

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

GLEND A KENNEDY,

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No. 07-410V

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Special Master Christian J. Moran

Petitioner,

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Filed: July 28, 2009

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v.

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Attorneys' fees and costs, evidence

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to support a reasonable hourly rate

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for attorneys and experts

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SECRETARY OF HEALTH
AND HUMAN SERVICES,

*

Respondent.

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UNPUBLISHED DECISION AWARDING ATTORNEYS' FEES AND COSTS*

Glenda Kennedy alleged that the trivalent influenza vaccine caused her to suffer neurologic problems - either Guillain-Barré syndrome or chronic inflammatory demyelinating polyneuropathy. The parties resolved this case without the need for formal adjudication and Ms. Kennedy was awarded compensation. Decision, filed Feb. 10, 2009.

Ms. Kennedy now seeks an award of attorneys' fees and costs pursuant to 42 U.S.C. § 300aa-15(e) (2006). Respondent has objected to the hourly rate sought by her attorneys and the hourly rate sought by her expert. **Ms. Kennedy is awarded \$30,278.58.**

* Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of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. Attorneys' Fees

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 v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). The second step is adjusting the lodestar calculation upward or downward. Id. at 1348.

When a party seeks an award of attorneys' fees, the fee-applicant bears the burden of showing the reasonableness of the request. "The burden is not for the court to justify each dollar or hour deducted from the total submitted by counsel. It remains counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero. In the process and especially in the end result, [trial] courts must continue to be accorded wide latitude." Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1210 (10th Cir. 1986).¹

For attorneys' fees, Ms. Kennedy seeks \$21,182.00. Originally, Ms. Kennedy sought \$20,482.00. She supplemented this amount by requesting \$700.00 in fees for litigating the fee request. Ms. Kennedy's request is predicated upon an assertion that Attorney Brooks should be compensated at a rate of \$350.00 per hour and that Attorney Fowles should be compensated at \$300.00 or \$318.00 per hour. See Pet'r App, exhibit 1. Respondent has objected to those hourly rates. Resp't Opp'n, filed June 15, 2009, at 1-2.

Ms. Kennedy supported her application for attorneys' fees with three pieces of evidence. However, each piece of evidence has relatively little persuasive value.

First, there is an excerpt from the 2004 Altman Weil Survey of Law Firm Economics, which was filed as exhibit 7. This type of evidence has previously been found to be unpersuasive. Town of Grantwood Village v. United States, 55 Fed. Cl. 481, 487 (2003); Ceballos v. Sec'y of Health & Human Servs., No. 99-97V, 2004 WL 784910, at *6 (Fed. Cl. Spec. Mstr. Mar. 25, 2004); see also Kuttner v. Sec'y of Health & Human Servs., No. 06-195V, 2009 WL 256447, at *7 (Fed. Cl. Spec. Mstr. Jan. 16, 2009) (noting size of law firm affects the hourly rate).

The second piece of evidence is an affidavit from Attorney Stephen A. Corr, which was filed as exhibit 5. Mr. Corr's affidavit is not helpful because Mr. Corr does not explain how he is

¹ Although Mares did not interpret the attorneys' fee provision of the Vaccine Act, fee-shifting statutes are interpreted similarly. Avera, 515 F.3d at 1348.

aware of the market rate for attorneys comparable to Mr. Brooks. For example, Mr. Corr does not charge hourly rates to his own clients. Instead, Mr. Corr receives fees contingent upon the success of the litigation. Exhibit 6 ¶4.

Ms. Kennedy also submitted an affidavit from Lawrence R. Cohan, exhibit 6. Mr. Cohan states that he has been paid as much as \$450.00 per hour, although Mr. Cohan does not describe the types of clients who have paid him this hourly rate. (Mr. Cohan stated that he practices civil litigation and specializes in “pharmaceutical and product liability, toxic tort litigation, vaccine injury related claims, and medical malpractice claims.”). Mr. Cohan did not provide any evidence about the market rate.

Respondent characterized the requested hourly rates as “unsubstantiated.” Respondent Opp’n, filed June 15, 2009, at 1. Respondent also outlined flaws in Ms. Kennedy’s evidence (as opposed to argument) in her opposition.

It is disappointing that this dispute over fees requires formal resolution. The amount actually disputed is approximately \$2,000.00. It would seem that reasonable people could have compromised to eliminate the dispute. Yet, that has not happened. Resp’t Opp’n at 1 n.1. Thus, the dispute will be resolved based upon the existing record and past experience. Saxton v. Sec’y of Health & Human Servs., 3 F.3d. 1517, 1522 (Fed. Cir. 1993).

