

**In the United States Court of Federal Claims**  
**OFFICE OF SPECIAL MASTERS**  
**E-Filed: April 18, 2012**

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CHRISTINE HIPPO,	*	PUBLISHED
	*	
Petitioner,	*	No. 10-642
	*	
v.	*	Attorneys' Fees and Costs;
	*	Varicella Vaccination;
SECRETARY OF THE DEPARTMENT	*	Seizure Disorder;
OF HEALTH AND HUMAN SERVICES,	*	Reasonable Basis for
	*	Claim
Respondent.	*	
	*	
* * * * *	*	

Mark T. Sadaka, Sadaka Associates, LLC, Englewood, NJ, for petitioner.  
Justine E. Daigneault, U.S. Dep't of Justice, Washington, D.C., for respondent.

**DECISION AWARDING ATTORNEYS' FEES AND COSTS<sup>1</sup>**

**Campbell-Smith, Chief Special Master**

Pending before the undersigned is petitioner's Application for Attorneys' Fees and Costs ("Application").<sup>2</sup>

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<sup>1</sup> Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this ruling on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b).

<sup>2</sup> Also pending are a number of responsive filings, including respondent's opposition to the Application, petitioner's reply in support of her Application, and respondent's sur-reply.

For the reasons discussed more fully below, the undersigned hereby **GRANTS** petitioner’s Application for Attorneys’ Fees and Costs.

## **I. BACKGROUND**

To put the undersigned’s decision on petitioner’s Application into proper context, some background discussion may be helpful.

### **A. Initial Factual Development of the Case**

On September 24, 2007, Christine Hippo (“petitioner”) received a varicella vaccination.<sup>3</sup> Pet’r’s Ex. 1 at 4. “Shortly after” her receipt of the vaccination, she began to experience “dizziness and fatigue” and “then developed seizures.” Pet. at ¶ 3.

Over two years later, on July 9, 2010, petitioner met with counsel for an intake interview, in preparation for the filing of a petition for compensation under the National Vaccine Injury Compensation Program (“the Program”).<sup>4</sup> App., Ex. A, at 5. Over the next two and one-half months, counsel began to elicit information in support of his client’s claim. See id. He gathered information through a packet of materials sent to petitioner, confirmed petitioner’s receipt of the varicella vaccination, and further communicated with petitioner through phone calls and email. Id.

Petitioner’s claim of alleged vaccine-related injury appeared to be supported by a handwritten notation located in the same medical record documenting petitioner’s receipt of the varicella vaccine. See Pet’r’s Ex. 1 at 4. This medical record, filed two months after the filing of the petition, referenced petitioner’s complaints of a possible reaction to the vaccination. Id. Petitioner’s counsel maintains that the notation reads, “[petitioner’s] arm red [and] swollen

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<sup>3</sup> The filed petition and Application mistakenly list petitioner’s date of vaccination as September 24, 2010. See Pet. at ¶ 2; App. at 1. The undersigned construes the date listed on the Cover Sheet that accompanies the petition, September 24, 2007, as the correct date of vaccination. See Pet., Cover Sheet. See also Pet’r’s Ex. 1 at 4 (documenting petitioner’s receipt of a varicella vaccine during a visit to Sample Medical Center on September 24, 2007).

<sup>4</sup> The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (hereinafter “Vaccine Act” or “the Act”). Hereinafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

from vaccination” and also denotes that petitioner was subsequently “advised to come back.” Reply at 2 (citing Pet’r’s Ex. 1 at 4).

On September 24, 2010, three years from the date of her alleged vaccination,<sup>5</sup> petitioner filed a petition for Program compensation. See Pet. In her petition, petitioner alleged that she developed a vaccine-induced seizure disorder as a result of her receipt of the varicella vaccine. Id. at 1. Petitioner asserted that prior to receiving the vaccine at issue, she did not “suffer from seizures or any serious disabilities.” Id. at ¶¶ 2-3, 5. Also accompanying the petition was a declaration by petitioner’s counsel, maintaining that he “[brought] this action in good faith that Petitioner suffered, and continues to suffer, from a vaccine related injury.” Id., Decl. of Counsel, at ¶ 2.

On September 29, 2010, the undersigned issued an initial order, noting that petitioner had filed a petition without any medical records. See Order, Sept. 29, 2010. The initial order directed petitioner’s counsel to file, on or before November 29, 2010, a status report regarding the status of the medical record collection effort. Id.

