

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

JOAN CAVES,	*	
	*	
	*	No. 07-443V
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	
	*	Filed: December 20, 2012
	*	
	*	
SECRETARY OF HEALTH	*	Award of attorneys’ fees and costs;
AND HUMAN SERVICES,	*	reasonable number of hours; reasonable
	*	costs
Respondent.	*	
	*	

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA., for petitioner;
Michael P. Milmoie, United States Dep’t of Justice, Washington, D.C. for respondent.

PUBLISHED DECISION AWARDING ATTORNEYS’ FEES AND COSTS¹

Joan Caves claimed that the influenza (“flu”) vaccine, which she received in 2005, caused her to develop a neurological demyelinating injury, transverse myelitis (“TM”). Petition, filed June 28, 2007. Ms. Caves sought compensation pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 *et seq.* (2006). Her claim for compensation was denied and two levels of appellate review upheld this denial of compensation. Caves v. Sec’y of Health & Human Servs., 100 Fed. Cl. 119 (2011); Caves v. Sec’y of Health & Human Servs., 463 Fed. App’x 932 (Fed. Cir. 2012).

Ms. Caves presently seeks an award of attorneys’ fees and costs for her entire case, including the initial work at the trial stage, her appellate litigation, and her fee application. The total amount she seeks in fees and costs is \$185,065.09. The Secretary opposes. The Secretary argues a number of hours litigating this case are not compensable because they are

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.

“unreasonable, excessive, redundant, duplicative, unexplained, and/or undocumented.” Resp’t Resp., filed Sept. 7, 2012, at 6. The Secretary also objects to some costs as excessive. Id. at 12.

For the reasons explained below, Ms. Caves is entitled to **\$109,469.16** in attorneys’ fees and costs.

I. Procedural History

Ms. Caves filed her petition on June 28, 2007, and medical records periodically later. On January 7, 2008, Ms. Caves filed an amended petition and a motion for ruling on the record (“MROR”). The Secretary opposed the MROR and, in so doing, submitted an expert report of Dr. Arthur P. Safran, who expressed an opinion that Ms. Caves’s flu vaccine did not cause her TM and that Ms. Caves’s medical records did not provide any support for her claim. On July 16, 2008, Ms. Caves filed a motion to cross-examine Dr. Safran to which the Secretary filed a response in opposition on August 22, 2008. On November 25, 2008, the undersigned denied both Ms. Caves’s MROR and her motion to depose Dr. Safran. Order, 2008 WL 5970976 (Fed. Cl. Spec. Mstr. Nov. 25, 2008).

Ms. Caves submitted a report on April 2, 2009 from Dr. Derek Smith, who expressed an opinion that Ms. Caves’s flu vaccine caused her TM. The Secretary submitted a supplemental expert report prepared by Dr. Safran that responded to and disagreed with Dr. Smith’s report and conclusion that Ms. Caves’s flu vaccine caused her TM.

On August 27, 2009, Ms. Caves filed a renewed motion for a ruling on the record (“renewed MROR”). The Secretary filed a response in opposition to the renewed MROR on October 28, 2009.

An entitlement hearing took place on December 9, 2009, during which Ms. Sylvia Chin-Caplan and Ms. Cristina Ciampolillo represented Ms. Caves. Dr. Smith testified at the hearing. Following the hearing, the parties filed briefs. Mr. Kevin Conway, the most senior attorney in Ms. Caves’s law firm, primarily prepared Ms. Caves’s 31-page brief, filed March 18, 2010, and two other attorneys contributed to it. See Pet’r App’n for Attorneys’ Fees, filed July 27, 2012, Tab A (“Timesheets”) at pdf pages 41-42. The Secretary filed a response brief on April 19, 2010. Ms. Caves filed a 23-page reply brief to the Secretary’s response on May 3, 2010. Mr. Conway primarily authored the reply brief, and three other attorneys contributed to it. See id. at pages 43-44. The undersigned heard oral argument on June 16, 2010.

The undersigned special master issued a decision, which concluded Ms. Caves failed to prove her flu vaccine caused her TM as required under Althen v. Sec’y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005), to prove causation-in-fact in off-Table cases. Entitlement Decision, No. 07-443V, 2010 WL 5557542 (Fed. Cl. Spec. Mstr. Nov. 29, 2010). Accordingly, the undersigned denied Ms. Caves compensation. Id. at *22.

The total amount of time spent litigating entitlement was 260.4 attorney hours, 34 law clerk hours, and 99.5 hours of paralegal hours for a total of 393.9 hours, which amounted to \$84,745.60 in attorneys' fees. Timesheets at 1-48.

Ms. Caves filed a motion for review with the Court of Federal Claims ("the Court") on December 29, 2010. Ms. Meredith Daniels primarily prepared the motion for review and 35-page supporting memorandum, and three other attorneys contributed to it. See Timesheets at 50-52. The Secretary filed a response on January 28, 2011, but Ms. Caves did not file a reply to it. The total time spent on the motion for review was 49.8 hours for a total cost of \$10,935.00. See Timesheets at 49-53. The Court upheld the special master's denial of compensation to Ms. Caves. Caves, 100 Fed. Cl. at 144.

