

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-102V

Filed: March 23, 2009

Not for publication

NICOLE BOUGIE, as the Prochien *
Ami of MAKAYLA BOUGIE *

Petitioner, *

v. * Attorneys' fees and costs

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Altom M. Maglio, Sarasota, FL, for petitioner.
Katherine C. Esposito, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING ATTORNEYS' FEES AND COSTS¹

On February 22, 2008, petitioner filed the above-captioned petition alleging that a Pediarix vaccine caused subcutaneous bleeding, fever, a seizure disorder, and autism. Petitioner's attorney of record, Mr. Altom Maglio, received the case from another attorney, Dennis W. Potts, located in Honolulu, HI. Petitioner filed a series of medical records in the case,

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

consisting of Exhibits # 1-29 (filed on May 21, 2008), Exhibits # 30-33 (filed August 6, 2008), Exhibits # 34-37 (filed August 22, 2008), Exhibits # 38-39 (filed September 16, 2008), and Exhibit # 40 (filed November 26, 2008). On January 16, 2009, respondent filed his Rule 4(c) report. On January 19, 2009, the parties filed a stipulation of dismissal. On January 23, 2009, the undersigned issued a decision dismissing the case.

Petitioner filed an Application for Attorneys' Fees and Costs ("Fee App.") on February 2, 2009, in which petitioner requested reimbursement in the amount of \$3,769.72 in fees and costs for Dennis W. Potts, the predecessor attorney; \$10,398.00 in fees and \$1,538.43 in costs for the Maglio, Christopher & Toale Law Firm; and personal costs to petitioner of \$16.22.

In the Response to Petitioner's Application for Fees and Costs ("Resp."), filed February 17, 2009, respondent noted that both former special master John F. Edwards (to whom the case was assigned previously) and the undersigned questioned whether petitioner could prove her case. Respondent requested that the Court consider whether this case was brought in good faith and with a reasonable basis required by 42 U.S.C. §300aa-15(e)(1)(B) for the compensation of attorneys' fees and costs.

Additionally, respondent noted correctly that Mr. Potts billed twice for \$315.28.² Respondent posited that neither Mr. Potts nor Mr. Maglio's paralegals should recover anything for reading one- and two-sentence orders. Respondent also contended that petitioner may not be reimbursed for conduct done in the ordinary cost of business, activities such as filing and photocopying, because such costs would be covered under overhead (i.e., administrative expenses). Further, respondent objected to petitioner's request to be reimbursed for reviewing the records in November and December 2008 (for a total of \$3,162.50) on the grounds that petitioner should have conducted the review earlier in the proceeding to avoid unnecessary fees.

Petitioner filed a Reply to Response to Application for Attorneys' Fees and Costs ("Rep.") on February 18, 2009. Petitioner agreed to withdraw the compensation request of \$315.28 for Mr. Potts' fee. Petitioner's counsel Anne C. Toale claimed the petition was filed in good faith and with a reasonable basis. Petitioner's counsel noted that petitioner saved money by not hiring an expert to review all the medical records in the case and doing it herself. Finally, petitioner requested additional compensation of \$1,146.50 for replying to respondent's response.

Respondent filed a Sur-Reply to Petitioner's Application for Fees and Costs on February

²In petitioner's original Application for Fees and Costs, petitioner filed an invoice for Mr. Potts, in which petitioner requested \$315.24 in costs and \$0.04 in tax for a total cost of **\$315.28**. Petr's App. at 6. In respondent's Response, respondent objected to petitioner's request for **\$315.24** for Mr. Potts' costs, failing to account for the \$0.04 in taxes. Resp. at 3. In petitioner's Reply, petitioner conceded that Mr. Potts included his costs twice, agreeing to exclude **\$315.28** from his bill. The undersigned has opted to utilize the number billed by Mr. Potts, **\$315.28**, noted above.

26, 2009, in which respondent claimed that the fees requested by Ms. Toale, partner of petitioner's counsel of record, were unnecessary since Mr. Maglio should have realized earlier in the proceeding that the case should be dismissed. Respondent also noted that Ms. Toale was never the attorney of record in this case. Respondent further objected to petitioner's requested fees for preparing the Reply to respondent's Response as "unnecessary."