Thereafter, petitioner’s counsel filed a number of medical records in support of his client’s claim. See Pet’r’s Exs. 1-2, Nov. 29, 2010; Pet’r’s Exs. 3-4, May 25, 2011; Pet’r’s Ex. 5, June 27, 2011. Although the earliest filed medical records suggested a possible reaction to petitioner’s receipt of the varicella vaccine, see Pet’r’s Ex. 1 at 4, the records also revealed that petitioner experienced her first documented seizure in March 2009, approximately 18 months after her receipt of the varicella vaccination at issue. See Pet’r’s Ex. 2 at 82-94 (documenting petitioner’s hospitalization for seizures in March 2009); Pet’r’s Ex. 3 at 134 (referencing “[petitioner’s] first seizure . . . in 2009”).

## **B. Change in the Focus of the Case**

As set forth in respondent’s responsive briefing, on July 8, 2011, respondent’s counsel contacted petitioner’s counsel to discuss “the substantial 18-month lapse in time between petitioner’s receipt of the Varicella vaccine and the onset of her seizures” and to “raise[] the concern that there did not appear to be a

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<sup>5</sup> The statute of limitations under the Vaccine Act expires 36 months, or three years, from the date of the occurrence of petitioner’s first symptom or manifestation of onset of injury. § 16(a)(2). Because the date of petitioner’s symptom onset was unclear, petitioner’s counsel cautiously filed this action in reliance on petitioner’s representation that her symptoms began “shortly after” the date of her vaccination.

reasonable basis for petitioner’s claim.” Resp. at 2. In response, petitioner’s counsel explained that upon learning of this time lapse, he had contacted petitioner, her sister, and a friend, who all attested to petitioner’s receipt of an influenza (“flu”) vaccine – rather than a varicella vaccine – prior to her first documented seizure in March 2009. Id. See also Reply at 3 (“[Ms. Hippo’s sister and girlfriend] both insisted that Ms. Hippo received a flu vaccination from Walgreens prior to the development of the seizure disorder on March 28, 2009.”).

Petitioner’s counsel described these developments in a status report dated July 12, 2011. See Pet’r’s Status Report, July 12, 2011, at 2. Counsel asserted that he would request, and subsequently file, the relevant medical records, including those from Walgreens Pharmacy, to substantiate the altered account of events. Id. The undersigned afforded petitioner’s counsel additional time to gather those medical records. See Order, July 12, 2011.

Thereafter, petitioner’s counsel filed additional medical records, see Pet’r’s Exs. 6-7, Aug. 15, 2011; Pet’r’s Exs. 8-9, Nov. 14, 2011, which “failed to show that petitioner received any vaccination in temporal proximity to her first seizure in March 2009,” Resp. at 2. Instead, the medical records revealed petitioner’s “history of psychiatric problems,” including hospitalization for auditory hallucinations, suicidal ideations, cutting, and depression, as well as diagnoses for schizoaffective disorder and borderline personality disorder. Pet’r’s Ex. 8 at 720-25. The medical records also described petitioner as “a chronic and difficult patient,” id. at 722, and revealed that in 2009, she was discharged from the care of her primary care physician because she was “drug seeking” from multiple physicians and “had multiple narcotics [prescriptions] filled with overlapping dates,” Pet’r’s Ex. 6 at 555-56.

### **C. Voluntary Dismissal of the Case**

Petitioner’s counsel relates that once the medical records were “complete enough to form an assessment” of the nature of petitioner’s claim, he “reached out to respondent’s counsel to inform her of the development.” App. at 2. On November 14, 2011, the same day that counsel filed the last two sets of medical records in this case, see Pet’r’s Exs. 8-9, Nov. 14, 2011, counsel also filed an Unopposed Motion for Voluntary Dismissal Under Vaccine Rule 21(a),<sup>6</sup> see Pet’r’s Mot. for Voluntary Dismissal. Counsel explains that “[d]ue to various factors in this case, as outlined in detail throughout her medical record,” petitioner “agreed to dismiss” her claim. App. at 2.

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<sup>6</sup> Under the Vaccine Rules, a petitioner may voluntarily dismiss the petition, without an order, by filing either a notice of dismissal before the service of respondent’s report or a signed stipulation of dismissal. Vaccine Rule 21(a).

On November 15, 2011, the undersigned issued an Order Concluding the Proceedings, dismissing petitioner's claim without prejudice.<sup>7</sup> See Order, Nov. 15, 2011.

On December 2, 2011, the undersigned issued another order, encouraging the parties to informally resolve the matter of attorneys' fees and costs in this case. See Order, Dec. 2, 2011. The order also indicated that in the event that informal resolution efforts proved to be unsuccessful, the undersigned would resolve the matter of fees and costs, following the submission of an application and any responsive briefings. Id.

