IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS

WAYNE PESTKA, Special Administrator of the Estate of KELSEY LYNN SHORT, deceased.	*	No. 06-708
	*	Special Master Christian J. Moran
	*	Filed: August 30, 2011
Petitioner,	*	
v.	*	Interim attorneys' fees and costs, reasonable hourly rate for attorney, lack of evidence supporting hourly rate for an expert, need for specificity in objections to fee application.
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Robert T. Moxley, Robert T. Moxley, P.C., Cheyenne, WY, for petitioner; Michael P. Milmoe, United States Dep't of Justice, Washington, DC, for respondent.

DECISION AWARDING ATTORNEYS' FEES AND COSTS ON AN INTERIM BASIS[1]

[1] 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 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).

Mr. Pestka seeks compensation pursuant to the National Childhood Vaccine Injury Compensation Program, for which the statutory basis is found at 42 U.S.C. § 300aa—10 et seq. (2006). Mr. Pestka has brought two claims – first that an influenza ("flu") vaccine administered to his daughter, Kelsey Short, in 1998 caused her to develop a condition known as acute disseminated encephalomyelitis ("ADEM"). Mr. Pestka's second claim is that a 1999 flu vaccination caused Kelsey's unfortunate and untimely death. One hearing was held and another hearing is anticipated.

While the question of whether Mr. Pestka is entitled to any compensation remains pending, he filed a motion requesting an award of attorneys' fees and costs on an interim basis. The Secretary opposes Mr. Pestka's motion. The Secretary argues that any award on an interim basis is not appropriate. Additionally, the Secretary argues that even if an award on an interim basis were to be made, Mr. Pestka has requested an amount that is excessive.

As discussed below, many cases have considered the issues raised in Mr. Pestka's motion for an award of attorneys' fees on an interim basis. On the first topic, whether it is appropriate to award attorneys' fees and costs on an interim basis, special masters have universally rejected respondent's argument. In accord with the analysis in those decisions, Mr. Pestka is awarded some amount of attorneys' fees and costs on an interim basis.

The amount awarded to Mr. Pestka, however, is reduced from the amount that he requested. Several cases, including cases decided by the Federal Circuit, indicate that the hourly rate proposed as a basis of compensating Mr. Pestka's attorney (Mr. Moxley), is not reasonable. Additionally, Mr. Pestka has not supplied sufficient evidence to support an award for many costs. Mr. Pestka is awarded **$21,175.27**.

PROCEDURAL HISTORY

Mr. Pestka filed his petition and six exhibits of medical records in October 2006. Over the next six months, Mr. Pestka filed additional medical records. When this process was completed, the Secretary filed her report pursuant to Vaccine Rule 4 on June 12, 2007. She maintained that Mr. Pestka was not entitled to compensation because, among other reasons, he had not produced the report of an expert stating that the flu vaccine caused either Kelsey's ADEM in 1998 or her death in 1999.

Mr. Pestka submitted the first report of his first expert, Dr. Marcel Kinsbourne, on February 11, 2008, which is approximately 16 months after the petition was filed. Dr. Kinsbourne opined that the flu vaccine caused Kelsey's 1998 injury and her 1999 death. Exhibit 14. In September 2008, Mr. Pestka filed the first report from a second expert, Dr. Patrick Barnes, and the first report from a third expert, Dr. M. Anthony Verity.

On December 1, 2008, the Secretary filed reports from two experts. Dr. Neal Halsey, an expert in pediatric infectious diseases, disagreed with the opinions presented by Dr. Kinsbourne. Dr. Lucy Rorke Adams, a pediatric neuropathologist, disagreed with the assertion that the 1999 flu vaccination caused Kelsey's death.

By May 2009, the parties were attempting to schedule a hearing. Due to the number of doctors and their locations, mutually convenient dates for a hearing were difficult to identify. Eventually, October 15-16, 2009 were found as acceptable dates. Thus, an order was issued setting the hearing for then and scheduling a sequence of supplemental reports.

In August 2009, Mr. Pestka filed a supplemental report from Dr. Marcel Kinsbourne. Exhibit 36. The Secretary filed a supplemental report from Dr. Rorke Adams on September 1, 2009.

Meanwhile, a conflict developed in the schedule of Mr. Pestka's attorney. Hence, Mr. Pestka requested a delay in the hearing that been scheduled for October 15-16, 2009. Mr. Pestka's request was granted.

After the hearing was rescheduled, the parties filed more supplemental reports. In January 2010, Mr. Pestka responded to Dr. Rorke Adams by a supplemental report from Dr. Verity. Exhibit 37. The Secretary addressed this report with another report from Dr. Rorke Adams. Exhibit O.

