

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 04-1541V

Filed: October 28, 2008

THEODORE J. HEFLIN,

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Petitioner,

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Attorney's Fees and Costs;
applicability of Avera

v.

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SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

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Respondent.

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ORDER¹

On October 13, 2004, petitioner filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., by his original counsel, Mr. Kirk Allan Morgan. Respondent filed a Rule 4(c) report on May 6, 2005, recommending against compensation. On March 7, 2006, petitioner filed a motion substituting Mr. Richard Gage as counsel. On January 31, 2008, the parties filed a joint stipulation settling the case for \$10,000.00. The undersigned issued a damages decision awarding petitioner \$10,000.00 on February 4, 2008. Judgment entered on March 12, 2008.

On June 6, 2008, petitioner filed a Fee Petition for attorneys' fees and costs. (Petr's Fee Pet.) On July 11, 2008, respondent filed a Response to petitioner's Petition for fees and costs. (Respt's Resp.) On September 26, 2008, petitioner filed a Reply to respondent's Response,

¹ The undersigned intends to post this order on the United States Court of Federal Claims' 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" order will be available to the public. Id.

including a supplemental Application for attorneys' fees.² (Petr's Rep., Petr's Supp. App.) Respondent declined to file a Sur-Reply to petitioner's Reply.

Petitioner's June 6, 2008, Fee Petition contains a request for reimbursement of attorneys' fees and costs in the amount of **\$40,484.03**. Petr's Fee Pet. at 3. Petitioner delineates the request as follows:

Richard Gage, P.C., requests **\$11,938.00 in fees**
Richard Gage, P.C., requests **\$12,073.99 in costs**
Gage & Moxley, requests **\$15,193.00 in fees**
Gage & Moxley, requests **\$173.37 in costs**
Gage & Moxley, requests **\$112.07 in additional costs**

Id. Tab C at 2. Petitioner also requests **\$1,105.67 for his own costs**. Id.

On July 11, 2008, respondent filed a Response to Petitioner's Fee Petition. Resp't's Resp. Respondent objected to the \$295.00, \$310.00, and \$325.00 hourly rates claimed by petitioner's attorney, Mr. Gage, as being unreasonably high for where Mr. Gage's practice is located. Id. at 3. Respondent asserts that the affidavits submitted in support of Mr. Gage's rates are insufficient. Id. at 4-5. Respondent maintains that \$324.00 in costs submitted by petitioner is unsubstantiated and should not be awarded. Id. at 6. Finally, respondent objects to the reimbursement sought for petitioner's experts, alleging that portions of the work performed by both experts was redundant, while the \$250.00 hourly rate for either expert is unsubstantiated. Id.

On September 26, 2008, petitioner filed a Reply to respondent's Response. In his Reply, petitioner states the rate requested is reasonable, noting the complexity of cases in the Program, the skills necessary to prosecute successfully a vaccine case, and petitioner's counsel's experience and reputation in the Program. Petr's Rep. at 7-9. Petitioner highlights the recent awards of \$300 and \$340 hourly for other established vaccine attorneys in the Program. Id. at 9. With respect to respondent's objections to petitioner's costs and the fees requested by petitioner's experts, petitioner maintains that such requests are reasonable and necessary for the successful prosecution of petitioner's petition. Id. at 3-7.

Petitioner included in the Reply a supplemental Application for Award of Attorneys' Fees not addressed in the original Fee Petition. The request includes additional fees that Mr. Gage incurred while working on the issues surrounding petitioner's Fee Petition and respondent's objections, totaling an additional \$3,705.00 in fees at a \$325 hourly rate. Petr's

²On October 3, 2008, petitioner also filed a duplicate copy of petitioner's Reply and Supplemental Fee Application, along with a Supplemental Application for Fees. The two replies are identical and any discussion referring to petitioner's September 26, 2008 Reply is understood to include the other filing.

Supp. Fee App. The undersigned's law clerk confirmed on October 22, 2008, that respondent declined to file a Sur-Reply to petitioner's Reply and supplemental Fee Application.

After carefully reviewing all the documents filed by both parties relating to petitioner's fee request, the undersigned hereby orders the parties to respond to the following issues arising from petitioner's submitted application.

1. The relevant legal background on attorneys' fees and costs

The Vaccine Act provides that a special master "shall also award as part of such compensation [for a petitioner's vaccine-related injury] an amount to cover . . . reasonable attorneys' fees." 42 U.S.C. § 300aa-15(e)(1). A special master may "award an amount of compensation to cover petitioner's reasonable attorneys' fees . . . if the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." *Id.* In its recent decision, Avera v. Sec'y of HHS, 515 F.3d 1343 (Fed. Cir. 2008), the Federal Circuit held that to determine the reasonable amount of attorney's fees, a court should apply a forum rate. *Id.* at 1349. A court in general should use the forum rate in the lodestar calculation previously employed. *Id.* Here, the forum for cases brought pursuant to the Vaccine Act is the District of Columbia, the location of the U.S. Court of Federal Claims, which has exclusive jurisdiction over cases arising under the Vaccine Act. *Id.* at 1348; *see* 42 U.S.C. § 300aa-12(a).

