

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

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DONALD R. MASIAS,

Petitioner,

v.

SECRETARY OF HEALTH  
AND HUMAN SERVICES,

Respondent.

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No. 99-697V  
Senior Judge Robert J. Hodges, Jr.  
Special Master Christian J. Moran

Filed: April 14, 2010

Attorneys' fees; reasonable  
reasonable number of hours;  
litigating "fees for fees;"  
Laffey matrix; downward departure

Robert T. Moxley, Esq., Robert T. Moxley, P.C., Cheyenne, Wyoming, for Petitioner;  
Catharine Reeves, Esq., U.S. Department of Justice, Washington, D.C., for Respondent

**PUBLISHED DECISION ON ATTORNEYS' FEES AND COSTS\***

The petitioner, Mr. Masias, received compensation based upon his claim that a hepatitis B vaccine caused him an injury. Mr. Masias sought an award for his attorneys' fees and costs and was awarded a portion of the amount sought. The pending dispute has been remanded to the undersigned to determine, in the first instance, the compensation for Mr. Masias to litigate the amount of attorneys' fees, which can be termed "fees for fees." Mr. Masias has requested \$59,072.50. After reviewing the materials submitted in connection with Mr. Masias's request for attorneys' fees, the undersigned awards Mr. Masias **\$25,851.40**. As set forth below, the requested amount is reduced primarily because Mr. Masias sought compensation for his attorney

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\* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

at an unreasonably high hourly rate. Additionally, the quality of the attorney's work necessitates a further reduction. These reasons are explained below.

## **I. Procedural History**

A brief summary explains the sequence of disputes involving attorneys' fees. Mr. Masias is represented by Mr. Robert T. Moxley, an attorney practicing in Cheyenne, Wyoming. In his original motion for attorneys' fees and costs, Mr. Masias requested compensation for Mr. Moxley, pursuant to the Laffey matrix, which has been used in the United States District Court for the District of Columbia to set a reasonable hourly rate for attorneys litigating in that tribunal. Respondent opposed Mr. Masias's request to use the Laffey matrix rates.

On February 6, 2008, the United States Court of Appeals for the Federal Circuit issued a decision in another case in which Mr. Moxley represented the petitioners that affects this litigation in two respects. First, the Federal Circuit indicated that special masters may award attorneys' fees and costs on an interim basis. Second, the Federal Circuit also explained that special masters should award attorneys' fees based upon the rate prevailing in the forum except when "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." Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1349 (Fed. Cir. 2008) (quoting Davis County Solid Waste Management and Energy Recovery Special Service District v. United States Environmental Protection Agency, 169 F.3d 775, 758 (D.C. Cir. 1999)) (emphasis in Davis).

Pursuant to Avera, Mr. Masias sought an interim award of attorneys' fees. After extensive briefing, Mr. Masias was awarded an amount of attorneys' fees and costs that a reasonable litigant could not dispute. Interim Fees and Costs Decision, 2009 WL 899703 (Fed. Cl. Spec. Mstr. Mar. 12, 2009). This decision did not address issues that were contested, such as whether Mr. Moxley should be compensated pursuant to the Laffey matrix and the reasonable number of hours spent litigating the fee application.

The matters left open in the Interim Fees and Costs Decision were resolved in a decision issued on May 5, 2009. This was intended to be the final decision, but Mr. Masias filed a motion for reconsideration. Thus, the May 5, 2009 decision was withdrawn to allow examination of the motion for reconsideration. Order, filed May 28, 2009.

On June 12, 2009, the undersigned resolved all outstanding issues, including those raised in Mr. Masias's motion for reconsideration. The June 12, 2009 decision awarded Mr. Masias compensation beyond what had been awarded in the Interim Fees and Costs Decision. The June 12, 2009 decision also found that the Laffey matrix did not set the reasonable hourly rate for work in the Vaccine Program. That decision also found that there was a substantial difference between the hourly rate in Washington, D.C. and the hourly rate in Cheyenne, Wyoming, where Mr. Moxley works. Thus, Mr. Moxley was compensated at \$220 per hour for work performed in 2009. Final Fees and Costs Decision, slip op. at 39, 2009 WL 183879, at \*31. Additionally, most

(but not all) of Mr. Moxley's work in litigating the attorneys' fees dispute was found to be reasonable. Mr. Masias was awarded \$19,035.25 in fees for litigating the attorneys' fees dispute. Final Fees and Costs Decision, slip op. at 44, 2009 WL 183879, at \*35.

Pursuant to Vaccine Rule 23, Mr. Masias filed a motion for review with the United States Court of Federal Claims ("the Court"). Mr. Masias also requested a second award of attorneys' fees and costs on an interim basis. See Pet'r Mot., filed July 20, 2009. The Court denied this motion. Order, filed Sept. 17, 2009. Mr. Masias then filed a second motion requesting a second award of attorneys' fees and costs on an interim basis. See Pet'r Mot., filed Oct. 14, 2009. The Court has not ruled upon the October 14, 2009 motion.

