In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
No. 99-495V
Filed: June 18, 2008
Not for Publication

JONATHAN CARRINGTON, a minor, by his mother and natural guardian, TAMMY CARRINGTON,	*	
Petitioner,	*	Attorney Fees and Costs; Failure to Timely File;
v.	*	Hepatitis B Panel Costs; Duplicate Billing;
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	Insufficiently Justified Costs
Respondent.	*	

Clifford Shoemaker, Esq., Shoemaker & Associates, Vienna, VA, for Petitioner.
Althea Davis, Esq., U.S. Department of Justice, Washington, DC, for Respondent.

DECISION AWARDING ATTORNEY FEES AND COSTS[1]

VOWELL, Special Master:

On July 26, 1999, Mrs. Tammy Carrington timely filed a petition under the National Vaccine Injury Compensation Act ["Vaccine Act" or "Program"], 42 U.S.C. §300aa-10 *et seq.*[2] on behalf of her minor son, Jonathan. Her petition was dismissed with prejudice on May 29, 2007, based on petitioner's failure to prosecute. Petitioner's election to pursue a civil action was filed on July 19, 2007.

[1] Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete 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 delete such material from public access.

[2] Hereinafter, for ease of citation, all "§" references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. §300aa (2000 ed.).

I. Filing of Fees and Costs Application.

Vaccine Rule 13 provides that an application for attorney fees and costs must be filed no later than 180 days after petitioner either accepts judgment or provides notice of intent to file a civil action. Therefore, any application for attorney fees and costs in this case was due no later than Monday, January 14, 2008. On February 4, 2008, petitioner's counsel filed an untimely [89] application for attorney fees and costs,[3] without preceding it with a motion for enlargement of time demonstrating good cause for the late filing. *See* Vaccine Rules 19(b) and 20(a). I ordered the untimely application struck from the record, but granted petitioner leave to file a motion for enlargement of time to demonstrate good cause for the late filing.[4] Order, dated February 8, 2008.

On February 11, 2008, petitioner's counsel filed a motion for enlargement of time, asserting that, in spite of repeated attempts to obtain the information regarding costs she personally incurred, petitioner had failed to provide her attorney with the information.[5] Petitioner's counsel also asserted that:

> [E]fforts – as it turned out unsuccessful efforts – were made to file the application electronically prior to the expiration of the deadline. Counsel believed the process was successful and set about continuing his efforts to contact petitioner, via email, written and telephonic communication. In one instance of following up with Petitioner counsel accessed the Pacer database to confirm the date of filing and determined that the application had not been successfully filed. Counsel made every effort to determine what had happened and to correct the situation. Including a discussion with Petitioner on January 25, 2008 – for which counsel did bill one hour of time. Regrettably, in his efforts to expedite *and complete* the filing Counsel neglected to file a Motion for Enlargement.

Motion for Enlargement, pp. 1-2 (punctuation and emphasis original).

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[3] The original application was incomplete as it did not include a statement of the costs incurred by petitioner as required by General Order 9.

[4] Prior to striking the application, I reviewed it to determine if the application and supporting documents contained any information regarding the reason for its untimely filing. The application provided no explanation for failing to meet the 180 day deadline.

[5] As noted in the motion, the attempts to contact petitioner were not documented in the time management records filed as a part of the fees application. The last recorded contact with petitioner was made on November 13, 2007.

I conducted a recorded status conference to discuss the late filing in this case, noting that it was one of many such late filings by petitioner's counsel. Transcript of Status Conference ["SC Tr."] at 4. Based on the manner in which the court's electronic filing system operates in generating a record of each access to an electronic case file, I questioned whether the statement that "efforts" were made to file a fees and costs application prior to the expiration of the deadline was factually correct. I urged counsel to file documentation of any such efforts, as the review I had requested from the court's automation officer had not generated any records of access prior to the date the application was due. SC Tr. at 10. On March 13, 2008, petitioner's counsel filed a PACER document reflecting access to the court's electronic case management system by petitioner's counsel on February 2, 2008. No records of any other access to the system between November 13, 2007,[6] and February 2, 2008, were filed.

On March 14, 2008, I granted petitioner's request for an enlargement of time in which to file an application for fees and costs.[7] That application was filed on March 17, 2008, and included costs personally incurred by petitioner in the amount of $1,859.30.

Subsequently, petitioner filed a joint status report on April 1, 2008, indicating that respondent did not object to an amended amount of $70,358.67. The amount included $1,859.30 in petitioner's costs, $56,392.50 in attorney fees, and $12,106.87 in attorney costs.[8]

II. Issues in the Fees and Costs Application.

A. Law Pertaining to Fees and Costs Applications.

The Vaccine Act permits a special master to award compensation to cover reasonable attorney fees and costs even if the underlying petition for compensation is denied. Before awarding attorney fees and costs to unsuccessful litigants and their attorneys, the Act requires the special master to determine that the petition was brought in good faith and that there was a reasonable basis for the claim. *See* 42 U.S.C. §300aa-15(e)(1). When a petitioner does not prevail on the merits, the award of reasonable fees and costs is discretionary, although such awards are commonly made.

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[6] November 13, 2007, is the date on which preparation of attorney fees and costs is first reflected on the time management records submitted. *See,* Petition for Attorney Fees and Costs filed March 17, 2008, p. 20.

