IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

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JENNIFER MORSE,	*	
	*	No. 05-418V
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	Filed: June 5, 2009
	*	
SECRETARY OF HEALTH	*	Attorneys' fees and costs, expert's
AND HUMAN SERVICES,	*	obligation to record time
	*	contemporaneously
Respondent.	*	
* *		

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA, for petitioner;
Althea Walker Davis, United States Dep't of Justice, Washington, D.C., for respondent.

PUBLISHED DECISION AWARDING ATTORNEYS' FEES AND COSTS[*]

Ms. Morse previously was awarded compensation based upon her claim that the hepatitis B vaccine caused her to suffer neurological injuries. She now seeks an award for her attorneys' fees and costs.

Respondent has not objected to most of the items in Ms. Morse's original request, including Ms. Morse's request for attorneys' fees and Ms. Morse's request for reimbursement of costs that she, personally, has incurred. However, respondent has objected to costs incurred by Ms. Morse's attorneys in retaining two experts, Dr. Sherri Tenpenny and Dr. Thomas Morgan. Ms. Morse is awarded $40,894.20 in attorneys' fees and $7,995.95 in costs.

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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 banned 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).

I. Attorneys' Fees

Originally, Ms. Morse requested $35,360.30 in attorneys' fees. Pet'r App'n, filed Jan. 8, 2009, at 2. After discussions between the parties, Ms. Morse agreed to reduce her request by $115 and respondent agreed not to object to the reduced amount.

Ms. Morse has demonstrated that an award of $35,245.30 is appropriate for her attorneys' work in prosecuting this case. While this amount may be toward the higher range of reasonableness for a case that did not proceed to a hearing, Ms. Morse's case required more time from her attorneys than more straightforward cases.

On two occasions, Ms. Morse has also requested additional compensation for her attorneys' work in seeking attorneys' fees. On January 29, 2009, Ms. Morse requested an additional $3,474.20. Pet'r First Supp. App'n, filed Jan. 29, 2009. Later, she requested an additional $2,174.70. Pet'r Second Supp. App'n, filed April 14, 2009. Respondent did not object to these two supplemental applications for attorneys' fees.

Generally, a party is entitled to be reimbursed for time spent preparing an application for attorneys' fees and costs. Schuenemeyer v. United States, 776 F.2d 329, 333 (Fed. Cir. 1985) (addressing Equal Access to Justice Act); see also Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, 369 (D.D.C. 1983) (stating "Defendants must compensate Plaintiffs for their counsels' efforts in litigating the attorneys' fees, but they do not have to pay for unreasonable or excessive endeavor."), rev'd in nonrelevant part, 746 F.2d 4 (D.C. Cir. 1984). Even respondent did not proffer an argument that Ms. Morse is not entitled to any time for preparing the fee application.

Thus, the same standard will be used to evaluate the number of hours claimed during the fee application stage as during the merit stage – is the number of hours reasonable? In doing so, the approach of substituting the hypothetical client becomes less reflective of what is happening because it is more difficult (although not impossible) to imagine attorneys billing their clients for preparing bills. Nevertheless, some time for preparing a fee application is reasonable.

The two supplemental invoices present reasonable charges for litigating attorneys' fees and costs. Notably, the attorneys performed some tasks, such as reviewing the judgment issued by the Clerk's Office, but did not bill for these tasks. While the time spent reviewing a judgment is probably de minimis, the attorney's decision not to request compensation reflects the "billing judgment" expected of attorneys. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

Ms. Morse is awarded the following amounts in attorneys' fees.

Initial Application (as negotiated)	$35,245.30
First Supplemental Application	$3,474.20
Second Supplemental Application	$2,174.70.
TOTAL	**$40,894.20**

II. Costs

Ms. Morse also seeks an award for her attorneys' costs as well as her own personal costs.

As mentioned, respondent has not objected to several items of the attorneys' costs. The list of items to which respondent has not objected includes costs for obtaining medical records and costs for mailing documents. Resp't Resp., filed Jan. 22, 2009, at 2. Ms. Morse is awarded $1,367.41 for these items. Ms. Morse is also awarded $18.62 for her attorneys' cost in litigating the fee dispute. Pet'r Second Supp. App'n, filed April 14, 2009.

Respondent also did not object to an award for Ms. Morse's own cost, which are $307.07. Resp't Resp., filed Jan. 22, 2009, at 1. Ms. Morse is awarded this amount in full.

The items in contention are the requested cost for Ms. Morse's expert, Dr. Tenpenny, and the requested cost for another expert, Dr. Morgan. Resp't Resp., filed Jan. 22, 2009, at 2-6.

A. Standards for Adjudication

Ms. Morse is entitled to an award for the reasonable costs incurred by her attorneys. 42 U.S.C. § 300aa–15(e). 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 * 1 (Fed. Cl. Spec. Mstr. Feb. 21, 2008); Kantor v. Sec'y of Health & Human Servs., No. 01-679V, 2007 WL 1032378 *4-8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).