For the motion for review, the Court affirmed the June 12, 2009 final fees and costs decision in an unpublished order, filed December 10, 2009. Mr. Masias appealed this decision to the United States Court of Federal Claims, where it has case number 2010-5077.

Three days before the Court issued its order affirming the June 12, 2009 decision, Mr. Masias filed another motion for attorneys' fees and costs, requesting compensation for Mr. Moxley's work from May 7, 2009, to November 18, 2009, as reflected in exhibit 91, which listed Mr. Moxley's activities. In this period, Mr. Moxley, among other tasks, prepared a motion for reconsideration, a motion for review, an initial motion for interim fees, and a renewed motion for interim fees. In total, Mr. Masias requests \$59,072.50 for work performed by Mr. Moxley and his legal assistant, Ms. Gollobith. This amount represents 126.5 hours for Mr. Moxley at \$465 per hour and 2.5 hours for Ms. Gollobith at \$100 per hour. Mr. Masias did not seek compensation for any costs in the December 7, 2009 motion for attorneys' fees.

Respondent filed a response to Mr. Masias's December 7, 2009 motion for attorneys' fees. Respondent argued that the amount of time spent by Mr. Moxley was unreasonable and all hours should not be credited. Respondent also argued that Mr. Moxley should not be compensated at the rate that he requested, but, instead at the rate found in the June 12, 2009 decision. Mr. Masias filed a reply, which included a request for an additional 3.1 hours.

Pursuant to Vaccine Rule 34(b), the Court has remanded the issue of attorneys' fees presented by Mr. Masias's December 7, 2009 motion. The parties' submissions and the Court's orders have been reviewed. Thus, the matter is ready for adjudication.

## **II. Analysis**

To determine a reasonable amount of attorneys' fees, the trial court uses the lodestar method – "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Avera, 515 F.3d at 1347-48 (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). Here, both aspects of the lodestar equation are disputed. "Once a court makes that initial calculation, it may then make an upward or downward departure to the fee award based on

other specific findings.” Avera, 515 F.3d at 1348, citing Blum v. Stenson, 465 U.S. 886, 888 (1984).

For the reasonable hourly rate portion of the lodestar formula, Mr. Masias requests that Mr. Moxley be awarded compensation at \$465.00 per hour. Exhibit 91. The reasonable hourly rate for Mr. Moxley’s work in 2009 was found to be \$220.00 per hour. Decision, slip op. at 39, 2009 WL 183879, at \*31. The Court affirmed this finding. Order, filed Dec. 10, 2009. The Court’s finding is binding on the undersigned.<sup>1</sup> Thus, Mr. Moxley will be compensated at \$220.00 per hour.

The other factor in the lodestar equation is the reasonable number of hours. Mr. Moxley’s invoice indicates that after the May 5, 2009 decision, he spent approximately 125 hours. Respondent argues that “the number of hours spent by Mr. Moxley in pursuit of this wholly fee-based appeal [is] excessive and should be reduced.” Resp’t Resp., filed Dec. 24, 2009, at 1. In support of the argument that Mr. Moxley’s hours are excessive, respondent relies on the Court’s December 10, 2009 order, in which the Court criticized the arguments presented in the motion for review:

In light of this Court’s remarks concerning the quality of petitioner’s counsel’s work during the review process in this case, there is ample justification for reducing the amount of fees requested for that work. See e.g., Masias, slip op. at 5 (“The memorandum does not ‘fully and specifically state and support each objection to the decision,’ however. As a result, the reviewing court cannot be clear which of petitioner’s contentions and arguments are directed to the special master’s rulings in this case and which are expressions of general unhappiness with the body of vaccine jurisprudence . . . . Petitioner does not agree with many of the special master’s findings. The nature of his disagreement is not always so clear, however.”); 7 n.5 (“Many of petitioner’s assertions are similarly conclusory and difficult to understand.”); 9 (“He does not include cites or case names, nor does he attempt to distinguish cases such as Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541 (1984).”)

Resp’t Resp., filed Dec. 24, 2009, at 3-4.

In reply, Mr. Masias defends the reasonableness of the hours expended by Mr. Moxley. Mr. Masias argues that the “government’s intractability . . . made it necessary for the petitioners’ [sic] counsel to fully brief and litigate these issues.” Pet’r Reply, filed Jan. 4, 2010, at 6. Mr.

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<sup>1</sup> Mr. Masias’s appeal to the Federal Circuit challenges the finding for the hourly rate of compensation.

Masias cites cases, including Gonzalez v. Bratton, 147 F. Supp. 2d 180, 211 (S.D.N.Y. 2001), in which courts have recognized the general principle that a defendant's response affects the number of hours reasonably expended.

