

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS

No. 99-537V

Filed: April 22, 2008

Not for Publication

BRUCE THOMAS SAVIN, a minor, by his *
mother and natural guardian, LAURA SAVIN *
*
Petitioner, * Attorney Fees;
* Costs; Untimely Filing;
* Compensable Entries;
v. * Contemporaneous Record
* Requirements; Expert Fees
SECRETARY OF THE DEPARTMENT * and Nature of Work
OF HEALTH AND HUMAN SERVICES, * Performed
*
Respondent. *

DECISION AWARDING ATTORNEY FEES AND COSTS¹

VOWELL, Special Master:

On July 2, 2007, petitioner requested that I grant judgment on the existing record, as he was unable to “find an expert to support causation in his case.” Petitioner’s Motion for Judgment on the Record. I granted petitioner’s request and on July 3, 2007, I issued a decision denying compensation. Judgment was entered on August 13, 2007, and petitioner filed an election to file a civil action on August 14, 2007. Pursuant to Vaccine Rule 13, any petition for attorney fees and costs pursuant to 42 U.S.C. § 300aa-15(e) was due on February 11, 2008.

On February 18, 2008, petitioner filed an untimely motion for enlargement of time to file for attorney fees and costs, citing problems in January, 2008, with counsel’s computer system which disrupted counsel’s “ability to complete fee applications as well as accurately track calendar events.” Petitioner’s Motion for Enlargement of Time to

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims's website, in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). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

File For Attorney's Fees and Costs.² I have serious concerns about the frequency of untimely motions and filings by petitioner's counsel and the validity of the "computer problems" excuse for this particular untimely filing. However, respondent did not object to petitioner's motion for enlargement and on February 19, 2008, I granted the requested extension. The motion for attorney fees and costs was filed on February 20, 2008. On March 5, 2008, respondent filed an opposition to certain matters contained in the fees and costs application, but did not object to the untimely application itself. Petitioner's Response to Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs ["Pet. Response"] was filed on March 13, 2008.

I. Standards to Be Applied.

The Vaccine Act permits a special master to award compensation to cover reasonable attorney fees and costs if the special master determines that the petition was brought in good faith and that there was a reasonable basis for the claim.³ 42 U.S.C. § 30011-15(e)(1). When a petitioner does not prevail on the merits, the award of fees and costs is discretionary, although such awards are commonly made. *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993) ("If the petition for compensation is denied, the special master 'may' award reasonable fees and costs if the petition was brought in good faith and upon a reasonable basis; the statute clearly gives [a special master] discretion over whether to make such an award.").

This court applies the lodestar method to any request for attorney's fees and costs. See *Blanchard v. Bergerson*, 489 U.S. 87, 94 (1989). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate" (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). In determining the number of hours reasonably expended, a court must exclude hours that are "excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

² I note that on February 8, 2008, in another of petitioner's counsel's cases, I ordered an untimely petition for fees and costs struck from the docket, directing that petitioner file a motion for enlargement of time in that case. I also note that the motion for enlargement subsequently filed in that case made no mention of computer database problems although the two applications were prepared in the same general time frame. By my cursory review of fees applications filed by this firm over the past year in cases assigned to me, this is one of six untimely fees and costs applications.

³ Respondent has not directly raised the issue of whether maintaining this petition for nearly seven years without filing any medical records and never filing any evidence linking petitioner's vaccinations to his medical problems constitutes a reasonable basis to maintain the claim. Were it not for Dr. Bellanti's decision to conduct additional testing and personally evaluate petitioner before declining to opine in favor of vaccine causation, I would, *sua sponte*, require petitioner to demonstrate that he had a reasonable basis upon which to continue his case. See *Hamrick v. Sec'y, HHS*, No. 99-683V, 2007 U.S. Claims Lexis 415 (Fed. Cl. Spec. Mstr. Nov. 19, 2007) (distinguishing between reasonable basis for filing a claim and a reasonable basis for continuing to pursue it).

Ordinarily, an attorney should not bill for attorney time for tasks that a paralegal should perform, nor should he bill for paralegal time when the tasks involved are of a secretarial nature. See, e.g., *Plott v. Sec'y, HHS*, No. 92-0633V (1997 WL 842543) (Fed. Cir. 1997).

Special masters may rely on their experience with the Vaccine Act in order to determine if the hours expended are reasonable. *Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 486 (1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993). Under the Guidelines for Practice under the National Childhood Vaccine Injury Compensation Program ["Guidelines for Practice"], petitioners' counsel are instructed to maintain contemporaneous time records⁴ that indicate the date and character of the service performed, the number of hours, or fractions of hours expended, and the identity of the person performing them. See Guidelines for Practice, Section XIV.A.3 (emphasis added). These guidelines encourage separate, rather than "lumped," entries in order to better assess the reasonableness of a fee request.

