In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 05-685V

(Filed: June 26, 2009)

TO BE PUBLISHED[1]

ROBERT AVILA and HEATHER AVILA, legal representatives of a minor child, TAYLOR AVILA,	*	Vaccine Act Fees; "Forum rates" issue
Petitioners,	*	
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Robert Moxley, Cheyenne, Wyoming, for petitioners.
Katherine Esposito, Department of Justice, Washington, D.C., for respondent.

DECISION (ATTORNEYS' FEES)

HASTINGS, ***Special Master***.

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"[2]), the petitioners seek, pursuant to § 300aa-15(e), an award for attorneys' fees and costs

[1]Because I have designated this document to be published, 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); 42 U.S.C. § 300aa-12(d)(4)(B). Otherwise, this entire document will be available to the public.

[2]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2006). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (2006).

incurred in their attempt to obtain Program compensation in this case. Respondent does not contest that petitioners are entitled to such an award, but filed a written opposition challenging the amount requested.[3]

I

THE ISSUE TO BE DECIDED

The dispute in this case concerns the appropriate *hourly rates* to be paid for the services of petitioners' counsel and other employees of that counsel's law firm. Certain case law is relevant to the resolution of that dispute.

A. Background case law

The Supreme Court has set forth guidelines that apply to the calculation of attorneys' fees awarded by statute. *See City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 429-37 (1983).[4] Under that Court's adopted approach, known as the "lodestar" approach, the basic calculation starts with the number of hours reasonably expended by the attorney, and then multiplies that figure by a reasonable hourly rate.[5]

The reasonable hourly rate is "the prevailing market rate" in the relevant community for similar services, by lawyers of "comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). The burden is on the fee applicant to demonstrate that the rate claimed is appropriate. *Id*. As the Supreme Court recognized in *Blum*, the determination of an appropriate

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[3]Petitioners filed two memoranda with respect to the issue of the fees and costs award. I will refer to the petitioners' Memorandum of Law, filed along with numerous other documents on October 8, 2008, as "P-1." I will refer to the respondent's response filed on October 30, 2008, as "R-1," and petitioners' Reply filed on December 8, 2008, as "P-2." I will refer to the petitioners' Exhibits filed on October 8 and December 8, 2008, as P. Ex. 9, P. Ex. 10, etc.

[4]The Supreme Court has declared that "[t]he standards set forth in [the *Hensley*] opinion are generally applicable in all cases in which Congress has authorized an award of fees." *Hensley*, 461 U.S. at 433 n.7. In *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989), that Court reaffirmed its view that such approach is "the centerpiece of attorney's fee awards."

[5]Once a total, sometimes called the "lodestar," is reached by multiplying the reasonable hourly rate by the number of hours expended, it may then be appropriate in a few cases to adjust the lodestar upward or downward based on the application of special factors in the case. *Hensley*, 461 U.S. at 434; *see also Martin v. United States*, 12 Cl. Ct. 223, 227 (1987), *remanded on other grounds*, 852 F.2d 1292 (Fed. Cir. 1988). However, such adjustments are to be made only in the exceptional case, on the basis of a specific and strong showing by the fee applicant. *See, e.g.*, *Blum v. Stenson*, 465 U.S. 886, 898-902 (1984); *Hensley,* 461 U.S. at 434 n.9; *Copeland v. Marshall*, 641 F.2d 880, 890-94 (D.C. Cir. 1980) (en banc). Here, petitioner has not requested any such adjustment of the "lodestar" figures.

market rate is "inherently difficult." *Id*. at 895 n.11. In light of this difficulty, the Court gave broad discretion to the trial judge to determine the prevailing market rate in the relevant community, given the individual circumstances of the case. *Id*. at 896 n.11.

Under the Program, reasonable attorneys' fees and costs may be awarded to a petitioner, regardless of whether the petitioner prevailed on the merits of the case. § 300aa-15(e)(1). According to the United States Court of Appeals for the Federal Circuit, "[t]he determination of the amount of reasonable attorneys' fees is within the special master's discretion." *Saxton v. Secretary of HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993).

In the 20-year history of the Program, the special masters have utilized the lodestar approach in determining a reasonable amount of attorneys' fees in each case. Up until 2008, in determining, pursuant to *Blum*, the "prevailing market rate in the relevant community" concerning a specific attorney, the special masters typically utilized a "hometown rate" approach. That is, they looked to the geographical area in which the attorney in question *practiced*, to determine what would typically be paid in *that geographical area* for similar services provided by a lawyer of comparable skill, experience, and reputation. *E.g.*, *Avera v. Secretary of HHS*, 75 Fed. Cl. 400, 403 (2007) (describing the "hometown rate" approach as a "traditional geographic rule"), *rev'd*, 515 F. 3d 1343 (Fed. Cir. 2008).

