

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

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 RAQUEL FRAGOSO, \*  
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 Petitioner, \* No. 08-236V  
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 v. \* Special Master Christian J. Moran  
 \*  
 SECRETARY OF HEALTH \*  
 AND HUMAN SERVICES, \* Filed: January 6, 2011  
 \*  
 Respondent. \* attorneys' fees and costs,  
 \* reasonable hourly rate  
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Albert J. Brooks, Jr. and Jill M. Follows, Sheller, P.C., Philadelphia, PA, for Petitioner;  
 Michael P. Milmoie, U.S. Department of Justice, Washington, DC, for Respondent.

### **PUBLISHED DECISION AWARDING ATTORNEYS' FEES AND COSTS**

Raquel Fragoso alleged that the trivalent influenza vaccine caused her to suffer transverse myelitis. The parties resolved this case without the need for formal adjudication and Ms. Fragoso was awarded compensation. Decision, filed June 11, 2010.

Ms. Fragoso 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 some items of costs, including the hourly rate for Ms. Fragoso's expert. **Ms. Fragoso is awarded \$32,375.61 in attorneys' fees and \$14,663.95 in costs.**

### **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).

In this litigation, Ms. Fragoso was represented primarily by Attorney Jill M. Follows, who was supported by Ms. Geri A. Caruso, a paralegal. Attorney Albert J. Brooks also worked on this case for less than two hours in 2008. Ms. Fragoso requests that Ms. Follows be compensated at a rate ranging from \$300 per hour to \$344 per hour, that Ms. Caruso be compensated at a rate ranging from \$55 per hour to \$65 per hour, and that Mr. Brooks be compensated at \$350 per hour.<sup>1</sup> A range of rates have been requested for Ms. Follows and Ms. Caruso because those two professionals performed work from 2007 to 2010. Respondent has objected to the hourly rates for the attorneys. Respondent has not objected to the paralegal's rate. Resp't Resp., filed Oct. 4, 2010, at 4-6.

The undersigned has previously found reasonable rates for work performed by Mr. Brooks in 2007 and for work performed by Ms. Follows in 2007 and 2008. Kennedy v. Sec'y of Health & Human Servs., No. 07-410, 2009 WL 2750961, at \*2-3 (Fed. Cl. Spec. Mstr. July 28, 2009).<sup>2</sup> Neither party has offered any reason for a different result in Ms. Fragoso's case. Indeed, neither party cited Kennedy. The same result is appropriate here because Ms. Fragoso's evidence appears to be the same as Ms. Kennedy's evidence and respondent's argument (the submitted evidence is not sufficient) is the same. Consequently, Ms. Follows will be compensated at a rate of \$300 in 2007 and \$318 in 2008. Ms. Fragoso has requested an increase in Ms. Follows's rate to \$336 for 2009 and to \$344 for 2010. These two increases appear to be reasonable increases based upon inflation.

After a reasonable hourly rate is established, the next step in the lodestar process is to determine the reasonable number of hours. Respondent makes a relatively weak comment on this point stating that she "defers to the special master to determine whether the number of hours charged by those attorneys is reasonable." Resp't Resp. at 6. The time sheets have been reviewed and the requested number of hours is reasonable.

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<sup>1</sup> Ms. Fragoso did not request that her attorneys be compensated at the forum rate as permitted by Avera.

<sup>2</sup> Although Kennedy was designated as "unpublished," it remains informative for two reasons. First, Westlaw now collects "unpublished" decisions, which appear on the website of the Court of Federal Claims as required by the E-Gov't Act, into its database making unpublished decisions accessible. Second, the Office of Special Masters considers unpublished decisions when adjudicating requests for attorneys' fees when the unpublished decision involves the same attorney.

Consequently, Ms. Fragoso is awarded \$32,375.61 in attorneys' fees. This is the full amount requested.

## II. Costs

Ms. Fragoso 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).

Ms. Fragoso seeks \$17,663.95 in attorneys' costs. Respondent has objected to three items of costs: costs for reports from Dr. Norman Latov, costs for work performed by Independent Allied Health Consultants, and cost of in-house copying.

The predominant item in dispute is the cost of obtaining reports from Dr. Latov. Ms. Fragoso seeks an award of \$10,000, representing 20 hours of Dr. Latov's work at \$500 per hour. Respondent objected to this much compensation. Resp't Resp. at 7.

