

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 16-1229V

Filed: June 13, 2024

* * * * *

WILLIAM DAVIS *and* SHANNON *

DAVIS, *as guardians of* ELIZABETH *

DAVIS, *an adult*, *

*

Petitioners, *

v. *

*

SECRETARY OF HEALTH *

AND HUMAN SERVICES, *

*

Respondent.

* * * * *

David Richards, Esq., Christensen & Jensen, P.C., Salt Lake City, UT, for petitioner.

Alexis Babcock, Esq., U.S. Department of Justice, Washington, DC, for respondent.

DECISION ON ATTORNEYS' FEES AND COSTS¹

Roth, Special Master:

On September 29, 2016, Yahvel Murphy filed a petition on behalf of her daughter, Elizabeth Davis, seeking compensation pursuant to the National Vaccine Injury Compensation Program.² She alleged that Elizabeth suffered Complex Regional Pain Syndrome (“CRPS”) and related sequelae following a tetanus, diphtheria, acellular pertussis (“Tdap”) vaccine she received on October 1, 2013. Petition, ECF No. 1. On June 29, 2017, respondent filed his Rule 4(c) Report, conceding that Elizabeth was entitled to compensation. ECF No. 14. A Ruling on Entitlement was issued thereafter on November 15, 2017, finding Elizabeth entitled to compensation for her CRPS and related sequelae. ECF No. 18.

¹ Because this Decision contains a reasoned explanation for the action taken in this case, it must be made publicly accessible and will be posted on the United States Court of Federal Claims' website, and/or at <https://www.govinfo.gov/app/collection/uscourts/national/cofc>, in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2018) (Federal Management and Promotion of Electronic Government Services). This means the Decision will be available to anyone with access to the internet. In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, the undersigned finds that the identified material fits within this definition, such material will be redacted from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (1986). Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2012).

On December 6, 2021, Elizabeth Davis’s legal guardians were substituted as petitioners. ECF Nos. 67-68. Respondent filed a proffer on March 27, 2023, and a decision adopting the proffer was filed on the same day. Proffer, ECF No. 96; Decision Awarding Damages, ECF No. 97.

Petitioners filed a Motion for Attorneys’ Fees and Costs on September 25, 2023. ECF No. 103 (“Fees Motion”). Petitioner requests a total of **\$196,859.30**, representing \$176,900.10 in attorneys’ fees and \$19,959.20 in costs. Fees Motion at 1. Pursuant to General Order No. 9, petitioners have indicated that they have not incurred any costs in this case. Fees Motion at 12. Respondent responded to the Motion on September 28, 2023, stating he “is satisfied the statutory requirements for an award of attorneys’ fees and costs are met in this case” and requesting that the Court “exercise its discretion and determine a reasonable award for attorneys’ fees and costs.” Response at 2-3, ECF No. 104. Petitioners did not reply.

This matter is now ripe for consideration.

I. Legal Framework

The Vaccine Act permits an award of “reasonable attorneys’ fees” and “other costs.” § 15(e)(1). If a petitioner succeeds on the merits of his or her claim, the award of attorneys’ fees is automatic. *Id.*; see *Sebelius v. Cloer*, 133 S. Ct. 1886, 1891 (2013). However, a petitioner need not prevail on entitlement to receive a fee award as long as the petition was brought in “good faith” and there was a “reasonable basis” for the claim to proceed. § 15(e)(1).

The Federal Circuit has endorsed the use of the lodestar approach to determine what constitutes “reasonable attorneys’ fees” and “other costs” under the Vaccine Act. *Avera v. Sec’y of Health & Human Servs.*, 515 F.3d 1343, 1349 (Fed. Cir. 2008). Under this approach, “an initial estimate of a reasonable attorneys’ fees” is calculated by “multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.” *Id.* at 1347-48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). That product is then adjusted upward or downward based on other specific findings. *Id.*

Special masters have substantial discretion in awarding fees and may adjust a fee request *sua sponte*, apart from objections raised by respondent and without providing petitioners with notice and opportunity to respond. *Sabella v. Sec’y of Health & Human Servs.*, 86 Fed. Cl. 201, 209 (2009). Special masters need not engage in a line-by-line analysis of petitioner’s fee application when reducing fees. *Broekelschen v. Sec’y of Health & Human Servs.*, 102 Fed. Cl. 719, 729 (2011).

II. Discussion

A. Reasonable Hourly Rate

A “reasonable hourly rate” is defined as the rate “prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Avera*, 515 F.3d at 1348 (quoting *Blum*, 465 U.S. at 896 n.11). In general, this rate is based on “the forum rate for the District of Columbia” rather than “the rate in the geographic area of the practice of petitioner’s

attorney.” *Rodriguez v. Sec’y of Health & Human Servs.*, 632 F.3d 1381, 1384 (Fed. Cir. 2011) (citing *Avera*, 515 F. 3d at 1349). There is a “limited exception” that provides for attorney’s fees to be awarded at local hourly rates when “the bulk of the attorney’s work is done outside the forum jurisdiction” and “there is a very significant difference” between the local hourly rate and forum hourly rate. *Id.* This is known as the *Davis County* exception. *Hall v. Sec’y of Health & Human Servs.*, 640 F.3d 1351, 1353 (2011) (citing *Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. U.S. EPA*, 169 F.3d 755, 758 (D.C. Cir. 1999)).

