

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

ESTHER HALL,

Petitioner,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

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No. 02-1052V
Special Master Christian J. Moran

Filed: July 28, 2009

interim attorneys' fees and costs,
amount which is not disputed.

Richard S. Gage, Esq., Richard S. Gage, P.C., Cheyenne, Wyoming, for Petitioner;
Melonie McCall, Esq., U.S. Dep't of Justice, Washington, D.C., for Respondent.

PUBLISHED DECISION ON INTERIM ATTORNEYS' FEES AND COSTS*

The petitioner, Esther Hall, established that a hepatitis B vaccination caused an injury to her shoulder. Ruling, filed Sept. 12, 2007. She was awarded compensation. Decision, filed Dec. 4, 2008. She now seeks an award of attorneys' fees and costs.

Ms. Hall is now awarded interim attorneys' fees in the amount of \$51,854.55, and interim costs in the amount of amount of \$12,633.59. This amount constitutes an amount that no reasonable litigant could dispute is owed Ms. Hall. Another forthcoming decision will resolve the parties' disputed fee and cost issues.

* 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).

I. Procedural History

Ms. Hall filed her petition on August 23, 2002. A hearing was held on November 19, 2003, and the case was reassigned to the undersigned on April 5, 2006. For reasons not entirely clear from the record, a ruling that Ms. Hall was entitled to compensation was not made until September 12, 2007.

After that ruling, the parties investigated the amount of compensation to which Ms. Hall was entitled. This process concluded when a decision awarding compensation was issued on December 4, 2008.

Ms. Hall filed a motion for an interim award of attorneys' fees and costs on April 17, 2009. The parties have filed additional materials regarding the request for attorneys' fees and costs. These matters have been reviewed as well. The issues surrounding Ms. Hall's motion for attorneys' fees and costs, including her request for an interim award of attorneys' fees and costs, are ready for adjudication.

II. Whether an Interim Award Is Appropriate

Ms. Hall's April 17, 2009 motion is captioned a request for an "award of interim attorneys' fees." However, this motion, which was filed after Ms. Hall was awarded compensation, does not explain why there should be an award on an interim – as opposed to final – basis. Ms. Hall subsequently explained that she seeks essentially two awards. The first (interim) award will encompass those items to which there is no reasonable objection. The second (final) award will resolve matters that the parties dispute and will probably be subject to appeal. For example, as discussed below, Ms. Hall seeks compensation for her attorney at a rate equal to the Laffey matrix rate, an issue that the Federal Circuit left unresolved in Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008). Ms. Hall advanced this division to prevent a situation in which an appeal over some portion of the fee request prevents the receipt of the undisputed portion.

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 Ms. Hall is entitled to an award for her attorneys' fees and costs. Ms. Hall prevailed in this case and was awarded compensation. When compensation is awarded, "the special master . . . shall also award"

reasonable attorneys' fees and costs. 42 U.S.C. § 300aa-15(e).¹ Ms. Hall'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. Gage 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. Gage has also provided the number of hours, which respondent has largely not contested.

The third factor is that without an award of interim attorneys' fees and costs, Ms. Hall and, by extension, her 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.

Admittedly, on the question of the potential length of delay in payment, Ms. Hall'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) in this case 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 that 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, Ms. Hall 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.

¹ This case differs from 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.

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.

The request for attorneys' fees can be divided into two different periods of time, depending upon the firm for which Mr. Gage worked. Respondent's views about the reasonableness of the two portions of the fee request differ. These disputes are resolved in the following sections.

B. Fees for Gage & Moxley, P.C.

In the first period of time, which runs from August 2002 to December 2005, Mr. Gage worked at a law firm known as Gage & Moxley, P.C. Mr. Gage's requested hourly rate ranged from \$175 to \$200. The fee request for work performed by all attorneys and their associated staff at Gage & Moxley, P.C. is \$28,839.25. Pet'r Fee Appl'n, exhibit E.