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).

Ms. Fragoso's case presents the same problem as Ms. Kennedy's case. In both cases, the petitioners did not submit any evidence supporting a reasonable hourly rate for Dr. Latov. In Ms. Fragoso's reply brief, she argued that "Dr. Latov's hourly rate is consistent with physician experts with comparable credentials, expertise and credibility." Pet'r Reply at 2. This assertion is not persuasive because Ms. Fragoso does not identify these comparable experts and does not cite to any cases.

Ms. Fragoso presents what is a policy-based (as opposed to evidence-based) argument for compensating Dr. Latov at \$500 per hour. Ms. Fragoso states that Dr. Latov "is just the sort of expert who should be welcomed by the Court as a barometer of reasonable and credible expert

opinion. This Court will send a chilling message to all claimants with potential vaccine claims, that they will not be able to secure competent expert evaluation, if the Court minimizes the hours or hourly rate of renowned physician experts.” Pet’r Reply at 2.

This argument, too, is unavailing. Ms. Fragoso could have submitted evidence to support Dr. Latov’s hourly rate. Given that the undersigned identified the lack of evidence supporting Dr. Latov’s hourly rate in Kennedy, Ms. Fragoso (and her attorneys) should have presented evidence. If evidence had been presented, Dr. Latov might have been awarded a higher hourly rate.

In the absence of evidence, Dr. Latov will be awarded the hourly rate used in Kennedy, which was \$350.00. In doing so, counsel is reminded that the lack of evidence about a reasonable hourly rate may justify the denial of compensation entirely. The unpublished decision in Kennedy made this point and it is being repeated in a decision that will be published.

The rate of compensation in the lodestar formula for Dr. Latov is \$350.00 per hour. Ms. Fragoso requests that he be compensated for 20 hours of work. Pet’r Appl, exhibit 13. A problem with Dr. Latov’s invoice is that he has lumped several activities into one billing statement without providing details such as the date on which a specific activity was performed.<sup>3</sup> The amount of time may be more than expected but falls within the range of reasonableness in light of the quality of Dr. Latov’s reports. Thus, Dr. Latov will be compensated for all the requested hours (20). Ms. Fragoso will receive \$7,000 in compensation for Dr. Latov’s work (\$350.00 x 20). This is \$3,000 less than the amount requested.

The remaining two disputed items of cost are less significant. Respondent objected to work performed by Independent Allied Health Consultants because the “need for these consultants has not been explained.” Resp’t Resp. at 6. In reply, Ms. Fragoso stated that this entity concerns the life care planner that she engaged. This explanation is reasonable and Ms. Fragoso is awarded the full amount requested.

The last item of dispute is whether Ms. Fragoso’s attorneys should charge 20 cents per page for in-house copying. Neither party devotes much time to the issue and it is difficult to see how the amount in dispute would warrant much work by anyone. A brief amount of research shows that federal courts in other districts have accepted 20 cents per page. See Chenault v. Dorel Industries, Inc., No. A-08-CA-354-SS, 2010 WL 3064007 (W.D. Tex. Aug. 2, 2010); Bennuzzi v. Board of Educ. of City of Chicago, No. 09 C 3510, 2010 WL 3038101 (N.D. Ill. July 30, 2010). Consequently, Ms. Fragoso will be reimbursed the amount requested for photocopying.

### III. Conclusion

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<sup>3</sup> Although Kennedy mentioned this point, Kennedy was issued before Dr. Latov created his invoices in Ms. Fragoso’s case.

Ms. Fragoso's case presents issues that are either the same or virtually the same as the issues in Kennedy. Ms. Fragoso appears to have submitted the same evidence and respondent has made the same objections, more or less. It appears that the parties could have resolved Ms. Fragoso's request for attorneys' fees and costs more quickly and with less work if they had used Kennedy as a model. When the parties did not, the dispute required resolution.

Based upon the information presented in this case, **Ms. Fragoso is awarded \$32,375.61 in attorneys' fees and \$14,663.95 in costs.** The Clerk's Office is instructed to enter judgment in accord with this decision unless a motion for review is filed.

IT IS SO ORDERED

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Christian J. Moran  
Special Master