

**In the United States Court of Federal Claims**

**OFFICE OF SPECIAL MASTERS**

(E-Filed: November 30, 2007)

No. 99-544V

PUBLISHED

---

BRANDON TURNER,	)	
	)	
	)	
Petitioner,	)	Motion to Reconsider Whether
	)	Basis for Filing Petition was
v.	)	Reasonable; Attorneys' Fees and
	)	Costs; Unreasonableness of
SECRETARY OF THE DEPARTMENT OF	)	Duplicative Billing Entries
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
	)	
	)	

---

Clifford J. Shoemaker, Vienna, VA, for Petitioner.

Vincent J. Matanoski, with whom Peter D. Keisler, Assistant Attorney General, Timothy P. Garren, Director, Mark W. Rogers, Deputy Director, U.S. Department of Justice, Washington, DC, for Respondent.

**Decision on Reconsideration of August 31, 2007 Attorneys' Fees and Costs Decision**<sup>1</sup>

On August 31, 2007, the undersigned issued a decision awarding attorneys' fees

---

<sup>1</sup> Vaccine Rule 18(b) states that all of the decisions of the special masters will be made available to the public unless an issued decision contains trade secrets or commercial or financial information that is privileged or confidential, or the decision contains medical or similar information the disclosure of which clearly would constitute an unwarranted invasion of privacy. Following the issuance of a decision or substantive order with the Clerk of the Court, a special master affords each party a 14-day period within which to identify and move for the redaction of privileged or confidential information before the document's public disclosure.

and costs to petitioner's counsel. In the unpublished decision, the undersigned addressed in a "summary discussion" respondent's objection to the award on the ground "that the petition was filed without a reasonable basis." Respondent's Motion for Reconsideration (R's Reconsid. Mtn.) at 1. At respondent's request, a status conference "was held on September 6, 2007, during which respondent asked whether the discussion of the reasonable basis issue encompassed in the decision reflected the full extent of the [undersigned's] views on the matter." Id. The undersigned "articulated the same rationale on reasonable basis as provided in her [August 31, 2007] decision, . . . with greater elaboration," and invited respondent to move for reconsideration of the decision to afford the undersigned "a means to have th[e] more elaborate treatment of the issue made a part of the record" in the event that respondent elected to seek review of the undersigned's decision. Id.

On September 11, 2007, respondent moved for reconsideration of the August 31, 2007 Attorneys' Fees and Costs Decision "to provide [an] opportunity for [the] amplification of the [undersigned's] decision." Id. By Order dated September 13, 2007, the undersigned afforded petitioner an opportunity to respond to respondent's reconsideration motion. On September 28, 2007, petitioner filed his Reply to Respondent's Objection to Application for Attorneys' Fees and Costs (P's Resp.). The motion for reconsideration is now ripe for a ruling.

## **I. Background**

On July 29, 1999, petitioner, Nancy Turner, as Guardian ad Litem for Brandon Turner (Brandon), a minor,<sup>2</sup> filed a petition pursuant to the National Vaccine Injury

---

<sup>2</sup> On June 22, 2006, petitioner filed a Motion to Amend Caption. On June 28, 2006, the Special Master granted petitioner's motion. Brandon Turner is currently the sole petitioner in this case.

In challenging the reasonableness of the basis underlying the filing of this vaccine claim, respondent's counsel noted in his opposition to petitioner's application for attorneys' fees that Brandon Turner had reached the age of majority before the petition in the instant case was filed by his mother. The filed records reflect that Brandon's date of birth is April 3, 1978, making him twenty-one years old at the time of filing. See, e.g., Petitioner's Exhibit ("P's. Ex.") 1 at 4. Respondent points out that "[n]o evidence has been offered showing that Brandon Turner was incapable of managing his legal affairs at the time the petition was filed, and no explanation has been provided for why the claim was brought by an individual who was not statutorily authorized to file a petition." R's Response, footnote 2 (citing 42 U.S.C. § 300aa-11(b)(1)(A)).

(continued...)

Compensation Program<sup>3</sup> (the Act or the Program). The petition states that “[o]n or about February 12, 1993, March 18, 1993, and August 16, 1993, Petitioner received hepatitis B vaccination(s) (a vaccine set forth in the Vaccine Injury Table) in the United States and experienced an adverse reaction to this (these) inoculation(s).” Petition (Petn.) ¶ 3. The petition further states:

---

<sup>2</sup>(...continued)

Section 11(b)(1)(A) of the Vaccine Act authorizes “any person who has sustained a vaccine-related injury, the legal representative of such person if such person is a minor or is disabled, or the legal representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table” to file a petition seeking compensation. 42 U.S.C. 300aa-11(b)(1)(A) (any of the described persons in section 11(b)(1)(A) “may” file a vaccine petition). Although Brandon Turner received the vaccinations in question when he was a minor, at the time of the filing of the petition, he was no longer a minor nor did he require a legal representative to file his claim.