#### **D. Attorneys' Fees and Costs**

On January 3, 2012, noting that the parties were unable to reach an agreement regarding attorneys' fees and costs, see Pet'r's Status Report, Jan. 3, 2012 ("Respondent indicated to petitioner that [she] oppose[s an award of] fees and costs in this matter."), petitioner's counsel filed an Application for Attorneys' Fees and Costs. In the Application, petitioner's counsel requests \$5,297.50 for attorneys' fees and \$1,085.74 for costs borne by petitioner's counsel. App. at 3. The Application includes supporting documentation, setting forth the nature of the costs incurred and delineating the amount of time that petitioner's counsel and a paralegal had expended for particular tasks in this case. See id., Ex. A.

On January 24, 2012, respondent filed an opposition to petitioner's Application ("Response"), urging the denial of attorneys' fees and costs because "there is simply no evidence in the records to support a reasonable basis for claiming that the Varicella vaccine caused petitioner's seizures." Resp. at 5.

That same day, petitioner's counsel filed a reply in support of petitioner's Application ("Reply"), challenging the arguments set forth by respondent and arguing that a reasonable basis did, in fact, exist for the filing of this claim. Reply at 2-3.

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<sup>7</sup> See Hamilton v. Sec'y of Health & Human Servs., No. 2-838V, 2003 WL 23218074, at \*5 (Fed. Cl. Spec. Mstr. Nov. 26, 2003) (holding that an order issued in response to a voluntary dismissal under Vaccine Rule 21(a) concludes the proceedings "on the merits" of a petition, but does not constitute a "decision" warranting entry of judgment).

On January 27, 2012, respondent filed a sur-reply in support of her response (“Sur-Reply”), to address several points raised in petitioner’s responsive briefing.<sup>8</sup>

The parties have completed briefing. The matter is now ripe for a decision.

## II. DISCUSSION

Under statutorily defined circumstances, the Act authorizes an award of reasonable attorneys’ fees and costs. See § 15(e).

If a petitioner is awarded compensation on her petition, the Act requires an award of reasonable attorneys’ fees and costs. Id. (“In awarding compensation on a petition filed under [§ 11 of the Act,] the special master or court shall also award as part of such compensation an amount to cover . . . reasonable attorneys’ fees, and . . . other costs, incurred in any proceeding on such petition.”) (emphasis added).

On the other hand, for unsuccessful claims for vaccine compensation, a special master may exercise her discretion in awarding reasonable attorneys’ fees and other costs, if she finds that the petition “was brought in good faith” and “there was a reasonable basis” for bringing the claim.<sup>9</sup> Id. (“If the judgment

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<sup>8</sup> Following the submission of petitioner’s Application, the parties disputed not only the reasonableness of petitioner’s claim, but also the opportunities afforded for the submission of responsive briefings.

On the same day that the undersigned granted respondent’s counsel’s oral request for leave to file a sur-reply, see Order, Jan. 25, 2012, petitioner’s counsel filed a status report challenging the undersigned’s consideration of respondent’s counsel’s request without first affording him the opportunity to object, as opposing counsel, see Pet’r’s Status Report, Jan. 25, 2012. In response, the undersigned afforded petitioner’s counsel an opportunity to file such objection, if desired. See Order, Jan. 26, 2012. By status report dated January 27, 2012, petitioner’s counsel expressed that he had no objection to respondent’s counsel’s request to file a sur-reply. See Pet’r’s Status Report, Jan. 27, 2012.

<sup>9</sup> In his responsive briefing, petitioner’s counsel asserts that “[a]ttorneys who represent petitioners in this [P]rogram are statutorily entitled to receive fees and reimbursement of costs.” Reply at 2. However, as respondent accurately points out, no such statutory mandate exists. Sur-Reply at 1. The Act “does not create an entitlement” to requested attorneys’ fees and costs. Id.

. . . on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner’s reasonable attorneys’ fees and other costs incurred in any proceeding on such petition[, ] if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.”) (emphasis added). See also Saxton v. Sec’y of Health & Human Servs., 3 F.3d 1517, 1520-21 (Fed. Cir. 1993). These two requirements are more fully discussed below.