Ms. Caves filed a notice of appeal to the Federal Circuit, which docketed her case as number 2011-5108. On September 13, 2011, Ms. Caves filed a 47-page brief in support of the appeal, primarily prepared by Ms. Sylvia Chin-Caplan, and four other attorneys and a law clerk contributed to it. See Timesheets at pages 56-59. The Secretary filed a response on October 27, 2011. On November 14, 2011, Ms. Caves filed a 27-page reply brief, prepared primarily by Ms. Ciampolillo and Mr. Conway, and two other attorneys contributed to it. See Timesheets at pages 59-60. Both Ms. Chin-Caplan and Ms. Ciampolillo attended oral argument at the Federal Circuit on February 10, 2012, but only Ms. Chin-Caplan spoke. Recording of oral argument, available at <http://cafc.uscourts.gov/oral-argument-recordings/all/caves.html>. The total amount of time spent on the Federal Circuit appeal was 158.3 attorney hours, 8.4 law clerk hours, and 0.5 paralegal hours for a total cost of \$39,323.10.

On February 14, 2012, the Federal Circuit issued a per curiam opinion pursuant to Federal Circuit Rule 36, affirming the judgment of the Court that Ms. Caves was not entitled to compensation. 463 Fed. App'x 932 (Fed. Cir. 2012). A Rule 36 disposition indicates that "an opinion would have no precedential value" and either "(a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous, . . . [or] (e) a judgment or decision has been entered without an error of law." (Provisions (b), (c), and (d) are not applicable to Ms. Caves's case.)

On July 27, 2012, Ms. Caves filed the pending motion for attorneys' fees and costs. Ms. Caves seeks a total of \$138,514.10 in attorneys' fees and \$46,550.99 in costs² for a total of \$185,065.09 in pursuing her case through the subject motion for fees.

The Secretary objects to Ms. Caves's request on the grounds she has requested an unreasonable amount of attorneys' fees and costs.³ Briefing on Ms. Caves's motion for final fees concluded on September 28, 2012. The matter is ready for adjudication.

² This figure includes \$959.87 in costs Ms. Caves personally incurred.

³ Despite being denied compensation and not succeeding on her motion for review or her appeal to the Federal Circuit, Ms. Caves remains eligible for an award of attorneys' fees and costs. The statute provides special masters may award attorneys' fees and costs to an

II. Standards for Adjudication

Like other litigation allowing an award of 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). Reasonable attorneys' fees are determined using 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)). For the hourly rates of her attorneys and expert, Ms. Caves has requested compensation at amounts that the Secretary has not challenged. See Resp't Resp. at 6-11. Thus, the ultimate question is the reasonable number of hours.

Quoting a decision by the United States Supreme Court, the Federal Circuit has explained some of the limits on the number of hours for which compensation may be sought.

The [trial forum] also should exclude from this initial fee calculation hours that were not "reasonably expended." . . . Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority."

Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (emphasis in original) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)).

Special masters are permitted to reduce the claimed number of hours to a reasonable number and they are not required to assess fee petitions on a line-by-line basis. Saxton, 3 F.3d at 1521 (approving the special master's elimination of 50 percent of the hours claimed); see also Broekelschen v. Sec'y of Health & Human Servs., 102 Fed. Cl. 719, 728-29 (2011) (affirming the special master's reduction of attorney and paralegal hours); Guy v. Sec'y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997) (affirming the special master's reduction in the number of hours from 515.3 hours to 240 hours); Edgar v. Sec'y of Health & Human Servs., 32 Fed. Cl.

unsuccessful petitioner when a petition is brought in good faith and with a reasonable basis. 42 U.S.C. § 300aa-15(e). Here, the Secretary does not argue Ms. Caves's pursuit of her claim through the Federal Circuit was in bad faith or without a reasonable basis. Further, the undersigned concludes Ms. Caves pursued her claim through the Federal Circuit in good faith and with a reasonable basis. Accordingly, she is eligible for reasonable attorneys' fees and costs.

505 (1994) (affirming the special master’s awarding only 58 percent of the numbers of hours for which compensation was sought). This approach is consistent with the Supreme Court’s instruction that when awarding attorneys’ fees, trial courts may use estimates to achieve “rough justice.” Fox v. Vice, ___ U.S. ___, 131 S. Ct. 2205, 2216 (2011).

III. Analysis

To organize the evaluation of Ms. Caves’s fee application, her case will be divided into four phases. Each phase corresponds to a different entity within the judicial system. First, the undersigned found she was not entitled to compensation. Second, the Court of Federal Claims considered her motion for review. Third, the Federal Circuit addressed her appeal. Fourth, the undersigned considers her motion for fees for the fees incurred bringing the subject motion.

The thrust of the Secretary’s objections to Ms. Caves’s fee application is that her attorneys spent an unreasonable amount of hours pursuing her claim because it employed an inefficient and wasteful model where numerous attorneys work on the case, which the Secretary claims leads to a “duplication of effort.” See Resp’t Resp. at 6. The Secretary made a number of specific objections to Ms. Caves’s fee request, but “remind[ed] the special master that special masters are permitted to reduce the claimed number of hours to a reasonable number and they are not required to assess fee applications on a line-by-line basis.” Id. The Secretary therefore “requests that the [undersigned] exercise his broad discretion and past experience to find a reasonable number of hours for the work of petitioners’ attorneys and staff in this case” and “greatly reduce petitioner’s expert costs consistent with respondent’s objections.” Id. at 12-13.

A. Entitlement Before the Special Master

The Secretary objects to several items of Ms. Caves’s request. These objections are resolved in the context of examining the sequence of steps for the entitlement phase.

1. Case Review

The Secretary generally objects to the methods Ms. Caves’s counsel employed to pursue her claim at all stages of her case. See Resp’t Resp. at 6. The gravamen of the Secretary’s objection is that Ms. Caves’s counsel uses (and thus bills for) multiple professionals inefficiently. Id. Among other things, the Secretary objects to their alleged inefficiency that necessitates their meeting regularly and charging for all attorneys’ time; writing multiple memos to one another; and duplicative case file and record review. Id. The Secretary also objects to attorney Ronald Homer charging his normal hourly rate for reviewing and managing the case file and correspondence with the courts and opposing counsel. Resp’t Resp. at 6-8.

