

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-322V

Filed: March 27, 2012

For Publication

MARINA MELNIKOVA, on behalf of *
PARAMON ALEXI YEVSTIGNEYEV, *
a minor, *

Petitioner, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

Ronald C. Homer, Boston, MA, for petitioner.
Linda S. Renzi, Washington, DC, for respondent.

Attorneys' Fees & Costs Decision;
Reasonable Hours Expended;
Guardianship Costs

MILLMAN, Special Master

DECISION AWARDING ATTORNEYS' FEES AND COSTS¹

On May 19, 2009, petitioner filed a petition under the National Childhood Vaccine Injury Act ("Vaccine Act" or "the Act"), 42 U.S.C. § 300aa-10-34, alleging that her son Paramon suffered from a seizure disorder after receiving Measles-Mumps-Rubella ("MMR"), pneumococcal conjugate ("PCV"), and varicella vaccines. The parties contacted the court on July 25, 2011, indicating that they reached a tentative settlement in the case. The parties

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to 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.

subsequently filed a stipulation, and the undersigned issued a Decision Awarding Damages on August 15, 2011.

On February 29, 2012, petitioner filed Petitioner's Application for Attorneys' Fees and Costs ("Fee App."), requesting \$19,476.70 in attorney's fees, \$4,729.20 in attorneys' costs, and \$109.98 in petitioner's costs. On March 19, 2012, respondent filed a Response to Petitioner's Application for Attorneys' Fees and Costs ("Resp."). Because respondent expressed only a limited objection to the costs billed for obtaining a guardianship, the undersigned stated her position on guardianship costs and asked petitioner to refrain from filing a reply. The fees motion is now ripe for decision.

I. Legal Standard for Attorneys' Fees and Costs

The Vaccine Act permits an award of "reasonable attorneys' fees" and "other costs." 42 U.S.C. § 300aa-15(e)(1). A petitioner need not prevail on entitlement to receive a fee award as long as petitioner brought the claim in "good faith" and with a "reasonable basis" to proceed. *Id.* Good faith and reasonable basis are presumed when a petitioner prevails as petitioner did in the instant case. The special master has "wide discretion in determining the reasonableness" of attorneys' fees and costs. See *Perreira v. Sec'y of HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994); see also *Saxton ex rel. Saxton v. Sec'y of HHS*, 3 F.3d 1517, 1519 (Fed. Cir. 1993) ("Vaccine program special masters are also entitled to use their prior experience in reviewing fee applications").

The Federal Circuit has approved the lodestar approach to determine "reasonable attorneys' fees" and costs under the Act. *Avera v. Sec'y of HHS*, 515 F.3d 1343, 1347 (Fed. Cir. 2008). The lodestar approach involves a two-step process. First, a court determines an "initial estimate . . . by 'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" *Id.* at 1347-48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). Secondly, the court may make an upward or downward departure from the initial calculation of the fee award based on specific findings. *Id.* at 1348.

II. Analysis

A. Hourly Rates

A reasonable hourly rate is "the prevailing market rate defined as the rate prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* (citation and quotation omitted). In *Avera*, the Federal Circuit found that in Vaccine Act cases, a court should use the forum rate, i.e., the DC rate, in determining an award of attorneys' fees. *Id.* at 1349. At the same time, the court adopted the *Davis County* exception to prevent windfalls to attorneys who work in less expensive legal markets. *Id.* (citing *Davis County Solid Waste Mgmt. & Energy Recovery Spec. Serv. Dist. v. U.S. Env'tl. Prot. Agency*, 169 F.3d 755 (D.C. Cir. 1999)). In cases where the bulk of the work is completed outside the District of Columbia, and there is a "very significant difference" between the forum hourly rate and the local hourly rate, the court should calculate an award based on local hourly rates. *Id.* (finding the market rate in Washington, DC to be significantly higher than the market rate in Cheyenne, Wyoming).

