

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 06-775V
Filed: May 27, 2010

BRIGITTE MUELLER,

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Petitioner,

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Interim Attorney Fees and
Costs Decision

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v.

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SECRETARY OF HEALTH AND
HUMAN SERVICES,

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Respondent.

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Lisa A. Roquemore, Broker & Associates, P.C., Irvine, CA, for Petitioner.

Ryan D. Pyles, United States Department of Justice, Washington, DC, for Respondent.

INTERIM FEES AND COSTS DECISION¹

Golkiewicz, Special Master

Petitioner filed a Motion for Interim Fees and Costs (hereinafter “P Interim Fees App”) on January 28, 2009. Respondent filed an opposition (“R Opp”) on February 17, 2009 (Nunc Pro Tunc) to petitioner’s request, seeking denial of petitioner’s request for interim fees, and in the alternative, arguing for a substantial reduction in the request. R Opp at 2. Petitioner replied (“P Reply”) on March 12, 2009. The undersigned discussed the parties’ filings during a status conference conducted on April 13, 2009. At the undersigned’s urging, the parties thereafter attempted to settle the matter

¹ The undersigned intends 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). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire” decision will be available to the public. Id.

but were unable. However, at a status conference conducted on May 11, 2009, the parties represented that respondent did not object to awarding \$40,000 in attorney's fees, \$830.88 in attorney costs, and \$2,925.98 in petitioner's costs. The agreement not to object to this amount was with the understanding that all of petitioner's remaining demands and all of respondent's objections thereto would be preserved for later determination by the undersigned. Interim Fees and Costs Decision filed May 14, 2009, at 2. The undersigned entered a decision in the amounts not objected to by respondent. Id. This decision resolves the remaining amounts in dispute.

Petitioner's interim fees request totaled \$88,440.83 in fees and costs covering the period of January 4, 2008, through December 30, 2008, - essentially a one-year period of litigation. The request breaks down to \$79,386.00 for attorney fees, \$1,528.85 for costs paid by counsel's firm, and \$7,525.98 for costs paid by petitioner herself. Thus, taking into account what has already been paid, a total of \$44,683.97 (\$88,440.83 - 43,756.86) remains in dispute. The breakdown of the \$44,683.97 is as follows: \$39,386.00 in attorney's fees; \$697.97 in attorney's costs; and, \$4,600.00 in petitioner's costs.

The award of interim fees and costs is governed by the Federal Circuit's decision in Avera v. Sec'y of Dept. of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008). The undersigned discussed and rejected respondent's arguments for not awarding interim fees during the April 13, 2009, status conference call. As mentioned above, fees and costs were previously awarded to the extent there was no disagreement. Interim Fees and Costs Decision, filed May 14, 2009. Thus, there is no need to resolve those issues herein. The undersigned has studied the record, including the parties' well-written briefs. The ruling and reasons therefore follows.

A. Attorneys' Fees

Reasonable attorneys' fees under the Vaccine Act are determined by "multiplying the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. . . ." Avera, 515 F.3d at 1347-48 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). The burden is on petitioner to establish the reasonableness of the request. See, e.g., Broekelschen v. Sec'y of the Dept. of Health & Human Servs., No. 07-137V, 2008 WL 5456319, *3 (Fed. Cl. Spc. Mstr. 2008)(citing Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1210 (10th Cir. 1986)).

1. Hourly Rates

Respondent objected to counsel's hourly rate of \$345 per hour. My colleague, Special Master Moran, addressed the issue of Ms. Roquemore's rate in Broekelschen v. Sec'y of HHS, 2008 WL at *4, where Ms. Roquemore also counsel of record. The Broekelschen decision was issued less than two months prior to petitioner's request in this case. In Broekelschen, counsel requested a rate of \$345 beginning on January 1, 2008. In resolving the issue, it was noted in Broekelschen that respondent did not object to Ms. Roquemore's requested rate. Broekelschen, 2008 WL at 5456319, *4. My colleague thus found the requested rate "reasonable because Ms. Roquemore is among the best attorneys representing petitioners in this Program and because Ms. Roquemore works in a relatively high cost area." Id. Based upon the undersigned's experience with Ms. Roquemore in

several litigated cases and in a very complex mediation, the undersigned agrees completely with my colleague's comments. The undersigned also agrees with petitioner's comments regarding the unnecessary re-litigation of issues respondent has not contested in the past. P Reply at 4, 16. Ms. Roquemore is awarded \$345 per hour.