## **A. The Good Faith Requirement**

### **1. The Legal Standard**

Whether a petition was filed in good faith is a subjective inquiry. Di Roma v. Sec’y of Health & Human Servs., No. 90-3277V, 1993 WL 496981, at \*1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). Evidence that a petitioner held an honest belief that she sustained a vaccine-related injury is sufficient to establish that her claim was brought in good faith. Turner v. Sec’y of Health & Human Servs., No. 99-544V, 2007 WL 4410030, at \*5 (Fed. Cl. Spec. Mstr. Nov. 30, 2007). Moreover, when there is no evidence that petitioner has acted in bad faith, a special master may make a presumptive factual finding of good faith. Grice v. Sec’y of Health & Human Servs., 36 Fed. Cl. 114, 121 (1996).

### **2. Evaluating Whether Petitioner’s Claim Was Filed in Good Faith**

Although petitioner’s “psychological issues might have clouded her recollection,” Reply at 3, petitioner’s counsel maintains that he filed the petition on the basis of petitioner’s representations and her genuine belief that she suffered a vaccine-related injury. See App., Decl. of Counsel, at ¶ 2 (asserting that counsel filed this claim “in good faith that Petitioner suffered, and continues to suffer, from a vaccine related injury”). That petitioner and her counsel earnestly believed that she suffered a vaccine-related injury is not disputed. See Resp. at 6 (arguing that some of the arguments made by petitioner’s counsel demonstrate, “at best,” that “he had good faith in filing a claim on petitioner’s behalf”).

Because the good faith of petitioner in bringing this claim has not been challenged, a determination regarding the appropriateness of an award of attorneys’ fees and costs turns on whether a reasonable basis existed for the filing of petitioner’s claim. See id. at 3-6 (arguing that petitioner’s claim never had a reasonable basis). See also Sur-Reply 2 (noting that “the issue remains whether there was a reasonable basis for claiming that the Varicella vaccine caused petitioner’s seizures 18 months later”).

## **B. The Reasonable Basis Requirement**

### **1. The Legal Standard**

In contrast to the subjective nature of the good faith requirement, the reasonable basis requirement is an objective inquiry and does not carry with it the same presumption. McKellar v. Sec’y of Health & Human Servs., 101 Fed. Cl. 297, 303-04 (2011) (citing Perreira v. Sec’y of Health & Human Servs., 33 F.3d 1375 (Fed. Cir. 1994)) (“[U]nlike good faith, there is no presumption of a petitioner’s reasonable basis. The petitioner must affirmatively establish a reasonable basis to recover attorneys’ fees and costs.”). An assessment of reasonable basis “look[s] not at the likelihood of success but more to the feasibility of the claim.” Di Roma, 1993 WL 496981, at \*1.

The reasonableness of a claim may be examined at different stages of a proceeding. Although the basis for bringing a claim may have been reasonable at the time of filing, the reasonableness of maintaining that claim may come into question as the claim is further developed. See Perreira, 33 F.3d at 1377 (“[W]hen the reasonable basis that may have been sufficient to bring the claim ceases to exist, it cannot be said that the claim is maintained in good faith.”). See also Lamar v. Sec’y of Health & Human Servs., No. 99-583V, 2008 WL 3845165, at \*4 (Fed. Cl. Spec. Mstr. July 30, 2008) (“[T]here is a distinction between a reasonable basis for filing a claim and a reasonable basis for continuing to pursue a claim.”).

#### **i. At the Time of Filing the Claim**

In evaluating whether a reasonable basis existed for filing a vaccine claim, a special master may consider a number of factors, including the factual basis for, medical support in favor of, and jurisdictional issues pertaining to, the filed action. Di Roma, 1993 WL 496981, at \*1. Also meriting consideration are the circumstances under which counsel filed the petition, which include, among other things, the period of time devoted to claim investigation prior to the filing of the claim and the information upon which counsel relied while preparing the petition. Turner, 2007 WL 4410030, at \*6-7. See also McNett v. Sec’y of Health & Human Servs., No. 99-684V, 2011 WL 760314, at \*7 (Fed. Cl. Spec. Mstr. Feb. 4, 2011) (citing Hearrell v. Sec’y of Health & Human Servs., No. 90-1420V, 1993 WL 129645, at \* 1 (Fed. Cl. Spec. Mstr. Apr. 6, 1993)) (observing that the time available to conduct a pre-filing investigation necessarily affects the scope of the inquiries made by counsel and informs the reasonableness of filing a petition without any supporting documentation).

