

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 04-997V
Filed: January 28, 2011
Unpublished

LAURA M. MERSBURGH, parent and next	*	
friend of ELIJAH MERSBURGH, a minor,	*	
	*	
Petitioner,	*	Decision on attorney fees and costs
	*	
v.	*	
	*	
SECRETARY OF THE DEPARTMENT	*	
OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

ATTORNEY’S FEES AND COSTS DECISION¹

GOLKIEWICZ, Special Master.

On August 4, 2010, petitioner filed for an award for Interim Attorneys’ Fees and Costs totaling \$76,902.81 in this compensated case.² P Application for Award of Interim Attorneys’ Fees and Reimbursement of Costs, filed Aug. 4, 2010 (hereinafter “P Fee Application”). Respondent objected to an interim award, arguing that a final award for fees and costs is due since the merits of the case are completed. R Response, filed Sept. 24, 2010. While petitioner agrees that the case is concluded and no further fees and costs will be incurred on the underlying action, petitioner seeks an interim award to preserve arguments as to whether local or forum rates should apply. This and other fee issues are currently on appeal before the Federal Circuit. See P Fee Application at 1-2. Petitioner’s counsel is counsel of record in one of the cases before the Circuit.

A status conference was conducted to discuss the handling of the current motion. After extensive discussion, petitioner’s counsel agreed for purposes of this fee application to not

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 rule requirement, a motion for redaction must include a proposed redacted decision, order, ruling, etc.**

² The total originally requested by petitioner had a duplicative request for \$1,500.00; therefore, the actual total requested by petitioner was \$75,402.81.

pursue the forum fees issue; agreeing to accept the local rate for his time. With that agreement, few issues remain. This abbreviated opinion resolves the remaining issues.

Respondent does not object to counsel's claimed hourly rate of \$240 per hour, but objects to a claimed rate of \$250 per hour for work performed in 2010. Petitioner explained that the rate of \$240 was charged beginning in 2008 and continued for a two year period. The increase of \$10, a 4.1% increase, is very reasonable and is allowed. Petitioner's claimed rates are accepted.

Respondent objected to four hours of billed time for an August 5, 2009 phone conference. Petitioner agreed that respondent was correct. Four hours, or \$960.00, is disallowed.

Respondent objected to \$3,567.50 for time spent by Gaye Dickey to establish a conservatorship on behalf of Elijah and for work related to establishing a trust.³ With regard to the conservatorship issues, petitioner notes "[h]aving the parents appointed in this case [as conservators] was a condition precedent to receiving an award." The undersigned agrees with petitioner regarding arrangement of the conservatorship and finds the amount claimed for allowable. See Ceballos ex rel.Ceballos v. Sec'y of the Dept. of Health & Human Servs., No. 99-97V, 2004 WL 784 (Fed. Cl. Spec. Mstr. Mar. 25, 2004).

With regard to the trust issue, respondent notes that the award was paid to petitioner as conservator of Elijah's property. Respondent further notes that she was not a party to any trust agreement and thus efforts to establish a trust "occurred outside of the proceedings on this petition." Petitioner rejoins that the "establishing of the trust to receive the funds in this case was absolutely necessary and, in fact, was the topic of status conferences in this case." P Response to Respondent's Response to Petitioner's Fees and Costs Application at 3. To clarify the involved issues, a status conference was held on January 28, 2011. The parties discussed how the issue of a trust arose in this case and its relationship to petitioner's compensation award. All involved recalled respondent's suggestion of a reversionary trust, which was rejected by petitioner. Thereafter, petitioner independently sought to have a trust set up in conjunction with the conservatorship.

As the trust was not a condition of payment of the Vaccine Act award, the undersigned finds the time and expenses not compensable; there is an insufficient nexus between the trust and the award and thus the time and costs spent are disallowed. See Ceballos. As noted, Ms. Dickey's bill does not delineate clearly the time spent between the conservatorship and the trust. However, petitioner's counsel, based upon his experience, explained the minimal additional time required to set up the trust. Based upon counsel's explanation, the undersigned finds it reasonable to disallow one third of Ms. Dickey's bill as time spent on the trust, subtracting \$1,189.00 from petitioner's requested costs. Further, petitioner's attorney billed for time related to the trust. The undersigned reviewed the attorney's bill and found references to time spent on the trust beginning in December 2009 through June 2010. P Fee Application, Tab C, pp. 16-17. The total amount is approximately 3.0 hours; however, some of the entries are block billed with other tasks. The undersigned finds it reasonable to deduct 1.5 hours from the attorney's time spent working on the trust at the attorney's \$240 per hour rate; therefore, \$360.00 is disallowed.

³ The trust and the conservatorship were both arranged by Gaye Dickey and the bill is ambiguous regarding what time was spent on the trust and what time was spent on the conservatorship. See P Fee Application, Tab D.

Petitioner agreed with respondent to reduce his costs by \$632.63 for certain questioned costs.⁴

Respondent objected to an increase by Dr. Harrell of \$50 per hour for his time. Dr. Harrell was compensated at a rate of \$300 per hour in the interim award, and now requests \$350 per hour. Petitioner responded with counsel listing a number of factors “driv[ing]” the rate increase. No information was provided by Dr. Harrell. It is well accepted that petitioner bears the burden of providing adequate documentation of not only his time, but also of the reasonableness of costs requested. Wasson v. Sec’y of the Dept. of Health & Human Servs., 24 Cl.Ct. 482, 484 n. 1 (1991). Petitioner simply failed to justify the increase in Dr. Harrell’s hourly rate. Counsel’s statements are not “adequate documentation.” Dr. Harrell’s time is reimbursed at \$300 per hour, reducing his entire bill by \$1,700.00.

Lastly, respondent questioned, but did not object to, the claim for \$1,500, as it appeared to be a duplicative request. Petitioner agreed. Petitioner states that “a check needs to be made payable to Laura Mersburgh in the amount of \$1,500 for her costs. That amount should then be deducted from the undersigned’s attorneys fees in this case.”

In compliance with General Order #9, petitioner filed an affidavit on August 4, 2010, stating petitioner incurred \$1,500.00 in costs. P Fee Application, Tab E.

The court hereby awards the petitioner’s attorney fees and costs in the total amount of \$70,561.18. **Specifically, petitioner is awarded a lump sum of \$69,061.18 in the form of a check payable jointly to petitioner and petitioner’s attorney; petitioner is also awarded a lump sum of 1,500.00 in the form of a check payable individually to petitioner.**

The Clerk of the Court is directed to enter judgment accordingly.⁵

IT IS SO ORDERED.

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

⁴ Petitioner’s response, filed October 14, 2010, only stated agreement that petitioner was to reduce \$349.92, whereas respondent’s Response stated objections to \$632.63. The undersigned’s office contacted petitioner’s counsel on January 24, 2011, and petitioner agreed to the reduction by the greater number.

⁵ 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).