

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-0435V
Filed: February 20, 2013

TO BE PUBLISHED¹

MILDRED LAWRENCE,

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

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Vaccine Act Attorneys' Fees.
Reasonable Basis for Claim.

DECISION AWARDING ATTORNEYS' FEES AND COSTS

HASTINGS, *Special Master.*

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), Mildred Lawrence ("Petitioner") seeks, pursuant to 42 U.S.C. § 300aa-15(e),² an award for attorneys' fees and litigation costs incurred in the course of Petitioner's attempt to obtain Program compensation.³ After careful consideration, I have determined to grant the request in part, for the reasons set forth below.

¹Because I have designated this document to be published, this document will be made available to the public unless petitioner files, within fourteen days, an objection to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." See 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

²The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2006). Hereinafter, for ease of citation, all § references will be to 42 U.S.C. (2006).

³ Petitioner filed an application on August 15, 2011, and a supplemental application on September 26, 2011.

I

PROCEDURAL BACKGROUND

The Petitioner, Mildred Lawrence, filed this petition on June 30, 2009, alleging that she was injured by a hepatitis B vaccination. (Pet. at 1.) Petitioner, at the time, was represented by Ronald Homer of the Conway, Homer, & Chin-Caplan (“CHC”) law firm. The case was originally assigned to Special Master Lord, and on March 17, 2010, in accordance with Special Master Lord’s Order dated February 12, 2010, Petitioner filed an amended petition and her affidavit. The amended petition included significantly more factual detail, but did not otherwise alter the first petition’s basic allegation that petitioner “suffered rheumatologic injuries” as a result of a hepatitis B vaccination. (Am. Pet. at *Introduction*.) On June 15, 2010, the Secretary of Health and Human Services (“Respondent”) filed a document opposing the petition for compensation. (Report, ECF No. 30.)

On August 15, 2011, Petitioner filed an application for interim attorneys’ fees and costs, seeking a total award of \$37,559.89. (Hereinafter “Pet. App.”) Respondent filed an “Opposition” to Petitioner’s application on September 8, 2011 (hereinafter “Opp.”), and Petitioner filed a reply document on September 26, 2011 (hereinafter “Reply”). Petitioner also filed a supplemental request on September 26, 2011, seeking another \$2,285.70 in fees; Respondent filed an Opposition to Petitioner’s supplemental request on October 13, 2011. (ECF Nos. 57, 58.)

On November 1, 2011, Petitioner moved to substitute Richard Gage for Ronald Homer as her counsel of record. (Motion, ECF No. 59.) The case was reassigned to my docket on September 10, 2012, when Special Master Lord was about to leave the Office of Special Masters. (Order, ECF No. 63.)

In the meantime, while the fees application was pending, Respondent filed a Motion for Summary Judgment on April 12, 2012. (Motion, ECF No. 61.) On April 26, 2012, a motion requesting a decision on the record was filed by Petitioner. (Motion, ECF No. 62.) In accord with that request, my final Decision, denying compensation, was filed on November 29, 2012. (Decision, ECF No. 64.) Judgment in accord with that Decision was entered on January 3, 2013. (ECF No. 65.)

II

LEGAL STANDARD FOR AWARDING ATTORNEYS’ FEES AND COSTS

Special masters have the authority to award “reasonable” attorneys’ fees and litigation costs in Vaccine Act cases. § 300aa-15(e)(1). This is true even when a petitioner is unsuccessful on the merits of the case, if the petition was filed in good faith and with a reasonable basis. (*Id.*) “The determination of the amount of reasonable attorneys’ fees and costs is within the special

master's discretion.” *Saxton v. Sec’y of HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993); see also *Shaw v. Sec’y of HHS*, 609 F.3d 1372, 1377 (Fed. Cir. 2010).

Further, as to all aspects of a claim for attorneys’ fees and costs, the burden is on the *petitioner* to demonstrate that the attorneys’ fees claimed are “reasonable.” *Sabella v. Sec’y of HHS*, 86 Fed. Cl. 201, at 215 (Fed. Cl. 2009); *Hensley v. Eckerhart*, 461 U.S. 424, at 437 (1983); *Rupert v. Sec’y of HHS*, 52 Fed.Cl. 684, at 686 (2002); *Wilcox v. Sec’y of HHS*, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). The petitioner’s burden of proof to demonstrate “reasonableness” applies equally to *costs* as well as attorneys’ fees. *Perreira v. Sec’y of HHS*, 27 Fed. Cl. 29, 34 (1992), *aff’d* 33 F.3d 1375 (Fed. Cir. 1994).