Respondent does not object to the hourly rates requested by petitioner's counsel. See generally Resp. The undersigned reviewed the fee application and finds the hourly rates requested to be reasonable and consistent with the rates at which these attorneys and staff have been compensated in past cases. See Calise v. Sec'y of HHS, No. 08-865V, 2011 WL 2444810, at *6 (Fed. Cl. Spec. Mstr. June 13, 2011); Soto v. Sec'y of HHS, No. 09-897V, 2011 WL 2269423, at *5 (Fed. Cl. Spec. Mstr. June 7, 2011).

B. Hours Expended

The lodestar approach requires that the reasonable hourly rate be multiplied by the number of hours "reasonably expended on the litigation." Avera, 515 F.3d at 1347-48 (quotation and citation omitted). Counsel must submit fee requests that include contemporaneous and specific billing entries, indicating the task performed, the number of hours expended on the task, and who performed the task. See Savin ex rel. Savin v. Sec'y of HHS, 85 Fed. Cl. 313, 315-18 (2008). Counsel must not include in their fee request hours that are "excessive, redundant, or otherwise unnecessary." Saxton, 3 F.3d at 1521 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). It is "well within the special master's discretion to reduce the hours to a number that, in [her] experience and judgment, [is] reasonable for the work done." Id. Furthermore, the special master may reduce hours sua sponte, apart from objections raised by respondent and without providing petitioner notice and opportunity to respond. See Sabella v. Sec'y of HHS, 86 Fed. Cl. 201, 208-09 (2009); see also Savin, 85 Fed. Cl. at 315-19 (quoting Duncan v Sec'y of HHS, No. 99-455V, 2008 WL 4743493, at *1 (Fed. Cl. 2008)) (explaining that "the Special Master has an independent responsibility to satisfy himself that the fee award is appropriate and not limited to endorsing or rejecting respondent's critique").

Respondent does not object to the hours expended by petitioner's counsel pursuing the case. See generally Resp. After a review of petitioner's fee application, the undersigned considers most of the hours included on the billing entry to be reasonable. A few entries, however, are redundant and unreasonable.

In the undersigned's experience reviewing billing entries submitted by petitioner's counsel's firm, the firm has made a habit of assigning numerous attorneys and paralegals to work on a case. In the instant case, a total of seven attorneys² and an unknown number of paralegals and law clerks billed for their time. This practice inevitably leads to billing entries for internal firm communications such as case meetings, reviewing the case file, and communicating about the case via case memos. As the undersigned has stated before, while attorneys may find it helpful to collaborate with their colleagues, it is not reasonable to bill for each attorney's time when he or she discusses the case or reviews the case to learn of new developments. See e.g., Soto v. Sec'y of HHS, No. 09-897V, 2011 WL 2269423, at *6 (Fed. Cl. Spec. Mstr. June 7, 2011). These hours are "excessive, redundant, or otherwise unnecessary." Saxton, 3 F.3d at 1521 (quoting Hensley, 461 U.S. at 434).

² Three associate attorneys, Ms. Fashano, Ms. Ciampolillo, and Mr. Pepper, performed a substantial amount of the work while two partners, Ms. Chin-Caplan and Mr. Homer, primarily supervised their work. Ms. Daniels's and Mr. Conway's billing entries were negligible.

On July 21, 2010, Ms. Ciampolillo and a law clerk had a case meeting regarding how to proceed with the petition and an upcoming deadline. Fee App., Tab A, at 7. Ms. Ciampolillo then had another case meeting with Mr. Homer on the same day regarding an upcoming deadline. These hours are redundant. Accordingly, the undersigned reduces the award by 0.2 hours measured by the law clerk's hourly rate, or **\$26.80**.

On July 21, 2010, two paralegals had a case meeting about "completing stage 2." Fee App., Tab A, at 7. Both billed for their time. It is redundant to have two paralegals work on a case and then bill for their time discussing the case. The undersigned reduces the award by 0.1 hours at the paralegal's rate, or **\$10.50**.