Basic inquiries are required prior to the filing of any documents under the Act. Di Roma, 1993 WL 496981, at \*2 (citing Lamb v. Sec’y of Health & Human Servs., No. 90-493V, 24 Cl. Ct. 255, 258-59 (1991)). Although special masters have historically been “quite generous in finding a reasonable basis for petitioners,” Riley v. Sec’y of Health & Human Servs., No. 9-276V, 2011 WL 2036976, at \*3 (Fed. Cl. Spec. Mstr. Apr. 29, 2011) (quoting Turner, 2007 WL 4410030, at \*8), this generosity does not extend to situations in which counsel completely fails to investigate the facts underlying the vaccine-injury claim, id. (citing Perreira, 33 F.3d at 1377). See, e.g., Turner, 2007 WL 4410030, at \*7 (“The case law is clear that basic inquiries are required as part of the pre-filing case investigation that counsel is expected to conduct prior to the filing of any paper under the Vaccine Act.”); Di Roma, 1993 WL 496981, at \*2 (“[T]he chief characteristic of the court’s not finding a reasonable basis for a claim is where fundamental inquiries are not made.”) (emphasis in original). See also Browning v. Sec’y of Health & Human Servs., No. 7-453V, 2010 WL 4359237, at \*6, \*11 (Fed. Cl. Spec. Mstr. Nov. 1, 2010) (denying an award of attorneys’ fees and costs where petitioner’s counsel failed to make fundamental inquiries prior to the filing of the petition and where counsel was repeatedly alerted to the insufficiency of the evidence and the pleadings).

If the end of the limitations period is imminent, counsel’s ability to conduct a more searching pre-filing investigation may be limited. See, e.g., Austin v. Sec’y of Health & Human Servs., No. 10-362V, 2012 WL 592891, at \* 4 (Fed. Cl. Spec. Mstr. Jan. 24, 2012) (citing Hamrick v. Sec’y of Health & Human Servs., No. 99-683V, 2007 WL 4793152, at \*5 (Fed. Cl. Spec. Mstr. Jan. 9, 2008)) (“Applying a lenient standard is particularly appropriate when the impending expiration of the statute of limitations prevents an attorney from conducting an adequate investigation of the basis for the claim.”); Hamrick, 2007 WL 4793152, at \*5 (quoting Metzger v. Sec’y of Health & Human Servs., No. 90-2955V, 1991 WL 278783, at \*2 (Cl. Ct. Spec. Mstr. Dec. 10, 1991)) (“The Office of Special Masters has long recognized that an impending deadline set by the statute of limitations affects whether a petition has a reasonable basis.”); Turner, 2007 WL 4410030, at \*6 (“The [vaccine] case law reflects that a filing on the eve of the running of the statute of limitations may be supported by less information than would be expected if counsel had more time to conduct a pre-filing investigation of the factual underpinnings and the medical basis for a vaccine claim.”).

Moreover, a petition filed without supporting medical records or an expert opinion does not necessarily preclude an award of attorneys’ fees. Turner, 2007 WL 4410030, at \*8. See, e.g., McKellar, 101 Fed. Cl. at 303 (“[W]hile the initial absence of medical records is one factor a special master may consider in determining whether a claim had a reasonable basis, such absence is not dispositive.”). See also Stevens v. Sec’y of Health & Human Servs., No. 90-221V, 1992 WL 159520, at \*3 (Fed. Cl. Spec. Mstr. June 9, 1992) (“The court,

and respondent for that matter, has not strictly applied [the] filing requirement [that petitioners submit their case-in-chief with the petition] in measuring the reasonableness of the claim for purposes of attorneys['] fees.”). Subsequently filed documentation may establish that a reasonable basis existed a the claim at the time it was filed. Turner, 2007 WL 4410030, at \*7. See, e.g., McNett, 2011 WL 760314, at \*8 (finding that a reasonable basis existed for the filing of petitioner’s claim because petitioner “eventually produced records from one doctor who provided some support for her claim”).

## **ii. As the Proceeding Continues**

Although reasonable grounds for bringing a vaccine claim may have existed at the time counsel filed the petition, a claim that continues to be prosecuted – after further record development reveals that the claim lacks merit – will not be deemed reasonable, and any fees sought for the maintenance of such action will be denied. Turner, 2007 WL 4410030, at \*9 (citing Perreira, 33 F.3d at 1377). See also Stevens, 1992 WL 159520, at \*3 (noting that changes in the scope of the case, among other things, may influence the reasonableness of a claim).

