

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

TODD and PATRICIA FOKKEN,
Natural Parents and Guardians of
CAITLIN FOKKEN, a Minor,

Petitioners,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

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* No. 10-211V
* Special Master Christian J. Moran
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* Filed: April 27, 2012
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* Attorneys' fees and costs,
* reasonable cost for expert
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DECISION AWARDING ATTORNEYS' FEES AND COSTS¹

Todd and Patricia Fokken received compensation upon their claim that the Varicella vaccine harmed their daughter, Caitlin. Decision, 2011 WL 4925502 (Sept. 16, 2011). Because the Fokkens received compensation, they are entitled to an award of attorneys' fees and costs. 42 U.S.C. § 300aa—15(e). The parties resolved all but a few parts of the Fokkens' request and this decision resolves the remaining disputed issues.

The main items in dispute concern the costs of consulting experts. The Secretary maintains that the Fokkens have not submitted sufficient evidence to support a finding that the incurred costs were reasonable. The Fokkens have not countered this point, despite being given opportunity to supplement the record with evidence. Thus, the Secretary's objections are sustained.

¹ The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

The Fokkens are awarded **\$63,092.59**.

Factual and Procedural Background

Caitlin Fokken was born on August 6, 2001. Pet. at 1. She received the Varicella vaccine on May 14, 2007, in preparation for her first day of school. Exhibit 9 at 9. The night after Caitlin received her vaccination, Caitlin's parents heard her "moaning" from her bedroom. They discovered that she had wet the bed. Later in the night, Caitlin's parents discovered she had again wet the bed. At this time, Caitlin's mom tried to wake her daughter, and found that she was nonresponsive, and her eyes were unfocused. Caitlin's parents rushed Caitlin to the emergency room of Providence Park Hospital. Exhibit 9 at 14-16.

On October 18, 2007, an initial differential diagnosis "included acute hemorrhagic or ischemic stroke, intracranial aneurysm with bleeding, acute encephalitis, thromboembolic phenomena, post seizure paralysis and complicated migraine." Exhibit 5A at 5. That same day, Caitlin was diagnosed with "acute onset of altered mental status and right-sided weakness." Exhibit 5A at 6. Caitlin's mom says that Caitlin continues to suffer the effects of her strokes and will "continue to be in therapy at least two days a week." Exhibit 9 at 10.

By March 18, 2008, an associate attorney with the firm Morgan & Meyers was working on this case. This entry appears to be the first entry made by an attorney from this firm. See Pet'r Appl'n, filed Nov. 17, 2011, exhibit 4, page 7. A senior attorney spent 0.5 hours consulting Dr. Leber and another doctor, in October 2008. This same attorney engaged in more frequent activity in July through September 2009. In January 2010, the attorney met with Dr. Gabrielle deVeber. Id.

In March 2010, Mr. and Ms. Fokken were consulting another attorney, Thomas Gallagher. Within a few days of the initial consultation, Mr. Gallagher had obtained the file from the previous attorney. Pet'r Appl'n, exhibit 1, page 1.

Mr. Gallagher filed the petition and served as the Fokkens' counsel of record throughout the case's duration. The Fokkens' case moved relatively quickly. After the Fokkens filed a complete set of medical records, Mr. Gallagher retained Dr. Marcel Kinsbourne. Dr. Kinsbourne opined that the Varicella vaccine caused Caitlin to suffer an ischemic stroke. Exhibit 12 (filed Oct. 15, 2000).

Once the Fokkens submitted an expert report, the parties began to discuss resolving the case based upon the costs and risks of continued litigation. This process produced a stipulation that was incorporated into a September 16, 2011 decision.

On November 17, 2011, the Fokkens submitted the pending application for attorneys' fees and costs. Acting through Mr. Gallagher, the Fokkens requested an award to reimburse them for Mr. Gallagher's fees, Mr. Gallagher's costs, Morgan & Meyers's fees, Morgan & Meyers's costs, and their own costs. Apparently, the parties attempted to reach an accommodation but the Secretary could not provide much substantive response due, primarily, to the lack of information from Morgan & Meyers. To promote informal resolution, a status conference was held on December 21, 2011. The Fokkens were instructed to file documentation that supported the fees and costs requested by Morgan & Meyers.

The Fokkens did file the Morgan & Meyers documentation on January 25, 2012. Exhibit 35.² The Secretary responded by letter, dated February 14, 2012. For many of Morgan & Meyers's requested costs, the Secretary argued that either the costs were not accepted in the Vaccine Program or the costs were not adequately documented. For items of fees and costs related to Mr. Gallagher, the Secretary made various critiques, but also offered not to object to a reduced request.