[7] A court may enlarge time limits contained in court rules, as distinguished from time limitations imposed by statute, which are jurisdictional. *See Bowles v. Russell,* 127 S.Ct. 2360, 168 L.Ed. 2d 96 (2007) and *Waller v. Sec'y, HHS,* 76 Fed. Cl. 321 (2005).

[8] This amendment reduced the amount claimed in attorney costs by $1,500, based on information contained in the application that petitioner had personally paid that amount to an expert witness. This amount was included in her costs statement.

Saxton v. Sec'y, HHS, 3 F.3d 1517, 1520 (Fed. Cir. 1993) ("If the petition for compensation is denied, the special master 'may' award reasonable fees and costs if the petition was brought in good faith and upon a reasonable basis; the statute clearly gives [a special master] discretion over whether to make such an award.").

As noted in *Hamrick v. Sec'y, HHS*, 99-683V, 2007 U.S. Claims LEXIS 415 (Fed. Cl. Spec. Mstr., Nov. 19, 2007), there is a distinction between a reasonable basis for filing a claim and a reasonable basis for continuing to pursue a claim. While one might argue that dismissal of a case for failure to prosecute demonstrates the lack of a reasonable basis to pursue the case, respondent does not make that argument. Based on the record here, I exercise my discretion in favor of an award of fees and costs. However, that does not mean I accept respondent's acquiescence to an award of $56,392.50 in attorney fees and $12,106.47 in costs.

This court applies the lodestar method to any request for attorney fees and costs. *See Blanchard v. Bergerson*, 489 U.S. 87, 94 (1989) ("The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate" (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). *See also, Avera v. Sec'y*, *HHS*, 515 F.3d 1343, 1347-48 (Fed. Cir. 2008). In determining the number of hours reasonably expended, a court must exclude hours that are "excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Ordinarily, an attorney should not bill for attorney time for tasks that a paralegal should perform, nor should he bill for paralegal time when the tasks involved are of a secretarial nature. *See, e.g., Plott v. Sec'y, HHS,* 92-0633V, 1997 U.S. Claims LEXIS 313 (Fed. Cl. Spec. Mstr. April 23, 1997).

The hourly rates for the attorneys and staff are not at issue. Although not filed with the fees and costs application, petitioner and respondent have entered into an agreement concerning the hourly rates for the attorneys from this firm. What is at issue are some of the hours billed. Special masters may rely on their experience with the Vaccine Act in order to determine if the hours expended are reasonable. *Wasson v. Sec'y, HHS*, 90-208V, 24 Cl. Ct. 482, 486 (1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993). For the reasons detailed below, I do not find that the hours expended are entirely reasonable. While I am mindful that the respondent has not challenged the hours expended, I have elected to conduct a line-by-line analysis of the billing records submitted.[9]

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[9] I will not speculate on why respondent decided against a challenge to the fees in this case. Respondent's failure to challenge the fees and costs requested does not relieve a special master from the statutory obligation to approve only reasonable fees and costs. *Cf. Beck v. Sec'y, HHS*, 924 F.2d 1029 (1991)(to effectuate purposes of the Vaccine Act, the Claims Court may disapprove fee agreement between counsel and Vaccine Act litigant). Respondent is represented by a team of attorneys at the Department of Justice. A particular respondent's counsel may not be cognizant of billing patterns in a

B. Specific Issues Presented by this Fees Application.

1. "Good Cause" for Untimely Filing.

This is the sixth untimely application for fees and costs I have received from this petitioner's counsel in the last year. These late fees applications are part of a general pattern of late filings by this firm over my two-year tenure as a Special Master. A cursory review of my docket reveals numerous instances of missed deadlines and over 40 motions for enlargement of time. Problems in calendaring deadlines, computer breakdowns, and interoffice communication mistakes are frequently cited by counsel as explanations for tardy filings. Each missed deadline and subsequent motion for enlargement requires additional work by petitioner's counsel, respondent, and the court. Missed deadlines and motions for enlargement result in additional billing to the Vaccine Program for attorney or paralegal fees (or both). Thus, this untimely application, followed closely by a motion for enlargement in another attorney fee application that cited different reasons for the requested extension, triggered a degree of scrutiny with regard to the reasons given for the late filing. It also triggered a greater degree of scrutiny with regard to repetitive billing for the same actions.

When the reasons advanced for the late filing are compared to the PACER record submitted and to the application for fees and costs, several discrepancies are apparent, causing me to question the factual accuracy of specific statements in the motion for enlargement of time.

The application for fees and costs contains this entry, dated November 13, 2007:

> prep of fees, prepared retainer statement, prepared table of expenses, reviewed file for petitioner's expenses, email and vm to client re lit exp's, completed review of accounts, reviewed petitioner's records previously submitted.