The reasonableness of a claim must be re-examined at the various stages of the proceeding. Riley, 2011 WL 2036976, at \*8 (admonishing counsel to “ensure that a reasonable basis is present at every stage of the case”) (emphasis in original). Should a petitioner’s efforts to address questions and concerns about a vaccine claim reveal critical deficiencies, dismissal of the petition may be appropriate and reasonably incurred attorneys’ fees and costs, to that point, may be awarded. Stevens, 1992 WL 159520, at \*3. In addition, prompt and responsive action by counsel is encouraged in Program proceedings once a claim’s serious shortcomings have been identified and the reasonableness of maintaining the claim is called into question. Compare Riley, 2011 WL 2036976, at \*7 (noting that counsel acted quickly in winding down a case after his “almost immediate recognition that the case was no longer reasonable to pursue”), and Turner, 2007 WL 4410030, at \*10 (observing that, “[t]o the credit of petitioner’s counsel,” counsel promptly moved for judgment on the record upon recognizing the deficiencies in the claim), with Stevens, 1992 WL 159520, at \*4 (admonishing counsel for, among other things, “fail[ing] to react” to the ample notice provided of the factual shortcomings of the case).

## **2. Evaluating Whether a Reasonable Basis Existed for Petitioner's Claim**

Respondent urges the undersigned to deny attorneys' fees and costs on the grounds that: (1) petitioner's claim is neither supported by medical records nor by medical opinion, but by petitioner's assertions only; (2) petitioner's counsel had ample time – prior to the filing of the petition in this case – to conduct a preliminary inquiry into the timing of onset of petitioner's symptoms; and (3) an impending statute of limitations deadline alone does not warrant the application of a more lenient standard when evaluating the reasonableness of the basis for petitioner's claim.

### **i. At the Time of Filing the Claim**

In this case, petitioner's counsel filed the petition based on facts elicited from petitioner, shortly before the expiration of the then-perceived statute of limitations.

#### **a. Counsel's Efforts to Substantiate Petitioner's Claim with Supporting Evidence**

Respondent contends that petitioner has not provided medical records or a medical opinion to address the extended lapse of time between petitioner's vaccination and her onset of seizures, neither at the time of the filing of the petition nor through later filed evidence.

In evaluating an application for attorneys' fees and costs, a special master need not view the failure to produce medical records or an expert opinion at the time of filing the petition as dispositive of the reasonableness issue. In some cases, a petitioner may be unable to file all of the required medical records with the petition because she requires the aid of a subpoena.<sup>10</sup> Moreover, cases of a type that are commonly filed within the Program do not demand the filing of an expert report during the early stages of a proceeding. *See, e.g., Riley*, 2011 WL 2036976, at \*5 (“Petitioners for the most part do not file expert reports with their petitions in the Vaccine Program.”).

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<sup>10</sup> The record in such cases may be developed only by compelling the collection of medical records from treatment facilities, pursuant to the special master's authority to approve the issuance of subpoenas under the Vaccine Rules. Vaccine Rule 7(c).

Prior to the filing of the petition in this case, counsel appears to have followed a systematic set of procedures to gather facts in support of his client's claim. Before drafting the petition, he conducted an intake interview, elicited pertinent information through a packet of materials sent to petitioner, confirmed petitioner's receipt of the vaccination at issue, and further communicated with petitioner through phone calls and email. See App., Ex. A, at 5. See also Riley, 2011 WL 2036976, at \*5 (recognizing, among other things, the "well-regimented set of procedures" employed by counsel to gather the necessary factual information "to advance [counsel's] client's case" in favor of an award of attorneys' fees and costs).

Significantly, the factual misrepresentations upon which counsel relied in preparing the petition were affected by petitioner's history of mental health and psychiatric conditions – circumstances which were not readily discernible at the outset of the filing of petitioner's claim. See Reply at 4 (explaining that petitioner's counsel "believed his client until the medical records proved otherwise"). Petitioner's inaccurate depiction of the facts clearly influenced the nature of the pre-filing investigation that could be conducted by counsel. See, e.g., id. at 3 ("As additional medical records arrived, it became clear that Ms. Hippo's psychological issues might have clouded her recollection."). In the view of the undersigned, counsel inquired reasonably of petitioner prior to the filing of the vaccine claim.

Respondent challenges the reasonableness of bringing a claim based on petitioner's own unsupported allegations. Resp. at 4-5. Highlighting the lack of evidence in the medical records to support the claim that the varicella vaccine caused petitioner's seizures, respondent argues that the record not only fails to support, but effectively contradicts the alleged temporal association between petitioner's vaccination and her alleged vaccine-related injury. Id. at 5. Respondent notes that the medical records do not reference either a causal or temporal association between petitioner's receipt of the varicella vaccination and her subsequent development of a seizure disorder. Id.

