

Wyoming, be compensated at rates awarded to attorneys who practice in Washington, D.C. In those cases, special masters have refrained from compensating Mr. Moxley at the Washington, D.C. rates and the Court of Federal Claims has affirmed those determinations. Avila v. Sec’y of Health & Human Servs., No. 05-685V, 2009 WL 2033063 (Fed. Cl. Spec. Mstr. June 26, 2009), motion for review denied, 90 Fed. Cl. 590 (2009); Masias v. Sec’y of Health & Human Servs., No. 99-697V, 2009 WL 1838979 (Fed. Cl. Spec. Mstr. June 12, 2009), motion for review denied (Dec. 10, 2009) (unpublished), appeal docketed, No. 2010-5077 (Fed. Cir. Feb. 17, 2010).

In Mr. Friedman’s case in particular, the petitioner requested that Mr. Moxley be compensated at rates ranging from \$425 to \$465 per hour. Mr. Moxley was actually compensated at rates from \$200 to \$220 per hour. Mr. Friedman was awarded \$11,114.50 for Mr. Moxley’s work. Fee Decision, 2009 WL 4975267 (Fed. Cl. Spec. Mstr. Dec. 4, 2009). Mr. Friedman found the amount awarded in attorneys’ fees to be inadequate and filed a motion for review with the Court of Federal Claims.

The motion for review challenged the decision to compensate Mr. Moxley at rates prevailing in Cheyenne, Wyoming, the locale where Mr. Moxley practices. In a separate pleading, Mr. Friedman requested that the Court divide the award of attorneys’ fees into two parts, one part constituting an “interim” fee award that would proceed to a payable judgment on all uncontested issues and the other part constituting a “final” fee award that would be the basis for an appealable judgment. Separating awards of attorneys’ fees into two components had not been addressed by the Court before Mr. Friedman’s request. In a third pleading, Mr. Friedman requested that the Court summarily affirm and certify the issue to the Federal Circuit. After respondent opposed these forms of relief, the Court held an oral argument.

The Court granted Mr. Friedman none of the relief that he sought. The Court found that the hourly rate for Mr. Moxley was within the special master’s discretion. The Court declined to make an interim award of attorneys’ fees. Finally, the Court denied the motion for certification to the Federal Circuit. Opinion on Mot. for Review, ___ Fed. Cl. ___, 2010 WL 3542835 (Fed. Cl. June 18, 2010). The Court’s decision, which was not appealed to the Federal Circuit, sets the stage for the pending motion.

Mr. Friedman now requests that he be awarded compensation for his unsuccessful work at the Court and also for his work in preparing the pending motion for attorneys’ fees. Mr. Friedman seeks \$47,417.50.¹ Respondent has challenged an award of this amount. He is awarded \$15,840.00.

¹ Mr. Friedman filed his request for additional attorneys’ fees and costs with the Court. The Court has assigned this issue to the undersigned. Order, filed Aug. 16, 2010, citing Vaccine Rule 34(b).

Analysis

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.

The reasonable hourly rate for Mr. Friedman's attorney, Mr. Robert Moxley, is settled in this case. The December 4, 2009 decision set reasonable hourly rates for Mr. Moxley's work at different periods of time. For 2008 and 2009, a reasonable hourly rate was \$220.00. Fee Decision, 2009 WL 4975267, at *10. The Court, in turn, affirmed this decision. Opinion, 2010 WL 3542835, at *7-8. Therefore, in setting the lodestar, the appropriate hourly rate is \$220.00.

The other portion of the lodestar is the reasonable number of hours. As mentioned at the beginning of this decision, Mr. Friedman is presently seeking reimbursement for fees that were incurred solely on the issue of fees. "Fees for fees" are not inherently unreasonable, see Schuenemeyer v. United States, 776 F.2d 329, 333 (Fed. Cir. 1985); JGB Enterprises, Inc. v. United States, 83 Fed. Cl. 20, 34 (2008), and even a petitioner who fails to receive an increased amount of fees and costs through the appellate process may be entitled to compensation for the unsuccessful effort. Morse v. Sec'y of Health & Human Servs., No. 05-418, 2010 WL 2925848 (Fed. Cl. July 26, 2010).

For the appellate work performed by Mr. Moxley, Mr. Friedman requests that Mr. Moxley be compensated for a total of 84.6 hours. Exhibit 91.² In addition, Mr. Friedman seeks a total of 17.0 hours for the pending fee request. Exhibit 91 (invoice for 2.1 hours), Exhibit 94 (invoice for 14.9 hours). The total number of hours is 101.6 hours. Respondent argues that "the number of hours spent by Mr. Moxley in pursuit of this wholly fee-based appeal are excessive and should be reduced." Resp't Opp'n, filed Aug. 4, 2010, at 5.

