

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

DONALD R. MASIAS,

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No. 99-697V

Petitioner,

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Special Master Christian J. Moran

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Filed: March 12, 2009

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v.

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SECRETARY OF HEALTH
AND HUMAN SERVICES,

*

Interim award of attorneys' fees and
costs, amount without reasonable
dispute

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Respondent.

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Robert T. Moxley, Esq., Robert T. Moxley, P.C., Cheyenne, Wyoming, for Petitioner;
Catharine Reeves, Esq., U.S. Department of Justice, Washington, D.C., for Respondent

PUBLISHED DECISION ON INTERIM ATTORNEYS' FEES AND COSTS*

The petitioner, Donald R. Masias, filed a petition alleging that he suffered arthritis as the result of a March 8, 1994 hepatitis B vaccination. The parties resolved this dispute. The special master issued a decision adopting the parties' stipulation and awarding Mr. Masias compensation. Decision, filed Dec. 27, 2007, at 1.

Mr. Masias is now awarded interim attorneys' fees in the amount of \$42,065.50, and interim costs in the amount of amount of \$6,302.15. This amount, termed the "irreducible minimum" of fees and costs in Mr. Masias's motion, constitutes an amount that no reasonable

* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it 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).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

litigant could dispute is owed Mr. Masias. Although this award is unusual, the particular circumstances of this case make it appropriate.

I. Procedural History

Mr. Masias filed a petition on August 6, 1999, alleging that he suffered injuries, including “arthritis, and associated problems,” as a result of his March 8, 1994 hepatitis B vaccination. Mr. Masias filed no medical records with his petition. Mr. Masias filed the bulk of his medical records between December 1999 and October 2002. In October 2002, pursuant to petitioner’s request, the case was stayed until the completion of evidentiary hearings in several other Program cases with related issues. See Order, filed October 30, 2002. Mr. Masias filed a medical expert opinion from Dr. Alan Levin on June 6, 2005.¹

An entitlement hearing was held in Denver, Colorado on January 26, 2006. Shortly after the entitlement hearing, the parties engaged in informal settlement negotiations. See Joint Status Rep’t, filed May 25, 2006. After an unsuccessful attempt at resolution, the parties agreed to use mediation in their efforts to reach an informal agreement. See Status Rep’t, filed Jan. 19, 2007; see also Joint Status Rep’t, filed Feb. 15, 2007. The parties participated in an alternative dispute resolution session on October 10, 2007, in Denver, Colorado.

The parties reached an informal resolution on October 23, 2007, and filed a stipulation regarding entitlement on December 21, 2007. On December 27, 2007, the special master issued a decision directing judgment.

Mr. Masias filed his fee application on March 10, 2008. This fee petition included a request that Mr. Masias’s attorney, Robert Moxley, be awarded an hourly rate of compensation equal to the rate established by the Laffey matrix.

Respondent vigorously disputed whether Mr. Moxley was entitled to Laffey matrix rates. Respondent also objected to other, smaller issues as well. Resp’t Resp., filed Mar. 24, 2008.

While Mr. Masias’s fee application was pending, the Federal Circuit decided Avera v. Sec’y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008). (Mr. Moxley was counsel to

¹ Petitioners are supposed to file medical records and, if one is required to establish that they are entitled to compensation, an opinion from an expert when they file their petition. 42 U.S.C. § 300aa–11(c). This provision is often not followed. The lack of compliance with this provision was especially true for cases involving the hepatitis B vaccine. The Clerk’s Office received, in August 1999, numerous petitions without medical records shortly before the statute of limitations expired. See 63 Fed. Reg. 25777 (May 11, 1998).

The filing of Dr. Levin’s opinion on June 6, 2005, arguably, completed what should have been submitted with the petition on August 6, 1999. Between these two dates, 2131 days (or nearly six years) elapsed.

petitioner/appellant in Avera.) Avera changed the law in two respects. First, it authorized special masters to award attorneys' fees and costs on an interim basis. Second, it recognized that petitioner's counsel may be entitled to forum rates, leaving open the specific question about Laffey matrix rates.

Shortly after the Federal Circuit denied a request for rehearing en banc filed by the petitioner / appellant in Avera, Mr. Masias filed a motion for interim payment of the irreducible minimum amount of attorneys' fees and costs. This decision resolves that motion. Mr. Masias argued that an interim fee award was appropriate in this case because he anticipated that the fee petition would take a significant amount of time to resolve.

Respondent opposed Mr. Masias's request for an interim award of attorneys' fees and costs. Resp't Resp., filed June 30, 2008.

The parties have filed additional materials regarding the request for attorneys' fees and costs. These matters have been reviewed as well.