"Reasonableness" may be evaluated from a paying client's perspective. The United States Supreme Court stated that "[h]ours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority." Hensley, 461 U.S. at 433-34 (emphasis in original). If a hypothetical yet reasonable client would be willing to pay for an expert's report, then it is appropriate to award compensation for that expert's report. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections, 522 F.3d 182, 184 (2d Cir. 2008) (stating a trial court "must act later to ensure that the attorney does not recoup fees that the market would not otherwise bear. Indeed, the district court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case

effectively"); Goos v. National Ass'n of Realtors, 68 F.3d 1380, 1386 (D.C. Cir. 1995) (phrasing the question as "would a private attorney being paid by a client reasonably have engaged in similar time expenditures"); Norman v. Housing Authority of the City of Montgomery, 836 F.2d 1292, 1302 (11th Cir. 1988) (recognizing that "in the private sector the economically rational person engages some cost benefit analysis."); Presault v. United States, 52 Fed. Cl. 667, 680 (2002). The client must be pictured hypothetically because individual attributes of Ms. Morse (for example, her wealth or poverty) should not determine whether the cost is reasonable. Furthermore, it must be assumed that the client would have to pay for the expert because the client's self-interest would lessen the likelihood that the client would invest money into the expert needlessly.

One aspect of the general rule that costs must be reasonable to be compensable is that costs are not awarded for work that is not necessary work. Duplicative work is presumptively unnecessary. Attorneys are not entitled to compensation for performing work that is not necessary. Hensley, 461 U.S. at 434. The same principle restricts experts. Kantor, 2007 WL 1032378 *4-8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).

As the party requesting an award of costs, petitioners bear the burden of establishing their reasonableness. Presault, 52 Fed. Cl. at 670. 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 *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 *16 (Fed. Cl. Spec. Mstr. Nov. 9, 2006). These principles are the basis for evaluating whether the cost of a specific person is reasonable in the following sections.

B. Dr. Tenpenny

Ms. Morse requested $14,522.50 for work performed by Dr. Tenpenny. Pet'r App'n, filed Jan. 8, 2009, Tab B at 22. Dr. Tenpenny's invoice contains three lines. The first line states that 43.5 hours were spent for "review of records, medical literature, draft report, and discussion with Mr. Conway." (Mr. Conway is an attorney representing Ms. Morse.) The second line is 1 hour for a discussion with Mr. Conway. For these activities, Dr. Tenpenny has sought compensation at a rate of $325 per hour. The third line on Dr. Tenpenny's invoice is $60 for purchasing an article.

Dr. Tenpenny's invoice is deficient. She did not specify how much time was spent on different tasks. She did not state when the tasks were performed. She failed to create the entries contemporaneously as the work was being performed.[1]

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 and Mr. Homer should have communicated these requirements to Dr. Tenpenny when they first retained her.

This case demonstrates why defining each task separately facilitates an understanding of the expert's work. In Ms. Morse's reply, she argued that Dr. Tenpenny's time was reasonable. Ms. Morse stated "Dr. Tenpenny reviewed the extensive volume of the medical records in this case as well as a substantial body of relevant medical literature." Ms. Morse continued and explained that "Dr. Tenpenny was instructed to review the expert reports and extensive scientific literature filed in the hepatitis B/demyelinating injury omnibus proceeding. Dr. Tenpenny did only what counsel requested, and it was reasonable for her to have done so." Pet'r Reply, filed Jan. 29, 2009, at 8.

A status conference was held to discuss respondent's objections. Eventually, Ms. Morse presented more information about Dr. Tenpenny's work. Ms. Morse, effectively, contradicted her earlier statements:

> Dr. Tenpenny informed counsel that she in fact had spent little time reviewing medical literature in the Morse case. In this regard, she said, she reviewed only one article, entitled Variants and Differential Diagnosis of GBS. Although she had reviewed the extensive literature filed in the hepatitis B vaccine/demyelinating omnibus proceeding, she had billed this time to another vaccine program case.

Pet'r Clarification, filed April 14, 2009, at 3. Ms. Morse, then, argued that the amount of time spent by Dr. Tenpenny was reasonable based upon an average rate of reviewing medical records. Id.

Ms. Morse has offered little to meet her burden in justifying an award for Dr. Tenpenny. In her January 29, 2009 reply brief, Ms. Morse defended the number of hours claimed by Dr. Tenpenny by arguing that she reviewed literature from the hepatitis B / demyelinating injury omnibus proceeding. This explanation implied that Dr. Tenpenny spent relatively few of the 44.5 hours requested in reviewing Ms. Morse's medical records. But, upon further information,

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[1] The attorney's time sheets showed that the attorneys were discussing this case with Dr. Tenpenny about every other month from October 2007, through July 2008. Yet, Dr. Tenpenny's invoice, which contains no dates the work was performed, was created on July 20, 2008.