For these activities, three hours were billed in attorney fees. Having reviewed a number of fees and costs applications by this firm, this entry comports with those made in other cases regarding both the preparation of the fees and costs application and the hours expended. The next entry made by this attorney is dated January 25, 2008, and contains the entry "completed fees," and bills for one hour of attorney time. This entry was made eleven days after the deadline for filing the fees and costs application. It is difficult to reconcile this statement with counsel's assertions that the application for fees and costs was sufficiently complete that "attempts" were made to file it before the due

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series of cases filed by a single attorney or firm. My vantage point in reviewing fees and costs applications in at least eleven cases filed by this firm in the past two years has permitted me to observe patterns of questionable time entries that an individual respondent's counsel may not have had the opportunity to observe.

date.[10] I note that the PACER record submitted by counsel does not show any PACER access between November 13, 2007, and February 1, 2008.[11] January 25, 2008, was eleven days after the expiration of the period established for filing such petitions. Any access to PACER to file a fees and costs application would generate a record. Any successful filing would generate a message to counsel and the assigned special master reflecting the case activity. *See* FAQ, Getting Started, at Question 3, *at* http://www.uscfc.uscourts.gov/node/1615 (last visited June 16, 2008). Although counsel has one free viewing of documents filed through a Notice of Electronic Filing, no such notice was generated for an attorney fees application prior to the February 4, 2008, filing. Had counsel accessed the system (as counsel represented) to view the docket sheet or any filing in this case between November 13, 2007, and the deadline to file the fees and costs application, a billing record would have been generated in PACER. No such billing record was ever filed with the court.

In petitioner's application for an enlargement of time, the January 25, 2008, entry was characterized as client contact involving discussions with petitioner concerning the costs she personally incurred. The time management record itself does not reflect client contact on this date and one hour appears to be a lengthy period to discuss petitioner's primary cost–the payment of a retainer to an expert witness. Given that many of the entries on the time management records indicate contact with the client electronically or telephonically, including the entry dated November 13, 2007, the omission of any indication that completing the fees application involved client contact is questionable. *See, e.g.*, entries on May 3, May 8, and November 20, 2006.

The fees application filed on February 4, 2008, stated that petitioner's expenses would be submitted separately. It thus does not appear that petitioner's personal failure to provide her expense statement to her attorney delayed the filing of the fees application.[12]

The motion for enlargement indicated that "in one instance of following up with Petitioner counsel accessed the Pacer database to confirm the date of filing and determined that the application had not been successfully filed." The motion then

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[10] General Order 9 requires a statement, signed by both petitioner and petitioner's counsel, to accompany the application for fees and costs, indicating which costs, if any, were born by petitioner. Most applications for fees and costs contain such a statement. However, when a petitioner is uncooperative or untimely in providing it, counsel often file the fees application without it, and indicate either that petitioner's General Order 9 statement will be filed when received, or that petitioner had not responded to counsel's attempts to obtain one.

[11] This comports with the information I received from the court's automation officer that the PACER system contained no record of any login by this firm to this case from November 13, 2007, through February 2, 2008, other than the one included in petitioner's March 13, 2008 filing.

[12] The General Order 9 statement found on page 5 of the final fees and costs application is dated February 11, 2008. The date on the fax machine header on the same page cannot be read.

indicated that corrective efforts ensued, which included the January 25, 2008, discussion with petitioner. This firm's only recorded PACER activity involving this case between November 11, 2007, and February 4, 2008, occurred on February 2, 2008. *See* Additional Documentation filed March 13, 2008, p. 2. This was apparently when counsel learned that the fees application had not been filed, because the application was filed two days later on February 4, 2008. This record of access on February 2, 2008, is inconsistent with the statement made in the motion for enlargement that access to PACER triggered the January 25, 2008 discussion with petitioner and subsequent completion of petitioner's costs statement.

In view of these discrepancies, the explanation for the failure to file this application in a timely manner is not particularly persuasive. If the billing records are taken at face value, the fees and costs application was not complete until 11 days after it was due. If the explanation in the motion for enlargement is accepted, then the sole PACER access on February 2, 2008, is inconsistent with the statement that PACER access triggered the client contact on January 25, 2008.

Whether petitioner's counsel has forthrightly established "good cause" for his failure to timely file his fees and costs application is certainly debatable. It appears to me that counsel is offering inconsistent excuses for his apparent inability to meet deadlines. The Vaccine Rules provide for a generous period of time in which to file applications for fees and costs. This counsel has been placed on notice by at least one other special master that a late fees application risks denial of the entire application.[13]

However, denying this application because it was not timely filed would cause an undue hardship on petitioner. I have the utmost sympathy for this petitioner. As the motion for enlargement notes, petitioner and her husband incurred an expense in the expert witness retainer fee that would be significant to a family struggling to care for a profoundly injured child. Based on my visit to their home (at petitioner's request) at the conclusion of the onset hearing, I am aware of how much time and attention Jonathan requires. *See*, *Carrington v. Sec'y, HHS*, 99-495V, U.S. Claims LEXIS 183 at *16 (Fed. Cl. Spec. Mstr. May 29, 2007) (noting "the extraordinary love and attention they lavish on Jonathan and the extent to which meeting Jonathan's overwhelming needs affects their lives"). In view of her circumstances, I am unwilling to attach the same opprobrium to petitioner's failure to submit her costs statement that I attach to her counsel's failure

[13] *Turner v. Sec'y, HHS*, 99-544V, 2007 U.S. Claims LEXIS 394, at *14, n. 6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) ("Although petitioner's counsel's request was filed nearly one month after the expiration of the afforded 180-day period under the Vaccine Rules for the filing of a petition for attorneys' fees and costs, respondent made no objection to the request on the ground of untimeliness.... The Vaccine Rules, however, limit the time for filing '[a]ny request' for attorneys' fees and costs to '180 days' following the entry of judgment or an order concluding proceedings. Vaccine Rule 13. Accordingly, petitioner's counsel is on notice that, notwithstanding the generous enlargements of time afforded in Program practice for the filing of attorneys' fee applications, late filed fee petitions are subject to challenge on the ground of untimeliness.")

to meet court imposed deadlines.