There is some merit to the Secretary’s argument. The approach used by this firm in which multiple attorneys (partners and associates) work on the case differs from the approach used by almost all other law firms routinely representing petitioners in the Vaccine Program. The most common model is one in which a single attorney handles the entire case. Examples

include Mr. Webb, Mr. Gage, Mr. Moxley, Ms. Bjorklund, Ms. Roquemore, Ms. Toale, Mr. Maglio, Mr. Caldwell, Ms. Stadelnikas, Mr. Terzian, Mr. Rodriguez, and Ms. Muldowney. The next most common model is one in which a senior attorney teams with an associate. Examples include Mr. McClaren and Mr. Cohan. All these attorneys competently represent their clients. These examples demonstrate that a team of multiple attorneys is not necessary to pursue a claim in the Vaccine Program.

Yet, Ms. Caves's law firm staffed her case with eight attorneys. Timesheets at 68-69. The use of multiple partners and multiple associates virtually guarantees some work (such as an intra-office memo) is done that, strictly speaking, would not be needed if only one attorney were staffing the case. It is possible (although consuming of judicial resources) to review the timesheets line-by-line to identify and to eliminate redundancies. See, e.g., Melnikova v. Sec'y of Health & Human Servs., No. 09-322V, 2012 WL 1339606 (Fed. Cl. Spec. Mstr. Mar. 27, 2012) (reducing a fee request by \$272.50 for a total of one hour spent by 4 different attorneys from the law firm).

Any such review, however, would need to consider that meetings and communications among attorneys are not necessarily redundant. A senior attorney can reasonably meet with a junior attorney to delegate appropriate tasks to the associate. A junior attorney can meet with a paralegal to delegate tasks to that person. These communications have the goal that the work is performed by a person who charges the lowest hourly rate. Thus, the ultimate outcome is that the meeting between attorneys, although duplicative in some sense, actually constitutes an investment that produces a lower total cost.

When viewed in this light, the law firm's staffing model is reasonable. The use of multiple attorneys to review the case may have contributed to the attorneys' fees request being larger than the request another firm may have submitted, but the difference is not unreasonable. That is, Ms. Caves's attorneys have spent a reasonable amount of time on activities like case review and intra-office meetings. Consequently, the Secretary's argument for a reduction based on multiple attorneys writing memos and the like is rejected.⁴

2. "Stage 2"

The law firm's paralegals have numerous entries in which their activity is recorded as "Stage 2." The Secretary objects to these entries as vague and unexplained and, therefore, not properly compensated. Id. at 10. Petitioner's counsel argues the law firm "has made similar

⁴ A slightly different question involving the assignment of tasks is discussed in the context of writing appellate briefs. An associate attorney may take the lead in drafting the brief but the natural choice among associates is the associate attorney who participated in the trial. Yet, as discussed below, the associate who wrote Ms. Caves's motion for review was not the associate involved in Ms. Caves's trial. That assignment is inefficient and is taken into account in the sections below.

billings for preparation of [Stage 2], without objection from the respondent, for decades.” Pet’r Reply, filed Sept. 28, 2012, at 10.

Although the phrase “Stage 2” on its face does not convey much information, the law firm’s paralegals have been using that description for many years. In that time, the law firm has conveyed to some special masters what this terminology means. See Hawkins v. Sec’y of Health & Human Servs., No. 00-646V, 2007 WL 5159581, at *2 (Fed. Cl. Spec. Mstr. Apr. 30, 2007). While most special masters have accepted “Stage 2,” another special master has not. See Calise v. Sec’y of Health & Human Servs., No. 08-865V, 2011 WL 2444810, at *7 (Fed. Cl. Spec. Mstr. June 13, 2011). Given this trend, the undersigned is reluctant to deduct money from the fee application because the paralegals, arguably, were not as specific as they could have been.

However, ultimately, the fee applicant “bears the burden of establishing the hours expended.” Wasson v. Sec’y of Health & Human Servs., 24 Cl. Ct. 482, 484 (1991) (affirming special master’s reduction of fee applicant’s hours due to inadequate recordkeeping), aff’d after remand, 988 F.2d 131 (Fed. Cir. 1993) (per curiam). In this light, some paralegal entries are more descriptive than others. Examples of informative entries include “STAGE 2, began review of exhibits 1 through 10; STAGE 2, continued initial stage 2 summary (ex. 1-10).” However, other entries could have contained more details, such as “STAGE 2, continued record summary,” and “STAGE 2, completed; memo to rch and sec.” The law firm is encouraged to instruct its staff to record time entries that describe the work performed specifically and without resort to codes. In doing so, the paralegals will inform the Secretary (and the special master) of what they were doing and thereby avoid future disputes.

3. Motion for Ruling on the Record

The next item to which the Secretary objects is time Ms. Caves’s attorneys spent on preparing a motion for ruling on the record. The procedural context for this objection is as follows.

The Secretary filed her Rule 4 Report on September 29, 2009. In October, Ms. Caves filed a substantial amount, but not all, of her medical records. See, e.g., exhibit 41, filed Oct. 6, 2009; exhibits 42-43, filed Oct. 22, 2009.

On January 7, 2008, Ms. Caves filed an amended petition and a MROR. Because Ms. Caves had not yet, however, procured an expert opinion or report before filing the MROR, the Secretary argues the hours spent filing the MROR were unreasonably spent because the then-existing record was “insufficient, both as a matter of law and fact, to prove actual causation.” Resp’t Resp. at 11. Ms. Caves did not address this argument in her reply.