Petitioner's counsel defends the sufficiency of the medical records by asserting that one of the earliest filed exhibits, in fact, does demonstrate "the early signs of a vaccine[-]related injury." Reply at 2. Specifically, counsel points to a handwritten notation included within the medical records from petitioner's visit to Sample Medical Center on the same day that she received the varicella vaccination. Id. Counsel asserts that the notation reads that "her arm red [and] swollen from vaccination" and also denotes that petitioner was subsequently "advised to come back." Id. (citing Pet'r's Ex. 1 at 4).

Respondent calls into question the reliance placed by petitioner’s counsel on this particular medical record. Sur-Reply at 3 n.3. Respondent argues that the word – which has been interpreted by petitioner’s counsel to read as “vaccination” – may instead be construed to be “injection[.]” or even “infection[.]” Id. Respondent seeks to diminish the significance of this notation by emphasizing that later filed medical records fail to discuss any reaction to the varicella vaccination or even mention petitioner’s prior complaint about her arm.<sup>11</sup> Id.

Although petitioner’s counsel ultimately was unable to produce medical records to substantiate petitioner’s claim of an alleged vaccine-related injury, the earliest filed medical records do reference the administration of a varicella vaccine as well as petitioner’s complaint of a possible reaction. See Pet’r’s Ex. 1 at 4. Respondent’s emphasis on the illegibility of an early record notation only serves to underscore the difficulty of interpreting medical records, and as respondent acknowledges in her briefing, the markings in the referenced medical record are not clear. See Sur-Reply at 3 n.1 (expressing that “[t]his note is difficult to read and it is unclear what it says . . . . Respondent admits that the handwriting in Exhibit 1 is difficult to decipher”).

Although later discovered to be erroneous, petitioner’s early representations of vaccine-related harm were consistent. The undersigned finds these representations, together with their medical record support, as sufficient to present a feasible claim for compensation and thus provide a reasonable – albeit a minimally reasonable – basis for the filing of the claim.

**b. The Sufficiency of the Time Period Afforded to Counsel for Claim Investigation**

Respondent argues that prior to the filing of the petition in this case, petitioner’s counsel had ample time – two and one-half months – to conduct a preliminary inquiry to determine when petitioner experienced the first symptom or manifestation of her onset of seizures. Resp. at 9. Respondent also notes that a more searching, preliminary inquiry into a determination of petitioner’s onset of symptoms would have clarified the statute of limitations issue. Id. Respondent argues that since petitioner suffered the first manifestation of her seizure disorder in March 2009, the expiration of the applicable statute of limitations was not imminent. See id. See also § 16(a)(2) (providing that the Act’s statute of

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<sup>11</sup> Instead, respondent notes that 18 days later, petitioner received medical attention for itchy skin and subsequently was diagnosed with “recurrent pruritis.” Sur-Reply at 3 n.3 (citing Pet’r’s Ex. 1 at 3).

limitations expires 36 months from the date of the occurrence of the first symptom or manifestation of onset of injury).

Observing that the “circumstances [of this case] were not normal,” petitioner’s counsel disputes the sufficiency of the time period prior to the filing of this claim. Reply at 3. Noting the “issues documented throughout Ms. Hippo’s medical records,” counsel explains that he “never received a complete listing of all of [petitioner’s] medical providers,” but instead “kept learning of new providers as months went on.” Id.

The evidence in this case supports a finding that petitioner’s counsel made affirmative and reasonable efforts to investigate the factual basis for the claim. Counsel’s ability to do so more effectively was hampered by his client’s unstable mental health – a factor that was beyond his control and, at the time, unknown to him. The undersigned is satisfied that counsel acted reasonably in the weeks before he filed this claim.

### **c. The Impending Statute of Limitations**

To be timely, a claim for Program compensation must be filed within the Act’s statute of limitations – 36 months from the date of the occurrence of the first symptom or manifestation of the onset of petitioner’s alleged vaccine-injury. See § 16(a)(2).

Although petitioner’s counsel acknowledges that he filed the petition in this case on the basis of petitioner’s factual misrepresentations, he maintains that he did so in the face of a looming statute of limitations deadline. See App. at 2 (“Counsel relied on Ms. Hippo’s representation of the facts and filed this case before completion of the investigation process because of the statute of limitations.”). In the petition, petitioner alleges that “shortly after” her receipt of the varicella vaccine on September 24, 2007, she began to experience “dizziness and fatigue” and “then developed seizures.” Pet. at ¶ 3. Additionally, as discussed earlier in this decision, a notation located in the same medical record documenting petitioner’s receipt of the varicella vaccine contains a reference to petitioner’s complaint of a potential adverse reaction. See Pet’r’s Ex. 1 at 4. Without a clearer understanding of when petitioner’s symptoms first appeared, counsel perceived that the applicable statute of limitations was triggered “shortly after” the date of petitioner’s vaccination and thus, he filed the claim on September 24, 2010 – 36 months from the date of petitioner’s vaccination.