However, counsel is on notice that this untimely petition for fees and costs is the last one that I expect to receive from this firm. Petitioner's counsel is hereby placed on notice that, in the absence of good cause clearly demonstrated, I am unlikely to grant any future fees and costs petitions that are not timely filed. Any motions for enlargement of the 180 day period must, themselves, be timely filed and clearly establish good cause for the enlargement. Finally, petitioner's counsel is reminded that Vaccine Rule 19(b) requires the party moving for an enlargement to contact opposing counsel and state whether opposing counsel opposes the motion.

2. Billing "Hepatitis B" Panel Costs to Individual Cases.

In 1997, the addition of the hepatitis B vaccine to the list of vaccines covered by the Vaccine Act resulted in an extremely large number of claims filed in 1999. The surge occurred because the "look back" statute of limitations for injuries incurred in the eight year period prior to the addition of the vaccine expired on August 6, 1999. In an effort to find some method for expeditiously handling the large number of claims, petitioner's counsel and several other attorneys who frequently represented Vaccine Act claimants worked with the Chief Special Master on what has been variously termed the "Hep B Panel," the "hepatitis B omnibus proceeding," or simply the "hep B proceeding." These efforts had limited success. Some grouping of cases involving similar types of injuries, *see, e.g., Sanders v. Sec'y, HHS*, 99-430V, 2007 U.S. Claims LEXIS 81 (Fed. Cl. Spec. Mstr. Mar. 6, 2007) (arthropathies) and *Lovett v. Sec'y, HHS*, 98-749V, 2007 U.S. Claims LEXIS 61 (Fed. Cl. Spec. Mstr. Feb. 8 2007) (demyelinating conditions), proved successful, but other cases were simply placed in a holding pattern until the conclusion of discovery in the Omnibus Autism Proceeding.

Each of the firms that worked on the hepatitis B omnibus proceeding submitted attorney fees and costs applications for this general effort. The application for "Hep B Panel" costs for this firm is currently pending before Chief Special Master Golkiewicz in *Riggins v. Sec'y, HHS*, No. 99-382V. Distinguishing what is a "Hep B Panel" cost from those costs associated with an individual case can be difficult. Petitioner's counsel has an application for over $100,000.00 in attorney fees for matters related to the hepatitis B claims in general currently pending in *Riggins.* Additionally, he has filed a request for nearly $100,000.00 in fees for his consultant, Dr. Mark Geier. The practice of billing panel costs separately from costs in individual cases, particularly in matters of expert research and discovery, has the potential to result, inadvertently or otherwise, in duplicate billing for the same event and both must be carefully scrutinized in order to avoid such issues.

It appears to me that certain periods of time billed in this case should have been more properly billed in the hepatitis B panel application now pending before Chief

Special Master Golkiewicz. Additionally, having reviewed a significant number of applications for attorney fees and costs in cases that were a part of the hepatitis B proceeding, I have concerns about what appear to be repetitive or duplicate billings.

The entries that appear related primarily to the "Hep B Panel" activities include the following extracts from the time management records submitted in this case.

	Date	Topic	Time (hr)	Amt Billed
1	8/10/2000	Meeting with Dr. Geier and Victor Miller	1.0	250.00
2	8/17/2000	Review materials from Dr. Geier	0.33	82.50
3	10/03/2000	[That portion of this entry pertaining to "work on lining up experts and preparing discover[sic] requests."]	2.0	500.00
4	10/27/2000	Preparation of pleadings - work on discovery requests (over the last week); includes numerous calls to experts and other attorneys	3.0	750.00
5	10/31/2000	Preparation of pleadings - finish SR and Motions and Discovery materials	2.0	500.00
6	12/07/2000	Preparation of pleadings - work on reply to response to disc motion	1.5	375.00
7	2/05/2001	[That portion of entry pertaining to mtg w/ Dr. Geier]	1.5	375.00
8	8/02/2001	Review discovery materials from other lawyers & discuss w/ [another Vaccine Act counsel outside this firm]	1.0	250.00
9	11/13/2001	Preparation of pleadings to seek discovery	2.0	500.00

Entries 1-9 are extractions from the billing records concerning meetings and "discovery" issues, totaling $3,582.50 in attorney fees. A review of petitioner's motion for discovery filed on November 1, 2000, indicates that the requested discovery concerned hepatitis B adverse reactions in general, not specifically what happened to Jonathan (an aneurysm). Nothing in the voluminous medical records filed in this case indicates that Jonathan had thrombocytopenia purpura. Yet petitioner's counsel, who then represented over 130 petitioners alleging injury from hepatitis B vaccinations (*see*, Motion to Designate Master File, filed Dec 8, 1999), requested discovery of reports pertaining to this condition. *See*, Proposed Interrogatories, #2, Motion for Discovery,

filed November 1, 2000. An even broader request for studies relating to the relationship between hepatitis B vaccine "and fever, aneurisms, ITP, brain bleeds, convulsions, autoimmune reactions, hypersensitivity reactions or deaths" is found in Proposed Interrogatories. *Id.* at #3. While some of these requests could pertain to Jonathan's condition (aneurysms and brain bleeding), the scope of the proposed discovery clearly encompassed conditions that Jonathan either did not have (autoimmune reaction), or had only after what the medical records called an "aneurysm" damaged significant portions of his brain (convulsions). Thus, I conclude that the majority of the time billed to discovery should not be attributed to this case, but should be billed in the "Hep B panel" application.