The MROR was prematurely filed because the motion could not have succeeded on the existing record, which lacked evidence that a doctor said the vaccine caused Ms. Caves’s transverse myelitis. See Lilley v. Sec’y of Health & Human Servs., No. 09-31V, 2012 WL 1836323, at *3 (Fed. Cl. Spec. Mstr. Apr. 30, 2012) (finding premature a filing of a motion for a

ruling on the record with petition but without expert report; petitioner's counsel was the same firm as that representing Ms. Caves). Therefore, the hours spent on it generally would not be compensable. See id. (denying compensation to Ms. Caves's law firm for hours spent preparing and filing MROR before obtaining an expert report). However, the MROR provided the factual and legal basis for subsequent filings. To that end, the hours expended on its preparation are ultimately compensable. Under these circumstances, Ms. Caves is awarded the full amount requested for the MROR (\$4,563.40).⁵

4. Motion to take Dr. Safran's Testimony

In the Secretary's response to Ms. Caves's MROR, the Secretary explained her expert, Dr. Safran, had opined that Ms. Caves's flu vaccine did not cause her TM. On July 16, 2008, Ms. Caves file a motion to take Dr. Safran's testimony at a hearing before she procured her own expert. The Secretary opposed this motion on August 22, 2008. Ms. Caves's motion was denied. Order, Nov. 25, 2008.

The Secretary urges a denial of compensation for the time Ms. Caves's counsel spent on preparing this motion. Resp't Resp. at 11. The Secretary alleges the undersigned "rejected [the motion] as being wholly meritless" and therefore Ms. Caves's counsel should not be compensated for any of the hours spent on preparing it. Id.

Regardless of its merit (or lack thereof), the overwhelming majority of the 17-page motion appears copied and pasted from the MROR with little to no edits or substantive changes. The facts section of the motion (pages 2-10) is by and large identical to the facts section in the MROR (pages 2-9). Likewise, pages 10-14, which presented Ms. Caves's argument that she met her burden of proof under Althen that her flu shot caused her TM, are similarly drawn from the MROR with only minor changes, additions, and reorganization. Moreover, this section is unnecessary given the purpose of the motion—"to explore the bases of Dr. Safran's opinions," which were "in sharp contrast to those of [Ms. Caves's] treating physicians." Pet'r Mot. to take Testimony of Dr. Safran, at 16. The argument as to why the motion should be granted was two paragraphs long and provided no applicable legal authority. Id. at 16-17. In summary, the new work for the motion is approximately three pages and essentially contained within page one to the bottom of page two, and from the bottom of page 15 to the conclusion on page 17.

Between June 11, 2008, and July 17, 2008, four attorneys spent 13.7 hours on the motion for a total of \$3,815.20 in fees. See Timesheets at pages 24-25. A reasonable amount of time for

⁵ The law firm's timesheets include four attorney entries and one paralegal entry that account for 6.7 hours spent on both the amended petition and the MROR at a cost of \$1,654.80. This lumping together of different tasks without accounting for the time spent on discrete tasks is inappropriate. See Doe v. Sec'y of Health & Human Servs., No. XX-XXXV, 2010 WL 529425, at *4, n.9 (Fed. Cl. Spec. Mstr. Jan. 29, 2010) (citing cases approving reductions of awards due to fee applicants' single entries accounting for multiple tasks). Ms. Caves's attorneys are advised to avoid doing so in the future.

experienced attorneys to draft three pages, the majority of which being factual, is four hours. An additional hour for preparing the remainder of the brief is reasonable. Accordingly, the undersigned awards four hours at the highest attorney rate charged (\$318) and one hour at the rate of \$200 for a total of \$1,472.00. This results in a deduction of \$2,343.20 from Ms. Caves's original fee request.

5. Renewed MROR

On August 27, 2008, Ms. Caves filed a 21-page renewed MROR. Between August 25-27, 2008, Mr. Conway and Mr. Homer spent 8.3 hours and a law clerk spent 4 hours preparing the renewed MROR for a total of \$3,527.00 in fees. The Secretary objects to compensating for this work. Resp't Resp. at 11.

Ms. Caves has not demonstrated why her renewed MROR had any likelihood of succeeding. Before August 2008, the Secretary had filed reports of Dr. Safran, who opined that the flu vaccine did not cause petitioner's transverse myelitis. Therefore, at the very minimum, the record contained a dispute between two experts. Ms. Caves's MROR provides no basis for accepting the opinion of her expert, Dr. Smith, in lieu of hearing the testimony from Dr. Safran. Petitioner's renewed MROR cites no cases in which special masters have dispensed with a hearing when the expert opinions are in conflict. Consequently, Ms. Caves's renewed MROR did not advance her case and a paying client would not have paid for the attorneys' efforts.

For these reasons, Ms. Caves will not be compensated for the work associated with the renewed motion for review. The sum of \$3,527.00 will be deducted from the application.⁶

6. Attendance of a Second Attorney at the Entitlement Hearing

The Secretary objects to Ms. Ciampolillo billing for the hours she spent preparing for and attending Ms. Caves's entitlement hearing on December 9, 2009 as duplicative because, the Secretary asserts, only Ms. Chin-Caplan's presence at the hearing was necessary. Resp't Resp. at 9. Ms. Caves's attorneys argue Ms. Ciampolillo deserves compensation because they are "professionally bound . . . to ensure the best [representation] . . . even if, in the firm's judgment, the participation of two (2) attorneys is required." *Id.* at 7. Compensating more than one attorney to attend a hearing in the Vaccine Program is highly unusual. In most cases, petitioners' requests have been denied. *See, e.g., Sabella v. Sec'y of Health & Human Servs.*, 86 Fed. Cl. 201, 214-15 (2009) (finding that the special master did not abuse his discretion in reducing attorneys' fees when three attorneys from two law firms were duplicatively working on the case); *Davis v. Sec'y of Health & Human Servs.*, No. 07-451V, 2012 WL 1357501, at *6 (Fed. Cl. Spec. Mstr. Mar. 20, 2012), *aff'd in relevant part, rev'd on other grounds*, 105 Fed. Cl. 627 (2012); *Valenzuela v. Sec'y of Health & Human Servs.*, No. 90-1002V, 1992 WL 59370, at *2

⁶ If the work for the renewed MROR were compensable, then any award would have considered that most of the renewed MROR duplicates material in the original MROR.

