ten hours billed by Dr. Melnyk. Upon an initial view, Dr. Melnyk's bills appear to bill a period of six hours and a period of four hours. However, examining the two bills, petitioner's payments and petitioner's request for expert costs, it appears to the undersigned that Dr. Melnyk's bill was for six hours total. P Fee Pet. pp. 56-59.

⁷ Petitioner's consultation with Dr. Melnyk undercuts his argument that he had to perform his own medical research because he was unable to find a geneticist.

C. Dr. Kinsbourne

Bills submitted for Dr. Kinsbourne charge two different rates, \$300 per hour and \$500 per hour. P Fee Pet. at 55. It appears that Dr. Kinsbourne charged \$300 for more administrative functions, such as teleconferences with petitioner's attorney, while charging \$500 for substantive work on the case. Regarding these costs from Dr. Kinsbourne, respondent objects to reimbursement of Dr. Kinsbourne's time at a rate higher than \$300.00 per hour. Respondent points to two cases where Dr. Kinsbourne was awarded a higher rate based on a combination of his knowledge and efficiency within those cases. R Resp. at 13 (citing Adams v. Sec'y of the Dept. of Health & Human Servs., No 01-267V, 2008 WL 2221852 (Fed. Cl. Spec. Mstr. Apr. 30, 2008); Simon v. Sec'y of the Dept. of Health & Human Servs., No. 05-941V, 2008 WL 623833 (Fed. Cl. Spec. Mstr. Feb. 21, 2008)). As indicated by respondent, the undersigned awarded Dr. Kinsbourne a higher rate in Simon while qualifying that this higher award was only appropriate in circumstances "where Dr. Kinsbourne was found credible and provided very good expert services." Id. (quoting Simon, No. 05-941V, 2008 WL 623833, at *7). In reply, petitioner states his belief that the \$500 per hour rate is reasonable and relates his experience of only working with one pediatric neurologist who charges less than \$400 to \$600 per hour. P Reply at 11. Petitioner states, "[y]ou do not need to analyze or address this issue in great detail. While I disagree with your conclusion, the issues presented are identical to those in your decision of interim fees and costs in Stone . . ." Id.

Dr. Kinsbourne has long testified in this Program regarding neurological aspects of cases and that portion of his testimony here is appropriate. However, as discussed in the entitlement Decision, Dr. Kinsbourne's testimony regarding the genetic aspects of this case was questionable. Petitioner consulted with Dr. Melnyk, a geneticist, but ultimately utilized only Dr. Kinsbourne to rebut the testimony given by respondent's clinical neurogeneticist, Dr. Raymond. The underlying entitlement Decision noted that Dr. Kinsbourne's testimony has been both applauded and criticized.⁸ Numerous general concerns regarding his testimony in this case were evidenced.⁹ Furthermore, Dr. Kinsbourne's testimony, as it related to the sizeable genetics portions of this matter, was unimpressive.

⁸ "Dr. Kinsbourne has testified in the National Vaccine Injury Compensation Program from its inception. Over the years, Dr. Kinsbourne has been found to be persuasive, but also has been criticized. While the undersigned recognized Dr. Kinsbourne's good efforts in Simon v. Sec'y of Dept. of Health & Human Servs., No. 05-941, 2009 WL 623833, *7 (Fed. Cl. Spec. Mstr. Feb. 21, 2008), more recently the undersigned criticized Dr. Kinsbourne's testimony at length with regard to that case but notably discussed the decline in the quality of Dr. Kinsbourne's testimony in recent years. Egan v. Sec'y of Dept. of Health & Human Servs., No. 05-1032, 2009 WL 1440240 at *17-19 (Fed. Cl. Spec. Mstr. May 1, 2009)(unpublished). My colleague expressed similar concerns about Dr. Kinsbourne in Snyder v. Sec'y of Dept. of Health & Human Servs., No. 01-162, 2009 WL 332044, *11-12 (Fed. Cl. Spec. Mstr. February 12, 2009), aff'd, 88 Fed. Cl. 706 (2009). He was also harshly criticized by my former colleague in Moberly ex rel. Moberly v. Sec'y of Dept. of Health & Human Servs., No. 98-910V, 2006 WL 659522, *5-6 (Fed. Cl. Spec. Mstr. Feb. 28, 2006), aff'd, 85 Fed. Cl. 571 (2009), aff'd, 592 F.3d 1315 (Fed. Cir. 2010). The concerns and criticisms raised in these cases were unfortunately apparent with respect to Dr. Kinsbourne's testimony in the instant case." Hammit v. Sec'y of the Dept. of Health & Human Servs., No. 07-170, 2010 WL 3735705, at * 8 (Fed. Cl. Spec. Mstr. Aug. 31, 2010) [hereinafter Hammit I], vacated, No. 07-170V (Fed. Cl. Dec. 22, 2010)[order remanding].