Determining what contact with Dr. Geier is properly billed to this specific case and what should be billed to the "Hep B panel" is complicated because most of Dr. Geier's bills in this case do not cross-reference to the time management records.[14] The sole exception is the entry on 8/10/2000, a meeting for which Dr. Geier also billed. This amount is therefore allowed in its entirety. The other two billings do not cross-reference to the time management records, do not provide the dates when the services were performed, and appear to be excessive for the subject matter listed. One hour of the two hours billed on 10/3/2000 is allowed for correspondence with petitioner; one hour of the 1.5 hours billed on 2/5/2001 is allowed.

The remainder of the entries in items 1-9 above would appear to be encompassed in the general hepatitis B claims, rather than in this specific case. Therefore, counsel will not be compensated for matters that appear more appropriately billed to the general hepatitis B proceeding. For the case specific matters, (consultation with petitioner and status conferences), the amount of the $3,582.50 deemed properly billed to this case is $750.00.

3. Duplicate Billings

On February 8, 2006, Chief Special Master Golkiewicz transferred this case, along with 25 other hepatitis B cases filed by this firm to me. The transfer was accomplished in a single order listing all 26 cases. Shortly thereafter, I issued an order in 28 cases involving this petitioner's counsel, setting a joint status conference to discuss how best to move these cases to decision.[15] Order, dated February 24, 2006. A single order was issued, listing each of the 28 petitioners. The status conference was held on March 27, 2006. Thereafter, individual orders, establishing deadlines in accordance with the agreement of the parties as expressed at the status conference, were issued in each case.

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[14] With the exception of this entry, Dr. Geier's bills do not reflect dates of service.

[15] Individual orders transferred an additional two of this firm's hepatitis B cases to me.

Many of these 28 cases have since proceeded to judgment and applications for attorney fees and costs have been filed. I have issued attorney fees decisions (or have applications for fees and costs currently pending before me) in eleven of those cases, including this one. In my review of these fees and costs applications, a disturbing pattern has emerged, giving rise to questions about the following entries:

10	9/23/2002	[That portion of the entry pertaining to getting a packet ready for mass mailing]	0.4	22.00
11	1/20/2004	Review case with [SSK] and discuss on how to proceed	1.0	250.00
12	2/02/2004	Conference with [SSK] and staff at office meeting re status	0.1	25.00
13	3/29/2004	Review status of case with [SSK] at office meeting	0.2	50.00
14	6/25/2004	Meeting re medical literature and recent decisions (½ travel time charged)	0.05	12.50
15	2/15/2006	Review order of 20060208	0.1	30.00
16	2/26/2006	Review order of 20060224	0.1	30.00
17	2/26/2006	Time spent over the last week with law clerk preparing file for transfer and talking with client	1.0	300.00
18	3/24/2006	Review chart from [SSK] and prepare for upcoming status conference	0.5	150.00

Items 10-18, above, involve small amounts of time which are mirrored in most of the other hepatitis B cases that were assigned to me. For example, the entry "got packet ready for mass mailing" that appears at item 10, above, involves the same 0.40 hours billed in cases 99-537V, 99-583V, 99-584V, 99-649V, 99-569V, 99-209V, 99-210V, and 01-263V.[16] Whatever the "mass mailing" contained, the characterization as "mass" means that it was not focused on this individual case. During the joint status conference on March 27, 2006, petitioner's counsel indicated that he communicated with his many clients with hepatitis B claims through mass mailings; perhaps this entry pertains to such communications. However extensive the mailings were, charging some portion of 0.40 of an hour to each individual case is not appropriate, in that

[16] These cases represent only a portion of the hepatitis B cases filed by this firm and assigned to me. These are simply the ones currently pending before me, or ones in which the fees petitions had been filed electronically, and were thus easily accessible. The questionable entries in items 10-18 have been paid in several of these cases.

mailing documents in individual cases in unlikely to consume the time billed. Having already authorized compensation for this mass mailing in other cases, I decline to do so again.

Other examples of what appear to be duplicate billings may be found in items 11 and 15-16. Item 11 bills for 1.0 hour on January 20, 2004, to discuss this case with another attorney in the office. Standing alone, the billing entry would be reasonable. However, the identical entry is found in cases 99-537V, 99-583V, 99-584V, 99-649V, and 2-1666V, assigned to me; in *Duncan v. Sec'y, HHS*, 99-455V (slip opinion, filed May 30, 2008, at p. 5.); and in *Hamrick*, 2007 U.S. Claims LEXIS 415. At least eight hours of meetings on the same date, lasting for an hour per case, appears to be an example of duplicate billing.