(Fed. Cl. Spec. Mstr. Mar. 2, 1990) (“It is also generally unreasonable for two attorneys to attend hearings in Program cases, particularly where, as here, only one actively participates.”).

Accordingly, the undersigned deducts Ms. Ciampolillo’s 10.7 hours spent preparing for the hearing between December 1-8, 2009 and 8 hours attending it on December 9, 2009, charged at a \$200/hr rate, from Ms. Caves’s fee request. See Timesheets at pages 37-40. This results in a deduction of \$3,740.00 from Ms. Caves’s original fee request.

7. Post-Hearing Briefs

Between the hearing on December 9, 2009, and March 18, 2010, the date on which Ms. Caves’s 31-page post-hearing brief was filed, three attorneys spent a total of 35.5 hours preparing it for a total cost of \$11,255.00. See Timesheets at pages 39-43.

The Secretary objects to the “duplicative and wasteful time” Ms. Caves’s counsel spent on her post-hearing brief and reply brief by having three attorneys prepare them. Resp’t Resp. at 10. Specifically, the Secretary objects to Mr. Conway primarily preparing the briefs even though he was not as familiar with the case as Ms. Chin-Caplan or Ms. Ciampolillo and did not attend the hearing. Id.

Regardless of whether using three attorneys to complete the brief was duplicative and/or wasteful, there is substantial overlap between the post-hearing brief and other filings. The fact section of the post-hearing brief (pages 1-5) is drawn entirely from the fact sections contained in the MRORs and the motion to take Dr. Safran’s testimony. The introduction and summary of the law sections of the argument (pages 6-11) are similarly drawn from those filings. The Althen prong 2 analysis (pages 23-26) in the post-hearing brief is drawn almost entirely from that section in the renewed MROR (pages 16-19) with minor changes in organization and additional cites to the hearing transcript. Finally, although Ms. Caves was explicitly ordered not to address Althen prong 3 in her post-hearing brief because the Secretary conceded Ms. Caves had satisfied her burden of proof on that issue, order, filed Jan. 27, 2010, Ms. Caves nonetheless spent approximately 1.5 pages doing so (pages 27-28).

In summary, approximately 10 pages of Ms. Caves’s post-hearing brief provide new, compensable work. The remaining pages are drawn wholly or primarily from previous filings and, as such, will not be compensated. A reasonable amount of time for experienced attorneys to draft the fresh portion of the post-hearing brief is 15 hours. Accordingly, Mr. Conway, its primary preparer (see Timesheets at page 42), is awarded 13 hours at the rate of \$330/hr and Ms. Ciampolillo is awarded two hours at the rate of \$200/hr for a total of \$4,690.00. This results in a deduction of \$6,565.00 from Ms. Caves’s original fee request.

Ms. Caves’s post-hearing reply brief is approximately 23 pages. The facts section and the summary of her argument (pages 1-7) are copied and pasted from previous filings. The remaining 16 pages, however, provide responsive arguments to the Secretary’s post-hearing brief. Four different attorneys spent 30.4 hours on the post-hearing reply brief for a total cost of

\$9,190. The number of attorneys appears redundant. Accordingly, the undersigned reduces the hours awarded from the requested amount by approximately one-third to 20 hours. Mr. Conway, the brief's primary preparer, is awarded 18 hours at a rate of \$330/hr and Ms. Ciampolillo is awarded two hours at the rate of \$200/hr for a total award of \$6,340.00. This results in a deduction of \$2,850.00 from Ms. Caves's original fee request.

8. Summary of Entitlement Phase

In summary, Ms. Caves requests \$84,745.60 for work done from filing her petition through the undersigned's decision denying compensation. From this amount, the following deductions are taken:

Requested Amount	\$84,745.60
Reduction for motion to take Dr. Safran's testimony	-\$2,343.20
Reduction for renewed MROR	-\$3,527.00
Reduction for Ms. Ciampolillo's hearing prep and attendance	-\$3,740.00
Reduction for post-hearing brief	-\$6,565.00
Reduction for post-hearing reply brief	-\$2,850.00
TOTAL AWARDED	\$65,720.40

The remaining amount, **\$65,720.40**, is reasonable. It is consistent with other awards in which cases have been litigated to hearing. Saxton, 3 F.3d at 1521 (holding it is "well within the special master's discretion to reduce the hours to a number that, in his experience and judgment, was reasonable for the work done.").

B. Motion for Review

On December 29, 2010, Ms. Caves filed with the Court a motion for review ("MFR") of the entitlement decision denying her compensation. Between November 29, 2010 and December 29, 2010, four attorneys spent 49.8 hours on the MFR and its supporting 30-page (not counting tables, etc.) memorandum for a total cost of \$10,935.00. Attorney Meredith Daniels, the MFR's primary preparer, spent 37.3 hours on its preparation. Ms. Ciampolillo spent 4.7 hours on it, Mr. Conway spent 6.5 hours on it, and Mr. Homer spent 1.3 hours on it. These entries account for all the time spent on the motion for review because the parties did not engage in oral argument.

