In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
No. 99-584V
Filed: July 30, 2008
FOR PUBLICATION

DESMOND 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, Desmond Lamar ["Desmond"], alleging that the 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, Donnovan Lamar ["Donnovan"] (No. 99-583V),

[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.).

alleging virtually identical claims.[3] Both petitions were 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 $23,383.42.[5] 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. On March 19, 2008, petitioner filed her Reply to Respondent's Response to Petitioner's Motion for Attorney's Fees and Costs ["Pet. Reply"], which included additional documentation and argument. Petitioner filed excerpts from a transcript of an 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.

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

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[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 application for fees and costs in this case would be denied and the consultant fees in Donnovan's case would be significantly reduced.

[4] 62 FR 52724, Vol. 62, No. 196 (October 9, 1997).

[5] This figure includes $500.00 in expert consultant fees that were accrued in Donnovan's case (No. 99-583V). Although petitioner should have claimed $500.00 in each case, because the consultant delineated the amount of time he spent on each case, the medical and genetic problems in both children were very similar (rendering it likely that the consultant's efforts on one case blended with the efforts on the other), and the fact that the petitioner and her counsel are identical in both cases, I conclude that it is permissible to authorize payment in this case for the single bill submitted.

[6] Excerpts from transcripts of oral argument in an unrelated case are not particularly illuminating on the issue of whether the fees and costs in this case are reasonable. Preparing a comprehensive and well-documented application–and one without obvious duplicate billing–would be a better use of counsel's time and effort.

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*, 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 reasonable 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 masters 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.

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 v. Sec'y, HHS*, 3 F.3d 1517, 1520 (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."). *See also*, *Smith v. Sec'y, HHS*, No. 91-57V, 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 permits the special master to comply with that mandate by rendering a decision within

[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).

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).

In spite of that presumption, this case presents a very close question regarding

[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 good faith because of the lack of information in this file to establish that good faith. Although Petitioner's Exhibit ["Pet. Ex."] 1, belatedly filed on June 1, 2006, indicated that Desmond received a number of vaccinations, only his mother's affidavit connects any of his vaccinations to the seizure disorder. Ms. Lamar's affidavit was not filed until March 30, 2007.[12] Petitioner's affidavit states that she noticed Desmond's seizures either on the day of his second hepatitis B vaccination or on the morning thereafter. She stated that he was having 20-60 seizures a day, but that doctors failed to diagnose them. Pet. Ex. 13, ¶ 7. However, there are no medical records demonstrating any complaints of seizures between Desmond's January 13, 1995, hepatitis B vaccination and his hospitalization April 8-13, 1995. Petitioner's Exhibit 7, which contains records from this hospitalization, contains the first medical record reflecting petitioner's concern that Desmond was having seizures. Pet. Ex. 7, p. 528. His seizure disorder was diagnosed at a second hospitalization beginning on April 15, 1995. Pet. Ex. 7, p. 356. These records do not reflect a concern about a vaccination-seizure connection.

Four exhibits containing medical records were filed on June 1, 2006. These exhibits were filed during the period in which petitioner's counsel had lost contact with his client. These records would thus have contained the information that was available at or near the time the petition was filed.[13] None of these medical records drew any connection between Desmond's vaccinations and his seizures.

In her response to Respondent's Opposition to Petitioner's Request for Attorney's Fees and Costs, petitioner points to "her actions and her sworn affidavit" as evidence of her good faith belief in vaccine causation when the petition was filed.[14] She did not identify any medical records in which she asserted such a belief, let alone any created at a time prior to the filing of her petition on Desmond's behalf. She did not file

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[12] Section 300aa–11(c). Petitioner's Exhibits 1-4 were filed on June1, 2006, rather than accompanying the petition filed on August 4, 1999. *See also* Vaccine Rule 2(e), RCFC, Appendix B. The remainder of the medical records were filed over the subsequent eleven months. Under other circumstances, I might conclude that a six and a one half years long failure to produce any evidence that demonstrated petitioner's good faith belief that vaccines caused an injury would itself constitute evidence of lack of good faith. Here, however, the court gave both overt and tacit approval to the failure to file records. *See* orders dated April 27, 2000 (staying the case), and July 9, 2002, (ordering petitioner to file an expert report or request a stay). In a status report filed on July 19, 2002, petitioner requested (and received) an apparently indefinite stay.