II. Whether an Interim Award Is Appropriate

Trial courts have discretion to award attorneys' fees and costs on an interim basis. Dubuc v. Green Oak Tp., 312 F.3d 736, 744 (6th Cir. 2002); Sunrise Development, Inc. v. Town of Huntington, New York, 62 F.Supp.2d 762, 779 (E.D.N.Y.1999). Although Avera, 515 F.3d at 1352, permits special masters to award petitioners in the Vaccine Program attorneys' fees and costs on an interim basis, Avera does not require an interim award in every case. For example, Avera actually affirmed the denial of interim attorneys' fees and costs because, in part, "there was only a short delay in the award pending the appeal." Avera, 515 F.3d at 1352.

Various factors support an award of interim attorneys' fees and costs in this particular case at this particular time. The first, and most important, factor is that Mr. Masias is entitled to an award for his attorneys' fees and costs. The parties resolved Mr. Masias's case by settlement under which Mr. Masias received compensation. When compensation is awarded, "the special master . . . shall also award" reasonable attorneys' fees and costs. 42 U.S.C. § 300aa-15(e).² Mr. Masias's entitlement to an eventual award of attorneys' fees and costs strongly favors an award of interim attorneys' fees and costs.

The second factor is that some amount of attorneys' fees and costs can be calculated relatively easily. Mr. Moxley has been awarded an hourly rate in the past. As discussed in section III below, this rate can be used to determine a minimum hourly rate. Mr. Moxley has also provided the number of hours, which respondent has largely not contested for the entitlement

² This case differs from other cases in which unsuccessful petitioners may be awarded attorneys' fees and costs if they show that they acted in good faith and had a reasonable basis for their petition.

phase. Respondent, however, has challenged Mr. Moxley's hours for litigating the fee petition.

The third factor is that without an award of interim attorneys' fees and costs, Mr. Masias and, by extension, his attorney, are very likely not to receive any compensation for a lengthy amount of time. This delay is anticipated because an appeal, regarding the forum rate and the issue of the Laffey matrix, appears almost certain. The briefing indicates that both sides believe in the accuracy of their position. Mr. Masias's counsel, Mr. Moxley, has already displayed persistence in appealing attorneys' fees issues in Avera to a judge at the Court of Federal Claims, a panel of the Federal Circuit, and a request for rehearing before the Federal Circuit en banc. If Mr. Moxley is awarded Laffey matrix rates, respondent may wish to appeal because such a decision could affect the adjudication of attorneys' fees for all attorneys in the Vaccine Program.

Notably, whether Laffey matrix rates constitute the forum rates is an issue on which appellate guidance will be useful. Any appeal almost certainly would be well grounded.

Admittedly, on the question of the potential length of delay in payment, Mr. Masias's case is likely to resemble Avera in the sense that both petitioners requested an award of interim attorneys' fees and costs while the only issue remaining in the case was the question of the amount of attorneys' fees and costs in total. The special master in Avera denied the request for an interim award of attorneys' fees and costs. The Federal Circuit affirmed this determination as within the discretion of the special master. Avera, 515 F.3d at 1343.

However, Avera does not require the same result (a denial of interim attorneys' fees and costs) for several reasons. First, of course, the Federal Circuit had not decided Avera when the special master denied the request for attorneys' fees and costs. Because the special master held (erroneously) that the Vaccine Act did not permit an award of attorneys' fees and costs on an interim basis, the special master never exercised discretion. Second, as a practical matter, an outright reversal of the special master's decision to deny interim attorneys' fees and costs would have been the equivalent of finding an error without a remedy. The usual remedy of awarding interest for a delay in payment is not available. Library of Congress v. Shaw, 478 U.S. 310, 315 (1986); Hubbard v. United States, 480 F.3d 1327, 1335 (Fed. Cir. 2007). Third, whether to award interim attorneys' fees and costs is a matter of discretion. Discretion means that different results can both be reasonable. Thus, any appeal of a discretionary decision is unlikely to succeed. See Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980); United States Steel Group v. United States, 96 F.3d 1352, 1357 (Fed. Cir. 1996).

For these reasons, Mr. Masias has established that an award of interim attorneys' fees and costs is appropriate. Thus, the next step is to determine the amount of compensation appropriate as an interim award.

III. Attorneys' Fees

A. Introduction

Petitioners in the Vaccine Program who receive compensation are entitled to an award for their attorneys' fees and costs. Like other litigation allowing a shift in attorneys' fees and costs, awards for attorneys' fees and costs in the Vaccine Program must be "reasonable." 42 U.S.C. § 300aa-15(e)(1) (2006).

Reasonable attorneys' fees are determined using a two-part process. The initial determination uses the lodestar method – "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Avera, 515 F.3d at 1347-48 (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). The second step is adjusting the lodestar calculation upwards or downward. Id. at 1348.