For the first period of time, in which Laffey matrix rates were not requested, respondent did not object to the hourly rate requested. Respondent did, however, assert a vague objection to some of the number of hours. Respondent also challenged the hourly rate sought by a paralegal working for Gage & Moxley, P.C. Resp't Resp., filed May 19, 2009, at 6-9.

Only one of respondent's two objections has merit. With regard to the number of hours, respondent argued that an attorney for Ms. Hall "has consolidated multiple tasks into blocks of time without clearly delineating the time spent on any given task. This is not permitted." Resp't Resp., filed May 19, 2009, at 7. Respondent has stated one requirement for submissions accurately. However, respondent did not identify any examples. The undersigned's review did not identify any egregious examples of block-billing. Thus, all time sought by the attorneys at Gage & Moxley, P.C. will be compensated.

Respondent's other objection is valid. The time sheets show that a paralegal, Julie Hernandez, was billing at \$100 per hour. However, this amount was previously determined not to be reasonable for all the periods of time for which compensation is sought. See Masias v.

Sec’y of Health & Human Servs., No. 99-697V, 2009 WL 889703, at *7 (Fed. Cl. Spec. Mstr. Mar. 12, 2009). Thus, a deduction must be made from the amount requested by Ms. Hall for work performed by Ms. Hernandez at Gage & Moxley, P.C. as detailed below.

Adjustments for Ms. Hernandez while employed by Gage & Moxley, P.C.			
Period of Time	Number of Hours	Rate Awarded	Difference between Rate Awarded and \$100 Per Hour
9/13/02 through 5/28/03	23.1	\$90.00	\$231.00
6/1/03 through 5/17/04	23.0	\$95.00	\$115.00
6/24/04 through 10/12/04	5.5	\$100.00	\$0.00
TOTAL	51.6		\$446.00

For work performed by people employed by Gage & Moxley, P.C., **Ms. Hall is awarded \$28,393.25** (\$28,839.25 - \$446.00). This decision resolves all issues regarding the fee request for Gage & Moxley, P.C.

C. Fees for Richard Gage, P.C.

The second period of time for which attorneys’ fees are being sought began in January 2006 and continues until the present. Mr. Gage works at a firm called Richard Gage, P.C. For his work in this period of time, the requested hourly rate is in accord with the Laffey matrix and ranges from \$360 to \$410. Pet’r Fee Appl’n, exhibit D. The total amount requested in attorneys’ fees for the second period of time is \$34,938.50.

For the second period of time, respondent objects to an award of an hourly rate based upon the Laffey matrix. Respondent states that she would not object to compensating Mr. Gage at \$200 per hour for this entire period. Resp’t Resp., filed May 19, 2009, at 5-6.

In a recent decision, the undersigned declined to use the Laffey matrix in Vaccine Program cases. Masias v. Sec’y of Health & Human Servs., No. 99-697V, 2009 WL 1838979, at *13-25 (Fed. Cl. Spec. Mstr. June 12, 2009). On July 13, 2009, Mr. Masias filed a motion for review with a judge at the United States Court of Federal Claims.² Whether the Laffey matrix is appropriate will probably be resolved by the Federal Circuit.

² Mr. Masias is represented by Mr. Moxley, Mr. Gage’s former partner.

While the usefulness of the Laffey matrix is pending, an interim award of attorneys' fees can be made at a rate without using the Laffey matrix. Splitting the award into two components permits attorneys and petitioners to recover at least a portion of their fees and costs sooner.

The interim award can be calculated using an hourly rate to which reasonable parties cannot dispute and the number of hours to which reasonable parties cannot dispute. In regard to the number of hours, respondent has not objected. Moreover, a review of the time sheets for Richard Gage, P.C. indicates that the number of hours requested is reasonable.