[13] I cannot determine precisely what information petitioner's counsel had available to him at the time he filed the petition. It appears from the billing records that the last contact with petitioner (prior to regaining contact in June, 2006) was on January 29, 2004, and involved a letter to petitioner. The billing records do not reflect any affirmative contact from petitioner to her attorney until after June, 2006.

[14] 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.

any additional documents indicating her basis for a good faith belief in vaccine causation. If her "actions" evidencing the sincerity of her belief merely consist of the filing of Desmond's Vaccine Act petition, then it is doubtful that any petition for compensation for a vaccine injury would ever be considered not filed in good faith. No specific actions were identified in the pleading.

However, evidence of petitioner's subjective belief in a connection between Desmond's vaccinations and his seizures is contained in Desmond's brother's case (No. 99-583V). Donnovan's medical records contain a reference indicating that petitioner attributed both of her children's seizure disorders to vaccinations. *See* Decision Awarding Fees and Costs, *Lamar v. Sec'y, HHS*, No. 99-583V, issued July 29, 2008, slip opinion at 9.

Subsequent filings in Desmond's case indicate that Ms. Lamar believed that the hepatitis B vaccines triggered the seizure disorders in both children. *See* Pet. Ex. 7, pp. 30-31, a medical record dated December 4, 2003. I am therefore willing to accord petitioner the benefit of the doubt. I conclude that, at the time the petition was filed, petitioner had a good faith belief that Desmond's seizures were caused by vaccines.

Petitioner's counsel is reminded that it is petitioner's obligation to establish her good faith belief in vaccine causation. Vague references to petitioner's "actions" and an affidavit filed years after the petition would not, ordinarily, be sufficient to demonstrate that belief. However, because both children's petitions were before me, and because I was aware that Donnovan's medical records contained the reference reflecting petitioner's belief in vaccine causation for both children's illnesses, I find in favor of a good faith belief in this case. These circumstances are unlikely to exist in other cases.

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.

The lengthy stays granted in this case excused petitioner from filing evidence substantiating the petition for many years, making it difficult to determine what information counsel had and when he had it. Although I cannot ascertain from the first

filed exhibits exactly when counsel received them, the billing records indicate that petitioner's counsel reviewed some medical records on February 15, 2006, when the informal and indefinite stay requested in July, 2002, was still in effect. Given that he still had not re-established contact with his client at that point, I conclude that Pet. Exs. 1-4 were likely available to him at some earlier time. Although none of these exhibits draw any connection between vaccination and Desmond's seizures, they do establish that some vaccinations occurred within three months of his diagnosis of a seizure disorder. Subsequently filed records indicate that petitioner had concerns about seizures prior to his diagnosis. *See* Pet. Ex. 7, p. 528. Those records establish that the seizures began after two hepatitis B vaccinations were administered, although the period between Desmond's second vaccination and seizure diagnosis was about three months. With the impending expiration of the statute of limitations precluding a more careful examination of the causation issue, 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. If petitioner had 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 expert would opine in favor of vaccine causation.[15] And, even if the petition was

[15] 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.
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> 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.
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> 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

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.

Some medical records reflect petitioner's attribution of Desmond's seizure disorder to his vaccinations. *See, e.g.*, Pet. Ex. 7, p. 30 (a history taken in December, 2003, stating that Desmond's seizures, like his brother's, were caused by vaccinations). However, the records also reflect that the seizures were most likely caused by an X-linked genetic defect. *See, e.g.*, Pet. Ex. 7, p. 29. 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 Desmond's seizure disorder.[16] *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).

C. 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*

> 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?

[16] 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, and with Dr. Bellanti on June 27, 2007. On the same date as the discussion with Dr. Bellanti, counsel contacted petitioner to obtain her agreement to drop her claims. Nearly all the hours claimed after this point involve necessary and reasonable expenses related to dismissing the petition and filing the fees and costs application. While one might argue that involving three different doctors in an effort to support causation was unreasonable and that the case should have been dismissed earlier, the support for that position is scant. *Perreira*, 33 F.3d at 1377, notes that counsel have a "duty to the court to avoid frivolous litigation." "Shopping a case" to several doctors after one has opined against causation may, under other circumstances, constitute a breach of this duty.