A reasonable hourly rate for Mr. Brooks is \$325.00 in 2007. As noted above, Ms. Kennedy has not presented persuasive evidence about the market rate for attorneys in Philadelphia. Ms. Kennedy compares Mr. Brooks to attorneys who were awarded \$350.00 per hour, Kantor v. Sec’y of Health & Human Servs., No.01-679V, 2007 WL 1032378 (Fed Cl. Spec. Mstr. March 21, 2007), and \$340.00 per hour, Barber v. Sec’y of Health & Human Servs., No. 99-434V, 2008 WL 4145653 (Fed. Cl. Spec. Mstr. August 21, 2008).

From the existing record, it is not clear that this comparison is appropriate. The attorney in Kantor, practices in New York City, where the cost of living is very high. David Terzian, the attorney in Barber, which the undersigned decided, formerly worked at the Department of Justice. The hourly rate awarded to Mr. Terzian considered that this factor was worth a premium. Ms. Kennedy has not established that Mr. Brooks, although an excellent attorney, possesses a trait that is worth a similar premium.

Given that Mr. Brooks seeks compensation for less than one hour of work, the change from \$350, which is the rate that he sought, to \$325, which is the rate awarded, is \$21.25. This much will be deducted from the amount sought in attorneys’ fees.

An hourly rate of \$325 for Mr. Brooks helps establish a reasonable hourly rate for Ms. Fellows. For work performed in 2007, Ms. Fellows requested compensation at a rate of \$300 per hour. Respondent did not object to this amount. Resp’t Opp’n at 1. Even if respondent had interposed an objection, \$300 per hour is a reasonable rate for Ms. Fellows in 2007.

Ms. Kennedy requests \$318 per hour for Ms. Fellow's work in 2008. Pet'r Appl'n, exhibit 1. Respondent objected to the increase from \$300 to \$318 as "unsubstantiated." Resp't Opp'n at 1.

In reply, Ms. Kennedy explained that this increase is based upon a cost of living adjustment. Pet'r Reply, filed June 26, 2009, at 2.

Ms. Kennedy's explanation is reasonable. Indexing base rates for inflation is a reasonable method. Masias v. Sec'y of Health & Human Servs., No. 99-697V, 2009 WL 1838979, at *8-9 (Fed. Cl. Spec. Mstr. June 12, 2009), motion for review filed (July 13, 2009). Thus, Ms. Fellows will be compensated at a rate of \$318 per hour for 2008.²

Ms. Kennedy also requested compensation for two hours of Ms. Fellow's time to litigate the fee request. Respondent objected. This objection is overruled. Litigating a fee request can be a reasonable use of time. Masias, 2009 WL 1838979, at *34. Thus, Ms. Kennedy is awarded \$636 (2 hours * \$318/hour).

Consequently, Ms. Kennedy is awarded \$21,160.75 in attorneys' fees.

II. Costs

_____ Ms. Kennedy is entitled to an award for the reasonable costs incurred by her attorneys. 42 U.S.C. § 300aa-15(e).

As the party requesting an award of costs, petitioners bear the burden of establishing their reasonableness. Presault v. United States, 52 Fed. Cl. 667, 670 (2002). When petitioners fail to meet their burden of proof, such as by not submitting appropriate documentation, special masters have refrained from awarding compensation. See, e.g., Gardner-Cook v. Sec'y of Health & Human Servs., No. 99-480V, 2005 WL 6122520, at *4 (Fed. Cl. Spec. Mstr. June 30, 2005). This practice is consistent with how the Federal Circuit and the Court of Federal Claims, two courts that review decisions of special masters, have interpreted other fee-shifting statutes. See Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987) (the Equal Access to Justice Act); Presault, 52 Fed. Cl. at 679 (the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970). On the other hand, special masters have also compensated experts when the petitioner failed to submit information about the expert's hourly rate. See, e.g., English v. Sec'y of Health & Human Servs., No. 01-61V, 2006 WL 3419805, at *16 (Fed. Cl. Spec. Mstr. Nov. 9, 2006).

² Ms. Kennedy requested that an order establish that her two attorneys are entitled to \$350 per hour through 2010. The undersigned declines to do so. First, decisions of special masters are not binding in future cases. Second, as mentioned previously, the evidentiary record with respect to the rates prevailing in Philadelphia was relatively thin. If Ms. Kennedy's attorneys submit persuasive evidence in future cases, the \$350 hourly rate might be appropriate.

