

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
No. 22-1400V

KERI MCCARTY,

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

Chief Special Master Corcoran

Filed: August 19, 2024

Jonathan Joseph Svitak, Shannon Law Group, P.C., Woodridge, IL, for Petitioner.

Alec Saxe, U.S. Department of Justice, Washington, DC, for Respondent.

DECISION ON ATTORNEY'S FEES AND COSTS¹

On September 28, 2022, Keri McCarty 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 alleged that she suffered a shoulder injury related to vaccine administration resulting from an influenza vaccine received in her left arm on October 9, 2020. ECF No. 1. On April 3, 2024, I issued a decision awarding compensation to Petitioner based on the parties' stipulation. ECF No. 30.

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).

Petitioner has now filed a motion for attorney's fees and costs, requesting an award of \$29,547.20 (representing \$29,004.20 in fees plus \$543.00 in costs). Application for Attorney's Fees and Costs ("Motion") filed April 24, 2024. ECF No. 34. Furthermore, counsel for Petitioner represents that Petitioner incurred no personal out-of-pocket expenses. *Id.* at 3.

Respondent reacted to the motion on May 2, 2024, indicating that he is satisfied that the statutory requirements for an award of attorney's fees and costs are met in this case, but deferring resolution of the amount to be awarded to my discretion. Respondent's Response to Motion at 2-3, ECF No. 35. Petitioner did not file a reply thereafter.

I have reviewed the billing records submitted with Petitioner's requests and find a reduction in the amount of fees to be awarded appropriate, for the reasons listed below.

ANALYSIS

The Vaccine Act permits an award of reasonable attorney's fees and costs for successful claimants. Section 15(e). 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).

The petitioner "bears the burden of establishing the hours expended, the rates charged, and the expenses incurred." *Wasson v. Sec'y of Health & Human Servs.*, 24 Cl. Ct. 482, 484 (1991). The Petitioner "should present adequate proof [of the attorney's fees and costs sought] at the time of the submission." *Wasson*, 24 Cl. Ct. at 484 n.1. Petitioner's counsel "should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private

practice ethically is obligated to exclude such hours from his fee submission.” *Hensley*, 461 U.S. at 434.

ATTORNEY FEES

The hourly rates requested for attorney Jonathan Svitak, Patrick Anderson and associated paralegals for all time billed through 2024 are reasonable and consistent with our prior determinations and will therefore be adopted herein. Petitioner has also requested the hourly rate of \$482 for 2023 work performed by attorney Craig E. Donnelly and the hourly rate of \$519 for 2024 work performed by attorney Elizabeth E. Simek. ECF No. 34-2. These rates require further evaluation.

Attorney Donnelly was admitted to the Illinois Bar in 2004, *Id.*, placing him in the category of attorneys with 11-19 years’ experience based on the OSM Attorneys’ Fees Schedules. ECF No. 34-6. Attorney Simek was admitted to the Illinois Bar in 1996, placing her in the range of attorneys with 20-30 years’ experience.³ ECF No. 34-5.

However, although Mr. Donnelly and Ms. Simek’s requested rates fall inside the OSM Fee Schedules relevant to their levels of experience, both attorneys were recently admitted to the Court of Federal Claims as of 2023, *Id.*, and do not have significant experience representing Petitioners in the Vaccine Program. Accordingly, it would be improper for Mr. Donnelly and Ms. Simek to receive rates established for comparably-experienced counsel who also have lengthy experience in the Program. See *McCulloch v. Sec’y of Health and Hum. Services*, No. 09–293V, 2015 WL 5634323, at *17 (Fed. Cl. Spec. Mstr. Sept. 1, 2015) (stating the following factors are paramount in deciding a reasonable forum hourly rate: experience in the Vaccine Program, overall legal experience, the quality of work performed, and the reputation in the legal community and community at large). Instead, and based on my experience applying the factors relevant to determining proper hourly rates for Program attorneys, **I hereby award Mr. Donnelly the lesser rate of \$450 for his time billed in 2023, and Ms. Simek the lesser rate of \$500 for her time billed in 2024. Application of the foregoing reduces the amount of fees to be awarded herein by \$396.40.**⁴

³ The Attorneys’ Fee Schedules are available at <http://www.cofc.uscourts.gov/node/2914>.

⁴ This amount consist of (\$482 - \$450 = \$32 x 5.5 hrs. = \$176.00) + (\$519 - \$500 = \$19 x 11.60 hrs. = \$220.40).

Petitioner has otherwise provided supporting documentation for all claimed costs. ECF No. 34-4. Respondent offered no specific objection to the rates or amounts sought. I find the requested costs reasonable and hereby award them in full.

CONCLUSION

The Vaccine Act permits an award of reasonable attorney's fees and costs for successful claimants. Section 15(e). Accordingly, I hereby GRANT in part Petitioner's Motion for attorney's fees and costs. **I award a total of \$29,150.80 (representing \$28,607.80 in fees plus \$543.00 in costs) as a lump sum in the form of a check jointly payable to Petitioner and Petitioner's counsel, Shannon Law Group, P.C.** In the absence of a timely-filed motion for review (see Appendix B to the Rules of the Court), the Clerk of Court shall enter judgment in accordance with this Decision.⁵

IT IS SO ORDERED.

s/Brian H. Corcoran

Brian H. Corcoran
Chief Special Master

⁵ Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing their right to seek review.