The hearing was held on March 18-19, 2010. The parties filed several rounds of briefs regarding entitlement. Whether Mr. Pestka is entitled to compensation remains unresolved. This issue will be decided in a forthcoming decision.

The present decision adjudicates Mr. Pestka's motion for an award of attorneys' fees and costs on an interim basis, which was filed on April 11, 2011.

The parties submitted additional briefs and the motion became ready for adjudication on July 29, 2011.

ANALYSIS

Broadly speaking, there are two issues. The first is whether Mr. Pestka should receive any attorneys' fees and costs at this time. The second question is assuming that some award is appropriate, what is a reasonable amount.

I. Should Mr. Pestka Be Awarded Attorneys' Fees and Costs on an Interim Basis?

In Avera v. Sec'y of Health & Human Servs., the Federal Circuit stated that awards of attorneys' fees and costs on an interim basis are permitted in the Vaccine Program. 515 F.3d 1343, 1352 (Fed. Cir. 2008). For some period of time, there was almost no litigation over the meaning of Avera.

However, more recently, the Secretary has started to oppose interim awards, maintaining either that Avera was wrongly decided or that Avera should be limited to a narrow set of facts. The first decision of a special master to address the Secretary's position rejected it. Hibbard v. Sec'y of Health & Human Servs., No. 07-446, 2011 WL 1135894 (Fed. Cl. Spec. Mstr. March 7, 2011). Since that decision, other special masters have considered the Secretary's position and also found the Secretary's arguments to lack merit. See Hirmiz v. Sec'y of Health & Human Servs., No. 08-371, 2011 WL 2680721 (Fed. Cl. Spec. Mstr. June 13, 2011) (collecting cases).[2]

For the reasons set forth in those decisions, there is authority for special masters to award attorneys' fees and costs on an interim basis. A subsidiary question is whether an interim award should be made in Mr. Pestka's case, which is a matter of discretion. This question turns on the circumstances of Mr. Pestka's case.

[2] Although the Secretary did not file a motion for review in the cases cited in the text, the Secretary has sought review of another special master's decision awarding attorneys' fees and costs on an interim basis. McKellar v. Sec'y of Health & Human Servs., No. 08-841.

An interim award is appropriate. The Secretary has not questioned either Mr. Pestka's good faith or the reasonable basis for the petition. Once Mr. Pestka satisfies the standards for good faith and reasonable basis, he is eligible for an award of attorneys' fees and costs. See 42 U.S.C. § 300aa—15(e) (2006). There appears to be little reason to delay all payment to wait for the entitlement phase to conclude. Although Mr. Pestka's case has not proceeded smoothly for reasons primarily attributable to Mr. Pestka, the case has been pending for more than three years. Thus, Mr. Peskta will be awarded some amount of attorneys' fees and costs on an interim basis.

II. What Is A Reasonable Amount of Attorneys' Fees and Costs?

The second issue is determining a reasonable amount for attorneys' fees and costs. Although each component is discussed separately, a theme common to both sections is an attempt to provide some compensation to Mr. Pestka now. It is conceivable that a more intensive analysis of the material submitted would produce a decision awarding more compensation. However, this additional use of time and resources would come at a cost of delaying Mr. Pestka's award as well as delaying adjudication in other cases. The undersigned has attempted to balance the competing demands for judicial attention that come from every litigant, including Mr. Pestka. See Landis v. North Am. Co., 299 U.S. 248, 254 (1936) (stating that every court has an inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); Amado v. Microsoft Corp., 517 F.3d 1353, 1358 (Fed. Cir. 2008) (stating "District courts manage hundreds of civil and criminal cases at any given time. For this reason, they are afforded broad discretion to control and manage their dockets, including the authority to decide the order in which they hear and decide issues pending before them."). The goal of expediting some award of attorneys' fees and costs to Mr. Pestka underlies the analysis in the following sections.

A. Attorneys' Fees

1. Background

As with the issue of whether interim awards are permitted at all, the parties have significant points of dispute as to the amount of any award. However, unlike the previous issue in which the Secretary's position was inconsistent with decisions of special masters, it is Mr. Pestka who has made demands that are out of line with previous decisions.

Litigation of the fees for Mr. Pestka's attorney, Mr. Moxley, has reached the Federal Circuit in Avera and Masias. Avera, in addition to stating that interim awards are permitted, provided guidance for determining the reasonable amount of attorneys' fees. The long-established practice for finding the reasonable amount of attorneys' fees had been (and still is) to use the lodestar approach in which a reasonable number of hours is multiplied by a reasonable hourly rate. See Perdue v. Kenny A. ex re. Winn, 130 S.Ct. 1662, 1672 (2010); Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517 (Fed. Cir. 1993).