Ms. Fellows seeks \$11,517.83 in attorneys' costs. The predominant expense - and the only item to which respondent objected - is the cost of obtaining a report from Dr. Norman Latov. Ms. Kennedy seeks an award of \$8,000, representing 16 hours of Dr. Latov's work at \$500 per hour.³

Respondent objected to this hourly rate. Respondent stated that "there is no evidence that the high hourly rate requested is reasonable." Resp't Opp'n at 3. Respondent cited to a decision by the undersigned, Broekelschen v. Sec'y of Health & Human Servs., No. 07-137V, 2008 WL 5456319, at *10 (Fed. Cl. Spec. Mstr. Dec. 17, 2008), motion for review filed on other grounds (March 5, 2009); that noted that verified evidence about Dr. Latov's hourly rate was not found.

The reasonable amount of an expert's compensation is determined using the same lodestar method used to determine the reasonable amount of compensation for an attorney. 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).

Like the issue with the attorneys' hourly rate, a problem with Ms. Kennedy's submission is a lack of evidence. Respondent is correct that Ms. Kennedy did not submit any evidence to substantiate Dr. Latov's hourly rate. Given respondent's objection and the undersigned's comment in Broekelschen, it was reasonable to expect that Ms. Kennedy would submit some evidence about the market rate for neurologists.

Under the circumstances in which respondent has noted a lack of evidence to support a proposition and petitioner fails to fill this evidentiary gap, denying all compensation based upon a lack of evidence is certainly an option. A lack of evidence has justified a denial of attorneys' fees. See Naporano Iron and Metal, 825 F.2d at 404; Presault, 52 Fed. Cl. at 679 .

However, the undersigned will award Dr. Latov compensation at a rate of \$350 per hour. The undersigned recognizes that Dr. Latov has excellent credentials and experience. Pet'r Reply, exhibit A (curriculum vitae). His reports were well written and well supported. Exhibits 10 & 17. Awarding Dr. Latov \$350 per hour should not be viewed as a comment upon Dr. Latov's abilities. Instead, this decision reflects the evidence - or more accurately, the lack of evidence - submitted to support Dr. Latov's rate.

A rate of \$350 per hour has been used as a rate for compensating an expert. Sabella v. Sec'y of Health & Human Servs., 86 Fed. Cl. 201, 220-21 (2009). Thus, the undersigned will use that hourly rate.

³Initially, Dr. Latov appears to have sought \$750.00 an hour. Pet'r Appl'n, exhibit 13. However, Ms. Kennedy has sought a lower amount. See, Pet'r Reply, filed June 26, 2009, at 3.

The undersigned is becoming increasingly concerned by the lack of evidence to support the expert's hourly rates. The burden to demonstrate the reasonableness of any requested hourly rate rests with the petitioner. Presault, 52 Fed. Cl. at 670.

A petitioner might skip the submission of evidence in an informal submission to ascertain respondent's views. But, after respondent objects to a proposed hourly rate, the petitioner should present evidence.

In this case, Ms. Kennedy argues that \$500 per hour is appropriate because respondent agreed to pay that much in Hill No. 07-469V. Hill is not persuasive at all. Hill does not indicate that a reasonable rate for Dr. Latov is \$500 per hour. See Masias, 2009 WL 1838979, at *9 (stating that unpublished decisions have no persuasive value).

To avoid denying Ms. Kennedy all reimbursement for Dr. Latov's work, he will be compensated at \$350 per hour. If future cases present evidence about the reasonableness of his rate, this evidence may justify an increased hourly rate.

Ms. Kennedy requests compensation for 16 hours of work by Dr. Latov. Pet'r Appl'n, exhibit 1. Respondent has not objected to the number of hours requested. The number of hours requested is reasonable. However, Ms. Kennedy's attorneys should encourage Dr. Latov not to group different activities in one block bill. More specificity will be helpful in reviewing the reasonableness of Dr. Latov's work.

Consequently, Ms. Kennedy is awarded \$5,600 for Dr. Latov's work (16 hours * \$350/hour). Respondent did not interpose an objection to other items of costs, which are reasonable. Ms. Kennedy is awarded \$3,517.83 for these items. The total cost awarded to Ms. Kennedy is \$9,117.83.

III. Conclusion

Ms. Kennedy is awarded the following items for her attorneys' fees and costs.

Attorneys' Fees	\$21,160.75
Attorneys' Costs	\$9,117.83
TOTAL	\$30,278.58

The Clerk's Office is ordered to file a judgment in accord with this decision unless a motion for review is filed.

IT IS SO ORDERED.

Christian J. Moran
Special Master