Ms. Morse has realized that this division is not accurate. Dr. Tenpenny did not request compensation for reviewing literature from the hepatitis B / demyelinating injury omnibus proceeding in Ms. Morse's case. Therefore, because Dr. Tenpenny's is not separated by task, Ms. Morse reasoned in her April 14, 2009 clarification that Dr. Tenpenny could reasonably have spent all 44.5 hours reviewing medical records.

Ms. Morse and/or Dr. Tenpenny have created this confusion. Ultimately, Ms. Morse is responsible for demonstrating the reasonableness of the cost requested by her attorneys. She can do so only if she received sufficient information from Dr. Tenpenny. As the difference in justification illustrates, Ms. Morse's attorneys and Dr. Tenpenny have had some misunderstanding.

Without a contemporaneously created invoice that details Dr. Tenpenny's activities, one reasonable result is to deny Ms. Morse compensation in regard to Dr. Tenpenny entirely. Ms. Morse could be viewed as having failed to meet her burden of proof. See Naporano Iron and Metal Co., 825 F.2d at 404; Presault, 52 Fed. Cl. at 679; Gardner-Cook, 2005 WL 6122520 *4.

Another reasonable result is to estimate from the materials that were provided how much time the person spent. If Dr. Tenpenny wrote a complete report, Ms. Morse did not file it. However, Ms. Morse did present a six-page chronology of medical records. Pet'r App'n, Tab D. In addition, the record contains Ms. Morse's medical records. Exhibits 1-39.

A reasonable number of hours for Dr. Tenpenny's activities is 13 hours. This estimate reflects the experience of special masters in evaluating fee applications, almost all of which include requests for the cost of a doctor's review of medical records. Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993). This estimate may be on the lower end of the reasonable range. But, Ms. Morse and Dr. Tenpenny could have avoided the need for any estimate by following the rules and presenting time records kept contemporaneously.

As a substitute for recording time contemporaneously, Ms. Morse proposed a method in which Dr. Tenpenny estimated how many pages of medical records she could read per hour and divided that number into the total number of pages of medical records for Ms. Morse. This method is entirely unpersuasive.

For Ms. Morse, the total number of pages cannot serve as a basis for an estimate. Many reports appear more than once in the record because they are shared among several doctors. When a doctor dictates a report, which is typed, the doctor's handwritten notes can usually be skipped or skimmed. Due to the length of time Ms. Morse's case was pending, this case contains medical records for treatment given years after Ms. Morse received the hepatitis B vaccine. At some time, the medical records will not provide any meaningful information about whether Ms. Morse experienced an adverse reaction to the hepatitis B vaccine.

Furthermore, Dr. Tenpenny's estimate rate per page seems unusually low. The number of pages of medical records that can be reviewed in an hour varies widely by the content of the

medical records. Typed reports can be read more quickly than handwritten reports. Tests that show normal results are usually less important than tests that show abnormal results. Medical authorizations provide no information about medical conditions. While an average rate of pages per hour could account for this variability, Ms. Morse has not provided persuasive evidence to support the proposed rate for Dr. Tenpenny. Dr. Tenpenny's proposed rate is not in line with the speed of other doctors or of attorneys, who also must review medical records.

Although Ms. Morse's record contains reports from many doctors, her medical history just before and just after the hepatitis B vaccination is more limited. Dr. Tenpenny should have focused on the most important period of time. A reasonable, if conservative, number of hours for reviewing Ms. Morse's medical records and simultaneously preparing a chronology is 13 hours.

Dr. Tenpenny is also entitled to an additional 1 hour for discussions with Mr. Conway and reviewing one article. Although Dr. Tenpenny suggests that the conference with Mr. Conway took one hour, Mr. Conway records only 0.60 hours for a conference with Dr. Tenpenny and drafting a memo following the conference. See entry for June 23, 2008.

Thus, a reasonable amount of time for all Dr. Tenpenny's work in this case is 14 hours. Dr. Tenpenny charges $325 per hour. Respondent did not specifically object to Dr. Tenpenny's billing rate, although when respondent filed his response, Ms. Morse had not yet presented Dr. Tenpenny's curriculum vitae. See Resp't Resp., filed Jan. 22, 2009, at 3-5.

Ms. Morse has not submitted any evidence to show that this rate is reasonable. For 14 hours of work, however, $325 per hour is probably a reasonable rate. For 44 hours of work, $325 per hour would be excessive because a doctor who earns $325 per hour is expected to complete the task in much less than 44 hours.

In sum, for Dr. Tenpenny, a reasonable amount of costs is $4,550.00 (14 * $325).