One test of the “reasonableness” of a fee or cost item is whether a hypothetical petitioner, who had to use his own resources to pay his attorney for Vaccine Act representation, would be willing to pay for such expenditure. *Riggins v. Sec’y of HHS*, No. 99-382V, 2009 WL 3319818, at *3 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff’d by unpublished order* (Fed. Cl. Dec. 10, 2009), *affirmed*, 40 Fed. Appx. 479 (Fed. Cir. 2011); *Sabella v. Sec’y of HHS*, No. 02-1627V, 2008 WL 4426040, at *28 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff’d in part and rev’d in part*, 86 Fed. Cl. 201 (2009). In this regard, the United States Court of Appeals for the Federal Circuit has noted that:

[i]n the private sector, ‘billing judgment’ is an important component in fee setting. It is no less important here. Hours that are not properly billed to one’s *client* also are not properly billed to one’s *adversary* pursuant to statutory authority.

Saxton, 3 F.3d at 1521 (emphasis in original), quoting *Hensley*, 461 U.S. at 433-34. Therefore, in assessing the number of hours reasonably expended by an attorney, 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; see also *Riggins*, 2009 WL 3319818, at *4.

III

SOME OF RESPONDENT’S ARGUMENTS HAVE BECOME MOOT

When Petitioner filed her initial application and supplement application for fees and costs, the petition for compensation was still pending. Therefore, the application was for “interim fees.” (See *Avera v. HHS*, 515 F. 3d 1343, 1352 (2008).) However, since then, as noted above, the petition has been dismissed and judgment has been entered on that dismissal. Therefore, parts II-A and II-B of Respondent’s argument against the application, contained at pp. 6-12 of Respondent’s Opposition, have become moot.

Two of Respondent’s arguments remain for consideration. First, Respondent argues that Petitioner has failed to demonstrate that her petition had a “reasonable basis.” (Opp. at 13-15.)

Second, Respondent argues that the amount claimed is excessive in certain aspects. (Opp. at 15-20.)

IV

“REASONABLE BASIS” ISSUE

I have carefully considered Respondent’s argument concerning “reasonable basis” (Opp. at 14-17), but I did not find it to be persuasive.

After reviewing the record, I conclude that Petitioner *did* have a reasonable basis for *filing* a claim, and for *pursuing* it to the point at which she abandoned the claim. Petitioner was in fact able to obtain the supporting opinion of a board-certified medical doctor, Dr. Paul J. Utz, of Stanford University. There is also additional circumstantial evidence supporting the existence of a reasonable basis, as detailed in Petitioner’s Reply at page 15. For example, Petitioner did experience a number of symptoms very soon after the vaccination in question.

V

AMOUNT OF THE AWARD

A. Initial application

Respondent challenges the amounts claimed in Petitioner’s initial application in several respects.

First, Respondent asserts that the *overall* number of hours at issue here, billed by the CCH firm’s attorneys and paralegals, was generally high due to use of multiple counsel and paralegals. (Opp. at 17.) Studying the file, however, I do not perceive an untoward number of hours billed in this case.

Respondent also points *specifically* to 7.6 hours and 2.3 hours that were billed between March 8 and June 1, 2011. (Opp. at 18.) However, it appears to me that the CCH law firm after March 8 reasonably took time to study the case to see if it remained viable, and the hours in question were part of that effort. I find those hours to be reasonable under all the circumstances.

In this regard, I am aware that in her Order issued on May 4, 2011, Special Master Lord stated that “there is a serious question at this stage as to whether a reasonable basis existed *to pursue* this case.” (Emphasis added.) It appears to me, however, that at that time, the CCH law firm continued its evaluation of the case, took Special Master Lord’s comments into account, and soon elected to *no longer pursue* the case.⁴ In my view, Petitioner’s attorneys reasonably

⁴ As noted above, in November 2011, the CCH firm left the case and was replaced by attorney Richard Gage.

pursued the case until such time as the case no longer seemed viable, and then chose to no longer pursue it. Petitioner's attorneys acted reasonably in this regard.

B. Supplemental application

Respondent also challenged the supplemental application, in an Opposition filed on October 13, 2011. I find some merit in that opposition, and I hereby reduce the supplemental application by \$500.

VI

CONCLUSION

For the reasons set forth above, I award Petitioner \$37,559.89 in fees and costs for her original application, plus \$1, 785.70 for her supplemental application.⁵ The total awarded is \$39,345.59. The award shall be made in the form of a check payable jointly to Petitioner and Petitioner's former counsel, Ronald Homer.

/s/ George L. Hastings, Jr.
George L. Hastings, Jr.
Special Master

⁵ I note that Petitioner may file another application seeking fees for the work performed by her subsequent attorney, Richard Gage, after he took over the case.