Items 15-16 represent a bill for 0.10 hours to review the order reassigning the case to me and 0.10 hour to review the order setting a joint status conference in 28 hepatitis B cases filed by this firm. The order reassigning the case to me was a single order listing a number of cases; likewise, the order setting the joint status conference was a single order listing all of this firm's cases assigned to me. I certainly do not want to discourage counsel from reading court orders, and have approved bills for short periods of time for reading even the most mundane of orders. However, billing for six minutes of time to reread the same order in each case listed on that order borders on the ridiculous. The Vaccine Program was billed for reading the reassignment order in nine of the eleven cases I examined (99-537V, 99-583V, 99-584V, 99-649V, 99-569V, 99-209V, 99-210V, 02-1666V, and this case). The Vaccine Program was billed for reading the order setting the joint status conference in nine cases as well (all of the above cases except 99-584V, and with the addition of case 01-263V). Having already authorized payment for reading these two orders in several cases, I decline to do so again.

Item 14, above, also contains an entry for travel time to review medical literature. That entry is duplicated in every other hepatitis B case I reviewed. As it does not appear that the literature reviewed was unique to this case, this is a matter best billed to the general hepatitis B omnibus proceeding. I note that other special masters have denied compensation for a similar amount of time in other hepatitis B cases. *See, e.g., Hamrick,* 2007 U.S. Claims LEXIS 415 at n. 2.

Item 17, above, contains an entry billing for one hour of contact over the "past week" with my law clerk, among other activities involving this specific client. Lumping dissimilar activities is not a proper billing practice; likewise, the failure to make contemporaneous records conflicts with Guidelines for Practice under the National Childhood Vaccine Injury Compensation Program ["Guidelines for Practice"]. The Guidelines instruct petitioners' counsel to maintain <u>contemporaneous</u> time records that indicate the date and character of the service performed, the number (or fractions) of hours expended, and the identity of the person performing them. These guidelines encourage separate, rather than "lumped," entries in order to better assess the

reasonableness of a fee request. *See* Guidelines for Practice, Section XIV.A.3 (emphasis added). *See also, Green v. Sec'y, HHS*, 19 Cl. Ct. 57, 67 (1989). I note that a similar entry concerning time spent over the prior week with my law clerk and an identical bill for one hour of time were filed and awarded in cases 99-649V and 99-569V. Given the failure to make contemporaneous entries and the previous payments, I decline to authorize compensation for this item.

Item 18, above, bills for 0.5 hours in this case, as well as in seven other hepatitis B cases (99-537V, 99-583V, 99-649V, 99-569V, 99-210V, 02-1666V, 01-263V, and *Hamrick*, 99-683V, 2007 U.S. Claims Lexis 415), to review a chart and prepare for the upcoming status conference. These billing entries are identical. Certainly it is reasonable for counsel to review a file (or a chart) in order to prepare for an upcoming status conference. Yet it is unlikely that counsel spent an identical amount of time reviewing a case in which no medical records had yet been filed (99-583V) and this one, in which the medical records were voluminous. These duplicate entries are thus problematic. If counsel could not distinguish between what time was spent on each individual case, the matters should more properly be billed to the general hepatitis B proceeding. No further compensation is authorized for this period of time.

These entries in the above chart are disapproved. Compensation for these entries is denied, as I find such hours "excessive, redundant, or otherwise unnecessary...." *Hensley*, 461 U.S. at 434.

4. Other Attorney and Staff Billing Issues.

a. An entry on November 3, 2003, bills 0.50 hour for review of a notice of appearance of respondent's counsel. The time billed is excessive. Only 0.10 hour will be approved.

b. An entry on January 7, 2006, bills 1.0 hour for reviewing a tape for another attorney and making DVDs. Making DVDs is a matter for administrative staff, not for an attorney. I will approve only 0.20 hour of attorney time.

c. An entry on May 7, 2006, bills for 0.50 hour for making reservations and emailing the client. As making reservations is a clerical function, it did not require an attorney's time and billing. I will approve only 0.20 hour of attorney time for emailing clients.

d. Two entries on April 21, 2007, both bill for 0.10 hour for an email from the client. These appear to be duplicate bills, with one referring to the petitioner by name and one referring to her as "client." I will authorize payment for both in this case. When entries appear to duplicate work (such as two entries covering email from a client on the same date), it is incumbent upon counsel, not the special master, to ensure that the entries are adequately explained, perhaps by reflecting in the second entry that this was, indeed, a second communication from the client. If future billings do not so

indicate, I will be unlikely to authorize payment for both.

5. Bills Submitted by Dr. Mark Geier and MedCon, Inc.

Perhaps the most difficult matter in this fees and costs application is the amount of compensation requested for Dr. Mark Geier and MedCon, Inc.,[17] a combined total of $3,800.00. I am concerned both by the lack of specificity in the bills submitted, as well as the use of medical consultants when no reports or other documents are filed with the court reflecting what role the consultant played in the case.