II. Review of the Application for Fees and Costs.

Although I am not required to conduct a line by line analysis of the billing records submitted, I have elected to do so in this case. Several problem areas are apparent.

A. Time Billed for Preparation of the Fees and Costs Application.

The application for attorney fees and costs was initially prepared on August 22, 2007, when 2.5 hours were billed for review of accounts, invoices, and "prep of fees." Based on my experience, this is the entry used by this firm to reflect preparation of the fees and costs petition. Two later entries, on February 16 and February 18, 2008, also bill for matters related to the fees and costs application. On February 16, 2008, 1.5 hours were billed for preparation of a motion for enlargement, and on February 18, 2008, 2.0 hours were billed for completion of the fees petition and filing the motion for enlargement. This reflects 6.0 hours to prepare a relatively uncomplicated fees and costs petition and file a motion for enlargement that would have been unnecessary had

⁴ See *Ceballos v. Sec'y HHS*, 99-97V, 2004 U.S. Claims LEXIS 77 at *36-43 (Fed. Cl. Spec. Mstrs. March 25, 2004) (where the attorney did not keep specific time records and, instead, estimated the hours expended, the court reduced the hours awarded to a reasonable rate in comparison to other Vaccine Program cases.) See also *Naporano Iron & Metal Co.*, 825 F.2d 403 at (Fed. Cir. 1987) (With regard to the EAJA and contemporaneous time records for determining reasonableness of attorney's fees, "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. *St. Paul Fire and Marine Insurance*, 4 Cl. Ct. At 771. Slip op. At 7.' We agree that under EAJA contemporaneous records of attorney's time and usual billing rates, as well [**4] as a breakdown of expenses, are necessary in order to determine the reasonableness of the charges."

petitioner filed the petition in a timely manner.⁵

Concluding that petitioner's counsel should not be compensated for matters occasioned by his delay in making a timely filing and that the 6.0 hours of attorney time billed is not a reasonable amount for an uncomplicated fees and costs application, I reduce the amount to 4.0 hours at the \$215.00 per hour rate.

B. Other Fees Issues.

Other problems noted in the application for fees and costs include:

(1) Two entries, one on August 8, 1999, for 2.0 hours and one on February 17, 2006, for 3.0 hours, reflect work performed "over the last two weeks." These entries do not conform to the Guidelines for Practice, which require contemporaneous time records.

The February 17, 2006 entry reflects 3.0 hours of work reviewing paper files and comparing them with digital records, supervising the assembly of records, and preparing summaries of records. With the exception of preparing summaries of records, which could reasonably be considered a matter requiring an attorney's attention, the tasks are ones that could (and should) be performed by a paralegal or secretary.

Based on the nature of the work claimed and the time frame in which it was performed, I reduce the August 8, 1999 entry to 1.0 hour. Based on the nature of the work performed and the failure to make contemporaneous entries with regard to the February 17, 2006 entry, I reduce the attorney time to be compensated to 1.0 hour and compensate 1.0 additional hour at the paralegal rate of \$165.00 per hour.

⁵ I recognize that some petitioners are tardy in providing information to their attorneys on the costs they have personally incurred in Vaccine Act cases, and that their tardiness may delay the attorneys in filing the applications for fees and costs. In this case, however, petitioner incurred no costs, and any tardiness or recalcitrance on his part could not have been the basis for the untimely filing. Why counsel chose to hold the application, rather than filing it in a timely manner back in August, 2007, is incomprehensible to me. Waiting until the end of the generous period allotted by the Vaccine Rules for filing fees applications, coupled with the firm's "computer problems," risked denial of the entire application as untimely. Petitioner's counsel has been placed on notice of the risks associated with an untimely application for fees and costs. *Turner v. Sec'y, HHS*, 99-544V, 2007 U.S. Claims LEXIS 394, at *14, n. 6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) ("Although petitioner's counsel's request was filed nearly one month after the expiration of the afforded 180-day period under the Vaccine Rules for the filing of a petition for attorneys' fees and costs, respondent made no objection to the request on the ground of untimeliness.... The Vaccine Rules, however, limit the time for filing '[a]ny request' for attorneys' fees and costs to '180 days' following the entry of judgment or an order concluding proceedings. Vaccine Rule 13. Accordingly, petitioner's counsel is on notice that, notwithstanding the generous enlargements of time afforded in Program practice for the filing of attorneys' fee applications, late filed fee petitions are subject to challenge on the ground of untimeliness.")