⁹ "A significant concern regarding Dr. Kinsbourne's reliability as an expert witness is that he has not maintained a 'hospital based clinical pediatric neurology practice' since 1981. Thus, despite his familiarity with cases involving seizure-related disorders alleging vaccine causation and his many past distinguished professional appointments in neurology, Dr. Kinsbourne no longer maintains a clinical practice treating patients with seizure disorders in an acute setting, and has not done so in almost thirty years. Dr. Kinsbourne has continued to see only patients related to the 'behavioral aspects' of pediatric neurology after 1981. Dr. Kinsbourne's testimony at the Hearing on May 15, 2009, reflected his lack of recent clinical practice. His testimony is highly

Although the undersigned found that Dr. Kinsbourne was “credible and provided very good expert services” in Simon, warranting the \$500.00 rate, the undersigned finds the case at hand is not such an “appropriate circumstance.” See Simon, No. 05-941, 2009 WL 623833, at *7. Revisiting the factors utilized in Simon, 2008 WL 623833, at *3, the undersigned is not doubting Dr. Kinsbourne’s ability to testify regarding neurology and, of course, Dr. Kinsbourne’s education and training are still exemplary. His experience in the past is definitely noteworthy but his lack of a current clinical practice causes a deficit in his testimony. That deficit is becoming more apparent and is being exposed with greater frequency to petitioners’ detriment. Moreover, Dr. Kinsbourne’s education, training and experience in the field of genetics are fairly nonexistent. Although Dr. Kinsbourne’s experience and expertise may provide efficiency in some Vaccine Act cases, use of his testimony as it related to the significant and substantial genetics portion of this case was inefficient and ineffectual. No evidence was provided by petitioners regarding the market rate or the rates traditionally charged for a comparable expert.¹⁰ Ultimately, the undersigned awards petitioners a rate for Dr. Kinsbourne at \$300.00 per hour. Petitioner is awarded \$9,810.00 in costs for the services of Dr. Kinsbourne.

CONCLUSION

The court hereby awards the petitioners attorney fees in the amount of \$141,228.00 and costs in the amount of \$23,550.15. **Specifically, petitioners are awarded a lump sum of \$164,778.15 in the form of a check payable jointly to petitioners and petitioners’ attorney.**

The Clerk of the Court is directed to enter judgment accordingly.¹¹

IT IS SO ORDERED.

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
Special Master

generalized and lacks any grounding in practice. While Dr. Kinsbourne may keep current with medical literature . . . his testimony amounts to little more than repeating snippets from that literature. He has no current experience or context outside of ‘behavioral aspects’ of pediatric neurology with which to apply, question, or discuss an article’s teachings. Dr. Kinsbourne testified he has not focused his practice, research or teaching for the past twenty-five years in the area of seizure disorders. In fact, Dr. Kinsbourne testified he has not ‘managed seizure disorders since 1980.’ Dr. Kinsbourne does not publish, research, teach, counsel, attend meetings or conferences, or have any special training in relation to the field of genetics. Nor does Dr. Kinsbourne have any ‘experience or training or knowledge in clinical genetics, molecular genetics, and neurogenetics.’ The fact that for the past twenty-five years Dr. Kinsbourne has not focused his practice, research or teachings in the field of seizure disorders, and that Dr. Kinsbourne has no expertise in the field of genetics significantly limited his ability to offer reliable, persuasive, and cogent testimony in this case.” Hammitt I, 2010 WL 3735705, at * 8.

¹⁰ The undersigned finds it difficult to imagine presenting evidence of comparable rates, considering petitioners presented the opinion of a non-practicing neurologist on genetics issues, issues that came into the spotlight in the last decade.

¹¹ Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge. Furthermore, 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.A. §300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally, Beck v. Secretary of the Dept. of Health & Human Servs., 924 F.2d 1029 (Fed. Cir. 1991).