

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 19-1625V

(not to be published)

JENNIFER JOHNSON,

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

Chief Special Master Corcoran

Filed: January 10, 2022

Special Processing Unit (SPU);
Attorney's Fees and Costs

Paul R. Brazil, Muller Brazil, LLP, Dresher, PA, for Petitioner.

Ronalda Elnetta Kosh, U.S. Department of Justice, Washington, DC, for Respondent.

DECISION ON ATTORNEY'S FEES AND COSTS¹

On October 17, 2019, Jennifer Johnson filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq.*² (the "Vaccine Act"). Petitioner has alleged that that she suffered left shoulder injuries caused in fact by an influenza vaccine she received on January 10, 2018. Petition at 1, ¶¶ 2, 9. On August 10, 2021, a decision was issued dismissing Petitioner's claim for failure to prosecute. ECF No. 25. Judgment entered on September 13, 2021. ECF No. 27.

¹ Because this unpublished Decision contains a reasoned explanation for the action in this case, I am required to post it on the United States Court of Federal Claims' website in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 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, I agree that the identified material fits within this definition, I will redact such material from public access.

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

On November 18, 2021, Petitioner filed a motion seeking a total of \$10,771.81³ in attorney's fees and costs. Petitioner's Application for Attorney's Fees ("Motion"), ECF No. 29. Petitioner did not address the requirements of good faith and reasonable basis, and provided no additional information regarding the merits of her case. *Id.* In his response filed on December 2, 2021, Respondent generally discussed the requirements of good faith and reasonable basis. Response to Motion for Award of Attorney's Fees and Costs ("Response"), ECF No. 30. Asserting, however, that he "no longer has sufficient resources to provide detailed objections to requests for attorneys' fees and costs" (*id.* at 4 n.3), Respondent defers to my discretion in evaluating if fees are appropriate - assuming I find "that the reasonable basis and fee awards standards are met in this case" (*id.* at 4).

For the reasons discussed below, I find there was a reasonable basis for Petitioner's claim, and she is otherwise entitled to a fees award despite the dismissal of her claim. I have reviewed the billing records submitted with Petitioner's request. In my experience, the request appears reasonable, and I find no cause to reduce the requested hours or rates.

I. Existence of Reasonable Basis

A. Legal Standard

Motivated by a desire to ensure that petitioners have adequate assistance from counsel when pursuing their claims, Congress determined that fees and costs may be awarded even in unsuccessful claims. H.R. REP. NO. 99-908, at 22 *reprinted in* 1986 U.S.C.C.A.N. 6344, 6363; *see also Sebelius v. Cloer*, 133 S.Ct. 1886, 1895 (2013) (discussing this goal when determining that attorneys' fees and costs may be awarded even when the petition was untimely filed). As Judge Lettow noted in *Davis*, "the Vaccine Program employs a liberal fee-shifting scheme." *Davis v. Sec'y of Health & Human Servs.*, 105 Fed. Cl. 627, 634 (2012). It may be the only federal fee-shifting statute that permits unsuccessful litigants to recover fees and costs.

However, Congress did not intend that *every* losing petition be automatically entitled to attorney's fees. *Perreira v. Sec'y of Health & Human Servs.*, 33 F.3d 1375, 1377 (Fed. Cir. 1994). And there is also a prerequisite to even obtaining fees in an unsuccessful case. The special master or court may award attorney's fees and costs in a case in which compensation was not awarded only if "that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was

³ As explained later in this Fee Decision, due to a simple mathematical error, this is an incorrect total.

brought.” Section 15(e)(1). Reasonable basis is a prerequisite to a fee award for unsuccessful cases – but establishing it does not automatically *require* an award, as special masters are still empowered by the Act to deny or limit fees. *James-Cornelius on behalf of E. J. v. Sec’y of Health & Human Servs.*, 984 F.3d 1374, 1379 (Fed. Cir. 2021) (“even when these two requirements are satisfied, a special master retains discretion to grant or deny attorneys’ fees”).