On February 29, 2012, the Fokkens filed a motion and submitted the Secretary's February 14, 2012 response as exhibit 1.³ As the author of the motion, Mr. Gallagher requested that the fees and costs for his firm be "de-couple[d] from" the fees and costs for Morgan & Meyers. Mr. Gallagher did so because he was willing to compromise his fee request.

Another status conference was held. The undersigned explained that Mr. Gallagher was the Fokkens' counsel of record, exclusively. See Vaccine Rule 14(b). To the extent that the Fokkens wished to continue to litigate their

² Exhibit 35 contains a series of separately number exhibits. These will be referred to as "subexhibits".

³ Given that the Secretary's February 14, 2012 response is in the form of a letter, it is unlikely that the Secretary intended for this document to become part of the Court's file. The Secretary, however, did not move to strike this document and later stated that the February 14, 2012 letter constituted her response to the November 2011 fee application.

November 17, 2011 fee application, the Fokkens had to act through their counsel of record. Thus, the undersigned suggested that Mr. Gallagher communicate the Secretary's February 14, 2012 response to Morgan & Meyers.

Morgan & Meyers prepared a reply to the February 14, 2012 response. Mr. Gallagher, as counsel of record, submitted this reply on March 19, 2012. In this reply, Morgan & Meyers withdrew a few items of costs for which they previously sought reimbursement. Morgan & Meyers continued to press two items, the costs associated with consulting Dr. Leber and the costs associated with consulting Dr. deVeber. The Secretary informally communicated that she did not intend to file a sur-reply. Thus, the matter is ready for adjudication.

Standards for Adjudication

Like many fee-shifting statutes, the Vaccine Act limits awards of attorneys' fees and costs to a "reasonable" amount. Perreira v. Sec'y of Health & Human Servs., 27 Fed. Cl. 29, 34 (1992), aff'd, 33 F.3d 1375 (Fed. Cir. 1994).

For attorneys, the presumptively reasonable amount of their fees is determined using the lodestar method in which a reasonable number of hours is multiplied by a reasonable hourly rate. Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1348 (Fed. Cir. 2008) (citing Blum v. Stenson, 465 U.S. 886, 888 (1984)). This lodestar method is also used for determining a reasonable amount of compensation for an expert. Simon v. Sec'y of Health & Human Servs., No. 05-941V, 2008 WL 623833, at *1 (Fed. Cl. Spec. Mstr. Feb. 21, 2008); Kantor v. Sec'y of Health & Human Servs., No. 01-679V, 2007 WL 1032378, at *4-8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).

To demonstrate the reasonableness of proposed hourly rates, the fee applicant bears the burden of proof. Fee applicants may meet their burden by submitting evidence taking various forms. For example, an attorney or a doctor might submit an affidavit stating his or her usual rate of compensation. The fee applicant will often submit affidavits from other members of the relevant community (that is, from other attorneys or doctors) attesting that the proposed hourly rate is reasonable. See Masias v. Sec'y of Health & Human Servs., 634 F.3d 1283, 1291-92 (Fed. Cir. 2011).

In regard to the other part of the lodestar formula, the reasonable number of hours, attorneys and doctors are expected to record their time contemporaneously with the work. Wilcox v. Sec'y of Health & Human Servs., No. 90-991V, 1997

WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997) (stating “petitioners must substantiate the hourly rates claimed by their experts and the number of hours spent in providing services.”); see also Morse v. Sec’y of Health & Human Servs., No. 05-418V, 2009 WL 1783639, at *3-4 (Fed. Cl. Spec. Mstr. June 5, 2009), aff’d in relevant part and remanded, 89 Fed. Cl. 683 (2009). In practice, special masters have tended to accept non-contemporaneous invoices from doctors because doctors are less familiar with litigation.

Analysis

In monetary terms, the most significant item of dispute concerns requests for Dr. deVeber. A lesser item is the amount for Dr. Leber. Finally, there are the undisputed items.

A. Dr. deVeber

Gabrielle A. deVeber works in the neurology division of the Hospital for Sick Children in Toronto, Ontario. Since 1990, a Canadian institution has certified her in pediatric neurology, and since 1991, an American organization has certified her in neurology. She has authored many articles, focusing on strokes in children. Pet’r Reply, filed March 19, 2012, exhibit 4 (curriculum vitae).

Dr. deVeber spent one hour conferring with Attorney Meyers in July 2009. In January 2010, she spent additional time reviewing medical records and literature, and meeting with Attorney Meyers in person. Altogether, she spent 6.25 hours working on this case. She has charged \$900 per hour. Exhibit 35, subexhibit 29 (invoice).⁴ The Fokkens did not file a report written by Dr. deVeber.

