In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
No. 99-583V
Filed: July 30, 2008
FOR PUBLICATION

DONNOVAN LAMAR, a minor, by his mother and natural guardian, TYEKA LAMAR,	*	Attorney Fees and Costs; Good Faith in Filing; Reasonable Basis for Filing; Reasonable Basis for Maintaining Petition; Insufficiently Justified Costs; Expert Consultant; Duplicate Billing;
Petitioner,	*	
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Clifford Shoemaker, Esq., Shoemaker & Associates, Vienna, VA, for Petitioner.
Chrysovalantis Kefalas, U.S. Department of Justice, Washington DC, for Respondent.

DECISION AWARDING ATTORNEY FEES AND COSTS[1]

VOWELL, Special Master:

On August 4, 1999, Tyeka Lamar ["petitioner"] timely filed a petition under the National Vaccine Injury Compensation Act ["Vaccine Act" or "Program"], 42 U.S.C. § 300aa-10 *et seq.*[2] on behalf of her minor son, Donnovan Lamar ["Donnovan"], alleging that hepatitis B vaccines and "other vaccinations" he received caused him to develop unspecified "adverse reactions." Petition, ¶ 3. On the same date, petitioner filed a petition on behalf of another son, Desmond Lamar ["Desmond"] (No. 99-584V), alleging

[1] Petitioner is reminded that, pursuant to 42 U.S.C. §300aa-12(d)(4) and Vaccine Rule 18, she has 14 days to request redaction of material in this decision that "would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b)(2).

[2] Hereinafter, for ease of citation, all "§" references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. 300aa (2000 ed.).

virtually identical claims.[3] The petition was filed two days before the expiration of the eight year "look back" period established when the hepatitis B vaccine was added to the Vaccine Table.[4] On July 20, 2007, petitioner filed a motion for judgment on the record, stating that she was unable to find an expert to support causation. I dismissed the petition with prejudice on July 26, 2007. On September 12, 2007, petitioner elected to file a civil action.

On February 27, 2008, petitioner filed her application for fees and costs ["Fees & Costs App."], requesting $17,596.20. Respondent filed an opposition to the fees and costs application ["Res. Opp."] on March 12, 2008, arguing that this petition was filed and maintained without either good faith or a reasonable basis. Additionally, respondent challenged the award of any reimbursement to two consultants, Dr. Greenspan and Dr. Geier, and to the reimbursement of attorney fees associated with the attempt to transfer this case to another attorney.[5] On March 19, 2008, Petitioner's Reply to Respondent's Response to Petitioner's Motion for Attorney's Fees and Costs ["Pet. Reply"] was filed, which included additional documentation and argument. Petitioner filed excerpts from a transcript of oral argument in an unrelated case on April 3, 2008.[6] For the reasons stated herein, I reject the majority of respondent's challenges, but I do not authorize compensation for some of the fees and costs claimed.

---

[3] A Vaccine Act petition and the subsequent fees and costs application should stand on its own merits, without reference to another petition. However, as explained below, were I to consider these two fees and costs applications entirely without reference to one another, petitioner's fees and costs in this case would be would be significantly reduced.

[4] 62 FR 52724, Vol. 62, No. 196 (October 9, 1977) For purposes of evaluating this attorney fees and costs application, I will assume, without deciding, that the two year look back statute of limitations, applies to this case, rather than the three year statute of limitations found at § 300aa-16(a)(2), because two of Donnovan's hepatitis B vaccinations occurred prior to the addition of the hepatitis B vaccine to the Vaccine Injury Table (42 C.F.R. § 100.3) . *See* Petitioner's Exhibit ["Pet. Ex."] 1, pp. 1-2.

[5] Respondent's objection, in this case, to any fees charged by Dr. Geier is rejected, as the Fees & Costs App., n.1, clearly states that the fee for Dr. Geier's services in this case and in Donnovan's brother's case (No. 99-584V) were billed to his brother's case. See also Synopsis of Fees and Costs, Fees & Costs App. at 2 (showing an entry for "Consultation re Literature" for $500.00, followed several lines with a deduction of that $500.00 amount). As Dr. Geier's bill (included in the Fees & Costs App. at Ex. 4) indicated that he performed two hours of work on one case and two hours of work on the other, two hours should have been billed to each case, rather than four hours in case No. 99-584V and no hours in this one. Rather than requiring a resubmission of the fees and costs applications in both cases, I will resolve the issues pertaining to Dr. Geier's fees in my fees decision in case No. 99-584V.

[6] Excerpts from transcripts of oral argument in an unrelated case are not particularly illuminating on whether the fees and costs in this case are reasonable. Preparing a comprehensive and well-documented application would be a better use of counsel's time and effort.

I. Applicable Law.

A. General.

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)). *See also Avera v. Sec'y*, *HHS*, 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) and *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993). 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. 92-633V, 1997 U.S. Claims LEXIS 313 (Fed. Cl. Spec. Mstr. Apr. 23, 1997). The same general principles apply to compensating an expert consultant.

The reasonable hourly rate is "the prevailing market rate," which is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896, n.11. The "prevailing market rate" is determined using the "forum rule." *Avera*, 515 F.3d at 1349 ("to determine an award of attorneys' fees, a court in general should use the forum rate in the lodestar calculation"). An exception to the forum rate is applied when the majority of the work is performed outside the forum in a location where the attorneys' hourly rates are substantially lower. *Avera*, 515 F.3d at 1349 (*citing Davis County Solid Waste Management and Energy Recovery Special Service District v. EPA*, 169 F.3d 755 (D.C. Cir. 1999). Prior to the Federal Circuit's decision in *Avera*, the Court of Federal Claims had applied the "geographic rule" to determine the appropriate rate of compensation. The geographic rule is based on the community in which the attorney performs the services, rather than the prevailing market rate in the forum community. *See Avera v. Sec'y, HHS*, 75 Fed. Cl. 400, 405-406 (2007).

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).

Special masters are may use their experience in Vaccine Act cases to determine whether the hourly rate requested and the hours expended are reasonable. *Wasson v. Sec'y, HHS*, No. 90-208V, 24 Cl. Ct. 482, 483 (1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993) (special master is given broad discretion in calculating fees and costs awards).

Once the court determines the appropriate attorneys' fees using the lodestar method, the court may then make adjustments to the award. The Supreme Court has cited with approval the 12 factors set forth in *Johnson v. Georgia Highway Express,*

Inc., 488 F.2d 714 (5th Cir. 1974) as relevant to the calculation of a reasonable attorney fee. *Blum*, 465 U.S. at 900.