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 v. Sec'y, HHS*, No. 90-208V, 24 Cl. Ct. 482, 486 (1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993). In determining attorneys' fees, the special master is not limited to the objections raised by respondent. *See 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 $1500.00 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 the case was reassigned to me on February 8, 2006.

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,[17] a careful review of their reasonableness is necessary.

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

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 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, 99-583V, 99-649V, 99-569V, 99-209V, 99-210V, and 01-263V.[18] 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 mailings. Perhaps this entry pertains to such communications, but charging 0.4 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, 99-583V, 99-649V, 99-495V, and 02-1666V, assigned to me, and in at least two of Special Master Moran's cases, *Duncan v. Sec'y, HHS*, No. 99-455V, 2008 U.S. Claims LEXIS 176 (Fed. Cl. Spec. Mstr. May 30, 2008) (petition for review filed June 27, 2008) and *Hamrick v. Sec'y, HHS*, No. 99-683V, 2007 U.S. Claims LEXIS 415 (Fed. Cl. Spec. Mstr. Jan. 9, 2008). At least eight hours of meetings on the same date, lasting for an identical one hour per case, appear to be examples 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, 99-583V, 99-518V, 99-495V, 99-

[18] 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.

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, 99-583V, 99-649V, 99-495V, 99-569V, 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 these discussions, the total time billed (and paid) in other cases, and the apparent duplication of time claimed, I do not authorize compensation for these entries.

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.[19] I note that compensation for this 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.

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[19] 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 561 (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, 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 proceedings billed in *Riggins*. Additionally, he has filed a request for nearly $100,000.00 in fees for his consultant, Dr. Mark Geier, in that case.

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

This period begins upon reassignment of this case to me and ends in July, 2006, when counsel succeeded in locating petitioner and prosecution of this case recommenced. Attorney fees and staff costs claimed during this period total approximately $3300.00. 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 $2,190.00 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 his 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 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.[20] During the years in which many of this firm's hepatitis B cases were stayed, there were no requirements to file status reports or

[20] 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.

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 have wanted her case transferred to an attorney who was able to handle the demands of bringing her case to a speedy and efficient 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 also 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 Vowell	0.1	30.00
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	3/24/2006	Review chart from [SSK] and prepare for upcoming status conference	0.5	150.00
10	6/08/2006	Left message with roommate for her to call	0.5	150.00
11	9/17/2007	Reviewed court order regarding filing of joint status report on attorney fees	0.1	17.50
12	9/17/2007	Reviewed court order regarding filing of joint status report on attorney fees	0.1	17.50

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 me. This was a single order listing 26 cases. I encourage counsel to read 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 re-read the same order in each case listed on the order borders on the ridiculous. *See Duncan,* 2008 U.S. Claims LEXIS 176, *12 . Having compensated for reading it in case No. 99-569V, I decline to authorize payment for re-reading this order.

Item 8 is an entry that is non-contemporaneous. It also "lumps" dissimilar activities. An identical entry was made in Desmond's brother's case (No. 99-583V). 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 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 Donnovan's case (No. 99-583V). 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 9 bills for 0.5 hour ($150.00) on March 24, 2006, in this case. The identical entry was billed 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. The same entry, other than the date upon which the work was performed (March 21, 2006), appears in cases 99-583V and 99-518V. 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.[21] These duplicate entries are problematic,

[21] 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. 1-4 available to him. *See* Orders, dated July 27, September 29, and November 22, 2006 and January 23 and March 9, 2007.

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. Additionally, another half hour was billed to *Hamrick*, 2008 U.S. Claims LEXIS 415, assigned to Special Master Moran, reflecting that this billing practice 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 arise. The hours billed for preparation for this status conference could easily exceed the hours available in a day.[22]

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 portion 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 10 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 Desmond's brother's case (No. 99-583V). I authorized payment for the entire amount claimed for this entry in that case. Therefore, I will not authorize payment for it here, finding 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.

Items 11 and 12, each billing for 0.1 hour ($17.50), are clearly duplicate entries. Payment is authorized for only one of them.

A deduction of $1202.50 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 July 26, 2007, when the

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[22] 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 the preparation time is clear.

decision on the record was rendered, and through the subsequent preparation and filing of the attorney fee application. This period was characterized by delays[23] 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 $18,200.00 in attorney fees and costs were billed for this period.

(1) Consultant Fees.