As the Federal Circuit has explained, whether a discretionary award of attorney’s fees and costs is appropriate in non-compensated cases involves two distinct inquiries – a subjective one when assessing whether the petition was brought in good faith, plus an objective one when ascertaining whether reasonable basis existed. *Simmons*, 875 F.3d at 635 (quoting *Chuisano v. Sec’y of Health & Human Servs.*, 116 Fed. Cl. 276, 289 (2014)). “Good faith is a subjective test, satisfied through subjective evidence.” *Cottingham*, 971 F.3d at 1344. “[T]he ‘good faith’ requirement . . . focuses upon whether petitioner honestly believed he had a legitimate claim for compensation.” *Turner v. Sec’y of Health & Human Servs.*, No. 99-0544V, 2007 WL 4410030, at *5 (Fed. Cl. Spec. Mstr. Nov. 30, 2007).

Cases in which good faith has been found to be lacking often involve petitioners who failed to produce or actively concealed evidence undermining their claims. *Purnell-Reid v. Sec’y of Health & Human Servs.*, No. 18-1101V, 2020 WL 2203712 (Fed. Cl. Spec. Mstr. Apr. 6, 2020); *Crowding v. Sec’y of Health & Human Servs.*, No. 16-0876V, 2019 WL 1332797 (Fed. Cl. Spec. Mstr. Feb. 26, 2019); *Heath v. Sec’y of Health & Human Servs.*, No. 08-0086V, 2011 WL 4433646 (Fed. Cl. Spec. Mstr. Aug. 25, 2011); *Carter v. Sec’y of Health & Human Servs.*, No. 90-3659V, 1996 WL 402033 (Fed. Cl. Spec. Mstr. July 3, 1996).

“Additionally, a petitioner’s attorney’s conduct may also be relevant when evaluating good faith.” *Purnell-Reid*, 2020 WL 2203712, at *6. “Counsel still have a duty to investigate a Program claim even if they reasonably find their client to be a credible individual.” *Cortez v. Sec’y of Health & Human Servs.*, No. 09-0176V, 2014 WL 1604002, at *8 (Fed. Cl. Spec. Mstr. Mar. 26, 2014). Factors, such as a looming statute of limitations and the conduct of counsel, are properly considered when determining whether good faith exists – but *do not bear* on the claim’s objective basis. *Simmons*, 875 F.3d at 636; *Amankwaa v. Sec’y of Health & Human Servs.*, 138 Fed. Cl. 282, 289 (2018) (“the effort that an attorney makes to investigate a claim or to ensure that a claim is asserted before the expiration of the statutory limitations period . . . are properly evaluated in determining whether a petition was brought in good faith”).

“Reasonable basis, on the other hand, is an objective test, satisfied through objective evidence.” *Cottingham*, 971 F.3d at 1344. The reasonable basis requirement examines “not at the likelihood of success [of a claim] but more to the feasibility of the claim.” *Turner*, 2007 WL 4410030, at *6 (quoting *Di Roma v. Sec’y of Health & Human Servs.*, No. 90-3277V, 1993 WL 496981, at *1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993)). The Federal Circuit recently explained “that a reasonable basis analysis is limited to objective evidence, and that subjective considerations, such as counsel’s subjective views on the adequacy of a complaint, do not factor into a reasonable basis determination.” *James-Cornelius on Behalf of E. J. v. Sec’y of Health & Hum. Servs.*, 984 F.3d 1374, 1379 (Fed. Cir. 2021).

Although clearly easier to meet than the preponderant standard required for compensation, “courts have struggled with the nature and quantum of evidence necessary to establish a reasonable basis.” *Wirtshafter v. Sec’y of Health & Human Servs.*, --- Fed. Cl. ---, 2021 WL 4188429, at *5 (Fed. Cl. 2021). “[I]t is generally accepted that ‘a petitioner must furnish *some evidence* in support of the claim.’” *Id.* (quoting *Chuisano*, 116 Fed. Cl. at 288, emphasis added in *Wirtshafter*). Citing the *prima facie* elements of a successful claim described in Section 11(c)(1), the Federal Circuit recently instructed that the level of the objective evidence sufficient for a special master to find reasonable basis should be “more than a mere scintilla but less than a preponderance of proof.” *Cottingham*, 971 F.3d at 1345-46. In a prior case, it affirmed a special master’s determination that reasonable basis was lost after Petitioner’s “expert opinion, which formed the basis of the claim, was found to be unsupported by either medical literature or studies.” *Perreira*, 33 F.3d at 1376.