The Secretary objected to the amount of compensation requested, describing the rate of \$900 per hour as “exorbitant.” Additionally, the Secretary complained that there was no information about her area of expertise.

The Fokkens’ submission of Dr. deVeber’s curriculum vitae on March 19, 2012, answers some of the Secretary’s questions. This document, as described above, shows that Dr. deVeber is a board-certified pediatric neurologist. Thus, she

⁴ Dr. deVeber’s invoice contains a mathematical error. The correct result of multiplying 6.25 hours times \$900 per hour is \$ 5,625, not the \$5,715 requested in exhibit 35, subexhibit 32 (spreadsheet).

is qualified to offer opinions about Caitlin's encephalopathy, arterial ischemic stroke, right hemiparesis, and other neurological injuries.

Her qualifications, however, can only take the Fokkens so far because her curriculum vitae provides little evidence about Dr. deVeber's hourly rate. Although the March 5, 2012 order "encouraged [petitioners] to submit evidence and not to rely simply on argument," the Fokkens have done just that. The Fokkens argue "her rate is supported by the fact that she is among the foremost experts in the world on [pediatric strokes]." Pet'r Reply, filed March 19, 2012, at 3.

The Fokkens have presented no evidence regarding a reasonable hourly rate for any pediatric neurologist. This gap in evidence jeopardizes the Fokkens' claim for reimbursement because a lack of evidence has caused a denial of expert costs. See Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987); Presault v. United States, 52 Fed. Cl. 667, 679 (2002).

Nevertheless, special masters have occasionally used their own experience to fill an evidentiary gap to prevent a complete denial of all costs. E.g. Sabella v. Sec'y of Health & Human Servs., No. 02-1627V, 2008 WL 4426040, at *29 (Fed. Cl. Spec. Mstr. Sept. 23, 2008), aff'd in relevant part and vacated in relevant part, 86 Fed. Cl. 201, 218-19 (2009); English v. Sec'y of Health & Human Servs., No. 01-61V, 2006 WL 3419805, at *16 (Fed. Cl. Spec. Mstr. Nov. 9, 2006). This procedure will be used here to compensate Dr. deVeber at a rate of \$300 per hour. This rate is intended to be used only for this case and if other petitioners in the Vaccine Program request reimbursement for Dr. deVeber in future cases, they should present an evidentiary basis for her hourly rate.

At this hourly rate, a reasonable amount of compensation for Dr. deVeber's work (6.25 hours) is \$1,875.00. Because the Fokkens originally requested \$5,715 for her work, \$3,840 will be deducted.

The Secretary also objected to costs associated with Mr. Meyers flying from Michigan to Ontario to meet with Dr. deVeber in person. The Fokkens did not address this objection in their reply and the undersigned is not aware of any reason why an in-person conference was needed. Thus, those costs (totaling \$519.00) are deducted as well.

B. Dr. Leber

Steven M. Leber is a doctor with board certifications in pediatrics and neurology with a special qualification in child neurology. Pet'r Reply, filed March 19, 2012, exhibit 3 (curriculum vitae). He treated Caitlin. Exhibit 5B at 100.

The law firm's spreadsheet of costs lists a meeting with Dr. Leber on September 3, 2008, and a deposition of Dr. Leber on September 8, 2008. The charge for each occasion is \$400, although Dr. Leber has not submitted an invoice. See exhibit 35, subexhibits 12, 19, and 32. Mr. Meyer's timesheets showed that his meeting with Dr. Leber took 0.5 hours and the deposition took 0.8 hours. Pet'r Appl'n, filed Nov. 17, 2011, exhibit 4.

The Secretary objected to these requests because the Fokkens had failed to provide "any invoices, billing records, or documentation other than a receipt." In response, the Fokkens point to evidence corroborating that the meeting and the deposition took place. The Fokkens, however, have not presented any information regarding a reasonable rate of compensation for Dr. Leber. See Pet'r Reply, filed March 19, 2012, at 2.

In the Vaccine Program, attorneys retaining experts usually instruct the experts to create billing records contemporaneously with their work. When the expert does not submit sufficient information to understand the charge, the petitioner may not be paid for the entire amount requested. See Morse v. Sec'y of Health & Human Servs., 89 Fed. Cl. 683, 688 (discussing Guidelines issued by the Office of Special Masters). The Fokkens' (and Dr. Leber's) failure to comply with this expectation is arguably tolerable because of the relatively small amount of time spent by Dr. Leber.