To the lodestar analysis, Avera added additional details about how to find the reasonable hourly rate. Marty and Kellie Avera claimed that Mr. Moxley should be compensated at a rate prevailing in the forum where the case was pending. For all cases in the Vaccine Program, the forum is the District of Columbia because the United States Court of Federal Claims, which oversees all cases in the Office of Special Masters, is located in Washington, D.C. As evidence of the rate for attorneys in Washington, D.C., Mr. and Ms. Avera relied upon the Laffey matrix.

The Federal Circuit held that finding the forum rate was one step in the process of determining the reasonable hourly rate. The Federal Circuit adopted a rule announced in Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist v. EPA, 169 F.3d 755, 758 (D.C. Cir. 1999), stating that attorneys' fees are based on the prevailing forum rate, except "where the bulk of the work is done outside the jurisdiction of the court and where there is a very significant difference in compensation favoring D.C." In Avera, the Federal Circuit explicitly refrained from determining whether the Laffey matrix set the hourly rate for attorneys in the Vaccine Program.

Hence, Avera established a three-step process for determining attorneys' fees that was used by (the undersigned) special master in Masias. The first step was to determine a reasonable hourly rate for Mr. Moxley's work in Cheyenne, Wyoming. Information considered in this step included affidavits from attorneys in Wyoming and various cases awarding attorneys' fees to attorneys from Wyoming. An evaluation of this information was the basis for finding that the following rates were reasonable for an attorney with Mr. Moxley's skills in Cheyenne, Wyoming:

Time	Hourly Rate
July 2001 to May 2002	$175
July 2005 to March 2006	$205
July 2006 to April 2007	$210

July 2007 to May 2008	$215
June 2008 to April 2010	$220

Masias, 2009 WL 1838979, at *5-13 & *45 (Table 6).[3]

For the second step, the special master in Masias determined a reasonable rate for Washington, D.C. Masias found that the Laffey matrix did not establish the reasonable hourly rate for attorneys in Washington, D.C. because Laffey contemplates a set of skills not needed in the Vaccine Program. Masias, 2009 WL 1838979, at *13-24.

The third and final step was to compare the reasonable local rate to the reasonable forum rate. Masias found that there was a "very significant difference" between the two rates, and, thus, Mr. Moxley was entitled to be compensated at the lower rate. Masias, 2009 WL 1838979, at *24-31.

Mr. Masias filed a motion for review. The Court of Federal Claims denied the motion for review in an unpublished decision issued on December 10, 2009. Mr. Masias then appealed to the Federal Circuit.

The Federal Circuit affirmed the decision to deny the motion for review, effectively affirming the special master's determinations. The Federal Circuit specifically rejected arguments that the special master set an hourly rate for Cheyenne, Wyoming that was too low. 634 F3d at 1289-94.

2. Hourly Rate in Mr. Pestka's Case

Although Masias is a decision by the Federal Circuit, Mr. Pestka largely omits any extended discussion of it. With regard to the Secretary's argument that Mr. Moxley should be awarded rates approved in Masias, Mr. Pestka states that those rates are "outdated." Pet'r Reply at 4. Mr. Pestka requests that Mr. Moxley be compensated at rates higher than the rates award in Masias.[4]

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[3] Time periods during which Mr. Moxley did not work on Mr. Pestka's case have been eliminated for simplicity.

[4] Mr. Pestka has submitted three tables, containing five proposals. The first table uses "historical Laffey rates." The second table uses "historical 'local rates.'" The third table contains three permutations based upon "current" rates, varying by whether the current rate is the local rate, the locality adjusted Laffey matrix rate, or

An initial question is whether attorneys should be compensated at their current rate or the historical rate. For example, Mr. Moxley attests that he charges clients $300 per hour. Thus, Mr. Pestka argues that Mr. Moxley should be compensated at this rate for all of the work performed by Mr. Moxley in this case, even the work performed in 2006, when Mr. Moxley charged clients $200 per hour. Mr. Pestka reasons that the delay in compensation justifies this method and cites Perdue, 130 S.Ct. at 1675, in support. Pet'r Mot. at 8-10 & at 13 (table 3). Mr. Pestka further argues that Perdue overrules cases that have refrained from compensating attorneys at rates equally their current hourly rate, such as Applegate v. United States, 52 Fed. Cl. 751, 770 (2002). Pet'r Mot. at 8-10. The Secretary overlooks this issue in her response.

Although Mr. Pestka's argument has some logical appeal, it is foreclosed by another Supreme Court case, Library of Congress v. Shaw, 478 U.S. 310 (1986), and a Federal Circuit case, Chiu v. United States, 948 F.2d 171 (Fed. Cir. 1991). In Shaw, the Supreme Court addressed whether an award of attorneys' fees, made in favor of a victim of race discrimination in employment, could be increased to account for a delay in the payment of attorneys' fees. The Court found that such an increase was not permitted because an award of interest required the express approval of Congress. Without such an express consent, the doctrine of sovereign immunity precluded the assessment of interest against the United States.