B. Authority to Pay Fees and Costs to Unsuccessful Litigants.

In a marked departure from most fee-shifting statutes, the Vaccine Act permits a special master to award compensation to cover reasonable attorney fees and costs, even if the underlying petition for compensation is denied. Before awarding costs and attorney fees to unsuccessful litigants and their attorneys, the Act requires a special master to determine that the petition was brought in good faith and that there was a reasonable basis for the claim. *See* 42 U.S.C. § 300aa-15(e)(1). When a petitioner does not prevail on the merits, the award of reasonable fees and costs is discretionary, although such awards are commonly made. *Saxton*, 3 F.3d at 1520 ("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."). *See also Smith v. Sec'y, HHS*, No. 91-057V, 1992 U.S. Cl. Ct. LEXIS 400, *5 (Cl. Ct. Spec. Mstr. Aug 13, 1992).

In awarding fees and costs to unsuccessful litigants, the court must make three determinations: first, whether the petition was brought in good faith; second, whether the petition was brought (and maintained) upon a reasonable basis; and third, whether the attorney fees and costs claimed are reasonable.

The authority to pay unsuccessful litigants and the requirements of good faith and reasonable basis should be considered against the backdrop of the Vaccine Act's requirements for filing a substantiated petition. Congress clearly contemplated that petitioners alleging an "off-Table"[7] injury would file documentation with their petition demonstrating that petitioner: (1) received a vaccine listed on the Vaccine Injury Table; (2) sustained or had significantly aggravated an illness or other condition caused by the vaccine; and (3) suffered the effects of the illness or other condition for more than six months.[8] The statute requires the filing of an affidavit of petitioner; prenatal, delivery, and newborn records; vaccination records; and inpatient and outpatient pre- and post-injury medical records.[9] If records are unavailable, the Act requires petitioner to identify the missing records and explain the reasons for their unavailability.[10] The Vaccine Act mandates an expedited decision process. Receipt of a substantially complete petition

[7] An "off-Table" injury is any injury not listed on the Vaccine Injury Table, 42 C.F.R. § 100.3, or an injury listed on the Table, but not occurring within the time frame specified for the received vaccine.

[8] Section 300aa–11(c)(1) contains these three statutory requirements, as well as several others.

[9] Section 300aa-11(c)(2).

[10] Section 300aa-11(c)(3).

permits the special master to comply with that mandate by rendering a decision within the statutory mandate.[11]

However, the Vaccine Act also recognizes that additional information might be required in order to establish causation. *See* § 300aa-12(d)(3)(B). The Federal Circuit has held that the required proof of causation must include: "(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury." *Althen v. Sec'y, HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005). *See also Grant v. Sec'y, HHS*, 956 F.2d 1144, 1148 (Fed. Cir. 1992) and *Hines v. Sec'y, HHS*, 940 F.2d 1518, 1525 (Fed. Cir. 1991). If the records submitted with the petition do not adequately establish causation, additional information, such as the report of a medical expert, might be required.

When a complete and substantiated petition is filed, determining whether the petition is filed in good faith and upon a reasonable basis can be made at the outset of the case, before additional costs are incurred. When the petition and the accompanying documents do not specify any particular injury or provide any proof of vaccination, let alone establish any causal connection between the two events, determining whether the petition was filed in good faith and upon a reasonable basis is more difficult. That determination requires a special master to delve into the circumstances surrounding the filing of the petition, rather than rely on its content.

II. Issues Presented in this Fees and Costs Application.

A. Was this Petition Filed in Good Faith and upon a Reasonable Basis?

1. Good Faith.

The required "good faith" in filing a petition for compensation is subjective good faith. *Hamrick v. Sec'y, HHS*, No. 99-683V, 2007 U.S. Claims LEXIS 415, *9 (Fed. Cl. Spec. Mstr. January 9, 2008); *DiRoma v. Sec'y, HHS*, No. 90-3277V, 1993 U.S. Claims LEXIS 317, *4 (Fed. Cl. Spec. Mstr. Nov. 18, 1993); and *Chronister v. Sec'y, HHS*, No. 89-41V, 1990 U.S. Cl. Ct. LEXIS 482, *2 (Cl. Ct. Spec. Mstr. Dec. 4, 1990). A petitioner is entitled to a presumption of good faith. *Grice v. Sec'y, HHS*, 36 Fed. Cl. 114, 121 (1996).

[11] Section 300aa-12(d)(3). The Act requires a decision of a special master to "be issued as expeditiously as practicable but not later than 240 days, exclusive of suspended time under subparagraph (C)." This subparagraph permits suspension for 180 days. If a decision is not rendered within the appropriate time frame, a petitioner may withdraw from the program and seek recompense for her injuries in another forum. In my experience, delays in obtaining the medical records and expert reports constitute the majority of the delay in resolving Vaccine Act petitions.

Petitioner's subjective belief in a connection between Donnovan's vaccinations and his seizures was sincere enough that she reported it to a health care provider well before her petition was filed. *See* Pet. Ex.1, p. 2. Although petitioner's counsel did not identify what he relied upon to establish a good faith belief in vaccine causation,[12] it appears from the case records that at least some medical records were obtained, as Pet. Exs. 1 and 2 were filed before counsel regained contact with his client. Given the impending statute of limitations and the lack of contrary authority, I am willing to attribute petitioner's good faith belief to her counsel, based on the severe constraints on his time to investigate this issue.

2. Reasonable Basis for Bringing the Claim.

Quoting my entitlement decision in this case (slip opinion at 5), respondent argues that because petitioner did not allege a specific injury and no expert opinion supported petitioner's claim, there was no reasonable basis for this petition. As Special Master Moran noted in *Hamrick*, "[s]etting a relatively low standard for [finding] a reasonable basis in filing a petition (as opposed to prosecuting a petition) is supported by public policy and cases interpreting roughly analogous rules from civil litigation." 2007 U.S. Claims LEXIS 415, *14-15. *See also Jessen v. Sec'y, HHS*, No. 94-1029V, 1997 U.S. Claims LEXIS 20, *17-18 (Fed. Cl. Spec. Mstr. Jan. 17, 1997) (adopting a lenient standard for determining a reasonable basis to bring a petition). Applying a lenient standard is particularly appropriate when the impending expiration of the statute of limitations prevents an adequate investigation of the basis for the claim. *Hamrick*, at *14.

Although I cannot ascertain from either Pet. Ex. 1 or 2 exactly when counsel received these two documents, the billing records indicate that petitioner's counsel reviewed them on February 15, 2006, when the informal and indefinite stay requested in July, 2002, was still in effect, and were likely available to him earlier, as he had lost contact with petitioner by February, 2006. Given that the lengthy stays granted in this case excused counsel from filing evidence substantiating the petition, I accord counsel the benefit of the doubt and find that he had a reasonable basis for filing the petition.