However, in 2008 the Federal Circuit decided *Avera v. Secretary of HHS*, 515 F.3d 1343 (2008). The *Avera* court ruled that to determine the appropriate market rate in Program cases, a special master should ordinarily not use the "hometown rate," but instead use the "forum rate" for the U.S. Court of Federal Claims. *Id*. at 1348-49. Use of the "forum rate" for the Court of Federal Claims means that the special master determines the prevailing billing rate in the *District of Columbia* for similar services provided by a lawyer of comparable skill, experience, and reputation.

Nevertheless, the *Avera* court also noted that an *exception* to the "forum rate" should be utilized "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 compensation favoring D.C." 515 F.3d at 1349 (emphasis and alteration in original), quoting *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA*, 169 F.3d 755, 758 (D.C. Cir. 1999).

B. The issue here

In this case, the primary issue is whether the *exception* to the "forum rule" described in *Avera* (hereinafter the "*Davis* exception") should be applied in determining appropriate hourly rates for petitioners' counsel and his employees. The petitioners argue that the hourly rates in this case should be determined via the forum rule. Respondent argues that the *Davis* exception applies here, so that the rates for petitioners' counsel should be determined based upon rates for attorneys practicing in the area of Cheyenne, Wyoming, where petitioners' counsel practices.

II

THE "*DAVIS* EXCEPTION" APPLIES TO THIS CASE

After careful consideration of the petitioners' arguments, I conclude that the *Davis* exception does apply to this case, for reasons to be set forth below.

A. The outcome in Avera

The biggest problem for the petitioners in this case is the result reached in the *Avera* case itself. That case involved the very same attorney, Robert Moxley, who is petitioners' counsel in this case. In *Avera*, the court concluded that the *Davis* exception *did* apply, so that Mr. Moxley was not entitled to forum rates. 515 F.3d at 1349-50. The Federal Circuit stated that it is "clear that the market rate prevailing in the District of Columbia is significantly higher than the market rate prevailing in Cheyenne." *Id*. at 1349. The court concluded that--

> [b]ecause the attorneys in this case performed the entirety of their work in Cheyenne, Wyoming, and the District of Columbia rates that they 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 Cheyenne rate.

Id. at 1350.

The "short answer" to the petitioners' arguments in this case, then, is that I conclude that the result in this case follows directly from the outcome in *Avera*. I conclude in this case, as did the Federal Circuit in *Avera*, that the prevailing market rates in Cheyenne, Wyoming, for services of the type provided by Mr. Moxley's firm in this case, are "very significantly" lower than the comparable rates for similar services in the District of Columbia. Therefore, the *Davis* exception appropriately applies to this case, so that the legal services provided in this case must be compensated at the Cheyenne rates.[6]

B. Petitioners' arguments that Avera was legally incorrect, and policy arguments

Petitioners' arguments in this case are often presented in such a fashion that it is not completely clear whether petitioners are presenting factual arguments, legal arguments, or policy arguments. It appears to me that in some portions of their brief, the petitioners, in effect, contend that the *Avera* court erred *legally* in concluding that the *Davis* exception was applicable in *Avera*, or is ever applicable in Program cases. However, such arguments cannot, as a matter of law, be of assistance to the petitioners in this case at this time. As a special master of the U.S. Court of Federal

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[6]It appears that the "bulk of the work" done by Mr. Moxley's firm in this case--in fact, all of the work--was done at Mr. Moxley's office in Cheyenne.

Claims, I am *bound* by all pronouncements of the Federal Circuit concerning *legal* issues. Therefore, I must reject any arguments alleging legal error by the *Avera* court.

Similarly, in some instances the petitioners in this case seem to argue that the application of the *Davis* exception was misguided as a matter of governmental *policy*. They argue passionately that Program petitioners in general would be better off if forum rates were uniformly available to counsel from all areas of the country. Petitioners may or may not be right in such policy arguments, but those arguments are *irrelevant* to my own consideration of this case. Such policy arguments are properly directed to Congress, not the courts.