The Secretary objects to Ms. Caves's counsel's use of multiple attorneys to prepare the MFR. Specifically, the Secretary objects to Ms. Daniels being the MFR's primary preparer even though she had had no previous involvement with the case. Resp't Resp. at 10.

The facts section (pages 1-6) is copied and pasted verbatim from previous filings' fact sections. The MFR's discussion of Althen prong 1 (pages 8-10) is drawn from that section in the post-hearing brief (pages 12-13) and the summary of the law section in the post-hearing brief

(pages 10-12). Likewise, the MFR's Althen prong 2 section (pages 10-14) is drawn from that section in the post-hearing brief (pages 23-26). The MFR's discussion of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), (pages 19-24) is almost identical to the same discussion in the post-hearing reply brief (pages 11-15). Finally, most of pages 26 and 27 are copied and pasted from discussions found in previous filings. Thus, approximately 20 pages of the MFR's 30-page supporting memorandum already existed.

The remaining approximately 10 pages of the MFR's 30-page supporting memorandum contain new, compensable work. The undersigned concludes this could reasonably be completed by experienced attorneys in 16.3 hours. Accordingly, the undersigned awards Ms. Daniels 11 hours at the rate of \$200/hr, Mr. Homer 1.3 hours at the rate of \$300/hr, and Mr. Conway 4 hours at the rate of \$330 for a total award of \$3,910.00.

C. Federal Circuit Appeal

As mentioned above, Ms. Caves appealed the Court's judgment to the Federal Circuit. The Federal Circuit affirmed the Court's judgment in an opinion issued pursuant to Federal Circuit Rule 36. Caves, 463 Fed. App'x at 932. Ms. Caves now seeks attorneys' fees and costs for this stage of the case. The Secretary argues Ms. Caves seeks an unreasonable amount of attorneys' fees.

The work required for the appeal to the Federal Circuit consisted largely of preparing the 47-page brief in support of the appeal and a 27-page reply brief. Ms. Chin-Caplan and Ms. Ciampolillo also billed for their travel time to and from Boston, Massachusetts, to oral argument at the Federal Circuit in Washington, D.C., which was approximately 8.8 hours. See Timesheets at 61-62. In total, five attorneys, a law clerk, and a paralegal spent 167.2 hours pursuing the appeal to the Federal Circuit for a total cost of \$39,323.10.

The Secretary objects to the amount of time Ms. Caves's counsel spent on the appeal as unnecessarily excessive. Resp't Resp. at 11. An independent review of Ms. Caves's appellate briefs shows they are very close, and oftentimes identical, to what her attorneys had written in previous filings in her case. The first 10 pages largely derive from the Federal Circuit brief filed in Davis v Sec'y of Health & Human Servs., 420 Fed. App'x 973 (Fed. Cir. 2011), and the Davis brief itself was based on a Federal Circuit brief filed in Moberly v. Sec'y of Health & Human Servs., 592 F.3d 1315 (Fed. Cir. 2010). See Davis, 2012 WL 1357501, at *14 ("Ms. Davis's initial [Federal Circuit] brief largely repeats briefs previously filed by Ms. Davis's attorneys with the motion for review before the Court of Federal Claims and the Federal Circuit briefs filed in Moberly" (citations omitted)). There are some relatively minor changes, such as conforming the petitioner's name, vaccination, and condition. These alterations, however, could not have taken much time.

Pages 10-12 present the procedural history. This material is different, although the course of proceedings in Ms. Caves's case is not very involved. Pages 13-16 provide the statement of facts, which is essentially the same statement of facts provided in the post-hearing

brief. Again, the changes, such as citations to the record, could not have taken much time. Page 17 contains the standard of review. This section comes from the Davis brief. Pages 18 and 19 contain the summary of Ms. Caves's argument, which comes from the Davis brief as well. Pages 20-21 contain a discussion of Althen that comes from the Davis brief. Pages 22-26 are drawn from the MFR and MRORs. Pages 26-30 contain a discussion of Althen prong 1 as it applies to Ms. Caves's case. This section comes largely from the Davis brief. Pages 30-36 contain a discussion of the evidence in the context of prong 1, namely, Dr. Smith's and Dr. Safran's testimony, which is drawn mostly from Ms. Caves's post-hearing brief and MFR supporting memorandum. Pages 37-39 contain a discussion of Althen prong 2 as it applies to Ms. Caves's case. Although worded and organized differently, it does not provide any argument regarding this issue not contained in previous filings. Page 40 contains a discussion of Althen prong 3 that is drawn from the Davis brief. Pages 42-46 discuss Dr. Safran's opinion that there is no alternate cause to explain Ms. Caves's TM. The legal arguments contained in this section are drawn from the MRORs and the MFR; the remainder summarizes Dr. Safran's testimony and other evidence, the vast majority of which had been discussed in previous filings. Page 47 contains part of a brief conclusion.

In summary, nearly all 47 pages of the Federal Circuit brief came from existing sources. Approximately 29 pages came virtually verbatim from previous filings from Ms. Caves's case and Davis. The remaining 18 pages are drawn from the MRORs and MFR with slight modifications and additions.

Likewise, Ms. Caves's 27-page reply brief is largely repetitious. Beyond summaries of the Secretary's response, which are necessarily repetitive of her previous responses in other filings, the brief does not provide any new factual or legal arguments not effectively contained in previous filings. Half of the brief (pages 13-27) simply reiterates Ms. Caves's position that she has satisfied her burden of proof under Althen contained in her post-hearing briefs, MFR, and appeal brief.

