

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 20-1672V

Filed: October 31, 2023

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MARY BROWN, *

*

Petitioner, *

*

v. * Attorneys' Fees and Costs

*

SECRETARY OF HEALTH *

AND HUMAN SERVICES, *

*

Respondent. *

* * * * *

Lisa M. Esser, Sommers Schwartz, P.C., Southfield, MI, for petitioner.

Mitchell Jones, U.S. Department of Justice, Washington, DC, for respondent.

DECISION ON ATTORNEYS' FEES AND COSTS¹

Roth, Special Master:

On November 24, 2020, Mary Brown ("petitioner") filed a petition pursuant to the National Vaccine Injury Compensation Program.² Petitioner alleged that she suffered from Guillain-Barré syndrome after receiving an influenza vaccination. *See* Petition (ECF No. 1). On July 28, 2022, petitioner filed a motion to voluntarily dismiss her petition, and on the same day the undersigned issued her decision dismissing the petition for insufficient proof. (ECF No. 36).

On December 12, 2022, petitioner filed an application for final attorneys' fees and costs. ("Fees App.") (ECF No. 39). Petitioner requests total attorneys' fees and costs in the amount of \$28,286.48, representing \$24,312.50 in attorneys' fees and \$3,973.98 in costs. Fees App. at 2.

¹ The undersigned intends to post this Decision on the United States Court of Federal Claims' website. **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 agrees that the identified material fits within this definition, the undersigned will redact such material from public access. Because this unpublished ruling contains a reasoned explanation for the action in this case, the undersigned is required to post it on the United States Court of Federal Claims'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).

² National Childhood Vaccine Injury Act of 1986, Pub L. No. 99-660, 100 Stat. 3755.

Pursuant to General Order No. 9, petitioner has indicated she has personally incurred costs totaling \$148.45 in pursuit of this litigation. *Id.* Respondent responded to the motion on December 15, 2022, stating “Respondent is satisfied the statutory requirements for an award of attorneys’ fees and costs are met in this case” and requesting that the undersigned “exercise her discretion and determine a reasonable award for attorneys’ fees and costs.” Response at 2 (ECF No. 40). Petitioner did not file a reply thereafter.

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). Here, although the petition was eventually dismissed, the undersigned is satisfied that the claim possessed both good faith and a reasonable basis to proceed. Respondent has also indicated that he is satisfied that the requirements of good faith and reasonable basis have been met in this case. Accordingly, petitioner is entitled to a final award of reasonable attorneys’ fees and costs.

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. See *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. See *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. See *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. See *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

Petitioner requests that her counsel, Ms. Lisa Esser, be compensated at \$400.00 per hour for all work performed in this case, from 2019 to 2022. This is Ms. Esser's first (and to date, only) Vaccine Program case. Thus, the question at bar is whether Ms. Esser's requested hourly rates are reasonable. Ms. Esser was admitted to practice law in Michigan in 2007, giving her approximately 12 years of experience when she began work on this case in 2019 and placing her in the range of attorneys with 11-19 years of experience in practice on the OSM Attorneys' Forum Hourly Rate Fee Schedules. Based on her overall experience, her Vaccine Program-specific experience, and the other factors listed in *McCulloch*, the undersigned finds that a reduction to the requested rates is necessary. In the undersigned's experience, the following hourly rates are reasonable for Ms. Esser's work in this case: \$330.00 per hour for work performed in 2019, \$345.00 per hour for work performed in 2020, and \$375.00 per hour for work performed in 2021. The undersigned finds the rate of \$400.00 to be reasonable for work performed in 2022. Application of these rates results in a reduction of \$1,457.50.

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. 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). Clerical and secretarial tasks should not be billed at all, regardless of who performs them. See, e.g., *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,

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. 09-293V, 2015 WL 5634323 (Fed. Cl. Spec. Mstr. Sept. 1, 2015).

2014 WL 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 undersigned has reviewed the submitted billing records and finds that the overall hours expended are slightly high based on the billing practices by Ms. Esser and her paralegals. The cause of this issue is that Ms. Esser and her paralegals billed a minimum of .25 hours for any billing entry. Typically, in the Vaccine Program, the accepted standard is that billing entries are billed in tenths of an hour rather than quarters, as the later system can lead to overbilling. This appears to be the case here. As an example, on July 27, 2022, counsel billed 15 minutes to leave a voicemail for her client and another 15 minutes on a phone call where the client asked to call back when her husband was out of the shower. Fees App. at 13. In the undersigned’s experience, it is extremely unlikely that all communication or review of routine court orders took a minimum of 15 minutes.

To accomplish “rough justice” the undersigned shall reduce the final award of attorneys’ fees by five percent to offset this issue of overbilling. *See Florence v. Sec’y of Health & Human Servs.*, No. 15-255V, 2016 WL 6459592, at *5 (Fed. Cl. Spec. Mstr. Oct. 6, 2016) (citing *Fox v. Vice*, 563 U.S. 826, 838 (2011)). Petitioner is therefore awarded final attorneys’ fees of \$21,712.25.

C. Reasonable 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 \$3,973.98 in costs for acquiring medical records, postage, the Court’s filing fee, and a retainer paid to a potential medical expert for review of petitioner’s records. Petitioner has provided adequate documentation supporting the requested costs and all appear reasonable in the undersigned’s experience. Accordingly, petitioner is entitled to final attorneys’ costs of \$3,973.98.

Additionally, pursuant to General Order No. 9, petitioner has indicated that she has personally incurred costs of \$148.45 in pursuit of this litigation for acquisition of medical records. These costs are reasonable and shall be fully reimbursed.

III. Conclusion

In accordance with the foregoing, petitioner’s motion for attorneys’ fees and costs is **GRANTED**. The undersigned hereby awards the following:

- 1) **a lump sum of \$25,686.23, representing reimbursement for petitioner's attorneys' fees and costs, in the form of a check payable jointly to petitioner and Ms. Lisa Esser; and**
- 2) **a lump sum of \$148.45, representing reimbursement for petitioner's costs, in the form of a check payable to petitioner.**

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/Mindy Michaels Roth
Mindy Michaels Roth
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).