C. Petitioners' factual argument

As noted above, in *Avera* the Federal Circuit concluded that prevailing attorney rates in the District of Columbia are significantly higher than prevailing rates in Cheyenne, so that the *Davis* exception applied. 515 F.3d at 1350. In this case, however, the petitioners seem to argue that the *Avera* court erred concerning a *factual matter* in its conclusion that the prevailing rates in Cheyenne were significantly lower than in the District of Columbia. Petitioners contend that as a *factual matter* the prevailing rates in Cheyenne for the legal services *of the type provided to petitioners in this case* are in fact similar to prevailing rates in the District of Columbia for similar services. Petitioners argue that while Cheyenne may have lower attorney rates than in D.C. for legal services provided in *local* courts, there is a different "market" in Cheyenne for "complex federal litigation" services, in which market attorneys charge and receive hourly rates that are similar to hourly rates for similar services in D.C. (P-1, pp. 5, 7).

In this regard, the petitioners only significant item of evidence is the affidavit of Donald Schultz, an attorney who practices in Cheyenne. (Ex. 22.) Schultz indicates that he himself practices in the area of "complex federal litigation," and that he has "personal knowledge" of attorneys who also practice in that area, and who have practice experience "akin" to that of Mr. Moxley, who routinely receive rates of between $375 and $405 per hour. (*Id*. at 3.)

This declaration of Attorney Schultz is certainly an important piece of evidence, which I have carefully considered. But it suffers from serious deficiencies. Mr. Schultz does not tell us what *he himself* charges and receives for his own services. Moreover, he does not tell us the names, legal experience, and reputations of the individuals who receive the $375 to $405 hourly rates. Therefore, even assuming that certain Cheyenne attorneys do in fact routinely receive such hourly rates for "complex federal litigation" in the Cheyenne area, I have no way to determine if those unnamed individuals truly are comparable to Mr. Moxley in their "skill, experience, and reputation."

After reviewing all the evidence filed by the petitioners[7] concerning the factual issue of what is the prevailing rate in Cheyenne for services of the type provided by Mr. Moxley in this case, by lawyers of "comparable skill, experience, and reputation," I conclude that the best evidence is provided by the declarations of Mr. Moxley himself. In one declaration, Mr. Moxley describes his practice, which includes much non-Program litigation that seems to fall within the category of "complex federal litigation." (Ex. 9, paras. 4, 5, 6.) He then indicates that for the period 2004 through August of 2006, he billed his hourly rate clients $200 per hour, increasing his rate to $250 per hour after September 1, 2006. (*Id*. at para. 46.) Mr. Moxley's later declaration confirmed that his billing rate thereafter remained at $250 per hour through at least September of 2008. (Ex. 21, para. 11.)

These declarations indicate to me that the clients who best know Mr. Moxley's "own skill, experience, and reputation," his own paying clients, including clients for whom he practiced "complex federal litigation," deemed that his services were worth $200 per hour during the 2004-2006 period, and $250 per hour during the 2006-2008 period. That evidence persuades me that the prevailing market rates in Cheyenne, for services comparable to those that Mr. Moxley performed in this case, by a lawyer of "skill, experience, and reputation" comparable to those of Mr. Moxley, were $200 for the period 2004 through August 31, 2006, and $250 thereafter.

D. The "Davis exception" applies to Mr. Moxley's rate

Thus, as set forth above, I have found that the prevailing market rates in Cheyenne for services comparable to those that Mr. Moxley performed in this case, by a lawyer of "skill, experience, and reputation" comparable to those of Mr. Moxley, were $200 for the period 2004 through August 31, 2006, and $250 thereafter. The next step, in determining whether the *Davis* exception applies here, is to *compare* those local Cheyenne rates to the corresponding "forum rates" for the District of Columbia. In *Avera*, the Federal Circuit compared the Cheyenne rate to the rates that Mr. Moxley *asserted* to be appropriate rates for him under the forum rule. 515 F.3d at 1349-50. Following that same approach here, I note that the petitioners in this case contended that the appropriate "forum rates" for Mr. Moxley's work in this case range from $405 to $465. (Ex. 25.) I conclude that, clearly, under the words of the *Davis* case adopted by the *Avera* court, there is a "very significant difference" between the Cheyenne rates of $200 to $250, and the claimed forum rates of $405 to $465.[8] *See*, *e.g.*, *Sabella v. Secretary of HHS*, No. 02-1627V, 2008 WL 4426040,

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[7]Respondent did not file any *evidence* relating to the topic of what is the market rate *in Cheyenne* for legal services similar to those provided in this case, by attorneys of skill, experience, and reputation similar to those of Mr. Moxley and his associates and paralegal.