An attorney representing a client in any type of litigation is entitled to hire consultants as needed to aid that attorney in the litigation. Expert consultants play an important role in aiding counsel to understand complex scientific and medical questions. In Vaccine Act litigation, expert consultants research medical literature and assist in reviewing and assessing the merits of a petition. *See Ray v. Sec'y, HHS*, 04-184V, 2006 U.S. Claims LEXIS 97 (Fed. Cl. Spec. Mstr. Mar. 29, 2006). Expert consultants may even become expert witnesses, filing opinions on causation.

When a client is billed for such consultation, the client is entitled to know what the consultant did, what hourly fee or flat rate of compensation was charged, and why the consultant was required. The client's scrutiny of consultation fees provides a necessary check on the attorney's use of such services. In the Vaccine Program, petitioners do not routinely pay "up front" for consultation services; the attorney simply bills the Vaccine Program for those costs at the conclusion of the litigation. Under fee-shifting statutes, the general rule is that an attorney may not bill the government (or the opposing party) for fees that would not be billed to a private client.[18] Petitioners have an obligation to monitor expert fees. *See Perreira v. Sec'y, HHS*, 90-847V, 1992 U.S. Claims LEXIS, 164436 at *10 (Cl. Ct. Spec. Mstr. Jun. 12, 1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994).

Without the check on consultant fees imposed by a private client's concern for his or her bank balance, oversight of counsel's professional obligation to keep

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[17] Invoices from both MedCon and Dr. Geier were submitted with the fees and costs application. The bill format of MedCon is identical to the format of the bills submitted by Dr. Mark Geier as a Medical/Legal Consultant, with the exception of an entry over the heading reflecting Dr. Geier's name. The bills for Dr. Geier and MedCon are aggregated in the Synopsis of Fees and Costs submitted with the Application for Fees and Costs. I thus conclude that MedCon is a business that is in some way connected with Dr. Geier.

[18] When there are indications that the arrangement between consultant and attorney is not entirely at arms length, the issue of consultant fees becomes even more problematic. Public records reflect that petitioner's counsel is an officer or director of the Institute for Chronic Illnesses, Inc., a charitable organization. *See* http://www.taxexemptworld.com/organization.asp?tn=1502647 (last visited June 12, 2008) . One of Dr. Geier's many published articles identifies his organizational affiliation as the Institute for Chronic Illnesses, Inc. *See, A meta-analysis epidemiological assessment of neurodevelopmental disorders following vaccines administered from 1994 through 2000 in the United States*, NEURO ENDOCRINOL LETT, 2006 Aug: 27(4):401-13.

consultant fees reasonable is provided by both respondent and the court. *See, e.g., Kuperus v. Sec'y, HHS*, 01-0060V, 2006 U.S. Claims LEXIS, 377 at *8 (Fed. Cl. Spec. Mstr. Nov. 17, 2006)(special master has discretion to review costs charged for experts). Understandably, this oversight may generate claims that such scrutiny unduly interferes with counsel's right to litigate the case as he sees fit. There is some merit to that position, as petitioner's counsel is undeniably in the best position to determine the type and extent of assistance required. However, the statute authorizing payment of fees and costs requires such charges and expenditures to be objectively reasonable. Ultimately, the special master is charged with determining what fees and costs are reasonable. *See Wasson*, 24 Cl. Ct. at 483.

In the case of Dr. Geier/MedCon, Inc., the situation is complicated by the frequency in which such services are utilized, when little or no information is ultimately filed with the court documenting what was actually done. The Guidelines for Practice state that petitioner should explain costs "sufficiently to demonstrate their relation to the prosecution of the petition." *See* Section XIV.A. 4. *See also, Kuperus*, 2006 U.S. Claims LEXIS 377 at *13 ("an award may be reduced where numerous hours were claimed but where little or no work product was filed with the Court."). The invoices in this case are insufficient to explain the relationship of the costs to the prosecution of this petition.

Doctor Geier has been paid for "literature searches" and "VAERS research"[19] in other cases. *See, e.g.*, *Densmore v. Sec'y, HHS*, 99-588V (unpublished) (Fed. Cl. Spec. Mstr. Aug. 14, 2006) (paying Dr. Geier at a paralegal rate for literature searches); *Ray*, 2006 U.S. Claims LEXIS 97 at *42 (reimbursing Dr. Geier's literature research regarding thrombocytocytopenia and other services at the claimed hourly rate). Without actually seeing literature or research results, it difficult to determine if the court is paying repeatedly for the same searches or research.[20] When, as here, even the dates on

[19] The VAERS (Vaccine Adverse Events Reporting System) database is a passive surveillance system in which anyone can report any purported vaccine reaction. No medical expertise is required to make a report. Research based solely or primarily on VAERS data purporting to show vaccine causation of a condition is not generally considered reliable evidence because of biases and flaws inherent in this form of data collection. *See Ryman v. Sec'y, HHS*, 65 Fed. Cl. 35 (2005) (noting that a special master is not required to accord substantial weight to VAERS reports). I recognize that what may be helpful to an attorney in attempting to evaluate a case may be very different from the type of reliable evidence a special master may find convincing at a hearing. However, when a bill is submitted for research that may not be reliable as evidence, which may well overlap with bills for research claimed in the general hepatitis B proceeding and in other cases, and which fails to reflect the times and dates during which the research was performed, I do not consider this portion of Dr. Geier's (or MedCon's) bill to be compensable.