Using the lodestar approach, the reasonable hourly rate is derived from the market rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Avera*, 515 F.3d at 1348, quoting Blum v. Stenson, 465 U.S. 886, 895-96 n. 11 (1984). The burden is on the fee applicant to establish the reasonable market rate. Wilcox v. Sec'y of HHS, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). However, in *Avera*, the Federal Circuit recognized the Davis exception when setting the reasonable rate of attorneys' fees in Vaccine Act cases where the **bulk of the work** was done outside the District of Columbia in a legal market where **the prevailing attorney's rates are substantially lower**. *Avera*, 515 F.3d at 1349; *see* Davis County Solid Waste Management and Energy Recovery Special Service District v. United States Environmental Protection Agency, 169 F.3d 755 (D.C. Cir. 1999). In Davis, the D.C. Circuit provided a limited exception to the forum rule where the bulk of an attorney's work is done outside the jurisdiction of the court and where there is a very significant difference in hourly fees favoring D.C. Davis, 169 F.3d at 759-60. The court held that an attorney, practicing in a location where the hourly rates were lower, would be **limited to the lower rate, rather than receiving the rates obtained in the forum**. *Id.*

The application of the Davis exception does not eliminate the requirement that the number of hours claimed must also be reasonable in scope. *See* Guy v. Sec'y of HHS, 38 Fed. Cl. 403, 406 (1997). In assessing the reasonableness of hours expended in the prosecution of a case, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Furthermore, a special master has the authority to reduce a requested amount that she deems unreasonable. Guy, 38 Fed. Cl. at

406; see also Wasson v. Sec’y of HHS, No. 90-208V, 24 Cl. Ct. 482, 486 (1991), aff’d 988 F.2d 131 (Fed. Cir. 1993) (special masters may rely on their experience with the Vaccine Act in Order to determine if the hours expended are reasonable). The rates requested by counsel must be in line with those prevailing in the community for similar services. Blum, 465 U.S. at 895, n. 11. The nature of the services provided is also a factor when determine the reasonable rate of compensation. Id.

Mr. Gage’s former partner, Robert Moxley, based in Cheyenne, WY, the same geographic area as Mr. Gage, was the counsel of record in Avera. Mr. Moxley was awarded the originally-requested hourly rate of \$200.00 under the Vaccine Act for work he performed between July 2004 through March 2006, a reduction from the \$574.00 hourly and \$598.00 hourly rate that petitioners later requested in their amended application for fees. Avera, 515 F.3d at 1349-50, aff’g Avera v. Sec’y of HHS, 75 Fed. Cl. 400 (Fed. Cl. Feb. 22, 2007), aff’g Avera v. Sec’y of HHS, No. 04-1385V, 2006 WL 5618158, at *1-3 (Fed. Cl. Spec. Mstr. Aug. 29, 2006). In Avera, the Federal Circuit stated that “because the attorneys in this case performed the entirety of their work in Cheyenne, WY, and the District of Columbia rates that [the petitioners’ attorneys] requested are significantly higher than the rates prevailing in Cheyenne, following Davis, we hold that the special master did not err in awarding attorneys’ fees at the lower [\$200.00] Cheyenne rate.” Id. at 1350.

2. Petitioner’s reimbursement claims for the rates and fees of Mr. Gage

Petitioner’s counsel, Mr. Gage, has requested compensation at a \$295.00 hourly rate for work performed during 2006; \$310.00 hourly for work performed during 2007; and \$325.00 hourly for work performed after January 1, 2008. Petr’s Fee Pet. at Tab E.

In the instant action, the same conclusion in Avera about a significant disparity between Washington, D.C. and Cheyenne rates applies since Mr. Gage works in Cheyenne. Therefore, one of the two Davis factors applies. However, since the undersigned must analyze both factors—a comparison of the rates and where the attorney did the bulk of his work—the crucial question is where did Mr. Gage do the bulk of his work? Like Mr. Moxley in Avera, Mr. Gage performed the bulk of his work outside the District of Columbia. See Avera, 515 F.3d at 1349. The undersigned did not conduct an entitlement hearing in Washington, D.C. because the case was settled. Mr. Gage did not leave Cheyenne during the prosecution of this case. Under Avera, a Washington, D.C. forum rate is not appropriate. Based on the Federal Circuit’s recent ruling in Avera, and the recent rates awarded in this Program, the undersigned intends to award petitioner compensation for Mr. Gage at a **\$200.00** hourly rate for work performed in 2006; a **\$225.00** hourly rate for work performed in 2007; and a **\$250.00** hourly rate for work performed in 2008, totaling a sum of **\$10,602.50** in compensation for the fees incurred by Mr. Gage in petitioner’s case.³

³Included in the sum are the additional fees incurred by Mr. Gage’s work in responding to respondent’s objections (**\$8,252.50** [the recalculated sum based on petitioner’s original request] **plus**

If petitioner would like to file a contrary interpretation of the above discussion of Avera, petitioner shall do so by **Tuesday, November 25, 2008**.