Even if Mr. Meyer's timesheet establishes how much time Dr. Leber spent, the problem of Dr. Leber's hourly rate remains. Implicitly, Dr. Leber has not used a consistent hourly rate for his work because one activity took 0.5 hours and the other activity 0.8 hours, yet both have the same charge (\$400.00). Additionally, as discussed in reference to Dr. deVeber, the Fokkens have not provided any evidence about a reasonable hourly rate for a pediatric neurologist. Under a circumstance in which the petitioners have not presented any evidence, Dr. Leber will be reimbursed at a rate of \$250 per hour. His total compensation is \$325 (1.3 hours times \$200 per hour). Because the Fokkens requested \$800 for Dr. Leber's work, \$475 will be deducted.

C. Non-disputed Items

Although the Secretary has not interposed any significant objection to the remaining portions of the Fokkens' application for attorneys' fees and costs, the undersigned has the responsibility to review the submission for reasonableness. Savin v. Sec'y of Health & Human Servs., 85 Fed. Cl. 313, 315 (2008). These items concern the attorneys' fees for Morgan & Meyers, other costs incurred by Morgan & Meyers, attorney's fees for Mr. Gallagher, costs incurred by Mr. Gallagher, and costs incurred by the Fokkens personally.

1. Morgan & Meyers

In the fee application, the Fokkens included an invoice from Morgan & Meyers, showing that between March 2008 and January 2010, the firm spent 8.7 hours on their case. Mr. Meyers performed most of the work, with an associate spending three hours at the beginning of the case. The firm's invoice totals \$2,670.00.

The amount is reasonable, and, possibly, too low. It is likely that Morgan & Meyers actually performed tasks that were not recorded on the timesheet. Examples of missing items include an initial client interview and the collection of medical records. The omission of these items from the fee request prevents an award for this work. Thus, Morgan & Meyers will be awarded all the fees that the law firm requested.

In respect to the incurred costs, Morgan & Meyers requested \$10,392.06. Pet'r Appl'n, filed Mar. 19, 2012. From this total, various deductions are needed.

Costs Incurred by Morgan & Meyers	
Amount Requested	\$10,392.06
Voluntary Withdrawals	- \$620.12
Deduction re: Dr. deVeber	-\$3,840.00
Deduction re: travel relating to Dr. deVeber	-\$519.00
Deduction re: Dr. Leber	-\$475.00
TOTAL	\$4,937.94

This amount (\$4,937.94) is reasonable. It represents costs for getting medical records, copies, and consulting Drs. deVeber and Leber.

2. Gallagher & Gallagher

Mr. Gallagher's invoice totals \$50,025.00. Pet'r Fee Appl'n, exhibit B. The Secretary noted that the time requested for some tasks was excessive and that the fee invoice charged attorney rates for work that could have been done by a paralegal. The Secretary stated that she would not object to a request for \$45,856.25. Resp't Resp. at 3. Mr. Gallagher agreed. Pet'r Mot., filed Feb. 29, 2012.

The reduced amount is reasonable. The Fokkens are awarded \$45,856.25 for Mr. Gallagher's fees.

The Fokkens' request for an award for costs associated with Gallagher & Gallagher appears in two places in their fee application. First, they indicate that Gallagher & Gallagher has actually paid \$877.29. Fee Appl'n, exhibit 2. These costs are reasonable. Second, the Fokkens indicate that Gallagher & Gallagher has incurred (but has not yet paid) costs totaling \$7,489.11. Fee Appl'n, exhibit 4.⁵ The Secretary did not object to these costs and they are reasonable. The Fokkens are awarded \$8,366.40 for costs incurred by Gallagher & Gallagher.

3. Fokkens

The Fokkens directly paid \$1,262.00 in costs. The Secretary did not object and these costs are reasonable.

D. Summary

For attorneys' fees, the Fokkens are awarded **\$48,526.25** (\$2,670.00 [Morgan & Meyers] + \$45,856.25 [Gallagher & Gallagher]). For costs, the Fokkens are awarded **\$14,566.34** (\$4,937.94 [Morgan & Meyers] + \$8,366.40 [Gallagher & Gallagher] + \$1,262.00 [Fokkens]). The total amount is **\$63,092.59**.

Conclusion

The Fokkens are entitled to an award of reasonable attorneys' fees and costs totaling **\$63,092.59**. This award should be divided into three separate payments. First, a check in the amount of **\$7,607.94** (\$2,670.00 [fees] + \$4,937.94 [costs]) shall be made payable to the Fokkens and Morgan & Meyers. Second, a check in

⁵ This exhibit also includes Morgan & Meyers's fees and costs.

the amount of **\$54,222.65** (\$45,856.25[fees] + \$8,366.40 [costs]) shall be made payable to the Fokkens and Gallagher & Gallagher. Third, a check in the amount of **\$1,262.00** shall be made payable to the Fokkens.

IT IS SO ORDERED.

S/Christian J. Moran
Christian J. Moran
Special Master