On Thursday, February 26, 2009, the undersigned's law clerk contacted petitioner, who declined to file a Sur-Sur-Reply to respondent's Sur-Reply, filed February 26th.

Relevant Case Law

The Vaccine Act allows recovery of "reasonable attorneys' fees, and other costs" as part of compensation. 42 U.S.C. §§300aa-15(e)(1)(A)-(B). The "reasonableness" requirement applies not only to attorneys' fees, but also to costs. Guy v. Sec'y of HHS, 38 Fed. Cl. 403, 405 (1997); Perreira v. Sec'y of HHS, 27 Fed. Cl. 29, 34 (1002), aff'd, 33 F.3d 1375 (Fed. Cir. 1994). In determining reasonableness, a special master must evaluate and may exclude any of the hours that she deems to be "excessive, redundant, or otherwise unnecessary." Saxton v. Sec'y of HHS, 3 F.3d at 1517, 1521 (Fed. Cir. 1993) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)). In making reductions, the special master is not required to base her decision on a line-by-line evaluation of the fee application. Wasson v. Sec'y of HHS, 24 Cl. Ct. 482, 484 (1991) (affirming the special's master's general approach to petitioner's fee request where the entries and documentation contained in the 82-page fee petition were organized in such a manner that specific citation and review were rendered impossible), aff'd, 988 F.2d 131 (Fed. Cir. 1993). In exercising that discretion, special masters may consider their prior experience in reviewing fee applications and even the special masters' prior experience with the specific attorney involved. See Saxton, 3 F.3d at 1519 (sustaining the special master's decision to reduce the amount requested by petitioner based upon special master's prior experience with petitioner's attorney who typically billed far more hours than other similarly-situated firms). It is also "well within the special master's discretion to reduce the hours to a number that, in [her] experience and judgment, was reasonable for the work done." Id. at 1521.

Analysis

Respondent did not object to petitioner's out-of-pocket expenses of \$16.22. After reviewing the relevant materials filed by the parties, the undersigned will discuss the objections raised by respondent below.

1. Fees requested by Mr. Potts

The parties agreed that the **\$315.28** requested by petitioner for Mr. Potts was submitted twice and conceded that the sum was to be removed from the total requested by petitioner for fees and costs. Resp. at 3; Rep. at 1.

Respondent also objected to charges for Mr. Potts' review of one- and two-sentence orders as *de minimus* and not compensable. Resp. at 3.

While the undersigned recognizes that prior rulings of other special masters in the Program have differed on the compensability of certain tasks, this special master has held previously that counsel's review of short, routine court orders should be equally brief in scope. See Stott v. Sec'y of HHS, No. 02-192V, 2006 WL 2457404, at *3 (Fed. Cl. Spec. Mstr. July 31, 2006) (declining to compensate petitioner's counsel for excessive billing for review of simple, short orders; reducing a charge of 30 minutes (0.5 hour) to 6 minutes (0.1 hour) to read a one-sentence order). The undersigned accepts respondent's objections to the time billed by Mr. Potts. During his tenure as petitioner's counsel of record, Mr. Potts charged time for reviewing orders issued by the special master six times, for a total duration of 1.1 hours. Having reviewed the Orders issued during Mr. Potts' tenure as petitioner's attorney, the undersigned observes that none is of any length longer than several lines, which should not require more than a couple of minutes' attention. Accordingly, petitioner shall be awarded for 0.6 hours (0.1 hour per review). The fees and costs to be excluded from this transaction total **\$150.00 (\$330.00 requested - \$180.00 awarded)**.

The total fees and costs to be excluded for petitioner's request for Mr. Potts is **\$465.28 (\$315.28 for double billing + \$150.00 for the reductions noted above)**.