2. Reasonable Number of Hours

The second step in determining reasonable attorneys' fees under the Act is calculating the reasonable number of hours to be awarded. The Federal Circuit has provided the following guidance:

The [special master] also should exclude from this initial fee calculation hours that were not "reasonably expended." . . . Counsel for the prevailing party 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. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority."

Saxton v. Sec'y of HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (emphasis in original)(quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)). Respondent has challenged the number of hours billed by Ms. Roquemore. R Opp at 5-10.

The undersigned has reviewed the parties' briefs and performed a line-by-line review of the hours spent by Ms. Roquemore. Some initial observations are warranted. Respondent notes that Ms. Roquemore spent 228.8 hours in addition to 3.6 hours of paralegal time in one year on this case. The proceedings on the case during this time involved efforts to gather additional medical records, discuss the case with potential experts and develop, prepare for and participate in a factual hearing. While the factual issues were difficult, the hours spent on this case to date mirror those spent in cases that have proceeded to judgment. That being said, one cannot jump to the conclusion that Ms. Roquemore's hours are excessive. Ms. Roquemore uses the word "diligent" to describe her efforts. P Reply at 4. Ms. Roquemore is diligent, she is thorough and comprehensive in her efforts. When does an attorney's exhaustive efforts become unreasonable? There is no bright line, and the undersigned is mindful to not punish a lawyer for zealous representation. However, the Vaccine Act does not provide a "blank check". Perreira v. Sec'y of HHS, 27 Fed. Cl. 29, 34 (Fed. Cl. 1992). With these general observations in mind, the undersigned will address petitioner's request.

Respondent challenges Ms. Roquemore's time entries that were presented in "block billing" format. R Opp at 6. Ms. Roquemore rejoins that the "blocks" represent a project and that she is multi-tasking during that block of time. P Reply at 9. Special Master Moran noted that block billing is not preferred, Broekelschen, 2008 WL at 5456319, *4, and Ms. Roquemore has since ceased the practice. P Reply at 11. As Special Master Moran did, the undersigned will eliminate only the tasks found objectionable, and, due to the lack of specificity in the block billing, will estimate the

objectionable time spent.

Respondent's second contention is excessive billing for e-mails and entries for "record review" billed for by Ms. Roquemore. R Opp at 7. Respondent notes that this case does not contain an extensive set of medical records and the time spent analyzing the record was unreasonable. Id. Ms. Roquemore explained fully her actions in the Application and in the Reply. In addition, the undersigned, as the Special Master conducting proceedings, is fully aware of the complexity of the case and the issues presented.

Respondent also objects to time spent "investigating Special Master Campbell-Smith," "unwarranted amount of research," time spent retaining Dr. Vera Byers, and the number of hours spent preparing for the fact hearing in this case. R Opp at 7-8. Ms. Roquemore defended fully and forcefully her time spent in each of these areas. P Reply at 12-15.

In analyzing petitioner's request, the undersigned agrees in general with respondent's criticisms of Ms. Roquemore's request. That is from the undersigned's line-by-line review, which was complicated by the block billing, it is apparent that far too much time was spent: in e-mail communication with Ms. Mueller; given that three experts were involved in the case, there should have been no need for the extensive research time; attorney time was billed for paralegal tasks; and in general, too much time was spent in moving this case up to the factual hearing. Despite Ms. Roquemore's quality work, in comparison to attorneys of comparable experience and ability, she spends far greater time accomplishing the same tasks. See Broekelschen, 2008 WL at 5456319, *10. Accordingly, Ms. Roquemore's requested hours must be reduced. While authority exists to make a percentage reduction, see Saxton, 3 F.3d at 1521, the undersigned engaged in an entry by entry analysis to make the reduction.²

In analyzing petitioner's application, the undersigned will track the billing periods in the application, which are monthly. Thus, for the first period, January of 2008, the undersigned disallows 3.3 hours. One hour is deducted for 1/17 - this block bill belies petitioner's argument that the block represents a specific project. P Reply at 9. This block includes discussing a retainer agreement, reviewing an e-mail from respondent's counsel regarding the status of the case, discussing the case with the expert and reviewing the record. P App at 26. It is very difficult to see how this is all part of a specific project, other than it all related to the Mueller case, and there is no way to judge the reasonableness of the individual tasks. Therefore, one hour is deducted. Two hours are deducted from 1/18. Again, there is no way to know the time spent on individual tasks and the undersigned questions the time spent researching CIDP and Hep A since counsel was already working with two experts. The time for entry 1/31 is deducted as unrelated to this case.