On August 17, 2010, Ms. Ciampolillo held a case meeting with a paralegal and a law clerk to discuss changes to petitioner's affidavit. Fee App., Tab A, at 9. Ms. Ciampolillo billed 0.4 hours, and the law clerk billed 0.4 hours. This is in addition to the 1.5 hours billed by the law clerk to draft the affidavit, 0.3 hours billed by the law clerk to revise the affidavit, the 1.7 hours billed by Ms. Ciampolillo to edit the affidavit, and the 0.2 hours billed by Mr. Homer to perform a final edit. Billing for a case meeting to discuss the edits to the affidavit for which the law clerk and Ms. Ciampolillo already billed is unreasonable. The undersigned reduces the award by 0.4 hours at the law clerk's hourly rate and 0.4 hours at Ms. Ciampolillo's rate, or **\$133.60**.

On September 7, 2010, Ms. Ciampolillo and Mr. Homer both billed hours for a status case meeting regarding the deadline for respondent's Rule 4(c) Report. Fee App., Tab A, at 10. On September 8, 2010, Ms. Fashano and Mr. Homer had another case meeting regarding the deadline for the Rule 4(c) Report. This is in addition to the 0.7 hours billed by Ms. Fashano to draft and review emails to and from Ms. Renzi, respondent's counsel, 0.2 hours billed by Mr. Homer to review the same emails, and another 0.1 hours billed by Ms. Fashano to write a case memo to Mr. Homer regarding the deadlines. The entries for the case meeting to discuss the correspondence are redundant. The undersigned reduces the award by 0.2 hours at Mr. Homer's rate and 0.2 hours at Ms. Fashano's rate, or **\$101.60**.

The remaining billed hours appear to be reasonable, and the undersigned will reimburse petitioner's counsel for this time.

C. Petitioner's Costs

Respondent asserts a limited objection to petitioner's fee application and contends that petitioner should not be reimbursed for costs incurred to obtain a guardianship. Resp. 2. Respondent does not consider costs associated with establishing a guardianship to be costs "incurred in any proceeding on such petition" as required by the statute. Resp 2-3 (citing § 300aa-15(e)(1)). In addition, respondent cites a Court of Federal Claims's decision in which Judge Futey found that "the state court [guardianship] proceedings were not part of the prosecution of the vaccine petition" and thus, costs incurred to establish the guardianship were not compensable. Mol v. Sec'y of HHS, 50 Fed. Cl. 588, 591 (2001) (citing Siegfried v. Sec'y of HHS, 19 Cl. Ct. 323 (1990); Lemon v. Sec'y of HHS, 19 Cl. Ct. 621 (1990)). Respondent notes that decisions from the Court of Federal Claims are not binding on special masters, except

in the same case, and that some special masters have reached the opposite conclusion. Resp. 4.

Section 300aa-15(e)(1) provides that a special master shall award “reasonable attorneys’ fees” and “other costs, incurred in any proceeding on such petition.” In more recent cases, special masters have interpreted the Vaccine Act’s fee provision to include reimbursement for costs incurred obtaining a guardianship in state court when establishment of a guardianship is a condition of settlement and incorporated as part of a damages decision. See Lindsey ex rel. Lindsey v. Sec’y of HHS, 08-258V, 2011 WL 6046605, at *2 (Fed. Cl. Spec. Mstr. Nov. 15, 2011) (awarding costs for guardianship when it is a condition of receiving the stipulated award and explaining that special masters have used a “but for” test to analyze reimbursement of costs); Gruber ex rel. Gruber v. Sec’y of HHS, No. 00-749V, 2009 WL 2135739 (Fed. Cl. Spec. Mstr. June 24, 2009), *vacated on other grounds*, 91 Fed. Cl. 773 (2010); Ceballos ex rel. Ceballos v. Sec’y of HHS, No. 99-97V, 2004 WL 784910, at *18-23 (Fed. Cl. Spec. Mstr. Mar. 25, 2004) (finding guardianship costs reimbursable generally but not in that case because a guardianship was not required by or mentioned in the court’s decision).