2. Fees charged by the Maglio, Christopher & Toale firm

Respondent renewed his objection to "numerous instances of billing for de minimus activities" for which petitioner should not be compensated. Resp. at 3.

a. De minimus entries billed by MCT's paralegal

Specifically, respondent objected to the review of electronic notices conducted by the Maglio, Christopher & Toale firm's paralegal after the firm filed a document in this case. Resp. at 3. Respondent also expanded the *de minimus* objection to include review of one- and two-sentence orders. Id.

Having reviewed petitioner's invoice in detail, the undersigned regards the activities performed by the Maglio, Christopher & Toale principals and their paralegal staff to be reasonably necessary except for paralegal time to read brief orders. The firm's certified paralegal, identified in petitioner's fee application as "SJK", entered a total of 158 billing entries in this case. Fee App., Ex. B at 1-8. Of these entries, the firm's certified paralegal billed 21 times for reviewing electronic notices for a total of 3.5 hours at \$95.00 per hour. See id. As respondent noted, the rate charged was that of the firm's certified paralegal, a rate below that charged by petitioner's counsel. While the undersigned recognizes that reviewing the electronic filing notices constitutes a reasonable expenditure for which petitioner may be compensated, I find that the amount of time for which petitioner seeks compensation in this case exceeds that reasonably necessary to perform such tasks. Accordingly, the undersigned will compensate petitioner at a rate of 0.1 hours for each entry conducted by the firm's paralegal for a total of 2.1 hours, instead of the 3.5 hours requested (21 entries x 0.1/entry). Accordingly, the fees and costs to be excluded for these activities are **\$133.00**. (\$332.50 requested - \$199.50 awarded).

b. Costs incurred during the ordinary course of business

Respondent also objected to several charges by the Maglio, Christopher & Toale law firm for which petitioner sought compensation as constituting charges incurred in the ordinary cost of business. Resp. at 3. Respondent specifically identified the following charges:

“Review statement from Pacer, enter into QuickBooks”;
“Enter monthly case costs”;
“Enter monthly invoices into QuickBooks”;
“Enter invoice from Mediconnect into QuickBooks” and
“Create note to file regarding monthly copy, scan, print, and legal research expenses”.

Resp. at 3.

In Guy, the U.S. Court of Federal Claims held that secretarial support is “included within an attorney’s hourly rate and is not reimbursable.” 38 Fed. Cl. at 408. Certainly, there are costs that constitute “part of the overhead inherent in practicing law.” Higgins v. Sec’y of HHS, No. 92-313V, 1993 WL 93920, at *2 (Fed. Cl. Spec. Mstr. Mar. 17, 1993) (denying compensation for reimbursement of clerical materials and supplies used in prosecuting petitioner’s case). Other special masters in the Program have refused compensation for work that was secretarial or “ministerial” in nature. See Isom v. Sec’y of HHS, No. 94-770V, 2001 WL 101459, at *2 (Fed. Cl. Spec. Mstr. Jan. 17, 2001).

Upon reviewing the contested entries, the undersigned finds that the specific entries noted above to which respondent objects are not compensable. The fees and costs to be excluded from these transactions totals **\$66.50 (the full sum requested for the above actions)**.

c. Hours requested by Anne C. Toale

On November 13, 2009, the undersigned issued an Order in which petitioner was ordered to “evaluate whether to go forward with this case,” after having received all the medical records in the case. Order, November 13, 2009. As of November 13, 2009, petitioner was still in the process of gathering medical records. On November 26, 2009, petitioner filed the medical records outstanding in her case. Petr’s Ex. 40.

Respondent objected to the 11.5 hours, totaling \$3,162.50 in fees, billed by Ms. Toale in November and December 2008, for medical record review and vaccine reaction research as “unnecessary.” Resp. at 4. Respondent noted that petitioner was “under order to decide whether to proceed with the case,” and “[h]ad petitioner exercised diligence in conducting this review earlier in the proceedings, many of petitioner’s requested fees could have been avoided entirely.” Id.