(2) The entry on November 9, 2001, bills 0.50 hours for reviewing a notice of appearance and exhibits filed. As no exhibits were filed in petitioner's case until May 19, 2006,⁶ and the time required to review a notice of appearance involving a change in opposing counsel is minimal, I reduce the amount of time for which compensation will be awarded to 0.20 hours.

(3) An entry on June 25, 2004, bills 0.05 hours for a meeting regarding literature and recent decisions. This entry should be more appropriately billed to petitioner's counsel's participation in the hepatitis B omnibus proceeding. I note that other special masters have denied compensation for a similar amount of time in other hepatitis B cases. *Hamrick* at *4, n.2.

(4) An entry on February 2, 2006, indicates 0.10 billed by petitioner's counsel to determine who paid the filing fee in petitioner's case. This is a matter that should be handled by administrative staff and does not require any attorney's review or expertise. No compensation is awarded for this entry.

(5) Two entries on July 25, 2006, appear to duplicate one another in that both involve an email from another attorney indicating that he could not accept the transfer of this case. In view of the nature of the work described, I award the higher of the two amounts of time claimed, 0.40 hours.

(6) Similarly, three of the five entries on March 22, 2007, appear to contain substantial overlap in the matters listed. The first problematic entry billed for a meeting with petitioner's expert and "Work on pleadings to file today - report, SOL issue, etc." For these matters and "numerous" telephone calls, 5.0 hours are billed. Two of the subsequent entries reflect the preparation and filing of a motion for extension of time (0.20 hours) and for a meeting with petitioner's expert (1.0 hours). As the only pleading filed on March 22, 2007, was the motion for extension of time, and the statute of limitations issue raised by respondent concerned only two of the four vaccines alleged to be causal, this issue was unlikely to have consumed much time. However lengthy the telephone conversations were, it is unlikely that counsel spent five hours on the telephone with petitioner and Dr. Greenspan.⁷ The 6.2 hours claimed, totaling the three overlapping entries, are excessive. I will award the 0.2 hours for filing the motion for extension of time, the 1.0 claimed for the meeting with Dr. Bellanti, and 2.0 hours for telephone calls and other matters.

C. Dr. Greenspan's Bill.

⁶ The May 19, 2006 filing contains 22 exhibits, at least 16 of which were not obtained until on or after March 5, 2006.

⁷ Doctor Greenspan was never identified as an expert in this case;. See Motion for Enlargement of Time, dated January 19, 2007, identifying the expert as Dr. Bellanti. The issue of the nature of Dr. Greenspan's services in this case and the compensation requested are addressed, *infra*.

Respondent's primary issues with the fees and costs application concern the role played in this case by Dr. Mark Greenspan. Respondent contends that the 19.5 hours that Dr. Greenspan billed are insufficiently justified, and that the hourly rate requested is unreasonable. There is some merit to respondent's position.

Doctor Greenspan's bill is submitted on letterhead indicating that he is a practicing attorney. However, the invoice submitted reflects the preparation of a "preliminary rapid review of records," followed by assembly of a chronologic medical record, and the preparation of an "opinion letter." The synopsis of fees and costs provides a third characterization of Dr. Greenspan's efforts as a "consultation re: literature." The total hours billed are 19.5, with 9.0 hours billed to prepare the "opinion letter." The requested hourly rate is \$350.00 per hour, the same rate billed by Dr. Bellanti, a board certified immunologist.⁸ See *Simon v. Sec'y, HHS*, No. 05-941V, 2008 U.S. Claims LEXIS 67, at *24-25 (Fed. Cl. Spec. Mstr. Feb. 21, 2008) (consultant services are not customarily billed at the same rate as medical expert review).

The invoice submitted does not clearly state that Dr. Greenspan, who is both a medical doctor and an attorney, performed services as a physician in this case. Petitioner indicates that Dr. Greenspan was serving as a "legal/medical" consultant. Pet. Response at 2. Given the experience of petitioner's counsel in this case, it would be unreasonable for him to bill the Vaccine Program for outside legal consultation under any but the most unusual of circumstances. Petitioner neither explains why his attorney, with some twenty years of experience in the Vaccine program, requires a legal consultant nor how Dr. Greenspan's medical expertise as a surgeon was reasonable in a case involving hepatitis B vaccine and immunological and seizure disorders.

Although counsel does not adequately explain the reasons for seeking Dr. Greenspan's assistance in this case, the facts and circumstances of this case suggest both a reason for the "expedited" record review and for the opinion letter. I thus conclude that some of the time billed by Dr. Greenspan was reasonable and should be compensated.