B. Was there a Reasonable Basis for Maintaining the Petition?

As noted in *Hamrick*, 2007 U.S. Claims LEXIS 415, *15, there is a distinction between a reasonable basis for filing a claim and a reasonable basis for continuing to pursue a claim. Whether there existed a reasonable basis for maintaining this petition is a much closer call. Had petitioner been required to comply with § 300aa-11(c) at the outset, it is doubtful that this claim would have been pursued, if filed at all, because no

[12] Petitioner's counsel cited petitioner's affidavit as evidence of good faith. However, as this affidavit was filed on March 30, 2007, it is of limited relevance in determining what evidence counsel had of petitioner's good faith belief in vaccine causation at the time the petition was filed.

expert would opine in favor of vaccine causation.[13] And, even if the petition was hurriedly filed to preserve the claim, timely enforcement of the requirement to substantiate the petition may have obviated at least some of the fees and costs claimed here.

The medical records reflect petitioner's attribution of Donnovan's seizure disorder to his vaccinations. Histories obtained assert a temporal connection between the two events. *See* Pet. Ex. 7, p. 94; Pet. Ex. 4, pp. 317 and 647. However, those exhibits, which were not filed until late 2006 and early 2007, also reflect the opinion of specialists that Donnavan's condition was the result of a genetic defect. *See, e.g.*, Pet. Ex. 4, pp. 40, 74, 144, 222-24. With competing views of causation reflected in the medical records, it is not reasonable to expect an attorney, even one as experienced in vaccine litigation as this petitioner's counsel, to dismiss the petition without seeking an expert opinion. Accordingly, I determine that fees and costs should be paid, at least up to the point that an expert opined that there was no support for vaccine causation of

[13] To some extent, our cases interpreting the good faith and reasonable basis requirements leniently encourage "gaming the system" by failing to require counsel to adequately investigate and substantiate the petition at the outset. To illustrate, consider the following hypothetical examples involving a petitioner consulting an attorney about what she believes to be a vaccine-caused injury:

> Example 1. The attorney conducts an adequate review of the facts and circumstances, including seeking advice from a medical professional on the likelihood of vaccine causation. The medical professional indicates that causation is unlikely. As a matter of professional ethics, the attorney refuses to file the petition. Under these circumstances, the attorney could not file for the fees and costs incurred in investigating the claim, because no petition was filed.
>
> Example 2. The attorney examines the medical records, noting that a covered vaccine was received and that petitioner thereafter suffered an injury lasting for more than six months. The Act's statute of limitations is rapidly approaching. The attorney does not seek advice from a medical professional before filing the petition. After filing, petitioner is ordered to file the report of a medical expert and fails to do so because no medical expert will opine that the vaccine caused the injury. The attorney thereafter files for fees and costs. Under these circumstances, our case law will support payment of reasonable fees and costs, to include the costs of obtaining the "no causation" opinion.
>
> Example 3. Assume the facts and circumstances of Example 2, except that the statute of limitations is not rapidly approaching and there is adequate time to obtain advice from a medical expert. The attorney does not do so. When the attorney thereafter files for fees and costs, should they be paid? To do so encourages the failure to adequately investigate cases before filing. However, an attorney's willingness to take such cases may mean that the petition is not filed *pro se*. Does encouraging attorneys to take vaccine cases sufficiently advance the Congressional purposes behind the Vaccine Act such that the filing of unsubstantiated petitions is deemed reasonable?

Desmond's seizure disorder.[14] *See Perreira v. Sec'y, HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1995) (denying attorneys fees for hours expended to litigate a case after receipt of an expert opinion that had no scientific basis).

D. Are the Fees and Costs Claimed Reasonable?

1. Hourly Fees for Attorneys and Staff.

The hourly fees for the attorneys and staff in this case are not in issue. Although not filed with the fees and costs application, petitioner and respondent have entered into an agreement concerning the hourly rates for the attorneys from this firm. Respondent did not challenge the hourly rates charged by attorneys and staff in this case. This agreement establishes what the Second Circuit has called the "presumptively reasonable" rate of compensation under the forum rule. *See Arbor Hill Concerned Citizens Neighborhood Association, et. al., v. Count of Albany*, 522 F.3d 182, 190 (2d Cir. 2008).

2. Hours Claimed.

There are issues with some of the hours billed. In addition to the issues raised by respondent, my review of the billing records disclosed claims for repetitive and unnecessary hours. Special masters may rely on their experience with the Vaccine Act in order to determine if the hours expended are reasonable. *Wasson*, 24 Cl. Ct. at 486. In determining attorneys' fees, the special master is not limited to the objections raised by respondent. *Moorhead v. U.S.*, 18 Cl. Ct. 849, 854 (1989) (in determining an attorney's hourly rate, Claims Court, *sua sponte*, reduced the hourly rate awarded by 25%). For the reasons detailed below, I do not find that all the hours claimed in this case are reasonable.

a. Fees During the Period from August, 1999, through January, 2006.

This period covers the six and one half years from the filing of the petition through January, 2006, and represents approximately $1200.00 in attorney fees and staff costs. The low fees claimed in this initial period reflect the fact that this case, along with many other cases alleging injuries from the hepatitis B vaccine, was stayed for a substantial period of time. On April 27, 2000, a formal stay for 180 days was granted. On July 19, 2002, petitioner requested another stay of the proceedings. Between the filing of the petition and the July 19, 2002 request for a stay, no substantive filings were made. After the requested stay, no further action occurred until

[14] Determining when that point was reached in this case is difficult, as no expert reports were ever filed. A billing entry on March 9, 2007 indicates that counsel had doubts about whether "the case should be dropped" and discussed it with Dr. Geier. Counsel discussed the case with Dr. Geier again on April 28, 2007, but the motion for judgment on the record was not filed until July 20, 2007.

the case was reassigned, first to Special Master Moran, on February 8, 2006, and then, on April 5, 2006, to me.

Over the last 28 months, I have had the opportunity to review at least eleven applications for attorney fees and costs involving hepatitis B cases filed by this firm, plus one additional case transferred to another firm in which this firm's fees request was incorporated. In my review of these fees applications, a pattern of billing has emerged that gives rise to questions about several entries in this fees application. These entries involve small amounts of time that are mirrored in most of the other hepatitis B cases in which fees applications have been submitted by this firm. Standing alone, the hours claimed are minor. However, when multiplied by the number of cases in which the same hours have already been claimed, and the potential that more will be claimed in the 136 hepatitis B cases originally filed by this firm,[15] a careful review of their reasonableness is necessary.