In the pending motion for attorneys' fees and costs, the parties disagree strenuously about the hourly rate that should be used in this case. Whether Mr. Moxley should receive Laffey matrix rates will be resolved in a forthcoming decision. The present decision awards only the amount to which not reasonably in dispute. The forthcoming decision will address the matters in dispute, such as the appropriate hourly rate and whether time spent litigating the fee petition was reasonable. No ruling on these points is being made and no inference is intended.

An award of an "irreducible minimum" interim amount of attorneys' fees and costs has some precedent. In McKenzie v. Kennickell, 669 F.Supp. 529, 531 (D.D.C. 1987), the district court ordered the defendant, essentially the United States Government Printing Office, to state the "irreducible minimum" to which it believed that the plaintiffs were entitled. This procedure has been used in at least one other case, Rosenfeld v. United States, 859 F.2d 717, 726 (9th Cir. 1988).

Respondent's attempt to distinguish McKenzie is very weak. Respondent observes, correctly, that the plaintiffs in McKenzie established that the Government Printing Office discriminated against them on the basis of their race, in violation of Title VII. Respondent then argues that because this case did not arise under the Vaccine Act, McKenzie "has no relevance to the Vaccine Act whatsoever." Resp't Resp., filed June 30, 2008, at 1. Respondent fails to appreciate that "similar language in the various fee-shifting statutes should be interpreted alike absent some indication to the contrary." Avera, 515 F.3d at 1348. Respondent offers no reason why the "irreducible minimum" award that was used in a Title VII case should not be used in a case pursuant to the Vaccine Act. Pointing out a difference without explaining why the difference matters is not an effective argument.

The hourly rate that is not reasonably in dispute can be determined. Respondent has indicated that he does not oppose compensation for Mr. Moxley at rates equal to the rates awarded by special masters in published decisions, that is, as much as \$200 per hour. Resp't

Resp., filed March 24, 2008, at 14-15. Thus, these hourly rates (\$160 to \$215, depending upon when Mr. Moxley worked) are accepted as part of the lodestar formula to determine the irreducible minimum.³

The next step is to determine the number of hours not reasonably in dispute. Respondent has contested only relatively few entries during the entitlement stage of the litigation. See Resp't Resp., filed March 24, 2008, at 16-19. These entries will be excluded from the present decision and resolved in the forthcoming decision. Similarly, respondent has challenged the reasonableness of time spent in litigating the fee petition. This time is also excluded entirely because addressing these hours as a category will be much easier.

A reasonable amount of compensation for Mr. Moxley at this stage is \$35,932.00. See Appendix for the calculations.

B. Reasonable compensation for attorney support

During the course of this litigation, Mr. Moxley employed the support services of Julie Hernandez and Carol Goldbrith. Mr. Masias has requested a total of \$6,635.50 for work performed by Ms. Hernandez and \$1,124.50 for work performed by Ms. Goldbrith. Exhibit 52 at 1; see also exhibit 84.

Julie Hernandez initially worked for Mr. Moxley as a law clerk and later as an associate attorney at Gage and Moxley, P.C., Mr. Moxley's previous firm. She was admitted to the Wyoming bar on October 28, 2005. See Avera v. Sec'y of Health & Human Servs., 75 Fed. Cl. 400, 401 (Fed. Cl. 2007).

Again, the parties dispute the reasonable hourly rate of compensation. Mr. Masias advocates that Ms. Hernandez should be paid in accord with the Laffey matrix; respondent disagrees. Respondent proposes using the hourly rates that were approved in Avera. These rates are accepted. Ms. Hernandez will be compensated at a rate of \$80 to \$100 per hour, depending upon when the services were performed, and \$130 per hour after her admission to the bar.

In regard to the number of hours, respondent has generally not objected. To the extent that respondent has objected, those entries will be addressed in the forthcoming decision. A reasonable amount of compensation is \$5,303.50. See Appendix for the calculations.

Carol Goldbrith provided paralegal support to Mr. Moxley at his current firm, Robert T. Moxley, P.C., beginning February 2007. Exhibit 55 at 4.

³ Mr. Masias contends that Judge Wheeler awarded Mr. Moxley \$250 an hour in an unpublished decision in Avera. For purposes of this interim award of attorneys' fees and costs, whether the rate set by Judge Wheeler is the appropriate local rate need not be decided. This decision can be made as part of the ultimate decision on attorneys' fees and costs.

The same analysis applies to Ms. Goldbrith. She will be compensated at \$100 per hour, which is the hourly rate given to Ms. Hernandez in Avera for paralegal work. Respondent has not challenged the number of hours, except with regard to work on the fee petition. A reasonable amount of compensation at this stage is \$830.00. See Appendix for the calculations.

This amount constitutes the irreducible minimum amount of attorneys' fees to which Mr. Masias is entitled. He is awarded this much on an interim basis.