[8]I do *not* conclude that the petitioners have *correctly* calculated exactly what an appropriate forum rate would be for an attorney of Mr. Moxley's skill, experience, and reputation, for the type of services that he provided in this case. But I see no need to make such a calculation myself, since it seems obvious to me in this case, as it did to the Federal Circuit in *Avera*, that Cheyenne rates for such services by such an attorney are substantially lower than D.C. rates. I note that in a recent case, another special master made his own calculation of what a forum rate might be for Mr. Moxley's

at *5 (Fed. Cl. Spec. Mstr. Sept. 23, 2008) (finding a "very significant difference" between a local rate of $300 and a forum rate of $440), *aff'd*, 86 Fed. Cl. 201 (2009); *Masias v. Secretary of HHS*, No. 99-697V, slip op. at 32 (Fed. Cl. Spec. Mstr. June 12, 2009) (finding a "very significant difference" between a local rate of $220 and a forum rate of $350); *Kuttner v. Secretary of HHS*, No. 06-195V, 2009 WL 256447, at *5-6 (compensating an Idaho attorney at local rates, not the forum rate).

Accordingly, I find that the "*Davis* exception" applies to the computation of the appropriate hourly rates for Mr. Moxley in this case, so that I will utilize the Cheyenne rates determined above in compensating his services. *Accord*: *Masias*, *supra*, awarding Cheyenne rates for Mr. Moxley's services.

E. Rates for associate counsel and paralegals

Neither party to this case has spent much time discussing appropriate hourly rates for the services of Mr. Moxley's two associate counsel, Julie Hernandez and Kirk Morgan, and Mr. Moxley's paralegal, Carol Gollobith. Petitioners' claim for compensation for their services appears to be at "forum rates"--*i.e.*, District of Columbia rates. (P. Ex. 25.) However, as explained above, the evidence in the record of this case indicates that prevailing market rates for legal services in Cheyenne are "very significantly" lower than D.C. rates. Therefore, it appears that these individuals should also be paid at Cheyenne rates, not D.C. rates. *Accord*: *Masias*, *supra*, slip op. at p. 41.

Respondent's brief suggests calculating rates for these individuals by looking to see what judges and special masters of this court have previously awarded for Mr. Moxley's associates in prior Program cases. (R-1, pp. 14-16.) In *Avera*, Ms. Hernandez' work was compensated at $130 per hour (No. 04-1385V, 2006 WL 5618158 at 3 (Fed. Cl. Spec. Mstr. Aug. 29, 2006), *aff'd*, 515 F.3d 1343, 1350 (Fed. Cir. 2008)), and Ms. Gollobith's work was compensated at $85 per hour (No. 04-1385V, slip op. at 2 (Fed. Cl. June 24, 2008)). See also *Hart v. Secretary of HHS*, No. 01-357V, 2004 WL 3049766, at *4-5 (Fed. Cl. Spec. Mstr. Dec. 17, 2004), awarding $85 for work performed by Mr. Moxley's paralegal.

Accordingly, in the absence of any better evidence in the record concerning appropriate "Cheyenne rates" for Mr. Moxley's associates and paralegal, in this case I will award $130 per hour for the services of the associates, and $85 per hour for the paralegal services.

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services, and reached a figure--$350 per hour--somewhat lower than the forum rate that Mr. Moxley *claimed* in that case, but still very significantly higher than the Cheyenne rates for Mr. Moxley's services that I have found in this case. *Masias v. Secretary of HHS*, No. 99-697V, slip op. at 17-31 (Fed. Cl. Spec. Mstr. June 12, 2009.) I conclude that if I were to calculate a forum rate for Mr. Moxley's services, my calculation, like the calculation made in *Masias*, would clearly be very significantly higher than the Cheyenne rates, so that I would still use the Cheyenne rates.

III

COMPUTATIONS

A. Robert Moxley

1) *Hours incurred prior to September 1, 2006*

7.6 hours times $200 per hour = $1,520.00

2) *Hours incurred after September 1, 2006*

13.7 hours times $250 per hour = $3,425.00

B. Julie Hernandez

7.6 hours times $130 per hour = $ 988.00

C. Kirk Morgan

.2 hours times $130 per hour = $ 26.00

D. Carol Gollobith--paralegal

5.5 hours times $85 per hour = $ 467.50

E. Costs	$ 3,456.39
TOTAL FEES AND COSTS	$ 9,882.89

IV

CONCLUSION

For the reasons set forth above, my Decision is that fees and costs are to be awarded in the total amount of $9,882.89, pursuant to § 300aa-15(e)(1). In the absence of a timely motion for review of this Decision, the Clerk of this Court shall enter judgment accordingly.

George L. Hastings, Jr.
Special Master