

I. Procedural History

Ms. Morse filed a petition alleging that the hepatitis B vaccine caused her to sustain neurological injuries. In support of her petition, Ms. Morse consulted a doctor, Dr. Sherri Tenpenny, whom she had seen during her illness. Ms. Morse also consulted another doctor, Dr. Thomas Morgan. The parties agreed to resolve the case based upon the costs and risks of continued litigation. The undersigned issued a decision awarding Ms. Morse \$30,000 in compensation. Morse v. Sec’y of Health & Human Servs., No. 05-418V, 2009 WL 255592 (Jan. 8, 2009).

This award of compensation entitled Ms. Morse to an award of her reasonable attorneys’ fees and costs. See 42 U.S.C. § 300aa–15(e)(1). Ms. Morse was awarded the amount in attorneys’ fees that she sought. In addition, Ms. Morse requested \$17,972.45 in costs. The largest items of costs were the work performed by Dr. Tenpenny and Dr. Morgan. The parties disputed whether Ms. Morse had established that she was entitled to the amount of costs requested for both Dr. Tenpenny and Dr. Morgan.

The undersigned issued a decision finding that Ms. Morse had not established the reasonableness of Dr. Tenpenny’s work because Dr. Tenpenny’s invoice did not adequately explain her activities, and awarded only a portion of the number of hours requested for Dr. Tenpenny. A similar analysis pertained to Dr. Morgan, although the amount of money requested for Dr. Morgan was less than the amount of money requested for Dr. Tenpenny. In sum, the undersigned awarded, for costs, approximately \$10,000 less than the amount Ms. Morse had requested. Morse v. Sec’y of Health & Human Servs., No. 05-418V, 2009 WL 1783639 (June 5, 2009).

Ms. Morse filed a motion for review by the United States Court of Federal Claims. Ms. Morse argued that the undersigned’s decision not to award the full amount of compensation for Dr. Tenpenny and Dr. Morgan was “arbitrary, capricious, and an abuse of his discretion.” Pet’r Mem. in Support of Pet’r Mot. for Review, filed July 6, 2009, at 7 and 10. Ms. Morse also requested that “her case be remanded to the special master for an assessment of appropriate attorneys’ fees for her motion for review.” Id. at 16.

The Court denied Ms. Morse’s motion for review. Agreeing with the undersigned, the Court stated “that Dr. Tenpenny’s invoice was deficient, in that it did not adequately explain why or how the 44.5 hours were reasonably spent on the tasks listed on the invoice.” Morse v. Sec’y of Health & Human Servs., 89 Fed. Cl. 683, 689 (2009). The Court also saw “no abuse of discretion in the special master’s estimate of thirteen hours, or in his overall conclusion that the reasonable cost for Dr. Tenpenny’s services was \$4550.” Id. at 689. Finally, the Court remanded the case to the undersigned “for consideration of petitioner’s request for attorneys’ fees and costs related to the filing of her motion for review.” Id. at 691.

After remand, Ms. Morse submitted an application for her attorneys' fees and costs for filing the motion for review. After discussion between the parties, Ms. Morse agreed to lower the amount requested and respondent agreed not to object to the reduced amount, which is \$11,000. Pet'r Amended Appl'n, filed Nov. 20, 2009. The undersigned was concerned whether a reasonable basis supported Ms. Morse's motion for review and requested that Ms. Morse submit a brief explaining why a reasonable basis existed to support her motion for review. Order, filed Jan. 5, 2010. Ms. Morse filed this brief.¹ Ms. Morse also requested additional compensation for responding to the undersigned's order. Thus, Ms. Morse's motion for attorneys' fees and costs is ready for adjudication.

II. Analysis

As a successful litigant, Ms. Morse was entitled to reasonable attorneys' fees and costs. 42 U.S.C. § 300aa-15(e)(1). These were awarded to Ms. Morse in the June 5, 2009 decision.