For cases in which forum rates apply, *McCulloch* provides the framework for determining the appropriate hourly rate range for attorneys’ fees based upon the attorneys’ experience. *McCulloch v. Sec’y of Health & Human Servs.*, No. 09-293V, 2015 WL 5634323 (Fed. Cl. Spec. Mstr. Sept. 1, 2015). The Office of Special Masters has accepted the decision in *McCulloch* and has issued a Fee Schedule for subsequent years.³

Petitioners request the following hourly rates for attorneys Mr. David Richards and Mr. Jeffrey Enquist:

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
D. Richards	\$300	\$300	\$300	\$305	\$312	\$321	\$332	\$343	\$352	\$362	\$375
J. Enquist	-	-	-	-	-	-	\$265	\$278	\$293	\$305	\$320

The rates requested are consistent with what Mr. Richards, Mr. Epstein, and staff have previously been awarded. *See Gardner v. Sec’y of Health & Human Servs.*, No. 17-1851V, 2023 WL 3775170 (Fed. Cl. Spec. Mstr. June 2, 2023); *Atnip v. Sec’y of Health & Human Servs.*, No. 14-1006V, 2016 WL 4272057 (Fed. Cl. Spec. Mstr. July 6, 2016). Thus, I find the requested rates reasonable.

B. Hours Reasonably Expended

Attorneys’ fees are awarded for the “number of hours reasonably expended on the litigation.” *Avera*, 515 F.3d at 1348. Counsel should not include in their fee requests hours that are “excessive, redundant, or otherwise unnecessary.” *Saxton ex rel. Saxton v. Sec’y of Health & Human Servs.*, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). “Unreasonably duplicative or excessive billing” includes “an attorney billing for a single task on multiple occasions, multiple attorneys billing for a single task, attorneys billing excessively for intra office communications, attorneys billing excessive hours, [and] attorneys entering erroneous billing entries.” *Raymo v. Sec’y of Health & Human Servs.*, 129 Fed. Cl. 691, 703 (2016). While attorneys may be compensated for non-attorney-level work, the rate must be comparable to what would be paid for a paralegal or secretary. *O’Neill v. Sec’y of Health & Human Servs.*, No. 08-243V, 2015 WL 2399211, at *9 (Fed. Cl. Spec. Mstr. Apr. 28, 2015). Clerical and secretarial tasks should not be billed at all, regardless of who performs them. *McCulloch*, 2015 WL 5634323, at *26. Hours spent traveling are ordinarily compensated at one-half of the normal hourly attorney rate. *See Scott v. Sec’y of Health & Human Servs.*, No. 08-756V, 2014 WL

³ The Fee Schedules can be accessed at <http://www.cofc.uscourts.gov/node/2914>. The hourly rates contained within the schedules are updated from the decision in *McCulloch v. Sec’y of Health & Human Servs.*, No. 09-923V, 2015 WL 5634323 (Fed. Cl. Spec. Mstr. Sept. 1, 2015).

2885684, at *3 (Fed. Cl. Spec. Mstr. June 5, 2014) (collecting cases). And “it is inappropriate for counsel to bill time for educating themselves about basic aspects of the Vaccine Program.” *Matthews v. Sec’y of Health & Human Servs.*, No 14-1111V, 2016 WL 2853910, at *2 (Fed. Cl. Spec. Mstr. Apr. 18, 2016). Ultimately, it is “well within the Special Master’s discretion to reduce the hours to a number that, in [her] experience and judgment, [is] reasonable for the work done.” *Saxton*, 3 F.3d at 1522. In exercising that discretion, special masters may reduce the number of hours submitted by a percentage of the amount charged. *See Broekelschen*, 102 Fed. Cl. at 728-29 (affirming the Special Master’s reduction of attorney and paralegal hours); *Guy v. Sec’y of Health & Human Servs.*, 38 Fed. Cl. 403, 406 (1997) (same).

The overall hours spent on this matter appear to be reasonable for this matter, which was pending for over seven years. The undersigned has reviewed the billing entries and finds that the billing entries adequately describe the work done on the case and the amount of time spent on that work. None of the entries appear objectionable, nor has respondent identified any entries as objectionable. Accordingly, petitioners are entitled to a final award of attorneys’ fees in the amount of **\$176,900.10**.

C. Reasonable Costs

Like attorneys’ fees, a request for reimbursement of attorneys’ costs must be reasonable. *Perreira v. Sec’y of Health and Hum. Servs.*, 27 Fed. Cl. 29, 34 (Fed. Cl. 1992). Petitioners request a total of \$19,959.20 in costs, representing costs for acquiring medical records, postage, the Court’s filing fee, petitioners’ portion of the cost of a mediator, and the work performed by petitioners’ life care planner and economist. Fees Motion, Tab A at 78-82. All the requested costs are typical of Vaccine Program litigation and are reasonable in the undersigned’s experience. Petitioner has provided adequate documentation supporting the requested costs. *See* Fees Motion, Tab B. Accordingly, petitioner is awarded **\$19,959.20** in costs.

III. Total Award Summary

Based on the foregoing, petitioners’ motion for attorneys’ fees and costs is **GRANTED**. The undersigned hereby awards **a lump sum of \$196,859.30**, representing \$176,900.10 in attorneys’ fees and \$19,959.20 in costs, **in the form of a check payable jointly to petitioners and petitioners’ counsel, David Richards, Esq.**

In the absence of a motion for review filed pursuant to RCFC Appendix B, the Clerk of the Court shall enter judgment in accordance with this Decision.⁴

IT IS SO ORDERED.

s/ Mindy Michaels Roth

Mindy Michaels Roth
Special Master

⁴ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party filing a notice renouncing the right to seek review.