A reasonable number of hours for the appellate issues can be determined more readily by examining each of the three requests before the Court individually. The three requests were (1) to find that the hourly rate awarded to Mr. Moxley was too low, (2) to divide the award into two separate judgments, and (3) to certify the hourly rate issue to the Federal Circuit. Of these three

² Mr. Friedman's fee request excludes 25.7 hours for which Mr. Moxley has said "no charge." Exhibit 91.

issues, Mr. Friedman's strongest argument on appeal was the second. Thus, it is taken up immediately.

Separate judgments for attorneys' fees began with Avera, which was another case in which Mr. Moxley represented the petitioner. After Avera, special masters have made decisions on interim fees in a number of cases that have led to separate judgments. Cf Shaw v. Sec'y of Health & Human Servs., 609 F.3d 1372, 1378 (Fed. Cir. 2010) (citing statistics provided by the Department of Justice). However, in Mr. Friedman's case, a decision on interim fees was not made by the special master. Fee Decision, 2009 WL 4975267, at *15-17. This decision was a predicate to Mr. Friedman's argument that the Court should enter a separate judgment, in effect, dividing the special master's unitary award into two pieces.

This argument had not been presented to the Court before Mr. Friedman's case. This novelty provides a reasonable basis for Mr. Friedman's request. Although the Court did not act favorably on the request, the Court did not suggest that Mr. Friedman's argument was wholly without merit. Thus, Mr. Friedman is entitled to compensation for Mr. Moxley's work on this aspect of the case.³ The validity of this issue also makes Mr. Moxley's work in preparing for the associated oral argument and participating in oral argument reasonable. An examination of Mr. Moxley's invoices suggests that 25 hours is a reasonable amount of work for all these tasks.

The second of the three requests before the Court was Mr. Friedman's challenge to Mr. Moxley's hourly rates. These efforts, too, were reasonable in principle because whether attorneys from Cheyenne, Wyoming should be compensated at the rate for attorneys from Washington, D.C. is still being determined. This determination is expected to be made by the Federal Circuit in its resolution of Masias. Until that time, different judges at the Court may reach different views and the Federal Circuit may wish to consider these opinions. Fee Decision, 2009 WL 4975267, at *16. Thus, Mr. Friedman had a good faith basis for challenging the hourly rate determination.

The more difficult question is how much time should be spent on this effort. Before the motion for review was filed in Mr. Friedman's case, Mr. Moxley had filed motions for review in Masias and Avila. The Masias and Avila briefs are the foundations for the arguments in Mr. Friedman's case. This previous experience suggests that Mr. Moxley was sufficiently informed about attorneys' fees that he should have proceeded relatively expeditiously. On the other hand, the brief in Mr. Friedman's case asserts slightly different arguments, showing that some additional work was performed on the hourly rate issue. After consideration of Mr. Moxley's invoices and his previous experience, a reasonable amount of time for refining previously advanced arguments is 30 hours.

³ The Court's decision not to divide Mr. Friedman's award of attorneys' fees into two components suggests that attorneys' fees for this request may not be awarded routinely.

Mr. Friedman's third request was for the Court to certify the hourly rate issue for an interlocutory review. Mr. Moxley's invoice includes approximately six hours for this task because much of this work was listed as "no charge." There seems to be little, if any, authority for the Court to have approved this request. The Court stated that "It would have been irresponsible, if not statutorily inappropriate, to have taken a pass on [the] duty" to review the special master's decision. Opinion, 2010 WL 3542835, at *14. Thus, Mr. Friedman will not be compensated for making a request for certification that could not be granted.

In addition to the work at the Court, the last issue is the time spent seeking fees, which may be accurately described as "fees for fees for fees." For the initial submission and the reply, Mr. Friedman requests that Mr. Moxley be credited for 17 hours of work. This amount seems reasonable.

In sum, efforts in seeking two judgments (25 hours), in seeking an increased hourly rate (30 hours), and in requesting additional fees (17 hours) were reasonable. Mr. Moxley's hourly rate is \$220.00. Thus, an appropriate amount of compensation for Mr. Moxley's work for attorneys' fees is \$15,840.00 (72 times \$220).

The Clerk's Office is ordered to enter judgment in accord with this decision unless a motion for review is filed. The Clerk's Office is also instructed to provide this decision to the assigned judge.

IT IS SO ORDERED.

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