Respondent objected to the fees claimed for Dr. Mark Greenspan as insufficiently documented and unjustified. Respondent also objected to the fees claimed for Dr. Mark Geier as insufficiently justified. Respondent's contentions have some degree of merit. However, my analysis indicates that these consultant fees are compensable, although not all at the hourly rates 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.[24] Thereafter, I granted many extensions of time to file the medical records, as reflected in footnote 22, above.

I held a status conference on November 21, 2006, to discuss the unfiled medical records and the need for an expert report. At that status conference, petitioner's counsel represented 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 this order, petitioner filed a late status report

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

[24] 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.

on February 20, 2007, identifying Dr. Kinsbourne as her expert.[25] 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[26] began a review of the medical records on February 22, 2007, and completed his "construction of chronologic medical record" on February 23, 2007.[27] For these two days, Dr. Greenspan billed 7.5 hours ($2625.00). The bill reflects that, after completing his review, Dr. Greenspan emailed counsel on February 23, 2007, and wrote a draft of an "opinion letter," for which he billed 1.5 hours. His efforts on February 26, 2007, to complete the opinion letter involved 5.5 hours. The total hours claimed for consultation with counsel and writing his opinion letter were 7.25 ($2537.50). The opinion letter was not filed as an exhibit in the case. The firm's billing records for late February and early March, 2006, reflect that two attorneys reviewed what petitioner's counsel characterized as "Dr. Greenspan's expert review." Doctor Greenspan's bill was dated February 26, 2007.

Shortly after receipt of Dr. Greenspan's opinion letter, petitioner's counsel contacted Dr. Mark Geier, who began a review of Desmond'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.[28] 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."

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

[26] Doctor Greenspan is an MD/JD practicing in Norfolk, VA. According to his website (www.lawmd.net) (last accessed on 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.

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

[28] Although Dr. Geier's bill separates the work on Desmond's case from that on his brother's case, the entries concerning what services were performed are identical. The total amount is claimed in this case; although the bill was filed as an attachment to the fees and costs application in case No. 99-583V, the fees for Dr. Geier's review were not charged to that case.

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, 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)

The billing records do not reflect any contact with Dr. Bellanti prior to June 27, 2007,[29] 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.[30]

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.

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[29] Doctor Bellanti is an immunologist. *See Savin v. Sec'y, HHS*, No. 99-537 (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). The June 27, 2007 entry does indicate that there was a prior case discussion, but does not indicate when (or why) Dr. Bellanti was initially consulted, nor does it indicate when or if he agreed to render an opinion.

[30] 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.
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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 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.[31] *See Perreira,* 1992 U.S. Claims LEXIS 289, *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 US Claims LEXIS 377, *4 (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.

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[31] 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.taxexemptworld.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.

However, the statute authorizing payment of fees and costs requires such expenditures 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,* 1997 U.S. Claims LEXIS 313. 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 specific 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*, 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. 99-583V. 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.

In the case of Dr. Geier, the bill submitted indicates that he played a variety of roles. Notwithstanding the frequent criticism of Dr. Geier's testimony in Vaccine Act[32] and other civil cases,[33] this case presents facts where his training as a geneticist is

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[32] *See, e.g.*, *Piscopo v. Sec'y, HHS,*No. 01-234V, 66 Fed. Cl. 49 (2005) (special master did not abuse his discretion in determining that Dr. Geier did not have the education, training or experience to proffer a reliable opinion on the cause of petitioner's autoimmune disorder); *Thompson v. Sec'y, HHS,* No. 99-436, 2003 U.S. Claims LEXIS 161, *19 (Fed. Cl. Spec. Mstr. May 23, 2003) (special master found Dr. Geier unqualified to testify about infantile spasms and found his testimony filled with speculation); *Haim v. Sec'y, HHS,* No. 90-1031V, 1993 U.S. Claims LEXIS 145, *46 (Fed. Cl. Spec. Mstr. Aug. 27, 1993) ("Dr. Geier's testimony is not reliable, or grounded in scientific methodology and procedure. His testimony is merely subjective belief and unsupported speculation."); *Marascalco v. Sec'y, HHS*, No. 90-1571V, 1993 U.S. Claims LEXIS 96, *16 (Fed. Cl. Spec. Mstr. July 9, 1993) (where the special master described Dr. Geier's testimony as intellectually dishonest); *Aldridge v. Sec'y, HHS*, No. 90-2475V, 1992 U.S. Claims LEXIS 284, *36 (Cl. Ct. Spec. Mstr. June 11,1992) (special master found Dr. Geier's reliance on statement from two outdated medical textbooks which was not included in the current edition to be disingenuous. "Were Dr. Geier an attorney, he would fall below the ethical standards for representation."); *Ormechea v. Sec'y, HHS*, No. 90-1683V, 1992 U.S. Claims LEXIS 274, *20 (Cl. Ct. Spec. Mstr. June 10, 1992) ("Because Dr. Geier has made a profession of testifying in matters to which his professional background [obstetrics and genetics] is unrelated, his testimony is of limited value to the court."); *Daly v.Sec'y, HHS,* No. 90-590V, 1991 U.S. Cl. Ct. LEXIS 368, *21(Cl. Ct. Spec. Mstr. July 26, 1991) ("[T]his court is inclined not to allow Dr. Geier to testify before it on issues of Table injuries. Dr. Geier clearly lacks the expertise to evaluate the symptomatology of the Table injuries and render an opinion thereon.").

