

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 06-0764V

Filed: 22 April 2009

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NATALIA GLASER, parent of MARIUS *
 GLASER, a minor, *
 *
 Petitioner, *
 *
 v. *
 *
 SECRETARY OF HEALTH AND *
 HUMAN SERVICES, *
 *
 Respondent. *
 * * * * *

PUBLISHED¹

*Pre-approval of attorneys' fees rates;
 expert fees*

ORDER

The Court convened a special status conference in the above-captioned case on 27 March 2009, upon Petitioner's request to lodge an oral motion for preapproval of expert fee rate of \$425.00. Petitioner had contacted a board-certified pediatric neurologist, and requested that the Court find a certain amount "reasonable" before said expert testifies at hearing or even composes an expert report.

The Court noted that this motion was not made in writing with the attached proofs and evidence that would be standard for a fee application at the end of an action, and would be all the more necessary to adequately assess the motion at this early stage. Nor did the oral motion provide Respondent notice and opportunity to respond, as would be also necessary for the Court to thoughtfully assess any but the most standard of motions.

The Court did not find the rate of \$425 exorbitant or unreasonable under all conditions, but was not convinced by what was (and is currently) known about this newcomer to the Vaccine Program that such rate is warranted. Indeed, the Court may later find such a rate reasonable for this expert; however, there is a paucity of evidence to evaluate his work *in this case* to determine a

¹ This Order will be published and posted to the Court of Federal Claims website. Therefore, Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), she has 14 days from the date of this Order within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

reasonable rate. Petitioner compared this expert to Dr. Kinsbourne, a regular expert witness in pediatric neurology before the Program, but the comparison is inapposite. Regardless of what any of the members of this bench may think of Dr. Kinsbourne as an expert witness, he is something of a “known quantity.” On the contrary, the Court knows nothing about the expert witness at issue. Petitioner has provided no evidence that his preparation and testimony is reasonably worth the rate requested. Even more importantly, the Court has not had firsthand, experiential knowledge of this expert’s work product in the form of expert opinion report or expert testimony at a hearing, which are among the best guides to adjudging the reasonable rate for fees.

Moreover, the Court will later need to look in retrospect to determine, according to the statutory mandate of 42 U.S.C. § 300aa–15(e)(1), whether Petitioner either has prevailed on the issue of entitlement or has, to the satisfaction of a preponderance, been brought in good faith and been founded upon a reasonable basis. The Court is in no position to determine any of these criteria at this juncture, and cannot very well bind itself in commitment to pay an unsubstantiated, and therefore arbitrary, amount. In this regard, one cannot “un-ring the bell.” What would happen if the Court granted the preapproval of rate sought by Petitioner and then later found the Petition not entitled to compensation and not supported by a reasonable basis? The Court does not here prejudge or state an opinion about the Petition in any way, but must consider the outcome of its actions in all contingencies.

Wherefore, the Court **DENIED** Petitioner’s motion for pre-approval of rate of expert fees. The next status conference remains set for **8 May 2009 at 10:00 AM (EDT)**. Any obstacles encountered should be addressed with the Court, via my law clerk, Isaiah Kalinowski, Esq., at 202-357-6351.

IT IS SO ORDERED.

Richard B. Abell
Special Master