For February, 1.6 hours is shifted from attorney time to paralegal time for efforts on 2/28 and 2/29. The records filed by prior counsel were in disarray, but correcting the organization of the file is a paralegal task.

² In hindsight, this may not have been wise because of the inordinate amount of time required and the undersigned's actual deduction computed to approximately 23%.

For March, a total of 8.1 hours is deducted. Three hours is deducted from 3/5 for excessive time spent researching the case law regarding the relationship of Hep A to GBS or CIDP. As a comparative test, my law clerk performed the search in under five minutes, resulting in fewer than 16 Program cases, totaling less than 200 cumulative pages. Even allowing for a search of the previous special master, that search can be completed in an additional five minutes. One hour is deducted from 3/10 - counsel had three experts and thus should be relying upon them for reviewing and describing the medical literature. It should be noted that the experts have not at this point submitted expert opinions and thus the relevant supporting literature is not yet identified. One-tenth of an hour is deducted from 3/11, the task should only take six minutes. One-half hour is deducted from 12/2 for excessive and unproductive contact with Ms. Mueller. Ms. Mueller's input on medical issues is not warranted and thus is unreasonable. One-half hour is deducted from 3/14 for Ms. Mueller communications. Counsel spent a total of seven hours on 3/17, 18 and 19 reviewing the case law on causation and Hep A and GBS and CIDP - this is in addition to the billed 11.5 hours spent on 3/5, 6 and 7. This experienced attorney has handled causation cases in the Program in the past. She also presumably has kept apprised of the Federal Circuit's decisions as they are issued. Thus, time spent researching and reading the decisions for this case should be minimal, if at all. Also, it is inconceivable how an experienced attorney could spend so much time reviewing so little material. Hep A was added to the Program on December 1, 2004. See Fed. Reg. 69,945-46. There simply were not many cases issued at this point. Thus, the time is reduced by three hours, which is generous to petitioner.

No reductions are made for April.

For May, a total of 11.7 hours are deducted for attorney time, and 9 hours are added to paralegal time. The time spent indexing on 5/1 through 5/7 is a paralegal function. Two tenths are deducted for 5/13, six minutes is plenty of time for the task. Two hours is deducted from 5/14. The time billed is excessive for the tasks listed. Three tenths billed for 5/20 is denied as unnecessary. Two tenths billed for 5/29 is denied as unnecessary.

For June, a total of 3.6 hours are deducted. Four-tenths is deducted for 6/5 and 6/6 - six minutes for each task is more than sufficient. One-half hour is deducted from 6/17 for client e-mails. Two-tenths is deducted from 6/18 for client e-mails. Three-tenths is denied for 6/19, Ms. Mueller's comments on the experts is completely unnecessary. Two hours is deducted from 6/20 for Hep A research - three experts are involved in the case; counsel billed 6.8 hours on 6/23 relating to working with the experts on causation. See P Reply at 10. Two-tenths is deducted from 6/24 for client e-mail.

For July, 4.2 hours is deducted from attorney time; 2.1 hours is added to paralegal time. One hour is deducted from 6/27 and 7/1 for time related to Dr. Byers - counsel billed for a telephone conference on 6/26. One-tenth is deducted on 7/14 for client e-mail related to Dr. Byers. Eight-tenths for 7/22 is shifted to paralegal time - general file work including indexing is a paralegal task. One hour is deducted for 7/24 is disallowed - time was billed on 7/22 and 23 for the same task. One and three-tenths billed on 7/28 is shifted to paralegal time - scheduling is administrative.