IV. Costs

Mr. Masias is entitled to an award for the reasonable costs incurred. 42 U.S.C. § 300aa-15(e).

Mr. Masias, personally, incurred costs of \$6,302.15. These costs are reasonable and adequately documented. He is awarded this sum as part of the interim award.

Mr. Masias's attorney, Mr. Moxley, incurred additional costs. However, there appears to be a fair likelihood that Mr. Moxley has double-billed for some items. Thus, this decision does not award costs to Mr. Moxley. The forthcoming decision will address the costs incurred by Mr. Moxley.

V. Summary

Mr. Masias is awarded the following items:

Summary of Attorneys' Fees and Costs	
Attorneys' Fees - Mr. Moxley	\$35,932.00
Attorneys' Fees - Ms. Hernandez	\$5,303.50
Attorneys' Fees - Ms. Goldbrith	\$830.00
Subtotal for Attorneys' Fees	\$42,065.50
Mr. Masias's Costs	\$6,302.15
TOTAL	\$48,367.65

Petitioner is entitled to an award of interim attorneys' fees and costs. The special master determines that there is no just reason to delay the entry of judgment on interim attorneys' fees and costs. Therefore, in the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment in petitioner's favor for **\$48,367.65** in interim attorneys' fees and costs. Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

IT IS SO ORDERED.

Christian J. Moran
Special Master

APPENDIX

Calculations for Mr. Moxley				
Time Period	Source of information	Number of Hours	Hourly Rate Awarded	Subtotal for Period
9/30/1998 to 3/19/1999	Exhibit 52, Invoice 46, pg 1	1.0	\$160	\$160.00
6/2/1999 to 5/30/2000	Exhibit 52, Invoice 46, pg 1	11.4	\$165	\$1,881.00
6/30/2000 to 5/16/2000	Exhibit 52, Invoice 46, pg 2-3	9.4	\$170	\$1,598.00
7/2/2001 to 6/4/2002	Exhibit 52, Invoice 46, pg 3-4	7.8	\$175	\$1,365.00
7/18/2002 to 1/4/2004	Exhibit 52, Invoice 46, pg 4-6	14.2	\$185	\$2,627.00
1/9/2004 to 5/13/2004	Exhibit 52, Invoice 46, pg 6-8	7.7	\$195	\$1,501.50
8/23/2004 to 5/9/2005	Exhibit 52, Invoice 46, pg 9; Exhibit 52, Invoice 120, pg 1	5.0	\$200	\$1,000.00
6/16/2005 to 5/19/2006	Exhibit 52, Invoice 120, pg 23; Exhibit 52, Invoice 7, pg 1-2	57.6	\$205	\$11,808.00
8/1/2006 to 5/23/2007	Exhibit 52, Invoice 7, pg 2-4	22.5	\$210	\$4,725.00
6/4/2007 to 6/17/2008	Exhibit 52, Invoice 7, pg 4-7; Exhibit 76 at 1-3; Exhibit 78 at 1.	43.1	\$215	\$9,266.50
7/25/2008 to present	Exhibit 81 at 1; Exhibit 84 at 1	0.0	\$220	\$0.00
	TOTAL			\$35,932.00

Calculations for Ms. Hernandez				
Time Period	Reference in Exhibit 52	Total Hours	Hourly Rate Awarded	Subtotal for Period
10/17/2000 to 5/23/2001	Invoice 46, pg 2-3	6.0	\$80	\$480.00
7/3/2001 to 5/16/2002	Invoice 46, pg 3-4	6.5	\$85	\$552.50
7/18/2002 to 3/13/2003	Invoice 46, pg 5-6	6.7	\$90	\$603.00
6/16/2003 to 5/23/2004	Invoice 46, pg 6-9	6.8	\$95	\$646.00
6/18/2004 to 5/31/2005	Invoice 46, pg 9; Invoice 120, pg 1-2	11.1	\$100	\$1,110.00
6/1/2005 to 10/18/2005	Invoice 120, pg 2-3	6.9	\$100	\$690.00
11/2/2005 to 1/25/2006	Invoice 120, pg 3; Invoice 7, pg 1	9.4	\$130	\$1,222.00
	Total	53.4		\$5,303.50

Calculations for Ms. Goldbrith				
Time Period	Source	Hours Awarded	Hourly Rate Awarded	Subtotal for Period
2/26/2007 to 5/1/2007	Exhibit 52, Invoice 7, pg 3-4	3.2	\$100	\$320.00
6/18/2007 to 10/26/2007	Exhibit 52, Invoice 46, pg 5-6	5.1	\$100	\$510.00
9/3/2008	Exhibit 84 at 1	0.0	\$100	\$0.00
	Total	8.3		\$830.00