Doctor Bellanti was "retained" as an expert in August 2006,⁹ according to his invoice and other filings, but getting his report was extraordinarily difficult. As set forth in my order of March 27, 2007, I granted repeated enlargements of time in order to obtain Dr. Bellanti's report. It now appears from his bill that during much of the time between August 2006 and March 2007, Dr. Bellanti was doing little to meet the court's deadlines. Under those circumstances, petitioner's counsel may have entertained

⁸ Respondent has not objected to Dr. Bellanti's hourly rate.

⁹ In a letter to the court filed pursuant to my order to petitioner to explain why I should grant another extension of his deadline to file an expert report, Dr. Bellanti indicated that he had not received any money for his services, but had begun to work on the case on August 29, 2006, when he met with petitioner's counsel and reviewed records. See Petitioner's Exhibit 30.

doubts about whether Dr. Bellanti would ever issue an expert opinion. Although I agree with respondent's position that Dr. Greenspan does not appear to have the level of qualification in immunology that Dr. Bellanti has, an opinion by a medical doctor favorable to causation would have been necessary to avoid a dismissal for failure to prosecute, in the event Dr. Bellanti did not file his.

Petitioner's Response provides support for Dr. Greenspan's charges of \$350.00 per hour in medical malpractice litigation. Certainly in a case involving his former medical speciality, surgery, Dr. Greenspan's unique medical-legal qualifications would warrant that level of compensation. In this case, given counsel's level of expertise, Dr. Greenspan's legal qualifications were largely irrelevant and his medical qualifications were only minimally relevant to the issues in the case. If he indeed performed a literature search as indicated in the summary entry assigned to his bill, I note that my colleagues have compensated such searches at the rate of \$250.00 per hour. *Ray v. Sec'y HHS*, No. 04-184V, 2006 U.S. Claims LEXIS 97, at *38-42 (Fed. Cl. Spec. Mstr. March 30, 2006).

As no work-product was filed in this case indicating the nature of the opinion letter, it is difficult to determine what Dr. Greenspan was doing as compared to what Dr. Bellanti was doing. Given the posture of this case, the nature of the medical records filed and the diagnosis of an immune disorder and partial seizure disorder, I conclude that compensating two doctors for a total of 23.2 hours for medical opinions is unreasonable.

As respondent has not objected to Dr. Bellanti's hours or rate, I will authorize full compensation for Dr. Bellanti's services. I will compensate Dr. Greenspan's work on the "opinion letter" at the rate of \$275.00 per hour for 6.0 hours. This is a higher level of compensation than many "world class" experts who provide actual testimony in the Vaccine Program have recently received.

The timing of the records review performed by Dr. Greenspan, and the urgency placed on it by petitioner's counsel's request for a "rapid review," militate in favor of compensating Dr. Greenspan for the hours spent in reviewing records and preparing a chronological summary of care. However, the 10.5 hours spent in assembling a chronologic record of care do not warrant compensation at the rate charged of \$350 per hour. Tasks of assembly and summarization of medical records are frequently performed by a paralegal or nurse consultant, and compensating for this task at the requested rate is unreasonable¹⁰. However, given the volume of the medical records in this case, the hours are reasonable. I will compensate the 10.5 hours at a rate of \$165.00 per hour.

¹⁰ See *Barnes v. Sec'y HHS*, 90-1101V, 1999 U.S. Claims LEXIS 241 at *18-19 (Fed. Cl. Spec. Mstr. Sep. 19, 1999) (reducing attorney's fee rates to paralegal fee rates for hours where the work would reasonably be expected to be done by a paralegal.)

Petitioner requested a total of \$36,408.98, including an additional hour for preparing the Pet. Response. The requested amount represents no costs incurred by petitioner, \$12,213.98 for litigation costs incurred by petitioner's counsel, Clifford J. Shoemaker, and \$24,195.00 for attorney fees.

After reviewing the file, I find that this petition was brought in good faith and that there existed a reasonable basis for the claim. Therefore, an award for fees and costs is appropriate, pursuant to 42 U.S.C. § 300aa-15(b) and (e)(1).

However, the requested amounts will be adjusted by the court as indicated above to a more reasonable and appropriate measure. Accordingly, I hereby award the total of \$30,691.48¹¹. The payment shall be:

a lump sum of \$30,691.48 in the form of a check payable jointly to petitioner and petitioner's counsel for attorney fees and costs.

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.¹²

IT IS SO ORDERED.

s/ Denise K. Vowell
Denise K. Vowell
Special Master

¹¹ 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. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. See *generally, Beck v. Sec'y, HHS*, 924 F.2d 1029 (Fed. Cir. 1991).

¹² Entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review. See Vaccine Rule 11(a).