For August, 1.3 hours is deducted from attorney time; 1 hour is added to paralegal time. One-tenth is deducted from 8/18, six minutes is more than sufficient to docket an action. One hour billed on 8/25 is shifted to paralegal time - looking for missing articles is not an attorney's function. Two-tenths is deducted from 8/26 - six minutes is sufficient time to review an e-mail.

For September, 3.2 hours is deducted. Counsel billed 7.6 hours from 9/10 - 9/19. Fully one-half of the tasks relate to whether to bifurcate the proposed hearing and setting a hearing date. Those tasks do not warrant 3.8 hours of time. Two hours are deducted, which is very generous to petitioner. One-half hour is deducted from 9/22 as excessive. The most egregious example of excessive time is the eight-tenths billed on 9/24 - it could be the "poster billing" of this decision. This motion is two lines of boilerplate, totaling twenty words. At most it would take five minutes of a paralegal's time to finalize this document; there is no need to draft and revise such a motion. Counsel needs to take action to ensure that this type of billing does not occur in the future. Seven-tenths of an hour is deducted.

For October, 1.8 hours is deducted from attorney time; 1.1 hours is allowed for paralegal time. For 10/3, the 1.1 hours is shifted from attorney time to paralegal time - scheduling is not an attorney function. For 10/23, 24 minutes is billed to request dates for a witness preparation session. Quite frankly, that is incomprehensible. One-tenth is allowed. Four tenths is disallowed for e-mails (e.g., reminding witnesses of west coast time.)

For November, 4 hours is disallowed. This time was billed on 11/18 for reviewing case law "in preparation for fact hearing" regarding causation and burden of proof shifting. Two points need be made: first, the preparation was for a fact hearing, causation and burden shifting is irrelevant; second, counsel is a very experienced and talented attorney who has had a number of causation cases in the Program. As part of her ethical obligations as an attorney, counsel should keep apprised of the Federal Circuit's decisions in the Vaccine Program. The undersigned has no doubt that counsel in fact does keep apprised. Thus, spending four hours to accomplish what counsel should be doing on an ongoing basis is not justified.

For December, 10 hours is deducted. Counsel billed 76 hours in December for preparation for the fact hearing and participating in the fact hearing. The undersigned notes that some counsel spend a total of 76 hours handling a case from filing to judgment. Respondent objects strenuously to these hours, noting that counsel billed over 60 hours preparing for the hearing. R Opp at 8. Respondent notes that the record in this case consists of less than 100 pages, and that the focus of the fact hearing was primarily on one exhibit, petitioner's diary. *Id.* Respondent also makes the valid point that much of counsel's efforts throughout the year were in essence preparation for this hearing. *Id.* Petitioner's counsel rejoins that preparation of the four fact witnesses was time-consuming and necessary to address the "make or break" onset issue. P Reply at 14-15. Counsel stated that "[i]t probably took, on average, no less than six to eight hours per witness, which equates to approximately 32 hours, almost half of the trial preparation." *Id.* at 15.

The undersigned notes that my colleague criticized Ms. Roquemore for the same issue in Broekelschen, 2008 WL at 5456319, *7-8. In that case, counsel spent 32 hours preparing the

examinations of two experts and one fact witness for a trial that lasted twelve hours. The fact hearing in this case focused primarily on one exhibit, the diary, and lasted a mere five hours and produced a 210 page transcript. Transcript of Hearing, December 19, 2008. While counsel represents that about 32 hours were spent on witness preparation, the undersigned totaled the time billed for preparing the witnesses as 10.8 hours for Blanchford; 10.3 hours for Pilat; 5.5 hours for Mueller-Golda; and 25 hours for Ms. Mueller. This totals 50 hours, not the 32 estimated by counsel. This is excessive by any gauge of reasonableness. The undersigned freely concedes that this was not a straightforward fact issue, and counsel did an excellent job of examining the witnesses to bring out every conceivable supportive piece of information. However, allowing for this good work, 25 hours to prepare the primary witness about the diary that she kept and about issues that involve her as petitioner is excessive. The undersigned deducts 10 hours for the month of December for excessive time preparing for the hearing. Again, this is very generous to petitioner.