1	9/23/2002	File review- got packet ready for mass mailing	0.4	22.00
2	1/20/2004	Review case with [SSK] and discuss on how to proceed	1.0	250.00
3	2/02/2004	Conference with [SSK] and staff at office meeting re status	0.1	25.00
4	3/29/2004	Review status of case with [SSK] at office meeting	0.2	50.00
5	6/25/2004	Meeting re medical literature and recent decisions (½ travel time charged)	0.05	12.50

Item 1, involving the entry "got packet ready for mass mailing," bills for the same 0.40 hours that were also billed in cases 99-537V, 99-584V, 99-649V, 99-569V, 99-209V, 99-210V, and 01-263V.[16] Whatever the "mass mailing" contained, the characterization as "mass" means that it was not focused on this individual case. During the joint status conference on March 27, 2006, petitioner's counsel indicated that he communicated with his many clients with hepatitis B claims through mass

[15] *See* Motion to Designate a Master File, filed December 9, 1999, listing this case and 135 other cases).

[16] These cases represent only a portion of the hepatitis B cases filed by this firm and assigned to me. These are simply the ones currently pending before me, or ones in which the fees petitions had been filed electronically, and were thus easily accessible. The questionable entries have been paid in several of these cases.

mailings. Perhaps this entry pertains to such communications, but charging 0.40 of an hour (or some portion thereof) to each individual case for mailing out the same documents is not appropriate. Having already authorized compensation for this mass mailing in other cases, I decline to do so again.

Item 2 bills for 1.0 hour on January 20, 2004, to discuss this case with another attorney in the office. Standing alone, the billing entry would be reasonable, as attorneys in the same firm may need to confer regarding a case. However, the identical entry is found in cases 99-537V, 99-584V, 99-649V, and 2-1666V, assigned to me, and in at least two of Special Master Moran's cases, *Duncan v. Sec'y, HHS*, No. 99-455, 2008 U.S. Claims LEXIS 176 (Fed. Cl. Spec. Mstr. May 30, 2008) (pet. for rev. filed June 27, 2008) and *Hamrick,* 2007 U.S. Claims LEXIS 415. At least eight hours of meetings on the same date, lasting for an identical one hour per case, appears to be an example of improper billing. I will not authorize compensation for this hour in this application.

Item 3 involves a discussion of the status of this case at an office meeting. This status discussion was also billed in cases 99-537V, 99-584V, 99-495V, 99-209V, 99-210V, and 01-263V. As no medical records had yet been filed in this case, there was little to discuss. A little over a month later on March 29, 2004, another bill for a discussion of the case status is claimed, this one (item 4) involving 0.2 hour. The identical entry appears in cases 99-537V, 99-584V, 99-649V, 99-495V, 99-568V, 99-209V, 99-210V, 02-1666V, and 01-263V. These entries total over two hours of discussion in eleven of the twelve cases I reviewed. The identical nature of these bills suggests that the time claimed cannot be attributed specifically to this case. Given the skeletal nature of the file at the time of the discussions, the total time billed (and paid), and the apparent duplication of time claimed, I do not authorize compensation for this entry.

Item 5, above, contains an entry for travel time to review medical literature. This entry was duplicated in every other hepatitis B fees case that I reviewed. As it does not appear that the literature reviewed was unique to this case, this is a matter best billed, if at all, to the general hepatitis B omnibus proceeding.[17] I note that compensation for this

---

[17] In an effort to find some method for expeditiously handling the large number of hepatitis B claims involving the "look back" provision of the action which added the hepatitis B vaccine to the Vaccine Injury Table, petitioner's counsel and several other attorneys who frequently represented Vaccine Act claimants worked with the Chief Special Master on what has been variously termed the "Hep B Panel," the "hepatitis B omnibus proceeding," or simply the "hep B proceeding." These efforts had limited success. Some groupings of cases involving similar groups of injuries, *see, e.g., Sanders v. Sec'y, HHS*, No. 99-430V, 2007 U.S. Claims LEXIS 81 (Fed. Cl. Spec. Mstr. Mar. 6, 2007) (arthropathies) and *Lovett v. Sec'y, HHS*, No. 98-749V, 2007 U.S. Claims LEXIS 61 (Fed. Cl. Spec. Mstr. Feb. 8 2007) (demyelinating conditions), proved successful, but other cases were simply placed in a holding pattern until the conclusion of discovery in the Omnibus Autism Proceeding. Each of the firms that worked on the hepatitis B omnibus proceeding submitted attorney fees and costs applications for this general effort. The application for "Hep B Panel" costs for this firm is currently pending before Chief Special Master Golkiewicz in *Riggins v. Sec'y,*

particular entry has been denied in other hepatitis B cases. *See, e.g., Hamrick,* 2007 U.S. Claims LEXIS 415 at n. 2. No compensation is authorized for this meeting.

The disapproved entries result in a deduction of $359.00 for the time frame of August, 1999, to January, 2006. Compensation for these entries is denied, as I find such hours "excessive, redundant, or otherwise unnecessary...". *Hensley*, 461 U.S. at 434.

b. Fees During the Period from January, 2006, through June, 2007.

This period begins when Special Master Moran set this case, along with 26 other cases involving the same petitioners' attorney, for a joint status conference on March 27, 2006, and ends when counsel succeeded in locating petitioner and prosecution of the case recommenced. Attorney fees and staff costs for this period total approximately $2800.00. Most of the time billed during this period involved efforts to locate petitioner and to find another attorney willing to accept representation of petitioner's case.

(1) Hours Pertaining to Case Transfer Attempts.

Respondent challenges $1,700.00 in fees pertaining to attempts by petitioner's counsel to transfer this case to another attorney, citing to cases holding that business decisions by counsel constitute firm overhead and are not properly billable to the program. Under the Vaccine Act and other fee shifting statutes, attorneys may bill only for those matters for which they would bill a private client. *See Hines*, 22 Cl. Ct. at 754. *See also Davis v. City and County of San Francisco*, 976 F.2d 1536, 1542 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993) (reasonableness of fees claimed is made by reference to "dealings with paying clients and the private bar") and *Former Emples. of BMC Software Inc., v. Sec'y, of Labor*, 519 F. Supp. 2d 1291, 1318 (Ct. Int'l Trade 2007). Respondent contends that a petitioner would not pay for hours expended by her counsel in attempts to get another firm to assume representation. Res. Opp. at 14.

There is some merit to this position because during the majority of counsel's attempts to transfer this case to another firm, counsel was unable to locate his client. Thus, unless permission was provided earlier, when the firm was in contact with

---

HHS, No. 99-382V. Distinguishing a "Hep B Panel" cost from those costs associated with an individual case can be difficult. The practice of billing panel costs separately from costs in each individual case is eminently reasonable. However, when the same expert/consultant bills both panel costs and individual case costs for research and discovery, there is the potential, inadvertently or otherwise, for duplicate billing for the same work. Petitioner's counsel has an application for over $100,000.00 in attorney fees for matters related to the hepatitis B claims in general currently pending before this court in *Riggins*. Additionally, he has filed a request for nearly $100,000.00 in fees for his consultant, Dr. Mark Geier.

petitioner, counsel did not have his client's permission to "shop" the case to another firm. To the extent that he provided client records to an attorney outside the firm, there may be issues regarding the client's privacy interests in the records she supplied to her attorney. *See, e.g.*, entry dated February 17, 2006, billing for "assembly of records to go to [D]; prepare summaries for [D]."