Ms. Morse sought compensation beyond the amount of fees awarded in the June 5, 2009 decision by filing a motion for review, but she did not prevail upon her motion for review. The Court denied Ms. Morse the full requested compensation for Dr. Tenpenny's work. This denial of additional compensation does not disqualify Ms. Morse from receiving attorneys' fees and costs associated with filing the motion for review, but it requires Ms. Morse to establish that "there was a reasonable basis for the claim." 42 U.S.C. § 300aa-15(e)(1).

As discussed in the January 5, 2010 order, the reasonable basis of Ms. Morse's action in filing the motion for review seems questionable.² In determining whether an unsuccessful claim was supported by a reasonable basis, one factor to consider is the likelihood of succeeding on the action. See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60 (1993). Another factor is the cost-benefit analysis of the action. See Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of

¹ Ms. Morse stated that she "intends to request the assistance of Judge Bush to resolve this issue." Pet'r Resp., filed Jan. 13, 2010, at 4. The undersigned interpreted this statement as indicating that Ms. Morse intended to bring this matter to the Court before the undersigned acted. See also id. at 5 (stating "If . . . Judge Bush agrees with the special master that the issue of reasonable basis is worthy of additional briefing, then [Ms. Morse] will consider this request.") Therefore, the undersigned deferred action on Ms. Morse's application to allow Ms. Morse to present any arguments to the Court.

In a status conference held on February 22, 2010, Ms. Morse clarified that she was not seeking immediate action from the Court. Consequently, this decision is being issued now.

² Respondent's failure to challenge the reasonable basis for Ms. Morse's supplemental application does not bar the undersigned from evaluating the reasonable basis. Savin v. Sec'y of Health & Human Servs., 85 Fed. Cl. 313, 316 (2008).

Elections, 522 F.3d 182, 184 (2d Cir. 2008). In Arbor Hill, the Second Circuit stated that a trial court

must act later to ensure that the attorney does not recoup fees that the market would not otherwise bear. Indeed, the district court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively.

Id.

In this case, Ms. Morse has not presented a persuasive reason why she expected to succeed on her motion for review. The undersigned's July 5, 2009 decision found, as a matter of discretion, that Ms. Morse had failed to establish the reasonableness of Dr. Tenpenny's activities. In doing so, the undersigned cited, among other authorities, Guidelines for Practice under the National Vaccine Injury Compensation Program § XIV (Rev. Ed. 2004). These Guidelines inform attorneys that

Each petition should include:

* * *

3. Contemporaneous time records that indicate the date and specific character of the service performed, the number of hours (or fraction thereof) expended for each service, and the name of the person providing such service. Each task should have its own line entry indicating the amount of time spent on the task. Several tasks lumped together with one time entry frustrates the court's ability to assess the reasonableness of the request.
4. A list of costs advanced under the petition. Such expenses, if not self-explanatory, should be explained sufficiently to demonstrate their relation to the prosecution of the petition.

Id. The July 5, 2009 decision found that Ms. Morse's submissions for Dr. Tenpenny did not comply with these requirements.

For Ms. Morse to prevail on her motion for review, she was required to establish that the undersigned's June 5, 2009 decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1519 (Fed. Cir. 1993). This standard of review is deferential to the decision of the special

master. In practical terms, this standard of review means that Ms. Morse was unlikely to prevail on her motion for review.

In her motion for review, Ms. Morse did not cite any cases showing that the documentation submitted by Ms. Morse for Dr. Tenpenny was adequate. Ms. Morse did not cite any cases in which a reviewing tribunal found that a special master had abused his (or her) discretion in awarding only partial compensation to an expert because the petitioner had failed to explain the reasonableness of the expert's activities. Ultimately, the Court denied Ms. Morse's motion for review.

The denial of the motion for review does not mean that Ms. Morse necessarily lacked a reasonable basis for the motion for review. See 42 U.S.C. § 300aa-15(e)(1). An analogy can be drawn to the Equal Access to Justice Act. In that context, the government may defeat a prevailing party's request for attorneys' fees by showing that although the government was wrong, its position had "substantial justification." 28 U.S.C. § 2412(d)(1)(A); see also Sharp v. United States, ___ Fed. Cl. ___, No. 07-547C, 2010 WL 742559, at *4-5 (Fed. Cl. Mar. 1, 2010) (finding that government's position on a question of law was substantially justified).