[20] Doctor Geier has published a number of medical articles involving VAERS research and the hepatitis B vaccine. *See, e.g.,* Geier, D. and Geier, M., "A two-phased population epidemiological study of the safety of thimerosal-containing vaccines: a follow-up analysis." MED SCI MONIT 2005 Apr;11(4): CR160-70 and Geier, M., *et al.*, "*A Review of Hepatis B Vaccination*," EXPERT OPINION DRUG SAFETY 2003 2 (2): 113-122;

which the services were rendered are not provided, it is impossible to determine if overcharging is involved. *See* Guidelines for Practice, Section XIV. A. 3. The July 2001 bill delineates to some extent what was done (Literature Research, VAERS Search, and Report Compilation), but not when it was done. This does not comport with the requirements for contemporaneous billing records. As this bill does not indicate that the VAERS research was focused on this case in particular and does not document when it was performed, I will not authorize compensation for this $2,800.00.

The bill dated March 2, 2002, submitted from MedCon, Inc., claims $400.00 for what is labeled "Research" in one column and "Lawyer Consultation" in another. I have carefully examined the attorney time records submitted, and find only one entry involving this case for any attorney in this firm in all of 2002, which was the entry for RJG on January 14, 2002, involving a motion to strike exhibits. There is one entry for a paralegal, GAS, on September 23, 2002, involving the "mass mailing" addressed above. Given the lack of specificity for this bill and the lack of any attorney entry reflecting consultation with MedCon, Inc., or Dr. Geier in the same year, I will not authorize compensation for this $400.00.

When an expert is retained and files an expert report, the complexity of the issues and the medical records in the case, the nature of research conducted and filed, the expert's qualifications, the quality of the report, and many other factors can be used to assess the reasonableness of the hours claimed. When no work product is provided to the court by a consultant, the assessment of the reasonableness of the hours and fees claimed becomes far more difficult. In such cases, counsel, and ultimately the consultant, would benefit by providing more detail in the costs application about the timeframes and nature of the services performed.

III. Conclusion.

A special master's review of an application for fees and costs must, of necessity, consider many competing factors. Applications for fees and costs must not become so onerous as to discourage counsel from taking Vaccine Act cases. For the same reason, fees and costs applications should be paid as swiftly as possible. However, those fees and costs are paid from a trust fund, not by a private litigant. In granting special masters the authority to order payment of fees and costs, Congress limited their authority to only those fees and costs deemed reasonable.

An application for fees and costs should provide sufficient detail regarding what is being claimed to allow a special master to determine whether those amounts are reasonable from the application and the case file. Petitioner bears the burden to document the fees and costs claimed. *Bell v. Sec'y, HHS,* 18 Cl. Ct. 751, 760 (1989). As the Supreme Court noted in *Hensley*, "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates...and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." 461 U.S. at 437.

In this case, some of the documentation is inadequate. When the time expended or fees claimed are inadequately justified, the court may determine what to award, based on the court's own experience. *See Wasson*, 24 Cl. Ct. at 483 (special master is given broad discretion in calculating fees and costs awards). *See also, Saxton*, 3 F.3d at 521 and *Slimfold Mfg. Co. v. Kinkead Indus., Inc.*, 932 F.2d 1453, 1459 (Fed. Cir. 1991). A court may exercise that discretion without requiring further pleadings or evidence.[21] *Hensley*, 461 U.S. at 433.

Petitioner requested a total of $71,858.67. The requested amount represents $1,859.30 in litigation costs incurred by petitioner, $13,606.87 for litigation costs incurred by petitioner's counsel, Clifford J. Shoemaker, and $56,392.50 for attorney fees.

After reviewing the file, I find that this petition was brought in good faith and that, although the case was dismissed for failure to prosecute, there existed a reasonable basis for the claim. Therefore, an award for fees and costs is appropriate, pursuant to 42 U.S.C. § 300aa-15(b) and (e)(1).

However, the requested amounts will be adjusted by the court, as indicated above, to an amount that is reasonable and appropriately documented. Accordingly, I hereby award the **total of $63,995.67**[22]*.* This total represents $1,859.30 in petitioner's personal costs, $53,229.50 in attorney fees, and $8,906.87 in litigation costs. The payment shall be:

1. **a lump sum of $62,136.37, in the form of a check payable jointly to petitioner, Tammy Carrington, and petitioner's counsel, Clifford Shoemaker, for attorney fees and costs; and**

2. **a lump sum of $1,859.30, in the form of a check payable to petitioner, Tammy Carrington, for litigation costs personally incurred by petitioner.**

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[21] In other cases, I have issued orders to more fully document fees and costs applications or to explain what appear to be duplicate entries, without obtaining any discernable improvement in the fees and costs applications routinely submitted by this firm. *See, e.g.*, Orders, dated October 11, 2007, filed in No. 99-209V and No. 99-210V. In view of the untimely nature of this application, the pattern of late filings, and the effort the court has previously expended to get counsel to comply with orders and make timely filings, I have acted upon this application without returning it to counsel for correction or additional documentation. If there are substantive matters that counsel wish to bring to the court's attention, a motion for reconsideration may be filed. *See* Vaccine Rule 10(c).

[22] This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. *See generally, Beck*, 924 F.2d 1029.

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.[23]

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master

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