Respondent acknowledges that the perceived impending statute of limitations deadline “at best demonstrates that [petitioner’s counsel] had good faith in filing a claim on petitioner’s behalf,” but contends that this does not

otherwise allow a finding of reasonable basis. Resp. at 6-7. In the absence of any other evidence in favor of finding a reasonable basis for petitioner's claim, respondent contends that the looming statute of limitations deadline does not warrant the more lenient standard customarily afforded to claims filed in the face of an impending statute of limitations deadline. Id. at 8.

Due to counsel's inability to gather a more accurate representation of petitioner's first symptom or manifestation of her onset of seizures, counsel necessarily perceived an impending expiration of the statute of limitations. This deadline consequently limited the period of time during which counsel believed he could conduct more searching pre-filing inquiries.

Based on petitioner's misrepresentations regarding the factual predicate underlying her claim and counsel's diligent efforts to investigate her claim in advance of the then-perceived looming statute of limitations deadline, the undersigned is persuaded that counsel acted reasonably in filing this claim in the manner he did.

## **ii. As the Proceeding Continued**

In objecting to this fee request, respondent has focused chiefly on the alleged lack of reasonableness in the filing of petitioner's claim. She adds that once the medical records revealed an 18-month time lapse between petitioner's receipt of the varicella vaccination and her first documented seizure, she contacted petitioner's counsel on July 8, 2011 to raise, among other things, her concern that the timing between vaccination and symptom onset did not appear to provide reasonable support for moving forward with petitioner's claim. See Resp. at 2.

In response to this communication from respondent's counsel, petitioner's counsel acknowledged the extended duration of time between petitioner's vaccination and symptom onset, but explained that after further investigation, the vaccine believed to be responsible for petitioner's injury changed from varicella to influenza. By status report filed July 12, 2011, petitioner's counsel related that, as corroborated by two witnesses, petitioner had received a flu vaccination prior to her onset of seizure disorder. See Pet'r's Status Report, July 12, 2011. Petitioner's counsel then actively sought, and subsequently filed, relevant medical records in an effort to substantiate this assertion. See Pet'r's Exs. 6-7, Aug. 15, 2011; Pet'r's Exs. 8-9, Nov. 14, 2011.

To counsel's credit, once the factual deficiencies in the claim became glaringly apparent, he reacted promptly. Counsel moved quickly to conclude these proceedings once he determined that the filed medical records failed to show that petitioner had received any vaccination in close temporal proximity to her first

documented seizure in March 2009. In addition, after drawing the claim to a conclusion, counsel presented an application for a reasonable amount of incurred attorneys' fees and costs.

The undersigned is satisfied that petitioner's counsel acted reasonably as this claim proceeded.

**C. Reasonable Amount of Requested Attorneys' Fees and Costs**

In her Application, petitioner requests \$5,297.50 for attorneys' fees and \$1,085.74 for costs borne by petitioner's counsel. App. at 3.

Respondent has not challenged the amount of the award sought, and the undersigned finds the aforementioned amounts of requested attorneys' fees and costs to be quite reasonable.

**III. CONCLUSION**

Under the circumstances of this case, the undersigned is persuaded that petitioner's counsel had a reasonable basis for filing and maintaining petitioner's claim for the period of time he did. Moreover, when confronted with the stark problems underlying this claim, counsel acted expeditiously to conclude the proceeding.

The undersigned has carefully considered petitioner's Application and respondent's objections, and in this case, exercises her discretion to award, as reasonably requested, \$5,297.50 for attorneys' fees and \$1,085.74 for costs borne by petitioner's counsel.<sup>12</sup> The award shall be made payable jointly to petitioner and her counsel.

**IT IS SO ORDERED.**

s/Patricia E. Campbell-Smith  
Patricia E. Campbell-Smith  
Chief Special Master

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<sup>12</sup> On April 18, 2012, the undersigned's chambers contacted petitioner's counsel to clarify the nature of claimed costs requested in the Application. Counsel orally confirmed that petitioner incurred no out-of-pocket expenses pursuant to General Order No. 9 and that the requested amount reflects costs incurred by counsel himself.