

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 19-1954V

Filed: May 24, 2024

MACKENZIE CRAMER,

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

Special Master Horner

Kathleen Margaret Loucks, Lommen Abdo Law Firm, Minneapolis, MN, *for petitioner*.
Camille Michelle Collett, U.S. Department of Justice, Washington, DC, *for respondent*.

DECISION ON ATTORNEYS' FEES AND COSTS¹

On December 26, 2019, petitioner 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 alleges that she suffered a shoulder injury related to vaccine administration ("SIRVA") as a result of her February 19, 2018 Tetanus-diphtheria-acellular pertussis vaccination. Petition at 1. On August 4, 2023, the parties filed a joint stipulation, which I adopted as my decision awarding compensation on the same day. (ECF Nos. 60-61.)

On September 28, 2023, petitioner filed a motion for attorneys' fees and costs. (ECF No. 66.) ("Fees App."). Petitioner requests attorneys' fees in the amount of \$34,133.40 and attorneys' costs and expert fees in the amount of \$11,423.83. Fees App. at 1. Pursuant to General Order No. 9, petitioner has indicated that she has not personally incurred any costs in pursuit of this litigation. Fees App. Ex. 4. Thus, the total amount

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, 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 (2018).

requested is \$45,557.23. On October 6, 2023, respondent filed a response to petitioner's motion. (ECF No. 83.) Respondent argues that "[n]either the Vaccine Act nor Vaccine Rule 13 requires respondent to file a response to a request by a petitioner for an award of attorneys' fees and costs." *Id.* 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. Respondent "respectfully requests that the Court exercise its discretion and determine a reasonable award for attorneys' fees and costs." *Id.* at 3. Petitioner did not file a reply thereafter.

This matter is now ripe for consideration.

I. Reasonable Attorneys' Fees and Costs

The Vaccine Act permits an award of reasonable attorneys' fees and costs. § 15(e). The Federal Circuit has approved the lodestar approach to determine reasonable attorneys' fees and costs under the Vaccine Act. *Avera v. Sec'y of Health & Human Servs.*, 515 F.3d 1343, 1347 (Fed. Cir. 2008). This is a two-step process. *Id.* at 1347-48. First, a court determines an "initial estimate . . . by 'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" *Id.* (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.

It is "well within the special master's discretion" to determine the reasonableness of fees. *Saxton v. Sec'y of Health & Human Servs.*, 3 F.3d 1517, 1521–22 (Fed. Cir. 1993); see also *Hines v. Sec'y of Health & Human Servs.*, 22 Cl. Ct. 750, 753 (1991). ("[T]he reviewing court must grant the special master wide latitude in determining the reasonableness of both attorneys' fees and costs."). Applications for attorneys' fees must include contemporaneous and specific billing records that indicate the work performed and the number of hours spent on said work. See *Savin v. Sec'y of Health & Human Servs.*, 85 Fed. Cl. 313, 316–18 (2008). Such applications, however, should not include hours that are "excessive, redundant, or otherwise unnecessary." *Saxton*, 3 F.3d at 1521 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)).

Reasonable hourly rates are determined by looking at the "prevailing market rate" in the relevant community. See *Blum*, 465 U.S. at 894-95. The "prevailing market rate" is akin to the rate "in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Id.* at 895, n.11. Petitioners bear the burden of providing adequate evidence to prove that the requested hourly rate is reasonable. *Id.*

Special masters can reduce a fee request *sua sponte*, without providing petitioners notice and opportunity to respond. See *Sabella v. Sec'y of Health & Human Servs.*, 86 Fed. Cl. 201, 209 (Fed. Cl. 2009). When determining the relevant fee reduction, special masters need not engage in a line-by-line analysis of petitioners' fee application. *Broekelschen v. Sec'y of Health & Human Servs.*, 102 Fed. Cl. 719, 729 (Fed. Cl. 2011). Instead, they may rely on their experience with the Vaccine Program to determine the reasonable number of hours expended. *Wasson v. Sec'y of Dep't of Health & Human*

Servs., 24 Cl. Ct. 482, 484 (1991), *rev'd on other grounds and aff'd in relevant part*, 988 F.2d 131 (Fed. Cir. 1993). Just as “[t]rial courts routinely use their prior experience to reduce hourly rates and the number of hours claimed in attorney fee requests . . . Vaccine program special masters are also entitled to use their prior experience in reviewing fee applications.” *Saxton*, 3 F.3d at 1521.

a. Hourly Rates

Petitioner requests the following hourly rates for the work of his counsel, Ms. Kathleen Loucks: \$358.00 per hour for work performed in 2018, \$360.00 per hour for work performed in 2019, \$362.00 per hour for work performed in 2020, \$365.00 per hour for work performed in 2021, \$370.00 per hour for work performed in 2022, and \$375.00 per hour for work performed in 2023. Fees App. at 4. These rates are consistent with what counsel has previously been awarded for their Vaccine Program work and shall be awarded herein. See e.g., *L.D. v. Sec’y of Health & Human Servs.*, No. 22-0495V, 2023 WL 2776881 (Fed. Cl. Spec. Mstr. Apr. 4, 2023).