In Chiu, an employee of the federal government was entitled to an award of attorneys' fees pursuant to the Back Pay Act and the Equal Access to Justice Act ("EAJA"). The Claims Court used the $75 per hour that was set in the EAJA, adjusted that rate to $102.73 per hour for inflation, "and applied that rate to all of the attorney's hours of work throughout the years of litigation." 948 F.2d at 712. Relying primarily upon Shaw, the Federal Circuit vacated the award and remanded for new calculations. The Federal Circuit stated "the post-performance adjustment to the attorney fee rate constitutes payment for the time value of money and, thus, the no-interest rule bars the award unless expressly and unambiguously authorized in the EAJA. We are further convinced that the EAJA does not mandate such adjustments to the hourly fee rate." 948 F.2d at 719.[5]

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the current Laffey matrix rate. All of these proposals are premised upon an hourly rate for Mr. Moxley that exceeds the rate awarded in Masias.

[5] The Federal Circuit followed Chiu in Hubbard v. United States, 480 F.3d 1327, 1334 (Fed. Cir 2007).

Whether Perdue requires the Federal Circuit to revise its holding in Chiu that attorneys are compensated using historic (not current) rates when seeking attorneys' fees from the United States is a question for the Federal Circuit. See Strickland v. United States, 423 F.3d 1335, 1338 & n. 3 (Fed. Cir. 2005). Until that time, attorneys should be awarded compensation at historic rates as explained in Chiu. See Hocraffer v. Sec'y of Health & Human Servs., No. 99-533V, 2011 WL 3705153, at *18-19 (Fed. Cl. Spec. Mstr. July 25, 2011), motion for review filed (Aug. 24, 2011).

The next step is evaluating information related to the historic rate of compensation. The actual evidence (using "evidence" in a strict sense) is scant. Mr. Pestka argues that Mr. Moxley's current rate is $300 per hour. Pet'r Mot. at 10. This argument is supported by Mr. Moxley's affidavit, which was filed with the reply. Exhibit 56. Other information includes a citation to a Wyoming Supreme Court case, Ultra Resources, Inc. v. Hartman, 2010 WY 36, ¶ 164, 226 P.3d 889, 939 (Wyo. 2010), and charts showing changes of cost of living in Wyoming. Exhibit 601.

An evaluation of this material starts with the Supreme Court's statement that "the burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v . Stenson, 465 U.S. 886, 895 n.11 (1984). The Federal Circuit quoted this passage and stated that a "trial court should demand adequate proof from individuals familiar with the market of the community billing rate charged by attorneys of equivalent skill and experience performing services of similar complexity." Raney v. Federal Bureau of Prisons, 222 F.3d 937, 938 (Fed. Cir. 2000). These cases indicate that although Mr. Moxley's own affidavit has some bearing on trying to determine the reasonable hourly rate for attorneys in Cheyenne, Wyoming, his affidavit is not conclusive evidence by itself. Thus, information other than Mr. Moxley's affidavit must be sought.

A persuasive source of information is Masias. In Masias, the record about reasonable hourly rates in Cheyenne was much more robust. See Masias, 2009 WL 1838979, at *5-13 & *45 (Table 6).[6] Additionally, the Court of Federal

[6] The information in Masias is not included in the record in Mr. Pestka's case. However, both Mr. Pestka (who shares his attorney with Mr. Masias) and the Secretary could have submitted the information. Additionally, due to special

Claims and the Federal Circuit affirmed the assessment of this material. Thus, after the Federal Circuit's affirmance, Masias establishes presumptively reasonable rates of compensation for Mr. Moxley for the period of time covered by Masias.

Mr. Pestka fails to offer any persuasive reason for significantly deviating from the result reached in Masias. Mr. Pestka argues that Masias was based on an "obsolete view of Wyoming Supreme Court authority." Mr. Pestka suggests that the recently decided case of Ultra Resources is in conflict with Morrison v. Clay, 2006 WY 161, ¶ 19, 149 P.3d 696, 702 (Wyo. 2006), which was cited in Masias. Pet'r Mot. at 10 & n.20. Actually, there is little tension between the cases. In Ultra Resources, some (but not all) of the plaintiff's attorneys charged and were paid $400 an hour for some (but not all) of the time the litigation was pending. The Wyoming Supreme Court affirmed the district court's award of attorneys' fees at this rate. The Supreme Court reasoned that "this case involved unique and extremely complicated matters of oil and gas litigation and accounting. In addition, the claims involved matters of obviously significant value. We can confirm that the file in this case was massive and the issues were complex." Ultra Resources, 2010 WY 36, ¶ 164, 226 P.3d at 939. These factors are not present in Mr. Pestka's case, which seems to be a more routine type of litigation roughly equivalent to Morrison.