In terms of the hourly rate, respondent indicates that she would not object to payments at \$200 per hour, which is the amount that Mr. Gage was awarded in 2004. Resp't Resp., filed May 19, 2009, at 6-7. However, the \$200 does not account for yearly inflation. Respondent's position is unreasonable. A rate that is reasonable in 2004 must be adjusted to account for inflation to be reasonable in 2009.

The undersigned adjusted the rates from 2004 to account for inflation in the Masias case. Masias, at *8-13 & Table 4A. These rates will be used in this case as well. See Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1519 (Fed. Cir. 1993) (authorizing special masters to use their experience in reviewing a petition for fees).

Calculations for Mr. Gage at Richard Gage, P.C.				
Time Period	Source of information	Number of Hours	Hourly Rate Awarded	Subtotal for Period
2006	Pet'r Statement, filed June 2, 2009	15.2	\$219	\$3,328.80
2007	Pet'r Statement, filed June 2, 2009	58.3	\$233	\$13,583.90
2008	Pet'r Statement, filed June 2, 2009	20.1	\$239	\$4,803.90
2009 (through April 15)	Pet'r Statement, filed June 2, 2009	7.3	\$239	\$1,744.70
	TOTAL			\$23,461.30

Whether Mr. Gage should be compensated at a higher hourly rate for his work from 2006 to the present will be addressed in more detail in the forthcoming decision on attorneys' fees.

IV. Costs

Ms. Hall is entitled to an award for the reasonable costs incurred. 42 U.S.C. § 300aa-15(e). Ms. Hall has requested reimbursement of costs paid by two different sources. Her current law firm, Richard Gage, P.C., paid \$15,174.84 in costs. Pet'r Fee Appl'n, tab A & tab D at pdf pages 38-84. Ms. Hall herself paid costs in the amount of \$4,447.75. Pet'r Fee Appl'n, tab A & tab C at pdf pages 7-25. It appears that Ms. Hall's initial law firm, Gage & Moxley, P.C., did not incur any costs. Pet'r Fee Appl'n, tab A & tab E.

Respondent did not object to some items of costs, but did object to other items. Respondent objected to items performed by Ms. Kattman of ReEntry Rehabilitation Services, Inc., to the hourly rate requested by Dr. Vera Byers, to the request for work performed by Dr. Marcel Kinsbourne entirely, and to some portion of the amount requested for Dr. Ralph Round. Resp't Resp., filed May 19, 2009, at 8-12.

Ms. Hall stated that she incurred costs totaling \$4,477.75.³ This amount includes \$1,500 paid as a retainer to Dr. Kinsbourne. Pet'r Fee Appl'n, tab C at pdf page 9, tab D at pdf page 60. As mentioned in the previous paragraph, respondent objected to payment to Dr. Kinsbourne. With the exception of this item, the costs incurred by Ms. Hall are reasonable. Therefore, in this interim decision, **Ms. Hall is awarded \$2,947.75** (\$4,447.75 - \$1,500.00). The issue regarding Dr. Kinsbourne will be resolved in the forthcoming final decision on attorneys' fees and costs.

Ms. Hall also requests \$15,174.84 in costs incurred by Richard Gage, P.C. The predominant items are for ReEntry Rehabilitation Services, Inc.; Dr. Kinsbourne; and Dr. Byers.

With regard to ReEntry Rehabilitation, respondent objected to an entry for four hours spent copying notebooks at \$156.00 per hour. Resp't Resp., filed May 19, 2009, at 9. Respondent's objection is well founded. Copying is usually an administrative task and should not be performed by someone charging \$156 per hour. Thus, \$624 will be reduced from the

³ The presentation of these costs could have been better. First, the supporting documentation within exhibit C totals \$4,629.79, which is \$182.54 greater than the amount actually claimed.