However, from my vantage point as a special master, I am aware that at the time petitioner's counsel was attempting to transfer this case to another attorney, petitioner's counsel had acknowledged to the court that he had more cases than he could competently or effectively handle.[18] During the years in which many of this firm's hepatitis B cases were stayed, there were no requirements to file status reports or begin moving the cases toward resolution. Once the stays were lifted in the firm's 28 hepatitis B cases assigned to me, and in a similar number of cases assigned to at least two other special masters, counsel's ability to effectively represent his clients was further strained by the workload involved in moving these cases towards resolution. Under these circumstances, a client might reasonably want her case transferred in order to obtain faster resolution. It is apparent to me that this attempted transfer served both the client's interests in having her case resolved and the Vaccine Program's goal of speedy resolution of cases.

As petitioner's counsel correctly notes, fees pertaining to transferring cases have been claimed and paid without objection by respondent. I authorized payment for hours expended in the successful transfer of *Clemens v. Sec'y, HHS*, No. 99-518V, to another firm. Although the fact that I authorized fees in one case does not bind me to authorize similar fees in any future case, I see no distinction between a successful transfer and an attempted transfer in determining whether the hours claimed were reasonable and related to the laudable goal of resolving this case in as timely a manner as possible. I conclude that these fees are compensable.

(2) Other Fee Issues.

My review of the fees claimed in this case discloses issues related to the fees set forth on the table, below.

6	2/02/2006	Review Payment of 19990804 Filing Fee paid by S & A	0.1	30.00
7	2/15/2006	Review order of 20060208-Re reassignment to SM Moran	0.1	30.00

[18] In a January 20, 2006 letter to Staff Attorney Michelle Mendelson of the Office of Special Masters ["OSM"], petitioner's counsel acknowledged that he had agreed to move all of his hepatitis B cases by transferring them to another attorney or by preparing them for resolution by a hearing or for dismissal. *See* Appendix A to Order, filed March 26, 2007, in case No. 99-495V.

8	2/17/2006	Review hard files and compare with scanned records; review TM data and supervise assembly of records to go to [D]; prepare summaries for [D] (work done over the last two weeks).	3.0	900.00
9	3/01/2006	Review order of 20060224 - Transfer of SM Joint STC 20060327.	0.1	30.00
10	3/21/2006	Review chart from [SSK] and prepare for upcoming status conference	0.5	150.00
11	6/08/2006	Left message with roommate for her to call	0.5	150.00
12	7/26/2006	Prepared and electronically filed Status report regarding finding client and how we're going to proceed.	0.3	49.50
13	[undated, but follows 7/26/2006 entry]	[nothing recorded]	0.3	49.50
14	10/26/2006	Reviewed information sent by client and prepared Status Report on why case should not be dismissed.	0.4	66.00
15	10/26/2006	Reviewed information sent by client and prepared Status Report on why case should not be dismissed.	0.4	66.00

Item 6 bills for 0.1 hour ($30.00) for review of the filing fee payment. This is an administrative matter not warranting the use of an attorney's time. It is disapproved.

Item 7 bills 0.1 hour ($30.00) to review the order reassigning the case to Special Master Moran and item 9 bills 0.1 hour ($30.00) to review an order setting a joint status conference in over 20 hepatitis B cases filed by this firm. The order reassigning the case to Special Master Moran was a single order listing 27 cases; likewise, the order setting the joint status conference was a single order listing all of this firm's cases assigned to Special Master Moran. I do not want to discourage counsel from reading court orders. To that end, I have approved bills for short periods of time for reading even the most mundane of orders. However, billing for six minutes of time to reread the same order in each case listed on these orders borders on the ridiculous. *See Duncan* 2008 U.S. Claims LEXIS 176, *12. I decline to authorize payment for either of these two bills.

Item 8 is an entry that is non-contemporaneous. It also "lumps" dissimilar activities. An identical entry was made in Donnovan's brother's case (No. 99-584V). Lumping dissimilar activities is not a proper billing practice; likewise, the failure to make contemporaneous records conflicts with Guidelines for Practice under the National Childhood Vaccine Injury Compensation Program ["Guidelines for Practice"]. The Guidelines for Practice instruct petitioners' counsel to maintain contemporaneous time records 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. Guidelines for Practice, Section XIV.A.3 (emphasis added). The Guidelines for Practice encourage separate, rather than "lumped," entries, in order that the reasonableness of a fee request may be assessed. *See also Green v. Sec'y, HHS*, 19 Cl. Ct. 57, 67 (1989). Given the state of the records available in this case at that point in time, reviewing hard files, comparing those files with scanned records, supervising assembly of records, and performing the other tasks listed could scarcely have taken 15 minutes, let alone the six hours billed between this case and Desmond's case (No. 99-584V). Much of this work, if performed at all, does not require an attorney's time or attention. I approve only 0.25 hours ($75.00) in this case for preparing a case summary.

Item 10 bills for 0.5 hour ($150.00) on March 21, 2006, in this case, as well as in another hepatitis B case (99-518V), to review a chart and prepare for an upcoming status conference. Identical bills, other than the date of the activity (March 24, 2006), were submitted in cases 99-537V, 99-649V, 99-569V, 99-210V, 02-1666V, 01-263V, and in *Hamrick*, No. 99-683V, 2007 U.S. Claims LEXIS 415. All of these entries involve reviewing a chart and preparing for an upcoming status conference.

It is reasonable for counsel to review a file (or a chart) in order to prepare for an upcoming status conference. However, it is unlikely that counsel spent an identical amount of time reviewing a case in which voluminous records were filed (99-495V) and this one, in which no records were yet filed.[19] These duplicate entries are problematic, as they total three and one half hours of time on one day for reviewing seven of the twelve cases I examined and an additional hour on a separate day for two more of those twelve cases. Another half hour was billed to *Hamrick*, 2008 U.S. Claims LEXIS 415, assigned to Special Master Moran, reflecting that these billing practices extended beyond those cases assigned to me. These cases alone total five hours of preparation time. If similar entries were made in a similar proportion of the other cases discussed at the joint status conference for which counsel was preparing, then serious questions about this firm's billing practices would arise. The hours billed for preparation for this

[19] Given the subsequent difficulty in getting the essential medical records filed, it is unlikely that counsel had more than the minimal records in Pet. Exs. 1 and 2 available to him. *See* Orders, dated July 27, September 9, and November 22, 2006, and January 23 and March 8, 2007.

status conference could easily exceed the hours available in a day.[20]

I recognize that counsel simply may have divided the hours spent preparing for this status conference by the number of cases to be discussed. If so, petitioner did not so indicate. Regardless, an aggregate method of billing would not accurately reflect the work actually done in an individual case. Additionally, the aggregate time frame billed in the cases examined suggests that the total hours that may potentially be billed for status conference preparation, if billed in all or a substantial proportion of this firm's hepatitis B cases, would exceed the hours available on the two days used for preparation. Having no confidence that this entry reflects work expended on this particular case, and having previously compensated for the identical entries in other cases, I decline to compensate for it here.