For these reasons, the rates that were used in Masias will continue to be used in Mr. Pestka's case. The remaining two steps are to determine the reasonable hourly rates prevailing in the forum (Washington, D.C.) and to compare the two rates.

An extensive discussion of these two steps is not needed. Masias found reasonable hourly rates for Washington, D.C. attorneys in the Vaccine Program. The Federal Circuit ruled that this analysis was not arbitrary.[7] Mr. Pestka did not submit any evidence suggesting that the fact-finding in Masias was inaccurate.

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masters' inquisitorial rule, see Munn v. Sec'y of Health & Human Servs., 21 Cl. Ct. 345, 349 (1990) (discussing legislative history), aff'd 970 F.2d 863 (Fed. Cir. 1992), the undersigned also could have added that material to the record.

[7] Separately, another special master found roughly equivalent rates for Washington, D.C. Rodriguez v. Sec'y of Health & Human Servs., No. 06 -559, 2009 WL 2568468, at *15 (Fed. Cl. Spec. Mstr. July 27, 2009). The Federal Circuit also ruled that this fact-finding was not arbitrary. Rodriguez, 632 F.3d 1381, 1384-86 (Fed. Cir. 2011).

Thus, if specific findings were needed here, the forum rate would be imported from Masias / Rodriguez.

More specific findings are not needed because Masias also found, as the third step of the Avera sequence, that there was a very significant difference between the reasonable rate in Cheyenne, Wyoming and the reasonable rate in Washington, D.C. The Federal Circuit also affirmed this finding. Masias, 634 F.3d 1283 (Fed. Cir. 2011).[8] Consequently, as a practical matter, the rate of compensation for Mr. Pestka's attorney is a reasonable rate for attorneys in Cheyenne, Wyoming.[9]

3. Reasonable Number of Hours

After the reasonable rate of compensation is found, the next step in determining the lodestar is to set the reasonable number of hours. Here, Mr. Pestka seeks compensation for 173.50 hours of Mr. Moxley's time. Exhibit 50 (attorneys' fees invoice); Pet'r Mot. at 12-13. Mr. Pestka presented a summary, which the Secretary did not dispute:

	Span of Time	Number of Hours
1	July 2001 to May 2002	2.9
2	July 2005 to March 2006	16.6

[8] A more extended discussion about how the rates should be compared appears in Hall v. Sec'y of Health & Human Servs., 640 F.3d 1351 (Fed. Cir. 2011).

[9] As mentioned previously, Mr. Pestka requests compensation for Mr. Moxley at various rates, including rates set by the Laffey matrix. Such requests appear to be foreclosed by Federal Circuit precedents that have turned away petitioner's reliance on the Laffey matrix. Masias, 634 F.3d at 1288 & n.6; Rodriguez, 632 F.3d at 1385. Thus, the present decision is intended to be the undersigned's final decision on Mr. Moxley's hourly rates in this case. Absent an intervening change in the law, the undersigned does not intend to reconsider or to reevaluate the issue of Mr. Moxley's hourly rate. Cf. Shaw v. Sec'y of Health & Human Servs., 609 F.3d 1372, 1376-77 (Fed. Cir. 2010) (noting that special master's decisions awarding attorneys' fees and costs on an interim basis constitute final decisions that are subject to a motion for review filed pursuant to Vaccine Rule 13(b)). Additionally, any requests for an award of attorneys' fees to compensate counsel for litigating his hourly rate, an issue that the Federal Circuit has already decided, will be examined carefully.

3	July 2006 to April 2007	11.3
4	June 2007 to May 2008	20.1
5	June 2008 to April 2010	83.1
6	June 2010 to December 2010	39.5
	TOTAL	173.5

Pet'r Mot. at 13.

The Secretary argues that such an amount of time is excessive. Resp't Opp'n at 8-9. In reply, Mr. Pestka argues that the Secretary's objections should be ignored because the Secretary has failed to meet her burden to present "'objections with particularity and clarity.'" Pet'r Reply at 3, quoting Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc., 776 F.2d 646, 664 (7th Cir. 1985). In making this argument, Mr. Pestka overlooks that a "Special Master has an independent responsibility to satisfy himself that the fee award is appropriate and not limited to endorsing or rejecting respondent's critique." Savin v. Sec'y of Health & Human Servs., 85 Fed. Cl. 313, 315 (Fed. Cl. 2008) (citation omitted).