B. Analysis

Although I dismissed this case due to Petitioner’s failure to communicate with her counsel and to file medical records required by the Vaccine Act, the record is sufficient to establish that the Petitioner had a reasonable basis for her claim. Along with her petition, Ms. Johnson filed records showing she received the flu vaccine as alleged in her left deltoid on January 10, 2018 (Exhibit 1 at 1) and that she complained of immediate left shoulder pain at an appointment five days later (Exhibit 2 at 173). This is a sufficient amount of objective proof to support a claim, regardless of its ultimate chance of success.

Regarding the Vaccine Act’s requirement that Petitioner suffer the residual effects of her injury for more than six months – beyond July 10, 2018, Petitioner provided only PT records showing she was experiencing mild symptoms – a pain level of four with activity and mild limitations of her range of motion. Exhibit 4 at 6-12. Petitioner was

discharge from PT on June 12, 2018, because she was awaiting additional authorization. *Id.* at 4. However, the discharge summary indicates she continued to experience mild symptoms as of that date. *Id.* at 4-5. Thus, although Petitioner had not yet provided enough evidence to satisfy the preponderant standard requirement for compensation, the evidence submitted is sufficient to meet the burden of reasonable basis. And I find no other reason why an award of fees is not merited despite Petitioner's lack of success.

II. Appropriate Amount to be Awarded

Before fees and costs can be awarded, counsel must submit fee requests that include contemporaneous and specific billing records indicating the service performed, the number of hours expended on the service, and the name of the person performing the service. See *Savin v. Sec'y of Health & Human Servs.*, 85 Fed. Cl. 313, 316-18 (2008). Counsel should not include in their fee requests hours that are "excessive, redundant, or otherwise unnecessary." *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)). 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." *Id.* at 1522. Furthermore, the special master may reduce a fee request *sua sponte*, apart from objections raised by respondent and without providing a petitioner notice and opportunity to respond. See *Sabella v. Sec'y of Health & Human Servs.*, 86 Fed. Cl. 201, 209 (2009). A special master 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).

In this case, Petitioner requests hourly rates normally awarded for the work performed by attorneys and paralegals at Petitioner's counsel's firm. She has provided the needed receipts, and provided a representation by Petitioner's counsel that "Petitioner has not advanced any funds in the prosecution of her claim as all expenses have been incurred by the attorney of record." Motion at ¶ 4.

I have reviewed the billing records submitted with Petitioner's request. In my experience, the request appears reasonable, and I find no cause to reduce the requested hours or rates. I did, however, notice a mathematical error in the total requested. When combined, the subtotals (\$10,263.00 for fees and \$448.81 in costs) equal \$10,711.81 - not \$10,771.81 as Petitioner requests. Thus, only this correct total will be awarded.

III. Conclusion

I have determined that an award of reasonable attorney's fees and costs is appropriate in this case even though compensation was not awarded. Section 15(e)(1). Accordingly, I hereby **GRANT** Petitioner's Motion for attorney's fees and costs. **I award a total of \$10,711.81 (representing \$10,263.00 in fees and \$448.81 in costs) as a lump sum in the form of a check jointly payable to Petitioner and Petitioner's counsel.**

In the absence of a timely-filed motion for review (see Appendix B to the Rules of the Court), the Clerk shall enter judgment in accordance with this Decision.⁴

IT IS SO ORDERED.

s/Brian H. Corcoran

Brian H. Corcoran
Chief Special Master

⁴ Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing their right to seek review.