

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

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STEPHEN WINKELSTEIN,

Petitioner,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

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No. 19-815V

Special Master Christian J. Moran

Filed: September 19, 2022

Leah V. Durant, Law Offices of Leah V. Durant, PLLC, Washington, DC, for
Petitioner;

Alexis B. Babcock, United States Dep't of Justice, Washington, DC, for
Respondent.

UNPUBLISHED DECISION AWARDING
ATTORNEYS' FEES AND COSTS¹

Pending before the Court is petitioner Stephen Winkelstein's motion for final attorneys' fees and costs. He is awarded \$39,706.54.

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¹ Because this published decision contains a reasoned explanation for the action in this case, the undersigned is required to post it on the United States Court of Federal Claims' website in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services). This posting means the decision will be available to anyone with access to the internet. In accordance with Vaccine Rule 18(b), the parties have 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 agrees that the identified material fits within this definition, the undersigned will redact such material from public access.

On June 3, 2019, petitioner filed for compensation under the Nation Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10 through 34. Petitioner alleged that the influenza vaccination he received on November 18, 2017, caused him to suffer Bell's palsy and bilateral sensorineural hearing loss. On March 29, 2022, the parties filed a stipulation, which the undersigned adopted as his decision awarding compensation on April 4, 2022. 2022 WL 1223812.

On October 3, 2022, petitioner filed a motion for final attorneys' fees and costs ("Fees App."). Petitioner requests attorneys' fees of \$36,104.90 and attorneys' costs of \$4,601.64 for a total request of \$40,706.54. Fees App. at 1. Pursuant to General Order No. 9, petitioner warrants that he has not personally incurred costs related to the prosecution of his case. *Id.* On October 4, 2022, respondent filed a response to petitioner's motion. Respondent argues that "[n]either the Vaccine Act nor Vaccine Rule 13 contemplates any role for respondent in the resolution of a request by a petitioner for an award of attorneys' fees and costs." Response at 1. Respondent adds, however that he "is satisfied the statutory requirements for an award of attorneys' fees and costs are met in this case." *Id.* at 2. Additionally, he recommends "that the Court exercise its discretion" when determining a reasonable award for attorneys' fees and costs. *Id.* at 3. Petitioner filed a reply on October 5, 2022, reiterating his belief that the requested fees and costs are reasonable.

* * *

In this case, because petitioner was awarded compensation pursuant to a stipulation, he is entitled to a final award of reasonable attorneys' fees and costs. 42 U.S.C. § 300aa-15(e)(1). Thus, the question at bar is whether the requested amount is reasonable.

The Vaccine Act permits an award of reasonable attorney's fees and costs. §15(e). The Federal Circuit has approved the lodestar approach to determine reasonable attorneys' fees and costs under the Vaccine Act. This is a two-step process. Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1348 (Fed. Cir. 2008). First, a court determines an "initial estimate ... 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)). Second, the court may make an upward or downward departure from the initial calculation of the fee award based on specific findings. *Id.* at 1348. Here, because the lodestar process yields a reasonable result, no additional adjustments are required. Instead, the analysis focuses on the elements of the lodestar formula, a reasonable hourly rate and a reasonable number of hours.

In light of the Secretary's lack of objection, the undersigned has reviewed the fee application for its reasonableness. See McIntosh v. Sec'y of Health & Human Servs., 139 Fed. Cl. 238 (2018)

A. Reasonable Hourly Rates

Under the Vaccine Act, special masters, in general, should use the forum (District of Columbia) rate in the lodestar calculation. Avera, 515 F.3d at 1349. There is, however, an exception (the so-called Davis County exception) to this general rule when the bulk of the work is done outside the District of Columbia and the attorneys' rates are substantially lower. Id. at 1349 (citing Davis Cty. Solid Waste Mgmt. and Energy Recovery Special Serv. Dist. v. U.S. Env'tl. Prot. Agency, 169 F.3d 755, 758 (D.C. Cir. 1999)).

Petitioner requests the following hourly rates for the work of his counsel: for Ms. Leah Durant, \$377.00 per hour for work performed in 2018, \$380.00 per hour for work performed in 2019, \$395.00 per hour for work performed in 2020, \$420.00 per hour for work performed in 2021, and \$441.00 per hour for work performed in 2022; and for Mr. Mike Milmo, \$464.00 per hour for work performed in 2019, \$484.00, and \$509.00 per hour for work performed in 2021 per hour for work performed in 2020. These rates are consistent with what counsel has previously been awarded for their Vaccine Program work and shall be awarded herein. See, e.g., Culp v. Sec'y of Health & Human Servs., No. 18-1315V, 2020 WL 4199040, at *2 (Fed. Cl. Spec. Mstr. Apr. 24, 2020).

B. Reasonable Number of Hours

The second factor in the lodestar formula is a reasonable number of hours. Reasonable hours are not excessive, redundant, or otherwise unnecessary. See Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993). The Secretary also did not directly challenge any of the requested hours as unreasonable.

The undersigned has reviewed the submitted billing records and the billed hours are largely reasonable. On review, the only reductions necessary are for two vague entries by Ms. Durant for client calls with no indication as to the topic of the call (entries on 10/4/18 and 6/30/21) and for an excessive amount of time expended by a paralegal for closing out the case file (entries on 2/8/22, 5/16/22, and 5/18/22). Upon review, a reasonable reduction for these issues is \$1,000.00.

Accordingly, petitioner is awarded final attorneys' fees of \$35,104.90.

C. Costs Incurred

Like attorneys' fees, a request for reimbursement of costs must be reasonable. Perreira v. Sec'y of Health & Human Servs., 27 Fed. Cl. 29, 34 (Fed. Cl. 1992), aff'd, 33 F.3d 1375 (Fed. Cir. 1994). Petitioner requests a total of \$4,601.64 in attorneys' costs. This amount is for acquisition of medical records, professional review of those records, the Court's filing fee, postage, and work performed by petitioner's medical expert, Dr. Salvatore Napoli. Fees App. Ex. 2, at 2. Dr. Napoli's hourly rate of \$400.00 has previously been awarded by the undersigned and the hours billed in this matter (7.5) are also reasonable. Wentland v. Sec'y of Health & Human Servs., No. 18-1308V, 2022 WL 3153263, at *3 (Fed. Cl. Spec. Mstr. Jul. 22, 2022). The remainder of the costs are also reasonable and have been supported by the necessary documentation. Petitioner is therefore awarded the full amount of costs requested.

D. Conclusion

The Vaccine Act permits an award of reasonable attorney's fees and costs. 42 U.S.C. § 300aa-15(e). Accordingly, the undersigned awards a total of **\$39,706.54** (representing \$35,104.90 in attorneys' fees and \$4,601.64 in attorneys' costs) as a lump sum in the form of a check jointly payable to petitioner and Ms. Leah Durant.

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.²

IT IS SO ORDERED.

s/Christian J. Moran
Christian J. Moran
Special Master

² Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing their right to seek review.