Ms. Caves's attorneys spent approximately 149.5 hours on the appeal. A typical entry on the attorneys' timesheets states "DRAFT work on Fed. Cir. brief 4.5 hours." A greater amount of specificity plus a division of large blocks of time (such as four hours) into smaller units would communicate more clearly how time was being spent. See Savin v. Sec'y of Health & Human Servs., 85 Fed. Cl. 313, 316-17 (2008) (discussing Guidelines issued by the Office of Special Masters); cf. Avgoustis v. Shinseki, 639 F.3d 1340 (Fed. Cir. 2011) (affirming, under Equal Access to Justice Act ("EAJA"), a court's denial of attorneys' fees for "draft[ing] client correspondence" because the entries were too vague). In light of the fact that substantial portions of Ms. Caves's initial Federal Circuit brief were either copied from or based upon previously written briefs, the limited amount of information provided in the attorneys' timesheets hinders the process of determining how much time is reasonable.

Given the repetitious nature of the work produced, as discussed above, 149.5 hours is an unreasonable amount of time to have spent on the appeal. Experienced attorneys could have reasonably spent half the time as Ms. Caves's attorneys did, if not less. Without being informed

exactly how much time was spent on the new work, the undersigned has studied the attorneys' timesheets and attempted to achieve "rough justice" as the Supreme Court permitted in Fox. A reasonable amount of compensation for the work at the Federal Circuit is \$16,700.00.⁷

D. Fees for Fees

Ms. Caves requests compensation for the fees associated with the subject motion for attorneys' fees and costs. Five attorneys and a paralegal spent 18 hours for a total cost of \$3,510.40. The Federal Circuit has recognized that "fees for fees" is an appropriate item of compensation, Schuenemeyer v. United States, 776 F.2d 329, 333 (Fed. Cir. 1985) (addressing EAJA), and the Secretary does not object to Ms. Caves's request. Accordingly, the undersigned awards \$3,510.40 for attorneys' fees and costs associated with bringing this motion.

Summary of Amount Awarded in Attorneys' Fees	
Phase	Amount
Entitlement	\$65,720.40
Motion for Review	\$3,910.00
Federal Circuit Appeal	\$16,700.00
Fees for Fees	\$3,510.40
TOTAL	\$89,840.80

E. Costs

Ms. Caves requests compensation in the amount of \$45,591.12 for costs incurred in pursuing her case. Many items, such as photocopying, are not disputed. The items to which the Secretary objects are the amount Dr. Smith charged for his report and testimony at the entitlement hearing, the costs associated with retaining a life care planner, and the costs associated with Ms. Ciampolillo's attendance at oral argument at the Federal Circuit.

Dr. Smith spent 88.9 hours at \$400/hr and 5.8 traveling hours at \$200/hr for a total of \$36,220.00. Fee Appl'n, Tab B, at page 23. For his hourly rate, the Secretary does not object to Dr. Smith's rate of \$400/hr. See Resp't Resp. at 11-12. Dr. Smith's rate of \$400/hr is reasonable due to, among other things, his experience as an expert witness in other cases in the Vaccine Program.⁸ See, e.g., Althen, 418 F.3d at 1277; Jane Doe/74 v. Sec'y of Health &

⁷ The award includes compensation for activities in addition to writing the two briefs. Ms. Caves's attorneys spent time on matters preliminary to writing the initial brief, on developing the joint appendix with the Secretary, on preparing for oral argument, and on concluding the case after the Federal Circuit's opinion.

⁸ Dr. Smith has been board-certified in adult neurology since 1999. He has worked at Harvard Medical School as a clinical instructor, assistant professor, and clinical assistant professor. He has written more than 20 articles or book chapters. At the time of the hearing, he was the director of Multiple Sclerosis Care of Connecticut. Exhibit 30 (curriculum vitae).

Human Servs., 2010 WL 2788239 (Fed. Cl. Spec. Mstr. June 28, 2010); Garcia v. Sec’y of Health & Human Servs., No. 05-0720V, 2008 WL 5068934 (Fed. Cl. Spec. Mstr. Nov. 12, 2008); Holliday v. Sec’y of Health & Human Servs., No. 07-459V, 2008 WL 2917771 (Fed. Cl. Spec. Mstr. Apr. 7, 2008). For instance, in Holliday, Dr. Smith was compensated for the time spent preparing an expert report in which he expressed his opinion that the flu vaccine can cause Guillain-Barré syndrome. In that case, Dr. Smith requested \$13,120.00 for 32.8 hours of work at the same rate of \$400/hr. The work and research Dr. Smith performed in Holliday and other cases suggests that he should be efficient in his work on Ms. Caves’s case.

Here, Dr. Smith has requested compensation for 88.9 hours for substantive (that is, non-travel) work and the Secretary opposes this many hours. The 88.9 hours breaks down into the following activities: 53.3 hours reviewing the parties’ exhibits and doing preliminary research/review; 9.1 hours preparing his report; and 26.5 hours reviewing updated records, expert reports, and literature. See Appl’n, Tab B, at page 23. The Secretary asks Dr. Smith’s requested compensation be reduced by at least half. Resp’t Resp. at 12. In response, Ms. Caves argues Dr. Smith’s fees are reasonable.

Assessing the reasonableness of Dr. Smith’s time is difficult. His invoice only has three entries to account for 88.9 hours he spent over the course of a year on Ms. Caves’s case. Motion for Fees, Tab B, at 23.⁹ The first entry, which accounts for 53.3 hours spent during January through March of 2009, describes the hours spent as “petitioner’s exhibits 1 thru 28 and respondent’s exhibits A and B . . . review, epidemiology review and research, immunologic review, preliminary discussion with Ms. Chin[-]Caplan on March 30.” Id. The second entry accounts for April, 2009, during which Dr. Smith spent 9.1 hours on “report formulation, preparation, edits.” Id. The final entry, which accounts for 26.5 hours spent during November through December of 2009, describes the hours spent as “Caves updated medical records as well as the expert reports and medical literature filed into evidence review, conference pre-hearing, additional articles reviewed and hearing prep, hearing on Dec. 9, post hearing conference.” Id. Dr. Smith’s invoice would have been much more informative if he had explained how much time was spent on specific tasks and if the invoice were prepared on a daily (rather than monthly) basis.