Item 11 bills for 0.5 hour ($150.00) for leaving a message with petitioner's roommate, ascertaining petitioner's work schedule, and asking her to call him. An identical bill was submitted in Donnovan's brother's case (No. 99-584V). I find it extremely unlikely that counsel spent an hour on the telephone with petitioner's roommate, a non-party to this litigation, discussing petitioner's confidential legal matters. I will authorize payment for the 0.5 hour claimed in this case alone, finding that time period more than ample to leave a message for petitioner, explaining the urgency of contacting her counsel immediately.

Item 12 bills for 0.3 hours ($49.50) for preparing and filing a status report. It is followed by an undated bill (Item 13) for the same number of hours, with no entry concerning the nature of the work performed. It appears that these are duplicate bills. Only the dated entry is approved for payment. Another duplicate entry appears in items 14 and 15, involving 0.4 hours ($66.00). Only one is approved for payment.

A deduction of $1180.50 is made for the time period from January, 2006, through July, 2007.

c. Fees During the Period from July, 2007, through Case Conclusion.

This period involves the time from July, 2006, through the July 26, 2007 decision on the record and the subsequent preparation and filing of the attorney fee application.

---

[20] At the time of the joint recorded status conference that began moving this firm's stayed hepatitis B cases toward resolution, I was assigned 26 cases. Special Moran's opinion in Duncan indicates that he had 27 such cases. Based on my recollection of the reassignment orders and that status conference, Special Master Campbell-Smith was assigned to a similar number of these cases. With five hours billed out of 13 cases (the twelve I examined and one of Special Master Moran's), the potential for over-billing is clear.

This period was characterized by delays[21] and missed deadlines, as well as by difficulties in getting petitioner to file her own affidavit, the medical records necessary to determine the merits of her petition, and the report of a medical expert on causation. On June 27, 2007, in lieu of filing an expert report as ordered, petitioner indicated that she would file a motion for judgment on the record. That motion was filed on July 20, 2007, and stated that petitioner was unable to find an expert to support causation. I dismissed the petition with prejudice on July 26, 2007. On September 12, 2007, petitioner elected to file a civil action. Approximately $9000.00 in attorney fees and costs were billed for this period.

(1) Consultant Fees.

Respondent objected to the hours claimed for Dr. Mark Greenspan as insufficiently documented and unjustified. Respondent's contentions have some degree of merit, but my analysis indicates that these fees are at least partially compensable, although not at the rate claimed.

To place the issue of consultant fees in perspective, a brief recitation of the efforts to obtain an expert report in this case is in order. I initially ordered petitioner to file her expert report by November 22, 2006. Order, dated July 27, 2006. No billing entry, or other record filed, identifies any attempt to obtain an expert review of this case prior to that date, perhaps because the filing of relevant medical records was not completed.[22] Thereafter, I granted many extensions of time to file the medical records, as reflected in footnote 19, above.

I held a status conference on November 21, 2006, to discuss the unfiled medical records and the need for an expert report. Petitioner's counsel indicated that he had hired a doctor to perform an initial review of the records and to help identify an expert to opine on causation. However, there is no indication in the billing records that any doctor was consulted or retained in this time frame.

I ordered petitioner to identify her expert by February 19, 2007. *See* Order, dated November 22, 2006. In response to the court order to identify her expert, petitioner filed a late status report on February 20, 2007, identifying Dr. Kinsbourne as

[21] To his credit, petitioner's counsel did not claim fees for preparing most of the motions for enlargement of time.

[22] There is a June, 2006 reference to emails to and from Dr. Shoenfeld and the attorney to whom petitioner's counsel had sought to transfer this case regarding a July meeting on causation, but there is no indication in the billing records that the proposed meeting occurred, or if it did, that this case was discussed with the doctor.

her expert.[23] No billing record or other document submitted indicates that Dr. Kinsbourne was ever contacted or agreed to opine on this case.

From the billing records, it appears that Dr. Mark Greenspan[24] began a review of the medical records on February 26, 2007, and completed his "construction of chronologic medical record" on February 27, 2007.[25] For these two days, Dr. Greenspan billed 4.25 hours and fees of $1487.50. After completing his review, the bill reflects that on February 28, 2007, Dr. Greenspan emailed a geneticist and a pediatric neurologist for consultation and wrote, edited and completed an "opinion letter." His efforts on February 28, 2007, involved 5.25 hours, and fees of $1837.50. The opinion letter was not filed. The firm's billing records for early March, 2006, reflect that two attorneys reviewed what was characterized by petitioner's counsel as "Dr. Greenspan's expert review." Doctor Greenspan's bill was dated February 28, 2007.

Shortly after receipt of Dr. Greenspan's opinion letter, petitioner's counsel contacted Dr. Mark Geier, who began a review of Donnovan's case on March 7, 2007. Doctor Geier billed for 4.0 hours of work performed over four days, 2.0 in early March, 2007, and 2.0 in late April, 2007, at a rate of $250.00 per hour.[26] Doctor Geier is a geneticist. *Weiss v. Sec'y, HHS*, No. 03-190V, 2003 US Claims LEXIS 359 (Fed. Cl. Spec. Mstr. Oct. 9, 2003). His bill indicates that he read the medical records and analyzed "the potential genetics and causation issues," "determined the appropriate experts to be used in the case," did a "literature search," and discussed his results with petitioner's counsel. No medical literature or opinion was filed. The attorney fees billed reflect several consultations with Dr. Geier, including one on March 9, 2007, inquiring of Dr. Geier "whether the case should be dropped."

I held a status conference on March 19, 2007, during which I ordered the expert report to be filed by May 30, 2007. Order, dated March 20, 2007. On May 30, 2007,

---

[23] Doctor Kinsbourne is a pediatric neurologist who has testified before me on several occasions. His background and training would certainly qualify him to opine on the cause of a seizure disorder in a pediatric patient.

[24] Doctor Greenspan is an MD/JD practicing in Norfolk, VA. According to his website (www.lawmd.net) (last accessed July 22, 2008), he has been practicing law since 2001. He was formerly a surgeon. According to the letters submitted with Petitioner's Response to Respondent's Application for Attorney's Fees and Costs ["Pet. Response"], and Dr. Greenspan's own affidavit, he bills $350.00 per hour for consulting in medical malpractice litigation.