Thus, in summary, petitioner requested 228.8 hours for attorney time and 3.6 hours for paralegal services. The undersigned reduces the attorney time by 52.8 hours, awarding 176 hours; and increases the paralegal time by 14.8 hours for a total of 18.4. Ms. Roquemore's time is compensated at \$345 per hour, for a total of \$60,720.00. The paralegal is compensated at \$125 for a total of \$2,300.00. The total allowable attorney's fees is \$63,020.00. Of this allowable amount, \$40,000 was paid pursuant to the undersigned's May 14, 2009, Interim Fees and Costs Decision. This leaves a balance owing of \$23,020.00.

B. Costs

Petitioner seeks \$1,528.85 for costs incurred by counsel. Respondent objected to \$901.77 incurred for the routine usage of Federal Express as opposed to regular mail. R Opp at 13. Petitioner's explanation does not justify this expense. P Reply at 18. Therefore, \$400 is disallowed. See, e.g., Jeffries v. Sec'y of Dept. of Health & Human Servs., No. 99-670, 2006 WL 3903710 (Fed. Cl. Spc. Mstr. 2006). Respondent objected to the copying rate of \$.20 per page. R Opp at 13. Petitioner rejoins that this is the first objection in ten years to her copying charges. P Reply at 18. Twenty cents per page has been allowed in other cases. See, e.g., English v. Sec'y of Dept. of Health & Human Servs., No. 00-0061V, 2006 WL 3419805, *15 (Fed. Cl. Spc. Mstr. 2006)(finding \$0.25 per page copying cost reasonable). Petitioner's copying charges are allowed in full. Thus, the undersigned finds that \$1,128.85 in costs is allowable. Petitioner received \$830.88 in attorney's costs per the undersigned's May 14, 2009 Decision. Thus, petitioner is awarded \$297.97 for counsel's costs as part of this Decision.

Petitioner seeks \$7,525.98 for costs incurred by petitioner personally. See Brigitte Mueller's Request for Payment of Litigation Costs Incurred ("Mueller Request"). Respondent objected to \$249.50 for Ms. Pilot's airfare. R Opp at 13, citing the Transcript at 148. Petitioner explains, and the transcript confirms, that Ms. Pilot was in California for both the Hearing and for business and that "we only charged a fraction of her ticket to the Vaccine Program." P Reply at 19. Petitioner's claim shows the total cost as \$619 and the employer paid \$369.50. Mueller Request at 3. The undersigned sides with petitioner and the cost is allowed. Petitioner claimed \$600 for airfare of Ms. Golda, which was obtained by frequent flier miles. The undersigned agrees with respondent that this

is not a cost incurred and thus is not reimbursable. The same issue pertains to \$375 claimed for “Value of Flight” for Ms. Mueller. Id. at 3. For the same reason, this item is denied. Lastly, petitioner paid \$2,000.00- retainers for both Dr. Latov and Dr. Steinman. Respondent objects to these costs due to the lack of documentation. R Opp at 14. Petitioner states that respondent is incorrect as both experts have submitted expert reports in the case. P Reply at 19. Petitioner submitted an invoice from Dr. Latov for four hours of work at \$500 per hour. Mueller Request at 16. There is no invoice for Dr. Steinman. Thus, the request for Dr. Steinman is denied at this time. It will be considered when Dr. Steinman’s invoice is submitted. There is no support for Dr. Latov’s hourly rate. However, relying upon Special Master Moran’s decision in Broekelschen, the undersigned awards Dr. Latov \$1,700.00.

Petitioner claimed \$7,525.98 in costs. The undersigned denied \$3,275.00 of the claim. Thus, \$4,250.98 is allowable. Petitioner received \$2,925.98 from the undersigned’s May 14, 2009 Decision, leaving a balance due of \$1,325.00.

Conclusion

Accordingly, pursuant to Vaccine Rule 13, petitioner is hereby awarded a total of \$24,642.97 in interim attorney’s fees and costs. **Specifically, judgment shall reflect that petitioner is awarded \$1,325.00 for her costs in a check made payable to petitioner; petitioner is also awarded \$23,317.97 for her counsel’s fees and costs in a check made payable jointly to petitioner and her counsel.** The Clerk is directed to enter judgment accordingly.³

IT IS SO ORDERED.

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
Special Master

³Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.