Requirements to submit detailed invoices created contemporaneously are well established. They are reflected in the guidelines. Office of Special Masters, Guidelines for Practice under the National Vaccine Injury Compensation Program § XIV (Rev. Ed. 2004). As attorneys experienced in the Vaccine Program, Mr. Conway, Ms. Chin-Caplan and/or Mr. Homer should have communicated these requirements to Dr. Smith when they first retained him. See Morse v. Sec’y of Health & Human Servs., 89 Fed. Cl. 683, 688-89 (2009) (affirming special master’s decision to reduce expert fees because expert’s invoice “did not include a breakdown of hours per task, or dates [working on the petitioner’s claim], and because it was not created until the end of the ten-month period during which her services were performed.”). Just as attorneys

⁹ The fourth and final entry, which accounts for travel time “driving to and from Boston for the hearing,” is adequate. Id.

are not entitled to compensation for work that is not necessary, Hensley v. Eckerhart, 461 U.S. 424, 434 (1993), neither are experts. Kantor v. Sec’y of Health & Human Servs., No. 01-679V, 2007 WL 1032378, at *4–8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007). Without a detailed invoice, it is difficult, if not impossible, to determine whether all of Dr. Smith’s work was necessary or performed in a reasonable amount of time.

Without a contemporaneously created invoice that details Dr. Smith’s activities, one reasonable result is to deny Ms. Caves compensation in regard to Dr. Smith entirely. Ms. Caves could be viewed as having failed to meet her burden of proof. See Naporano Iron & Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987); Presault v. United States, 52 Fed. Cl. 667, 679 (2002); Gardner–Cook v. Sec’y of Health & Human Servs., No. 99–480V, 2005 WL 6122520, at *4 (Fed. Cl. Spec. Mstr. June 30, 2005).

Another reasonable result is to estimate from the materials that were provided how much time the person spent. A reasonable number of hours for his substantive activities is 26.6 hours. This estimate takes into account Dr. Smith’s experience and familiarity with the literature arguably connecting the flu vaccine and demyelinating diseases. See Simon v. Sec’y of Health & Human Servs., No. 05-941V, 2008 WL 623833, at *3 (Fed. Cl. Spec. Mstr. Feb. 21, 2008) (reasonableness of expert’s hourly rate and time expended determined by, among other things, the expert’s “experience in the Vaccine Program as indicative of an ability to efficiently utilize time”); Broekelschen v. Sec’y of Health & Human Servs., No. 07-137V, 2011 WL 2531199, at *4 (Fed. Cl. Spec. Mstr. June 3, 2011) (“A consequence of [an experienced attorney’s] high hourly rate is an expectation that [the attorney] works efficiently” and thus the time he or she “spends on certain tasks will be less than the amount of time a less experienced attorney would spend”), motion for review denied, 102 Fed. Cl. 719 (2011). This much time (26.6 hours) is much more consistent with the time claimed by other experts of comparable skill on comparable cases. See Saxton, 3 F.3d at 1521 (authorizing special masters to use their experience in evaluating fee applications).

Accordingly, a reasonable amount of costs for Dr. Smith is \$11,800.00 (26.6 * \$400 + 5.8 * \$200). This results in a reduction of \$24,420.00 from Ms. Caves’s initial fee request.

The two remaining items involve less expense. The Secretary objects to Ms. Caves’s request for compensation for the costs of retaining a life care planner. Resp’t Resp. at 12. Ms. Caves argues the life care planner was necessary to assess adequately the prospects of settlement at the early stages of her case. The undersigned agrees and awards the full \$1,200.00 Ms. Caves requested for the life care planner.

Finally, the Secretary objects to Ms. Caves’s counsel’s costs incurred attending oral argument at the Federal Circuit. The Secretary argues Ms. Ciampolillo’s attendance was entirely unnecessary and thus her costs should be entirely eliminated. It is doubtful a paying client would authorize expenses for two attorneys when only one is necessary. Accordingly, \$1,542.76 is deducted.

Summary for Attorneys' Costs	
Requested Amount	\$45,591.12
Reduction for Dr. Smith's testimony	-\$24,420.00
Reduction for Ms. Ciampolillo's attendance at oral argument at the Federal Circuit	-\$1,542.76
TOTAL AWARDED	\$19,628.36

A reasonable amount of costs is an award of **\$19,628.36**.

IV. Conclusion

Ms. Caves has established that she had a reasonable basis for her petition for compensation and the subject filings associated with pursuing it, as well as her motion for review and appeal to the Federal Circuit. Accordingly, she is eligible for attorneys' fees and costs. However, as discussed above, she requests an unreasonable amount (\$185,065.09). Based on the foregoing, **she is awarded \$109,469.16 in attorneys' fees and other litigation costs**. A check shall be made jointly payable to Ms. Caves and her law firm, Conway, Homer & Chin-Caplan, P.C., in the amount of **\$108,509.29** for its fees and costs. A check shall be made payable only to Ms. Caves in the amount of **\$959.87** for her costs. The Clerk's Office is instructed to enter judgment in accord with this decision unless a motion for review is filed.¹⁰

IT IS SO ORDERED.

S/ Christian J. Moran
Christian J. Moran
Special Master

¹⁰ Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.