C. Dr. Morgan

In addition to retaining Dr. Tenpenny, Ms. Morse also retained Dr. Morgan. Ms. Morse seeks compensation for $1,756.85 in fees and costs for Dr. Morgan. The primary component of Dr. Morgan's bill is five hours of his time at a rate of $350 per hour. Pet'r App'n, Tab B, at 25.[2]

[2] Dr. Morgan's method of recording time does not comply with the best practices for presenting accurate information. Although the problems with Dr. Morgan's invoice are not as stark as the problems with Dr. Tenpenny's invoice, Dr. Morgan still should present more information. Dr. Morgan's invoice lumps together work performed over two weeks. Daily entries are preferred. Dr. Morgan's invoice is also vague. For example, one item is "Review & Interpretation of Documents Received." The word "documents" provides almost no information about what Dr. Morgan was reviewing. It would be better if Dr. Morgan identified the material, such as saying, for example, "reviewed exhibits 1-5."

Respondent's objection to Ms. Morse's retention of Dr. Morgan is that Ms. Morse did not justify the use of Dr. Morgan after Ms. Morse had already retained Dr. Tenpenny. Resp't Resp., filed Jan. 22, 2009, at 5-6.

In reply, Ms. Morse explained that Dr. Morgan specializes in neurology, unlike Dr. Tenpenny. Because Ms. Morse believed that her injuries were neurological, Dr. Morgan would be more qualified to present an expert opinion. Pet'r Reply, filed Jan. 29, 2009, at 9-10. Ms. Morse also asserted that Dr. Tenpenny provided her summary to Dr. Morgan and that Dr. Tenpenny's summary permitted Dr. Morgan to work more quickly. Pet'r Clarification, filed April 14, 2009, at 4. (Due to its vagueness, Dr. Morgan's invoice does not confirm this assertion.)

The amount of time spent by Dr. Morgan and his hourly rate is reasonable. If a hearing were held, Ms. Morse's case would probably have been strengthened by testimony from Dr. Morgan. Her decision to retain a neurologist is reasonable. Thus, Ms. Morse will be awarded the full amount requested for Dr. Morgan, $1,756.85.

Ms. Morse's retention of Dr. Morgan raises additional issues about the retention of Dr. Tenpenny. Given that Ms. Morse asserted that the hepatitis B vaccine caused her a neurological injury, retaining Dr. Tenpenny, who is not a neurologist, may be questioned fairly. The answer to this question is that Dr. Tenpenny (or her colleague) treated Ms. Morse. See exhibit 14 at 27 (test for toxic metals), exhibit 39 at 49 (same). There may be some utility to obtaining a report from a treating doctor, although this usefulness is limited because Dr. Tenpenny did not express an opinion regarding causation when Dr. Tenpenny was treating Ms. Morse. See Graves v. Sec'y of Health & Human Servs., No. 02-1211V, 2008 WL 4763730 *6 (Fed. Cl. Spec. Mstr. Oct. 14, 2008), remanded for additional fact-finding, 2009 WL 989772 (April 9, 2009). If Dr. Tenpenny had not been a treating doctor, then the decision to retain her may have been considered unreasonable entirely.

Exploring these points in more detail is unnecessary. As explained above, a reasonable cost for Dr. Tenpenny is $4,550.00. A reasonable cost for Dr. Morgan is $1,756.85. The total reasonable cost for these two experts is $6,306.85. If Ms. Morse had retained only Dr. Morgan and had not retained Dr. Tenpenny, the reasonable cost for Dr. Morgan's work may have been approximately $6,300.00. So, in effect, Ms. Morse has divided a reasonable amount between two doctors.

An award of approximately $8,000 in costs (as calculated below) aligns Ms. Morse's case with other comparable cases. Analogous cases include those cases in which petitioner obtained an expert report but did not proceed to a hearing. While every case differs to some degree, a broad-brush comparison with these other cases shows that an award of approximately $8,000 in total costs is reasonable. See Saxton, 3 F.3d at 1521 (authorizing special masters to use their experience in determining a reasonable amount of attorneys' fees and costs).

D. Summary for Costs

Ms. Morse is awarded the following items of cost:

Item	Amount
Attorneys' Costs - primary stage	$1,367.41
Attorneys' Costs - fee dispute	$18.62
Attorneys' Costs - Dr. Tenpenny	$4,550.00
Attorneys' Costs - Dr. Morgan	$1,756.85
Ms. Morse's Costs - personal expenses	$307.07
TOTAL	$7,999.95

III. Conclusion

A reasonable amount of attorneys' fees is **$40,894.20.** A reasonable amount of costs is **$7,995.95.** The Clerk's Office is instructed to enter a judgment in accord with this decision unless a motion for review is filed.

IT IS SO ORDERED.

S/ Christian J. Moran

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Christian J. Moran
Special Master