The number of hours listed in exhibit 91 are reasonable. Whether the Laffey matrix establishes a presumptively reasonable hourly rate for attorneys who represent petitioners in the Vaccine Program affects Mr. Moxley's compensation in this particular case, Mr. Moxley's compensation in all his other cases, and, potentially, all other cases in the Vaccine Program. Thus, this question warrants more research and analysis than issues that are limited to a specific case.

The number of hours also reflect the variety of approaches to obtain interim fees. After Avera opened the door to awards of attorneys' fees and costs on an interim basis, the special masters and the Court have been developing procedures to regulate the submissions of requests for attorneys' fees. Because of the uncertainty surrounding how interim fee requests would be processed, Mr. Masias explored various procedural devices to advance Mr. Moxley's claim for compensation. Each of the pleadings filed by Mr. Masias were reasonable requests, although they were not successful. For example, Mr. Masias's July 20, 2009 motion for an award of interim attorneys' fees was the first time a petitioner had requested an interim award of attorneys' fees while a motion for review of a decision on attorneys' fees was pending. After the Court denied the motion on the ground that Mr. Masias "has not offered sufficient factual and legal assertions to support his request for this extraordinary remedy," Order, filed Sept. 17, 2009; Mr. Masias filed a second motion with additional support. Because the procedures governing interim fees are unsettled, Mr. Masias's successive requests were not unreasonable.

In addition to the time listed on exhibit 91, Mr. Masias requests compensation for Mr. Moxley's time (3.1 hours) spent preparing a reply brief. Almost all that time was reasonable. One portion was obtaining an affidavit from another attorney, who parroted Mr. Moxley's assertion that the time expended was reasonable. This attorney's affidavit adds little, if anything, to the analysis. Time spent on obtaining this affidavit was not reasonable, so 0.3 hours will be deducted for time spent on the reply brief. Therefore, for Mr. Moxley's work between May 7, 2009 and January 4, 2010, a reasonable amount of time is 126.5 hours (exhibit 91) + 2.8 hours (reply brief) = 129.3 hours.

Respondent's argument that the number of hours is excessive due to the poor quality of Mr. Moxley's work is well grounded, but not a persuasive reason for reducing the number of hours. The Court did express concerns about Mr. Moxley's advocacy. The undersigned, too, did not find Mr. Moxley's arguments that he should be compensated at the rate set by the Laffey matrix to be well presented, as reflected in the June 12, 2009 decision denying Laffey matrix rates to Mr. Moxley. A finding that the advocacy was poor does not necessarily mean that the number of hours was excessive. Ineffective advocacy may be cured by spending more time improving the brief, not spending less time.

A more natural place to consider the quality of the attorney's work is in the hourly rate. In the relevant market, an effective attorney should command a higher hourly rate than a less effective attorney because the skilled attorney can accomplish the same task in less time. For example, a skilled attorney may write a brief in six hours, charging \$200 per hour for a total cost of \$1,200. Another attorney may spend ten hours but charge only \$120 per hour also for a total cost of \$1,200. This example demonstrates that the reasonableness of the amount of time is affected by the hourly rate.

For Mr. Moxley, the reasonable hourly rate has already been set. It is \$220 per hour. According to Avera, the lodestar calculation (reasonable hourly rate multiplied by the reasonable number of hours) establishes the presumptively reasonable amount of attorneys' fees. In this case, the lodestar is  $\$220 \times 129.3 = \$28,446$ .

The lodestar determination does not end the analysis because Avera also indicates that the trial court may adjust the lodestar determination. "Once a court makes that initial calculation, it may then make an upward or downward departure to the fee award based on other specific findings." Avera, 515 F.3d at 1348, citing Blum v. Stenson, 465 U.S. 886, 888 (1984).

The "specific findings" to which Avera referred were made by the Court. The Court found that the petitioner's memorandum "does not 'fully and specifically state and support each objection to the decision'" and that Mr. Moxley did not "include cites or case names, nor does he attempt to distinguish cases such as Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541 (1984)." These statements suggest that the quality of advocacy did not satisfy the Court's expectations for an attorney seeking to be paid an amount commensurate with the best advocates in Cheyenne, Wyoming, if not Washington, D.C. In light of the Court's concerns about the quality of Mr. Moxley's advocacy, this case presents a rare case in which a downward departure is appropriate. As a matter of discretion, the undersigned will reduce the lodestar determination by ten percent. Therefore, the reasonable amount of compensation for Mr. Moxley is \$25,601.40.

Mr. Masias has also requested compensation for work performed by Mr. Moxley's paralegal, Ms. Gollobith. The amount requested (\$250) is reasonable. Mr. Masias is awarded this additional compensation.

### **III. Conclusion**

**Mr. Masias is awarded an additional \$25,851.40 in attorneys' fees for activities in litigating the fee dispute between May 7, 2009 and January 4, 2010.** The Clerk's Office is instructed to provide this decision to the presiding judge. See Vaccine Rule 28.1. The Clerk's Office is also ordered to enter judgment in accord with this decision unless a motion for review is filed.

IT IS SO ORDERED.

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