

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

PATRICIA MORROW, *

Petitioner, *

v. *

SECRETARY OF HEALTH AND HUMAN SERVICES, *

Respondent. *

No. 09-588V
Special Master Christian J. Moran

Filed: July 31, 2012

Attorneys' fees; former counsel
of record

Patricia Morrow, pro se petitioner;
Michael P. Milmo, United States Dep't of Justice, Washington, DC, for respondent;
Anne C. Toale, Maglio, Christopher & Toale, Sarasota, FL, former counsel of record for
petitioner.

UNPUBLISHED DECISION AWARDING ATTORNEYS' FEES AND COSTS¹

In 2009, Anne Toale represented Ms. Morrow about a claim in the Vaccine Program. To advance this claim, Ms. Toale and her staff gathered Ms. Morrow's medical records and prepared Ms. Morrow's affidavit. Ms. Toale drafted a petition on Ms. Morrow's behalf and filed it on September 9, 2009.

Within six months of filing the petition, Ms. Toale and counsel for the government were discussing the possibility of settling the case. The undersigned suggested that Thompson v. Sec'y of Health & Human Servs., No. 06-128V, a case in which Ms. Toale represented a petitioner with a relatively similar claim, might serve as

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.

a basis for the parties' negotiations. The parties were not able to reach an agreement for reasons that were (appropriately) not disclosed.

On April 7, 2010, Ms. Toale filed a motion to withdraw as counsel of record. Ms. Toale's relatively succinct motion stated that there were "irreconcilable differences" between Ms. Toale and Ms. Morrow. The undersigned conducted a status conference during which Ms. Toale, Ms. Morrow, and counsel for the Secretary participated. The undersigned granted Ms. Toale's motion to withdraw, meaning that Ms. Morrow was representing herself.

Approximately five months after Ms. Toale stopped representing Ms. Morrow, Ms. Toale filed the pending application for an award of attorneys' fees and costs. Two rounds of briefing between Ms. Toale and the government followed. In addition, Ms. Morrow informally communicated that she objected to an award of attorneys' fees to Ms. Toale. Ms. Toale's fee application has remained pending until now.²

On the merits, Ms. Morrow continued the case without an attorney. By early June 2008, she reached a tentative settlement with the government. See order, filed June 8, 2012.³

After it appeared that Ms. Morrow's case was likely to settle, the undersigned discussed the fee application with Ms. Morrow and counsel for the government during an unrecorded status conference on June 20, 2012. During this status conference, Ms. Morrow withdrew her previous objection. Despite some misgivings about how the relationship ended, Ms. Morrow recognized that Ms. Toale had worked on her behalf.

In response to an order, Ms. Morrow indicated that she did not incur any costs. See order, filed July 12, 2012. Ms. Toale confirmed this by filing a statement pursuant to General Order #9. See statement, filed July 23, 2012. With acquiescence from Ms. Morrow regarding the appropriateness of some fees for Ms. Toale, the fee application can be adjudicated.

² Ms. Toale had sought an award of attorneys' fees on an interim basis. The completion of Ms. Morrow's case has rendered the request for fees on an interim basis moot. This decision awards final fees.

³ Authorized officials from the government later approved the agreement. After the parties filed a joint stipulation, Ms. Morrow was awarded \$35,000 in compensation. Decision, filed July 11, 2012.

Analysis

1. Reasonable Amount of Fees and Costs

Ms. Toale originally sought \$17,994.50 in fees and \$2,472.02 in costs. Fee App'n.⁴ Ms. Toale calculated her fee request using the lodestar formula in which a reasonable hourly rate is multiplied by a reasonable number of hours. The government objected to the total amount requested because of perceived inadequacies for both the hourly rate and the amount of time. Resp't Resp., filed Oct. 4, 2010.

Ms. Toale's reply answered respondent's objections. Ms. Toale submitted extensive and persuasive documents showing that the hourly rate that she requested for her work in Sarasota, Florida was reasonable.⁵

In regard to the reasonable number of hours, the government's objection lacked specificity except for one point, discussed below. The lack of any concrete examples about how Ms. Toale and her staff allegedly spent an unreasonable amount of time makes the government's general objection unhelpful. See Pestka v. Sec'y of Health & Human Servs., No. 06-708V, 2011 WL 4433634, at *7-8 (Fed. Cl. Spec. Mstr. Aug. 30, 2011).