[33] *See, e.g., Graham v. Wyeth Laboratories*, 906 F.2d 1399, 1418 (10th Cir. 1990) (Dr. Geier's calculation error was of sufficient magnitude so as to warrant a new trial); *Doe v. Ortho-Clinical Diagnostics,* 440 F. Supp. 2d 465, 474 (M.D.N.C. 2006) (excluding Dr. Geier's testimony as based on "hypothesis and speculation."); *Redroot v. B.F. Ascher & Company,* 2007 U.S. Dist. LEXIS 40002 (N.D. Ca 2007) (excluding Dr. Geier as an expert, finding his testimony "not reliable."); *Pease v. American Cyanamid Co.*, 795 F. Supp. 755, 760-61 (D. MD 1992) (in granting summary judgment, trial judge noted inconsistencies in Dr. Geier's opinion); *Jones v. Lederle Laboratories, American Cyanamid Co.*, 785 F. Supp. 1123, 1126 (E.D. NY 1992) ("the court was unimpressed with the qualifications, veracity, and bona

highly relevant. To the extent that his work on the case involved reviewing the genetics issues, I have no difficulty in concluding that the hourly fee is warranted. Unfortunately, his bill does not break down the time he spent on a number of distinct tasks.

An evaluation of the reasonableness of the hours Dr. Geier expended and the fee charged for his services is complicated by the failure to explain clearly what he actually did. Doctor Geier has been paid for "literature searches" in other cases at the rates paid an associate attorney. *See, e.g.*, *Paul v. Sec'y, HHS*, No. 05-886V, 2007 U.S. Claims LEXIS 408, (Fed. Cl. Spec. Mstr. Dec. 13, 2007) and *Densmore v. Sec'y, HHS*, No. 99-588V (unpublished). Without seeing the literature or research results, it is difficult to determine if the court is paying repeatedly for the same searches or research in individual cases that are also billed as "Hep B panel" expenses. *See* footnote 20, above, discussing the fees of Dr. Geier charged to the Hep B panel, in part for literature searches.

I will extend Dr. Geier the benefit of any doubt in this particular case, as the hours expended are modest and included consultation with firm attorneys on several occasions. Furthermore, the issues raised pertained to his expertise in genetics. I authorize compensation for the two hours claimed in this case at the claimed rate of $250.00 per hour and for the two hours at $250.00 per hour expended on Case No. 99-583V. *See, Ray*, 2006 U.S. Claims LEXIS 97, *42 (awarding Dr. Geier $250.00 per hour for his consultant work).

(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 333, *3-4 (Fed. Cl. Spec. Mstr. Dec. 16, 1993).

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.

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fides" of Dr. Geier); and *Militrano v. Lederle Laboratories, American Cyanamid Co.*, SCt NY, 3 Misc. 3d, 523, 537-38 (2003) (characterizing Dr. Geier's affidavit as "conclusory and scattershot" and "undermined by many of the materials submitted in support of it").

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 the matters initially submitted.

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 **$23,383.42** 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 $19,880.57**.[34]

> The payment shall be **a lump sum of $19,880.57**, 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.[35]

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[34] 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).

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

IT IS SO ORDERED.

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