The Court may award attorney’s fees and costs if a petition was brought “in good faith and there was a reasonable basis for the claim for which the petition was brought.” 42 U.S.C. § 300aa-15(e)(1). As a general practice, this Court accepts petitions filed without records, usually done when such a filing is adequate to stop the running of the statute of limitations (although the filing by itself does not establish a reasonable basis under the statute). See Stewart v. Sec’y of HHS, No. 02-819V, 2002 WL 319695743, at *4 (Fed. Cl. Spec. Mstr. Dec. 30, 2002).

The undersigned’s docket includes numerous cases where petitioners and their counsel

have been permitted to supplement their filings with additional medical records, often at the request of respondent. This widely-accepted practice advances the goals of the Program to ensure that Program petitioners have access to competent counsel. See Jessen v. Sec’y of HHS, No. 94-1029V, 1997 WL 48940 (Fed. Cl. Spec. Mstr. Jan. 17, 1997). However, the Federal Circuit has effectively limited recovery of attorneys’ fees and costs in cases where the reasonable basis ceases to exist. See Perreira v. Sec’y of HHS, 33 Fed.3d 1375 (Fed. Cir. 1994) (affirming limitations on attorneys’ fees and costs, allowing compensation only up to the point where the reasonable basis sufficient to support the claim ceases to exist).

Respondent’s objection fails to appreciate the timing and the nature of the undersigned’s November 13th Order highlighting the undersigned’s concerns about the weakness of the evidence supporting petitioner’s claim as of November 13, 2008. The undersigned intended to call the parties’ attention to the fact that, without more evidentiary support, petitioner risked dismissal of her petition. As petitioner’s counsel, the attorneys of Maglio, Christopher & Toale were bound to advance their client’s interests provided there was a reasonable basis for doing so. Petitioner’s attorneys located and filed additional records on November 26, 2008; respondent filed a Rule 4 (c) report on January 16, 2009, and the parties filed the Joint Stipulation of Dismissal on January 23, 2009. The undersigned does not view the compensation requested for Ms. Toale for action taken in the latter months of 2008 as being beyond the bounds of reasonableness prescribed by Perriera. Accordingly, the undersigned rejects respondent’s objections and awards petitioner full compensation for the attorney fees billed during this time period.

3. Petitioner’s Request for Supplemental Fees and Costs

The undersigned has awarded supplemental fees and costs in prior cases, provided the request was reasonable under the Vaccine Act. See Heflin v. Sec’y of HHS, No. 04-1541V, 2008 WL 5024923 (Fed. Cl. Spec. Mstr. Oct. 28, 2008); see also Marston v. Sec’y of HHS, No. 91-0355V, 1998 WL 719493 (Fed. Cl. Spec. Mstr. Sept. 29, 1998).

It is unclear to the undersigned how petitioner’s additional request for compensation in preparing the Reply, filed February 18, 2009, could be deemed “unnecessary.” A review of petitioner’s supplemental fee application filed with the Reply reveals that Ms. Toale and a paralegal at the MCT law firm spent 4.3 hours (4.2 hours and 0.2 hour, respectively) preparing petitioner’s Reply. Petitioner did not spend an inordinate amount of time drafting the Reply, which adequately responded to respondent’s objections. Accordingly, the undersigned can see no reason to deny compensation for the time spent by petitioner’s counsel in drafting her Reply. The undersigned hereby concludes that petitioner’s supplemental request for attorneys’ fees and costs incurred in replying to the government’s objections is reasonable.

Conclusion

In sum, the undersigned finds an award in the amount of **\$16,204.09** in attorneys’ fees and costs to be reasonable. In compliance with General Order #9, petitioner states that she incurred **\$16.22** in costs. Accordingly, pursuant to Vaccine Rule 13, petitioner is hereby awarded a total of **\$16,204.09** in attorneys’ fees and costs. The award shall be in the form of one

check made jointly payable to petitioner and Mr. Dennis Potts in the amount of **\$3,304.44**; one check made jointly payable to petitioner and petitioner's counsel of record, Mr. Altom M. Maglio, in the amount **\$12,883.43**; and one check made payable to petitioner in the amount of **\$16.22**.

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

IT IS SO ORDERED.

Dated: March 23, 2009

/s/ Laura D. Millman

Laura D. Millman
Special Master

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