3. Petitioner's costs

Respondent objects to petitioner's request for reimbursement of \$324.00 for what respondent characterizes as "estimated costs," citing that petitioner has failed to file any supporting documentation of such costs. Resp't Resp. at 6. In petitioner's Reply, petitioner maintains that such expenses are reasonably claimed, while noting that the language of the Vaccine Act and case law support compensation for such expenses. See 42 U.S.C. § 300aa-15(e); see also Comm. Heating & Plumbing Co., Inc. v. Garrett, III, 2 F.3d 1143, 1146 (Fed. Cir. 1993) (stating that petitioner is required only to provide reasonably specific documentation). Petitioner maintains that "[s]ufficient documentation requires [. . .] 'a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and other expenditures related to the case.'" Petr's Rep. at 3, quoting Comm. Heating, 2 F.3d at 1146, quoting Naporano Iron & Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987).

Respondent objects to the lack of documentation supporting petitioner's request. Petitioner is expected to provide some method for verifying the request. Therefore, by **Tuesday, November 25, 2008**, petitioner shall provide supporting documentation in the form of receipts or an affidavit that support his \$324.00 request for reimbursement.

4. Petitioner's reimbursement claims for the Drs. Lefkowitz

Petitioner seeks \$12,000.00 for the services of two experts, Dr. Stanley S. Lefkowitz, Ph.D, and his wife, Dr. Doris L. Lefkowitz, M.D., who spent 48 hours of work total at an hourly rate of \$250.00. Petr's. Fee Pet. at Tab E. Respondent objects to the amount of work done by the two experts on the grounds that several of their tasks were redundant, while also objecting to their claimed \$250.00 hourly rate as unsubstantiated. Resp't Resp. at 6.

After reviewing the invoice petitioner submitted detailing the work performed by petitioner's experts, the undersigned finds the tasks performed to be reasonable in light of what they contributed to petitioner's prosecution of the case. While respondent correctly notes some tasks appear to be repeated by both individuals, the undersigned views the overlap of those functions, namely, "review[ing] medical records submitted by attorneys" and "library research" to be among the threshold functions necessary to perform their duties. Petr's Fee Pet. at Tab E. The total hours claimed by both experts in this regard are also minimal compared to the total number of hours of petitioner's reimbursement request for their services. Id.

\$2,350.00 [the recalculated sum based on petitioner's supplemental request] **incurred in response**). The undersigned views supplemental fees as having been incurred under the petition and sees no reason why they should not be included in an award for reasonably compensable expenses under the petition proceedings.

Nonetheless, it is the opinion of the undersigned that respondent's objection to substantiation of the fee rates requested by Stanley Lefkowitz, Ph.D, and his wife, Doris L. Lefkowitz, M.D., warrants some discussion. While the undersigned views the number of hours at the high end for what may reasonably be necessary in prosecuting a case in the Program, the difference between the qualifications is enough to compensate each individual at a different hourly rate. The undersigned notes Dr. Stanley Lefkowitz's literary and academic qualifications; however, the medical and diagnostic training unique to a medical doctor, and its application to rendering an expert opinion, as Dr. Doris Lefkowitz has done in petitioner's case, cannot be overlooked. Accordingly, while the undersigned sees no reason to reduce the amount of hours requested by petitioner for Drs. Stanley and Doris Lefkowitz, the undersigned intends to compensate petitioner for work performed by Dr. Stanley Lefkowitz at an hourly rate of **\$225.00 for his 20 hours of work performed**, and Dr. Doris Lefkowitz at an hourly rate of **\$225 for her 28 hours of work performed** in petitioner's case, for a total of **\$11,500.00**.

The parties have until **Tuesday, November 25, 2008** to respond to the undersigned's discussion of this issue.

It appears that the major issue dividing the parties is the hourly rate claimed by petitioner's attorney, Mr. Gage, along with certain cost requests by petitioner, and the requested compensation for petitioner's experts. In light of the above discussion, the undersigned encourages the parties to settle attorneys' fees and costs in this case. If they do not settle, petitioner and respondent shall file their responses to this Order by **Tuesday, November 25, 2008**.

IT IS SO ORDERED.

Dated: October 28, 2008

/s/ Laura D. Millman
Laura D. Millman
Special Master