Savin, however, should not be interpreted so broadly that the Secretary is freed from an obligation to present some basis for her objections to a request for attorneys' fees. Although the Secretary argues that an unreasonable amount of time was spent "litigating this relatively straight-forward death case," Resp't Opp'n at 9, the Secretary does not identify any tasks that took an excessive amount of time. Even if the Secretary does not present an exhaustive list, the Secretary should be able to point to examples that illustrate the general objection. This is not a taxing burden as the Secretary has done so in other fee disputes. E.g. Broekelschen v. Sec'y of Health & Human Servs., No. 07-137, 2011 WL 2531199, at *5 (Fed. Cl. Spec. Mstr. June 3, 2011), motion for review filed (June 16, 2011). Specific examples of allegedly excessive amounts of hours may focus the special master's attention and provide an opportunity for the fee-applicant to explain the reasonableness of the activities.

Despite no specific objections from the Secretary, the undersigned has reviewed the fee application to determine whether the number of hours requested fall within a wide zone of reasonableness as provided in Savin. For example, the first period of time for which Mr. Pestka seeks compensation for Mr. Moxley is July 2001 to May 2002. Mr. Moxley's time sheets show that he was working with an attorney from Minnesota about a potential medical malpractice claim. Given that Mr. Pestka's petition in this case was not filed until 2006, the 2.9 hours devoted to pursuing a medical malpractice claim is not credited as work being

performed to advance Mr. Pestka's case in this forum. See Sabella v. Sec'y of Health & Human Servs., 86 Fed. Cl. 201, 212 (2009) (affirming special master's elimination of hours spent on medical malpractice claim). Thus, the 2.9 hours are removed.

Once Mr. Pestka started pursing compensation in the Vaccine Program, the initial tasks of Mr. Moxley and his staff were gathering medical records, reviewing those records and drafting the petition. These tasks were accomplished during periods two and three, for which Mr. Pestka has requested compensation for Mr. Moxley in the amount of 16.6 hours and 11.3 hours, respectively.

The Secretary did not identify any tasks on which an arguably unreasonable number of hours was spent. An independent review has also not suggested that an excessive amount of time was spent. Although the amount of time spent in these phases may be higher than the amount of time spent in other cases, Kelsey's medical history was lengthy. Mr. Pestka filed more than 1,000 pages of records (stacking approximately six inches high). All of these records have at least some potential relevance to Kelsey's two claims that a 1998 flu vaccination and a 1999 flu vaccination caused her harm.[10] Thus, a relatively lengthy amount of time for reviewing medical records and filing the petition is reasonable.

The next phase of the case was presenting reports from experts. Most of the work in period four was related to this topic. Mr. Moxley initially consulted Dr. Kinsbourne, a person with training in pediatric neurology. As the case evolved, Mr. Moxley also consulted Dr. Barnes, a neuroradiologist, and Dr. Verity, a pathologist. The Secretary has not specifically argued that the retention of three experts was unreasonable. In any event, the participation of Dr. Kinsbourne and Dr. Verity could not be questioned reasonably because Mr. Pestka presents a claim that Kelsey was injured by the 1998 flu vaccination, a topic about which Dr. Kinsbourne opined, and the claim that1999 flu vaccination caused Kelsey's death, a topic on which Dr. Kinsbourne and Dr. Verity both testified. The remaining expert is Dr. Barnes, but the Secretary did not argue that his participation was unreasonable. Thus, Mr. Moxley's work in retaining Dr. Barnes is accepted as reasonable.

In connection with Dr. Verity's and Dr. Barnes' review of Kelsey's case, Mr. Moxley's time records indicate that he was involved in the process of

[10] The 1,000 pages of records for Kelsey do not include extensive records from rehabilitation, which are sometimes filed in Vaccine Program cases.

obtaining original MRIs (not just the reports of MRIs) and slides from her autopsy. Details from the time records show that Mr. Moxley became involved only when initial attempts to obtain this material by a paralegal were not successful. Thus, although Mr. Moxley's efforts increased the number of hours, they were reasonable under circumstances. Consequently, Mr. Moxley's work in the fourth period (20.1 hours) is credited as reasonable.

In the fifth period, Mr. Moxley continued his work with the trio of experts and also conducted the trial. During this time, some question about the reasonableness of Mr. Moxley's work starts. At least two issues warrant some consideration.

The first area of concern relates to how Mr. Pestka responded to a position taken by the Secretary's expert, Dr. Halsey. Dr. Halsey's first report, which was filed Dec. 1, 2008, disclosed his opinion that Kelsey suffered an "anoxic encephalopathy." Exhibit A at 6. Dr. Halsey repeated this opinion in his second report, which was filed February 27, 2009. Exhibit E at 3. Subsequently, a significant portion of the March 18-19, 2010 hearing was devoted to this issue. The parties continued this dispute in their post hearing briefs.