The undersigned agrees with the more recent decisions issued by special masters on the matter of guardianship: when the parties’ stipulation requires establishment of a guardianship in state court as a condition of receipt of the damages award, the costs of establishing the guardianship are compensable under the Vaccine Act. See also Haber ex rel. Haber v. Sec’y of HHS, No. 09-458V, 2011 WL 839111 (Fed. Cl. Spec. Mstr. Feb. 14, 2011); Cansler ex rel. Cansler v. Sec’y of HHS, No. 09-596V, 2011 WL 597791, at *1-3 (Fed. Cl. Spec. Mstr. Feb. 2, 2011) (explaining that respondent required the establishment of a guardianship in the stipulation, the court then adopted the provision of the stipulation in the damages award, and the issuance of the award placed the issue of guardianship within the purview of a proceeding on a vaccine petition).

As other special masters have acknowledged, respondent’s policy of including a guardianship or conservatorship provision in a settlement agreement is a wise one. See Gruber, 2009 WL 2135739, at *10 n.17; Ceballos, 2004 WL 784910, at *22 n.30. Guardianships protect minors who are injured by vaccines and found entitled to compensation from potential misuse of the funds awarded for their care and benefit. Requiring the establishment of a guardianship and then forcing parents who act as petitioners or their attorneys to bear the costs personally, however, undermines that policy and introduces an element of unfairness.

Under the stipulation memorializing the parties’ agreement, petitioner was required to become authorized to serve as a guardian of Paramon’s estate to receive payment pursuant to the stipulation. Stip. ¶ 13. In the Decision Awarding Damages issued on August 15, 2011, the undersigned adopted the parties’ stipulation and awarded damages according to the stipulation’s terms, including the provision requiring the establishment of a guardianship. Thus, the costs incurred to establish the guardianship in state court are within a “proceeding” on the petition and reimbursable under section 300aa-15(e)(1).

Petitioner’s costs, including costs incurred to obtain a guardianship, must be “reasonable.” See Pereira, 27 Fed. Cl. at 34 (“The conjunction ‘and’ conjoins both ‘attorneys’ fees’ and ‘other costs’ and the word ‘reasonable’ necessarily modifies both. Not only must any

request for reimbursement of attorneys' fees be reasonable, so also must any request for reimbursement of costs.”). Petitioner requests reimbursement for \$4,285.50 in costs for work performed by petitioner’s guardianship attorney. See Fee App., Tab A, at 19 & Tab B, at 10. This amount is reasonable and consistent with awards for guardianship costs in past cases. See e.g., Amar ex rel. Amar v. Sec’y of HHS, No. 06–221V, 2011 WL 6077558, at *24 (Fed. Cl. Spec. Mstr. Nov. 10, 2011) (awarding \$3,520.50 for guardianship costs); Doe 21 ex rel. Doe v. Sec’y of HHS, No. 02–411V, 2011 WL 6941671, at *10 (Fed. Cl. Spec. Mstr. Oct. 26, 2011) (awarding \$3,590.00 for guardianship costs); Finet ex rel. Finet v. Sec’y of HHS, No. 03–348V, 2011 WL 597792, at *3 (Fed. Cl. Spec. Mstr. Jan. 31, 2011) (awarding \$7,440.00 for guardianship costs).

III. Conclusion

Using the requested hourly rates and incorporating the reductions in hours above, the undersigned awards:

- a. \$23,933.40**, representing reimbursement for attorneys’ fees and costs. The award shall be in the form of a check made payable jointly to petitioner and Conway, Homer & Chin-Caplan, P.C.; and
- b. \$109.98**, representing reimbursement for petitioner’s costs. The award shall be in the form of a check made payable to petitioner.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.³

IT IS SO ORDERED.

Dated: March 27, 2012

/s/ Laura D. Millman
Laura D. Millman
Special Master

³ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party’s filing a notice renouncing the right to seek review.