The undersigned reviewed Ms. Toale's timesheets and the activities are reasonable. The one exception, which the government identified, is work performed regarding the 240 day notice. Because Ms. Toale stopped representing Ms. Morrow before 240 days had passed, Ms. Toale's staff should not have spent any time responding to the 240 day notice. Thus, the fees charged for this work (\$32.00) are eliminated.

The undersigned has also reviewed Ms. Toale's requests for costs and the government's objections. The costs have been explained adequately. They are awarded in full.

In sum, a reasonable amount of attorneys' fees and costs is \$21,762.06.

⁴ Ms. Toale added \$1,327.54 in attorneys' fees as part of the briefing process. Reply, filed Oct. 20, 2010, at 14. The total is \$21,794.06.

⁵ Ms. Toale did not request compensation at the "forum rate" as permitted in Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008).

2. Form of Payment

The last issue is the form of payment, specifically to whom the check should be made payable and to what address should the government mail the check. Ms. Toale requested that the government make the check payable to Ms. Toale and send the check to her. The government disagreed. Resp't Resp., filed Feb. 26, 2011.

Most (but not all) special masters order checks for attorneys' fees to be paid to the petitioner and the petitioner's law firm.⁶ The circumstances of this case do not require an evaluation of this practice because Ms. Morrow has stated that she will cooperate in having Mr. Toale receive payment for her work.⁷ Similarly, the government may follow its usual practice of mailing the check to counsel of record, which, in this case, is Ms. Morrow. See Vaccine Rule 14(a)(2). In turn, Ms. Morrow is expected to endorse the check and to mail the check to Ms. Toale's law firm.

Conclusion

Ms. Morrow is entitled to an award for the work her former counsel of record, Ms. Toale, performed in representing her and for the costs Ms. Toale incurred.

⁶ A sample of cases awarding attorneys' fees to the client and counsel jointly include: Aholt v. Sec'y of Health & Human Servs., No. 12-55V, 2012 WL 286619 , at *1 (Fed. Cl. Spec. Mstr. June 18, 2012); Brown v. Sec'y of Health & Human Servs., No. 09-426V, 2012 WL 952268, at *12 (Fed. Cl. Spec. Mstr. Feb. 29, 2012); King v. Sec'y of Health & Human Servs., No. 03-584V, 2009 WL 2524564, at *5 (Fed. Cl. Spec. Mstr. July 27, 2009); Heath v. Sec'y of Health & Human Servs., No. 08-86V, 2011 WL 4433646, at *16 (Fed. Cl. Spec. Mstr. Aug. 25, 2011); Torday v. Sec'y of Health & Human Servs., No. 07-372V, 2011 WL 2680717, at *6 (Fed. Cl. Spec. Mstr. May 4, 2011); and Browning ex rel. Brynildson v. Sec'y of Health & Human Servs., No. 02-928V, 2010 WL 4033200, at *5 (Fed. Cl. Spec. Mstr. Sept. 27, 2010). Cases taking a different approach include Mead v. Sec'y of Health & Human Servs., No. 03-215, 2010 WL 3584449, at *1 (Fed. Cl. Spec. Mstr. Aug. 20, 2010), and Asbury v. Sec'y of Health & Human Servs., No. 99-682V, 2008 WL 2630932, at *2 (Fed. Cl. Spec. Mstr. June 16, 2008)

⁷ In the course of briefing, the Secretary argued that any "check should be made jointly payable to petitioner and the attorney of record." Resp't Resp., filed Feb. 28, 2011, at 2 n.1. The Secretary made this statement when it appeared that another attorney would represent Ms. Morrow. However, this attorney never became counsel of record.

A reasonable amount of attorneys' fees and costs is \$21,762.06. The Clerk's Office is directed to enter judgment for this amount unless a motion for review is filed.

The government shall pay the forthcoming judgment in a check made payable to Ms. Morrow and Maglio, Christopher & Toale and the government shall mail this check to Ms. Morrow. The Clerk's Office is also instructed to mail a courtesy copy of this decision to Ms. Toale.

IT IS SO ORDERED.

Christian J. Moran
Special Master