After the final briefs were filed and the case was submitted for adjudication, Mr. Moxley communicated with one of the doctors who cared for Kelsey during her final hospitalization. The doctor wrote a letter, saying that Kelsey did not suffer hypoxia. Mr. Pestka filed this letter as exhibit 58 on July 1, 2011.

Submitting evidence after the hearing is completed, the record is closed, and the briefs are filed is highly unusual. At a minimum, another hearing will be held to permit the Secretary an opportunity to question the treating doctor. Additional proceedings will delay adjudication of Mr. Pestka's case. Moreover, the testimony of the treating doctor may have such persuasive force that it may, essentially, resolve whether Kelsey had a hypoxic episode. If so, hours of litigation were not needed.

As noted, Dr. Halsey's opinion that Kelsey suffered from anoxic encephalopathy was properly disclosed before the hearing. Mr. Pestka had more than one year to present a response before the hearing. Mr. Pestka has not yet explained why Mr. Moxley did not seek clarification from the treating doctor until more than a year after the hearing. Mr. Pestka's response may be provided in a final application for fees.

It is important to note that Mr. Pestka filed the treating doctor's letter after the Secretary filed her opposition to Mr. Pestka's pending motion for attorneys' fees. Thus, the Secretary could not raise any specific objection to the efficiency with which Mr. Pestka's attorney litigated this case based upon the very late disclosure of additional evidence. Consequently, it seems appropriate to defer a more in depth evaluation of the course of litigation until the case is complete.

The second (and less significant) area of concern is Mr. Moxley's efforts to coordinate among Dr. Kinsbourne, Dr. Verity, and Dr. Barnes. In supporting the number of hours requested by Dr. Kinsbourne, Mr. Pestka contends that "he acted as a consulting expert." Pet'r Reply at 5. A review of Mr. Moxley's time sheets shows extensive discussions with Dr. Kinsbourne. Special masters have usually found that attorneys who are experienced in the Vaccine Program (that is, the attorneys who command a higher hourly rate) do not routinely require extensive assistance of a consulting expert. Riggins v. Sec'y of Health & Human Servs., No. 99-382, 2009 WL 3319818, at *8-11 (Fed. Cl. Spec. Mstr June 15, 2009), aff'd, 406 Fed. Appx. 479 (Fed. Cir. 2011); Lamar v. Sec'y of Heath & Human Servs., No. 99-584, 2008 WL 3845157, at *14 (Fed. Cl. Spec. Mstr. July 30, 2008); see also Sabella 86 Fed. Cl. at , 224-25 (affirming special master's reduction in cost for a non-testifying consultant). This is not a hard and fast rule and there may be occasions when it is reasonable for an experienced attorney to retain a consulting expert. Whether Mr. Pestka's case is one such case may be discussed as part of an application for final fees.

For these reasons, there is no determination about the reasonableness of Mr. Moxley's work after May 2008. An exercise of discretion and case management suggests that this issue may be better resolved after the entitlement phase of the case concludes.

The lodestar determination for Mr. Moxley's work is as follows:

	Span of Time	Number of Hours	Hourly Rate	Subtotal
1	July 2001 to May 2002	0.0	$175	0.00
2	July 2005 to March 2006	16.6	$205	$3,403.00
3	July 2006 to April 2007	11.3	$210	$2,373.00
4	June 2007 to May 2008	20.1	$215	$4,321.50
	TOTAL			$10,097.50

Mr. Pestka is awarded this much compensation for Mr. Moxley's services from July 2001 to May 2008.

4. Support Staff

Mr. Pestka also seeks compensation for work performed by Julie Hernandez and Carol Gollobith. Ms. Hernandez worked for Mr. Moxley as a law school student and later as a recent graduate of law school. Ms. Gollobith works for Mr. Moxley as a paralegal. Mr. Pestka requested compensation at a rate of $115 per hour for Ms. Hernandez and $100 per hour for Ms. Gollobith, regardless of when the work was actually performed. Pet'r Mot. at 12.

A review of the time sheets shows that Ms. Hernandez performed all her work before August 2005. Most of Ms. Gollobith's work was also done before May 2008. For the entries after May 2008, Ms. Gollobith's work was relatively limited and certainly reasonable. Thus, Mr. Pestka is awarded all the compensation that he requested for Ms. Hernandez and Ms. Gollobith, which is $6,251.50.

5. Summary for Attorneys' Fees

For the period from July 2001 until May 2008, Mr. Pestka is awarded $10,097.50 for Mr. Moxley's work. For the period from July 2001 to December 2010, Mr. Pestka is awarded $6,251.50 for the work of staff supporting Mr. Moxley. Thus, Mr. Pestka is awarded **$16,349** in attorneys' fees.