Second, several bills are paired with checks showing that they were paid by Gage & Moxley, P.C. No invoices show that Ms. Hall paid the invoices. This issue was discussed during an unrecorded status conference on June 2, 2009. Mr. Gage explained that part of the paperwork have been misplaced in the transition from one law firm to another. In addition, there is no request for reimbursement of costs paid by Gage & Moxley, P.C. Thus, there has not been any duplication. Based upon Ms. Hall's statement that she paid these expenses, she will be reimbursed.

invoice from ReEntry Rehabilitation. This decision resolves all issues regarding to ReEntry Rehabilitation.⁴

For Dr. Kinsbourne, the parties dispute whether Ms. Hall’s decision to retain him at all was reasonable. To simplify an award of interim attorneys’ fees and costs, resolution of this issue is deferred to the forthcoming decision. Thus, \$4,650.00, the amount requested by Richard Gage, P.C. for Dr. Kinsbourne’s work will be deducted from the costs awarded in this interim decision.

For Dr. Byers, Richard Gage, P.C. requested \$1,505.00. Pet’r Appl’n, tab D at pdf page 54. This amount represents 4.3 hours at \$350 per hour. Respondent has objected to paying Dr. Byers at a rate higher than \$300 per hour. Ms. Hall has not submitted any evidence to support an award of \$350 per hour to Dr. Byers. See Pet’r Reply, filed June 18, 2009, at 3. Ms. Hall bears the burden of producing evidence, not just argument, to support a request for attorneys’ fees and costs. The failure to submit evidence can justify the award of fees and costs. See Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987) (the Equal Access to Justice Act); Presault v. United States, 52 Fed. Cl. at 667, 670 & 679 (the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970); Gardner-Cook v. Sec’y of Health & Human Servs., No. 99-480V, 2005 WL 6122520, at *4 (Fed. Cl. Spec. Mstr. June 30, 2005). Thus, due to Ms. Hall’s failure to submit any evidence, Dr. Byers will be compensated at the rate to which respondent has not objected, \$300. Dr. Byers will be awarded \$1,290, which is 4.3 hours at \$300 per hour. This decision resolves all issues with regard to Dr. Byers.

Respondent did not object to other items of costs requested by Richard Gage, P.C. These other items are reasonable and are appropriately documented. They are awarded in full.

Costs for Richard Gage, P.C.

Amount requested initially	\$15,174.84
Deduction for ReEntry Rehabilitation	(\$624.00)
Deduction for Dr. Kinsbourne	(\$4,650.00)
Deduction for Dr. Byers	(\$215.00)
TOTAL	\$9,685.84

⁴ Ms. Hall argued that “there was not almost five hours of photocopying done.” Pet’r Reply, filed June 18, 2009, at 2. Yet, the time records from ReEntry state “admin time copying records notebook for attorney” and “admin time copying records notebook for attorney.” Pet’r Appl’n, tab D, at pdf page 48. It is difficult to square the argument presented by Ms. Hall with the record created contemporaneously and submitted by ReEntry.

V. Summary

Ms. Hall is awarded the following items:

Summary of Attorneys' Fees and Costs

Attorneys' Fees - Gage & Moxley, P.C.	\$28,393.25	
Attorneys' Fees - Richard Gage, P.C.	\$23,461.30	
Subtotal for Attorneys' Fees		\$51,854.55
Costs for Ms. Hall, personally	\$2,947.75	
Costs for Richard Gage, P.C.	\$9,685.84	
Subtotal for Costs		\$12,633.59
TOTAL		\$64,488.14

The forthcoming decision on attorneys' fees and costs will resolve two issues – (1) whether the amount awarded for work done by professionals at Richard Gage, P.C. should be increased, (2) whether Ms. Hall is entitled to compensation for work performed by Dr. Kinsbourne. Notably, if Ms. Hall is awarded compensation for Dr. Kinsbourne, some portion of the award would be paid to Ms. Hall personally. Other than these two issues, no other portion of this decision will be addressed by the undersigned in the forthcoming decision. See Globe Sav. Bank, F.S.B. v. United States, 74 Fed. Cl. 736, 741 (2006) (explaining that a partial judgment should describe the matters encompassed by it).

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 **\$64,488.14** 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.

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