The undersigned's January 5, 2010 order presented Ms. Morse with an opportunity to demonstrate that her unsuccessful motion for review had a reasonable basis. Ms. Morse did not address why she believed that her motion for review was likely to be successful. For example, Ms. Morse's response to the January 5, 2010 order, again, did not cite any cases that suggest a reviewing Court was likely to find that the undersigned's July 5, 2009 decision was arbitrary or capricious. See Vaccine Rule 8(f).

The undersigned's July 5, 2009 decision was premised upon Ms. Morse's failure to provide preponderant evidence showing the reasonableness of Dr. Tenpenny's work. This standard is not new. See Wasson v. Sec'y of Health & Human Servs., 24 Cl. Ct. 482 (1991), aff'd after remand, 988 F.2d 131 (Fed. Cir. 1993) (unpubl.); 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.").

In response to the January 5, 2010 order concerning the reasonable basis for her motion for review, Ms. Morse presents three points, none of which address the likelihood that Ms. Morse would prevail upon her motion for review. First, Ms. Morse argues that an inquiry into the reasonableness for the motion for review was foreclosed by the Court's instruction on remand. Ms. Morse notes that the remand order did not specifically direct the special master to evaluate the reasonable basis for the motion for review. Essentially, Ms. Morse argues that this silence implies that the Court has found that a reasonable basis exists. See Pet'r Resp. at 5.

The Court's order denying the motion for review and remanding the case to the undersigned for consideration of an award of attorneys' fees and costs does not preclude the

undersigned from determining whether the motion for review was reasonable. Ms. Morse did not submit her application for fees and costs for the motion to review to the Court. Thus, the Court could not reach any conclusion as to whether the decision to spend approximately \$11,000 to recover approximately \$10,000 was reasonable. The Court has not made an explicit finding that Ms. Morse's action in filing a motion for review had a reasonable basis. See Morse, 89 Fed. Cl. at 691. In the absence of such a finding, it is incumbent upon the special master to make such a finding as a condition of awarding attorneys' fees and costs. See 42 U.S.C. § 300aa-15(e)(1).

Ms. Morse's second point concerns her obligation to pay Dr. Tenpenny. Ms. Morse states that she "is liable to Dr. Tenpenny for costs not awarded by the Program. In these circumstances, any reasonable client would have instructed her attorneys to appeal the special master's decision." Pet'r Resp. at 3 (emphasis in original); accord id. at 1 n.1. Ms. Morse made a similar argument as part of her motion for review. See Pet'r Mem. in Support of Pet'r Mot. for Rev. at 9 n.11.

There are two problems with this argument. An initial point is that Ms. Morse has not established that she is obligated to pay Dr. Tenpenny the difference between the amount Dr. Tenpenny requested and the amount awarded. For example, Ms. Morse has not submitted a retainer agreement that established the compensation arrangement among Ms. Morse, Dr. Tenpenny, and the law firm retained by Ms. Morse. The existing record is devoid of evidence – as opposed to attorney argument – that Ms. Morse has a personal obligation to pay additional costs to Dr. Tenpenny.³

In addition, even assuming that Ms. Morse is liable to reimburse Dr. Tenpenny, how this fact affects the reasonableness of the decision to file the motion for review is not clear. The identity of the person who will suffer any adverse consequences of the July 5, 2009 decision does not affect whether there was a reasonable basis for filing the motion for review.

Ms. Morse's final argument with regard to her decision to file the motion for review relies upon the history of litigation in the Vaccine Program. Ms. Morse asserts that "she is unaware of a single case in the history of the Vaccine Program where a petitioner has been denied attorneys' fees for lack of reasonable basis for a motion for review or for an appeal to the Federal Circuit." Pet'r Resp. at 3. From this observation, Ms. Morse seems to argue that the reasonable basis for her motion for review should not be examined.