This decision is intended to be a final decision for the periods covered by this decision. The undersigned does not intend to revisit either the hourly rate or the number of hours for the periods addressed in this decision.

B. Costs

Mr. Pestka seeks reimbursement of costs expended both by Mr. Moxley on his behalf and by himself. Mr. Pestka's personal share is $9,319.03. Mr. Moxley's share is $36,987.24. The total amount requested is $46,306.27. Pet'r Mot. at 13. The bulk of the costs is for amounts paid to Dr. Kinsbourne, Dr. Verity, and Dr. Barnes. See id.; exhibit 51 (cost invoice for Mr. Moxley), exhibit 54 (general order #9 statement of client's costs); see also exhibit 49 (invoice from Dr. Kinsbourne); exhibit 52 (invoice from Dr. Verity); and exhibit 53 (invoice from Dr. Barnes).[11]

The Secretary objected to the amount of costs requested. The Secretary's objection was based upon both the number of hours, which the Secretary argued is "clearly excessive," and the hourly rate requested. With regard to the latter point, the Secretary argued that the fee applicant bears the burden of submitting evidence to demonstrate the reasonableness of the expert's requested hourly rate. Resp't Opp'n, citing Simon v. Sec'y of Health & Human Servs., No. 05-941V, 2008 WL 623833, at *2 (Fed. Cl. Spec. Mstr. Feb. 21, 2008) (further citation omitted).

Mr. Pestka does not directly answer the Secretary's argument that he failed to submit evidence supporting the hourly rate claimed. Mr. Pestka contends that the special master "can simply examine the experts' billing to determine if the actions taken by the experts were incurred in the prosecution of the case." Pet'r Reply at 5. However, whether the efforts were to advance Mr. Pestka's case is a question relevant to the reasonable number of hours. Mr. Pestka's reply does not identify any evidence useful to determining whether there is support for the proposed hourly rate. There is not even an affidavit from the experts stating that the rate requested is their usual billing rate. If Mr. Pestka had submitted sufficient information to evaluate the reasonableness of the requested hourly rate, then an award for the experts' work could have been contemplated.

[11] Exhibit 53 apparently supersedes exhibit 43, which is also an invoice from Dr. Barnes.

There is precedent for denying a fee application when it lacks appropriate documentation. Naparano Iron & Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987); Preseault v. United States, 52 Fed. Cl. 667, 679 (2002). However, in this case, Mr. Pestka will be given a second chance to support the hourly rates requested by his experts. Thus, the reasonableness of their work will be deferred until a more complete application for final fees. See Trustees of Chicago Plastering Inst. Pension Trust v. Cork Plastering Co., 570 F.3d 890, 905-06 (7th Cir. 2009) (affirming denial of a requested item of cost when the fee applicant failed to provide reasonable amount of detail).

Other than the requests for experts, the costs requested are routine. There are costs for obtaining medical records, costs for mailing documents before the case was converted to electronic case filing, and costs for getting medical articles. Mr. Pestka's share of these costs is $1,819.03. Mr. Moxley's share of non-expert costs is $3,007.24. The Secretary did not object to these costs, which appear to be supported with appropriate documentation. Thus, Mr. Pestka is awarded **$4,826.27** on an interim basis.

III. Conclusion

In Avera, the Federal Circuit indicated that the Vaccine Act does not bar special masters from awarding attorneys' fees and costs on an interim basis. Yet, there was nothing in the Federal Circuit's decision that suggests that special masters should permit litigation about attorneys' fees on an interim basis to become the "second major litigation," about which the Supreme Court warned in Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

The present decision attempts to balance these concerns. It awards Mr. Pestka some compensation for his attorneys' fees and costs. Although the amount awarded in attorneys' fees is not as much as Mr. Pestka requested, the decision prevents an extremely lengthy delay in payment because all of Mr. Moxley's work before May 2008 is compensated. Similarly, this decision awards all the requested costs for which Mr. Pestka submitted comprehensive evidence.

Petitioner is entitled to an award of interim attorneys' fees and costs. The special master determines that there is no just reason to delay the entry of judgment on interim attorneys' fees and costs. Therefore, in the absence of a motion for review filed under RCFC Appendix B, **the clerk of court shall enter judgment in petitioner's favor for $21,175.27 in interim attorneys' fees and costs. Of this**

amount, $19,356.24 shall be payable to Mr. Pestka and Mr. Pestka's law firm and $1,819.03 shall be payable to Mr. Pestka alone. Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

IT IS SO ORDERED.

s/ Christian J. Moran
Christian J. Moran
Special Master