Additionally, petitioner requests compensation for paralegals at the Lommen Abdo Law Firm, including Esther J. Novak, Jody Thorsett, Danielle Dehnke, and Katie R. Grenell at the following hourly rates: \$132.00 per hour for work performed in 2018, \$135.00 per hour for work performed in 2019, \$137.00 per hour for work performed in 2020, \$139.00 per hour for work performed in 2021, \$153.00 per hour for work performed in 2022, and \$161.00 per hour for work performed in 2023. Fees App. Ex. 1 at 4. The requested hourly rates requested for work performed by the paralegals through the end of 2021 are reasonable and consistent with prior determinations, and will therefore be adopted. However, I find a reduction in the hourly rate proposed for the paralegals in 2022 and 2023 to be appropriate. The paralegals have been previously found eligible for the lesser rate of \$142.00 per hour for time billed in 2022 and in 2023. *L.D.*, 2023 WL 2776881, at *3. I find no reason to deviate from such reasoned determinations, and it otherwise is not the practice of OSM to adjust prior rate determinations upward in later cases. See *Jefferson v. Sec’y of Health & Hum. Servs.*, No. 19-1882V, 2023 WL 387051 (Fed. Cl. Spec. Mstr. Jan. 9, 2023). This results in a reduction of attorney’s fees to be awarded of \$248.60.³

b. Hours 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*, 3 F.3d at 1521. 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. See *O’Neill v. Sec’y of Health & Human Servs.*, No. 08–243V, 2015 WL 2399211, at *9 (Fed. Cl. Spec. Mstr. Apr. 28, 2015).

³ This amount consists of $(\$153 - \$142 = \$11 \times 13.1 \text{ hours billed in 2022} = \$144.10) + (\$161 - \$142 = \$19 \times 5.50 \text{ hours billed in 2023} = \$104.00) = \$248.60$

Clerical and secretarial tasks should not be billed at all, regardless of who performs them. See, e.g., *McCulloch*, 2015 WL 5634323, at *26.

Upon review, the overall number of hours billed appears to be reasonable. I have reviewed the billing entries and find that they adequately describe the work done on the case and the amount of time spent on that work. I do not find any of the entries to be objectionable, nor has respondent identified any as such. Petitioner is therefore awarded final attorneys' fees of \$33,884.80.

c. Attorneys' Costs

Like attorneys' fees, a request for reimbursement of attorneys' costs must be reasonable. *Perreira v. Sec'y of Health & Human Servs.*, 27 Fed. Cl. 29, 34 (Fed. Cl. 1992). Petitioner requests a total of \$11,423.83 in attorneys' costs, comprised of acquisition of medical records, postage, and the Court's filing fee. Fees App. Ex. 3 at 1. This amount also includes expert services performed by Naveed Mayer Natanzi, DO, board certified in pain management, and physical medicine and rehabilitation, at \$520.00 per hour for 17.5 hours totaling \$9,100.00. *Id.* at 21, 38. Dr. Natanzi's rate is consistent with what he has previously been awarded for his expert services, and I find it to be reasonable herein. See, e.g., *Peka v. Sec'y of Health & Human Servs.*, No. 20-1099V, 2023 WL 9288151 (Fed. Cl. Spec. Mstr. Dec. 20, 2023). Accordingly, I find that all costs have been supported with the necessary documentation and are reasonable. Petitioner is therefore awarded the full amount of costs sought.

II. Conclusion

In accordance with the Vaccine Act, 42 U.S.C. § 300aa-15(e) (2012), I have reviewed the billing records and costs in this case and finds that petitioner's request for fees and costs is reasonable. I find it reasonable to compensate petitioner and her counsel as follows: **a lump sum in the amount of \$45,308.63, representing reimbursement for petitioner's attorneys' fees and costs, in the form of a check payable to petitioner and petitioner's counsel, Ms. Kathleen Loucks.**

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

IT IS SO ORDERED.

s/Daniel T. Horner
Daniel T. Horner
Special Master

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