³ Ms. Morse's briefs distinguish between fees for legal services and litigation costs. Attorneys who represent petitioners in the Vaccine Program may not seek compensation from their clients in an amount that exceeds the amount awarded in the litigation. 42 U.S.C. § 300aa-15(e)(3). In a slightly different context, the Federal Circuit has held that attorneys may not charge a client fees or costs that exceed the amount set by 42 U.S.C. § 300aa-15(b). Beck v. Sec'y of Health & Human Servs., 924 F.2d 1029, 1034 (Fed. Cir. 1991) (discussing "pre-Act cases").

Contrary to Ms. Morse's assertion, there is at least one case in which a motion for review was found to lack a reasonable basis. See Jordan v. Sec'y of Health & Human Servs., 38 Fed. Cl. 148, 154 (1993) (finding that petitioners' motion for review lacked a reasonable basis when it failed to address "the critical finding"). The decision in Jordan was made approximately one month after a concurring opinion from the Federal Circuit discussed the reasonable basis for Federal Circuit appeals challenging "fact-specific findings and credibility determinations made by the special master." Phillips v. Sec'y of Health & Human Servs., 988 F.2d 111, 113 (Fed. Cir. 1993) (Plager, J., concurring).

One or two cases from 1993 may not establish a general policy of finding that motions for review or appeals to the Federal Circuit lack a reasonable basis. Nevertheless, Jordan does refute Ms. Morse's suggestion that a denial of attorneys' fees for a motion for review has never happened.

Even if attorneys' fees are commonly paid for unsuccessful motions for review, this fact cannot override the statute, which requires unsuccessful petitioners to establish the "reasonable basis" for their claim. Perreira v. Sec'y of Health & Human Servs., 33 F.3d 1375 (Fed. Cir. 1994), establishes that a case may cease to have a reasonable basis during the entitlement phase. So, too, a case may cease to have a reasonable basis during the litigation over attorneys' fees and costs.

Furthermore, Ms. Morse's reference to the outcome of the many cases in which attorneys' fees have been awarded for filing an unsuccessful motion for review is superficial. Ms. Morse's argument that she should be awarded attorneys' fees for her unsuccessful motion for review because other cases had awarded attorneys' fees for unsuccessful motions for review would be more persuasive if Ms. Morse had cited to a factually similar case. The basis for Ms. Morse's motion for review is that the July 5, 2009 decision was arbitrary and capricious in awarding only a portion of the amount requested in Dr. Tenpenny's invoice. A problem with Ms. Morse's response to the January 5, 2010 order is that Ms. Morse failed to explain the specific arguments in Ms. Morse's case that made the motion for review reasonable. This omission is not filled by referencing other cases that may have entirely different factual circumstances.

Consequently, Ms. Morse has not established that her motion for review had a reasonable chance of succeeding. The July 5, 2009 decision was a discretionary decision based upon the evidence that Ms. Morse presented. Ms. Morse's evidence in regard to Dr. Tenpenny did not satisfy Ms. Morse's burden and was well below the standard that numerous other experts, including experts retained by Ms. Morse's attorneys, achieve regularly. Pursuant to the standard of review established by the Federal Circuit in Saxton, Ms. Morse had little chance of establishing that the undersigned acted arbitrarily and capriciously in finding that Ms. Morse had failed to present adequate evidence for awarding compensation for Dr. Tenpenny's and Dr. Morgan's work. Ms. Morse failed to persuade the Court that the July 5, 2009 decision constituted an abuse of discretion. Ms. Morse has also failed to establish that there was even a reasonable basis for her argument to succeed.

III. Conclusion

Ms. Morse has failed to establish that her motion for review had a reasonable basis. She is not awarded any compensation for filing the motion for review. The Clerk's Office is instructed to enter judgment in accord with this decision unless a motion for review is filed. See Vaccine Rule 28.1(b). The Clerk's Office is also instructed to provide a copy of this decision to the presiding judge. See Vaccine Rule 28.1(a).

IT IS SO ORDERED.

S/ Christian J. Moran

Christian J. Moran
Special Master