[25] One half hour of attorney time was billed on January 29, 2007, to prepare the records for "expert/consultant review."

[26] Although Dr. Geier's bill separates the work on Donnovan's case from the work performed on his brother's case, the bills are identical. The total amount is claimed in Desmond's case (No. 99-584V); although the bill was filed as an attachment to the fees and costs application here, the fees for Dr. Geier's review were not charged to this case.

petitioner filed a request for an extension of time to obtain an expert report, stating:

> Counsel has spoken to the Petitioner's expert, Dr. Bellanti, and he has stated that he has been unable to complete his expert report in this case. He stated to Counsel that he has been working on several reports and has not been able to finish the Petitioner's expert report due to this. In addition, he has stated that this report has taken him more time than expected to complete because there are some genetic issues involved that he has not had time to research adequately and needs more time to research these issues. Dr. Bellanti assured Counsel that he would have the expert report to us within thirty days. (emphasis added)

No billing records reflect any contact with Dr. Bellanti,[27] although several records reflect contact with Drs. Geier and Greenspan. No bill for Dr. Bellanti's services was submitted.

Expert consultants play an important role in aiding counsel to understand complex scientific and medical questions. In Vaccine Act litigation, expert consultants research medical literature and assist in reviewing and assessing the merits of a petition. *See Ray v. Sec'y, HHS*, No. 04-184V, 2006 U.S. Claims LEXIS 97 (Fed. Cl. Spec. Mstr. Mar. 29, 2006). Expert witnesses often perform similar reviews of records and medical literature. In addition, their opinion letters, if favorable, are generally filed as exhibits.[28]

When an expert is retained and files an expert report, the complexity of the medical issues and records in the case, the nature of research conducted and filed, the expert's qualifications, the quality of the report, and many other factors can be used to assess the reasonableness of the fee claimed. An expert opinion filed as an exhibit permits respondent's counsel and the court to review the nature of the work performed. An opinion exhaustively summarizing the medical records and literature reflects the expenditure of more hours and effort on the part of the expert, and helps in justifying the fees paid to that expert.

The issue of determining payment for consultants, particularly since their work-product is rarely submitted, is a more difficult one. If the consultant's work product is

---

[27] Doctor Bellanti is an immunologist. *See Savin v. Sec'y, HHS*, No. 99-537V (unpublished) (available at http://www.uscfc.uscourts.gov/sites/default/files/Savin%20AFC%20Decision%204-8-2008.pdf) (last visited on July 24, 2008) (Fed. Cl. Spec. Mstr. Apr. 22, 2008).

[28] Motions for judgment on the record are often filed in lieu of filing an ordered expert opinion, as in this case. In general, the special masters do not require that these unfavorable opinions be filed, recognizing that the bad news may be delivered orally and informally (and thus less expensively). In this case, an opinion letter was prepared and significant fees were charged for that opinion, but it was not filed.

not provided to the court, assessment of the reasonableness of the hours and fees claimed cannot be made on the same basis as that of expert witnesses. In such cases, counsel, and ultimately the consultant, would benefit by providing more detail in the costs application about the nature of the services performed. The Guidelines for Practice state that petitioner should explain costs "sufficiently to demonstrate their relation to the prosecution of the petition." *See* Section XIV.A.4. *See also Kuperus v. Sec'y, HHS*, No. 01-0060V, 2006 U.S. Claims LEXIS 377, *13 (Fed. Cl. Spec. Mstr. Nov. 17, 2006) ("an award may be reduced where numerous hours were claimed but where little or no work product was filed with the Court.").

Petitioner's counsel is quite correct in asserting that he is in the best position to gauge what assistance he needs in a case. However, in traditional civil litigation, the client paying consultant costs (or expert fees) provides a necessary check on the costs an attorney might wish to incur. In a fee-shifting program such as the Vaccine Act, the petitioners only rarely incur personal costs for expert or consultant reviews, although nothing in the statute or our rules prohibits petitioners' counsel from requiring their clients to advance these costs.

When, in traditional civil litigation, a client is billed for an expert consultation, the client is entitled to know what the consultant did, what hourly fee or flat rate of compensation was charged, and why the consultant was required. Under fee-shifting statutes, the general rule is that an attorney may not bill the government (or the opposing party) for fees that would not be billed to a private client. Petitioners have an obligation to monitor expert fees.[29] *See Perreira v. Sec'y, HHS*, No. 90-847V, 1992 U.S. Claims LEXIS 289 (Cl. Ct. Spec. Mstr. Jun. 12, 1992), *aff'd* 33 F.3d 1375 (Fed. Cir. 1994).

Without the check on consultant fees imposed by a private client's concern for his or her bank balance, oversight of counsel's professional obligation to keep consultant fees reasonable is provided by both respondent and the court. *See, e.g., Kuperus*, 2006 U.S. Claims LEXIS 377 (special master has discretion to review costs charged for experts). Understandably, this oversight may generate claims that such scrutiny unduly interferes with counsel's right to litigate the case as he sees fit. However, the statute authorizing payment of fees and costs requires such expenditures

---

[29] When there are indications that the arrangement between consultant and attorney is not entirely at arms length, the issue of consultant fees becomes even more problematic. Public records reflect that petitioner's counsel is an officer or director of the Institute for Chronic Illnesses, Inc., a nonprofit corporation. *See* http://www.taxescemptworld.com/organization.asp?tn=1502647. (last visited July 24, 2008). One of Dr. Geier's many published articles identifies his organizational affiliation as the Institute for Chronic Illnesses, Inc. *See A meta-analysis epidemiological assessment of neurodevelopmental disorders following vaccines administered from 1994 through 2000 in the United States*, NEURO ENDOCRINOL LETT, 2006 Aug: 27(4):401-13. As nonprofit corporations may pay their employees and officers, the nonprofit status of the corporation does not resolve the issue of whether this particular consultant-attorney relationship requires a careful and objective review of consultant fees billed to the Vaccine Program by this firm for this consultant.

to be reasonable. Ultimately, the special master is charged with determining what fees and costs are reasonable. *See Wasson*, 24 Cl. Ct. at 483.

With regard to the specific consultation fees claimed in this case, I analyze the reasonableness of both the hourly rate and the number of hours claimed. Factors bearing on reasonableness include the information provided in the bills submitted, the nature of the work performed, the level of skill required to perform the work, and the posture of the case. Obviously, reviewing voluminous medical records is more time consuming than review of very few records.

It is appropriate for an attorney to hire someone to prepare a chronologic record of medical care in a Vaccine Act case. Determining what happened and when it happened can be time consuming, as creating a chronologic record of care frequently involves examining the records of several providers. This can be even more complicated when a child has been hospitalized repeatedly and sees specialists in addition to primary care providers. Having thoroughly reviewed these medical records myself, I am satisfied that the hours Dr. Greenspan claims for preparing a chronologic record of care are entirely reasonable. However, that does not mean that they are compensable at his claimed hourly rate of $350.00.

Paralegals and nurse consultants are frequently employed in vaccine cases to prepare a chronologic record of care. Fees approved for nurse consultants and paralegals are less than half the rate charged by Dr. Greenspan for such services. . *See Duncan*, 2008 U.S. Claims LEXIS 176, *7-8 and *Kantor v. Sec'y, HHS*, No. 01-679V, 2007 U.S. Claims LEXIS 100, *14-15 (Fed. Cl. Spec. Mstr. Mar. 21, 2007). Just as an attorney should not bill at an attorney's rate for tasks that a paralegal should perform, nor should he bill for paralegal time when the tasks involved are of a secretarial nature, a doctor-lawyer should not bill at a medical consultant's rate for tasks that a nurse consultant or paralegal should perform. *See, e.g., Plott v. Sec'y, HHS,* No. 92-0633V, 1997 U.S. Claims LEXIS 313 (Fed. Cl. Spec. Mstr. April 23, 1997). Therefore, I approve the hours expended for preparing the chronological record of care, but substitute $165.00 for the hourly rate claimed. This is higher than the paralegal or nurse consultant rates customarily awarded in Vaccine Act cases, but reflects that a medical doctor and attorney performing such services would be more efficient than those with a lesser degree of training.

The issue of Dr. Greenspan's hourly fee for preparing the opinion letter and for discussing the case with doctors with more expertise is complicated, because it is not entirely clear what Dr. Greenspan's role was. Based on the information supplied in the Pet. Reply and its attachments, I have no difficulty in concluding that Dr. Greenspan warrants a fee of $350.00 per hour in his review of medical malpractice cases involving surgical issues, based on his unique qualifications as a surgeon-lawyer. However, his experience as a surgeon is not particularly relevant in a Vaccine Act case without surgical implications, although his general medical background would be of some assistance in identifying issues and relevant records. Courts have often considered an

expert's area of expertise in determining whether the fee requested is reasonable. *See Kantor*, 2007 U.S. Claims LEXIS 100. The role the expert plays in the litigation is another factor to be considered, as the fee charged for serving as an expert witness is often more than that charged for reviewing a case. Consultants are not compensated at the same rate as experts. *See Kantor,* 2007 U.S. Claims LEXIS 100, *14-15 and *Simon v. Sec'y, HHS*, *HHS*, No.05-941V, 2008 U.S. Claims LEXIS 67 (Fed. Cl. Spec. Mstr. Feb. 21, 2008). I note that in this case, Dr. Geier, a doctor with a genetics background more relevant to the issues raised by the medical records than Dr. Greenspan's surgical background, charged $250.00 per hour for his efforts in this case and in No. 99-584V. Fees & Costs App. at 38. To the extent that Dr. Greenspan's legal expertise was used, I note that petitioner's counsel, an attorney with considerably more years in practice in general and in Vaccine Act litigation in particular, billed at an hourly rate below that charged by Dr. Greenspan. Based on all the evidence available to me, I conclude that compensating Dr. Greenspan for the remainder of the hours claimed at a rate of $275.00 per hour is reasonable.

(2) Bills for CDs.

Entries on December 1, 2006, and March 5 and 30, 2007, bill a total of $9.60 for "CDs, labels and cases for e-filing." These costs are overhead expenses and are therefore not payable. *See Borger v. Sec'y, HHS*, No. 90-1066V, 1993 U.S. Claims LEXIS 33, *3-4 (Fed. Cl. Spec. Mstr. Dec. 16, 1993).

(3) Fees Incurred after Expert Review.

On May 30, 2007, 0.1 hour ($31.00) was billed for an email between two of the firm's attorneys and an additional 0.3 hour ($52.50) was billed for preparation and filing of a Motion for Enlargement of Time to file an expert report. On June 3, 2007, 0.1 hour ($17.50) was billed to read and calendar my order granting the motion for enlargement.

The pertinent portion of the enlargement motion is set forth in part IIC(2)(c)(1) this opinion, *supra*. In essence, it asks for more time to file the report of Dr. Bellanti, when the billing records and previous filings demonstrate no connection of Dr. Bellanti with this case. The statements contained in the motion for enlargement pertaining to contact with Dr. Bellanti, his willingness to opine, and his scheduling difficulties are not substantiated elsewhere in the records. Were it not for a brief entry in Donnovan's brother's attorney's fees application, dated June 27, 2007, I would find none of these hours compensable. Absent that entry's reference to a consultation with Dr. Bellanti, I would conclude that, whatever counsel knew about the merits of petitioner's causation claim, it was known to him before this motion for enlargement was filed. Given this reference, I authorize compensation for these hours. In doing so, I caution counsel that fees and costs requests must stand or fall based on what is contained in the record. It is happenstance that Desmond's case file was available to me at the same time I was considering the fees and costs application in Donnovan's case.

III. Conclusion.

A special master's review of an application for fees and costs must, of necessity, consider many competing factors. Preparing and justifying applications for fees and costs must not become so onerous as to discourage counsel from taking Vaccine Act cases. For the same reason, fees and costs applications should be paid as swiftly as possible. However, those fees and costs are paid from a trust fund, not from private pocketbooks. In granting special masters the authority to order payment of fees and costs, Congress limited their authority to pay only those fees and costs deemed reasonable.

An application for fees and costs should provide sufficient detail regarding what is being claimed to allow a special master to determine whether those amounts are reasonable from the application and the case file. Petitioner bears the burden to document the fees and costs claimed. *Bell v. Sec'y, HHS,* 18 Cl. Ct. 751, 760 (1989). When entries appear to duplicate work, it is incumbent upon counsel, not the special master, to ensure that the entries are adequately explained.

In this case, some of the documentation is inadequate. When the time expended or fees claimed are inadequately justified, the court may determine what to award, based on the court's own experience. See *Wasson*, 24 Cl. Ct. at 483 (special master is given broad discretion in calculating fees and costs awards). A court may exercise that discretion without requiring further pleadings or evidence. *Hensley*, 461 U.S. at 433.

Petitioner requested a total of **$17,596.20** in attorney fees and litigation costs for a case that was dismissed based on lack of evidence of causation. The requested amount represents no litigation costs incurred by petitioner.

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 an amount that is reasonable and appropriately documented. Accordingly, I hereby award the **total of $14,867.10**[30]*.*

---

[30] 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).

The payment shall be a lump sum of **$14,867.10**, in the form of a check payable jointly to petitioner, Tyeka Lamar, and petitioner's counsel, Clifford Shoemaker, 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.[31]

IT IS SO ORDERED.

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

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