The undersigned construes section 11(b)(1)(A) to define the class of persons who may file and maintain an action for Program compensation. In the absence of more interpretative guidance in the Vaccine Act or the legislative history of the statute, the undersigned finds instructive guidance in Rule 17(a) of the Rules of the Court of Federal Claims (RCFC) for curing a filing that is defective because the party filing the action is unable to maintain the action. Rule 17(a) requires that an action be prosecuted by the real party in interest in the underlying litigation (or by an authorized legal representative for the real party in interest). RCFC 17(a). The rule expressly states that dismissal of an action on the ground that it is not prosecuted by the real party in interest is not required until a period of time has been afforded to cure the defect by allowing the ratification, joinder, or substitution of the real party in interest. Id.

Reasoning analogously that a similar practice is appropriate here, the undersigned concludes that because Mr. Turner’s mother could not maintain under the Vaccine Act the filed claim on behalf of her son, who was an adult with capacity to sue when the claim was filed, petitioner’s counsel properly cured the filing defect by subsequently filing a motion to amend caption to reflect Mr. Turner’s majority status. How the defective initial filing in this case reflects on the reasonableness of counsel’s filing the claim is addressed in the discussion section of this decision.

<sup>3</sup> The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. § 300aa-10-§ 300aa-34 (West 1991 & Supp. 2002) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

A fact-specific description of the claimed symptoms and the nature and extent of the injuries caused by the inoculation and the condition of the Petitioner at all relevant times will be set forth in further affidavits which will be filed and is set forth in the medical records which, when filed, will be incorporated by reference herein and annexed hereto as Exhibits pursuant to 42 U.S.C. § 300aa-14(b) and § 300aa-11(c)(2).

Id. ¶4.

At petitioner's request, proceedings in this matter were suspended for 180 days pursuant to Vaccine Rule 9(a). See Order filed March 13, 2000. Petitioner's counsel subsequently filed four status reports between May 16, 2000 and March 13, 2001, indicating that he was in the process of collecting medical records and working with potential experts. See Petitioner's Status Reports filed May 16, 2000, Aug. 21, 2000, Dec. 12, 2000, and Mar. 13, 2001. By July 10, 2002 Order, the special master requested that petitioner's counsel schedule a status conference within fifteen days of the issuance of the order. See Order filed July 10, 2002. The order indicated that failure to schedule a status conference within this time frame would result in a deadline of September 30, 2002, for the filing of a medical expert's report. Id. On July 19, 2002, petitioner's counsel filed a status report in response to the court's order indicating that he wanted the case temporarily stayed pending the outcome of the Hepatitis B omnibus proceedings. See Petitioner's Status Report filed July 19, 2002.

#### A. The Hepatitis B Omnibus Proceedings

"Omnibus" proceedings under the Vaccine Program have involved the litigation of several identified test cases at a joint hearing during which experts opine on the general causation issue of whether a particular vaccine can cause a particular injury. The commencement of omnibus proceedings requires the consent of the parties through counsel. Either during the joint hearing on general causation or during subsequent proceedings, the parties present evidence on the specific causation issue of whether a particular vaccine caused the particular injury alleged in each of the test cases. Litigants may designate evidence adduced during general causation proceedings for consideration in a specific causation, non-test case by: (1) identifying with specificity the evidence from the general causation proceeding on which the litigants intend to rely; and (2) indicating how the designated evidence applies to the factual circumstances in a specific causation, non-test case. See Allen v. Sec'y of Dept. of Health and Human Servs., 99-504V, 2007 WL 601176 (Fed. Cl. Spec. Mstr. Feb. 1, 2007).

For several years, the Office of Special Masters (OSM) attempted to address,

through various omnibus proceedings, the numerous filed petitions claiming injuries that resulted from the receipt of hepatitis B vaccinations. See, e.g., Stevens v. Sec’y of Dept. of Health and Human Servs., No. 99-594V, 2006 WL 659525 (Fed. Cl. Spec. Mstr. Feb. 24, 2006) (test case in omnibus proceeding concerning whether or not hepatitis B vaccine could cause demyelinating diseases, including multiple sclerosis, transverse myelitis, Guillain-Barré syndrome, and chronic inflammatory demyelinating polyneuropathy); Capizzano v. Sec’y of Dept. of Health and Human Servs., No. 00-759V, 2004 WL 1399178 (Fed. Cl. Spec. Mstr. June 8, 2004) (test case in omnibus proceeding concerning whether hepatitis B vaccine could cause rheumatoid arthritis). During this period of time, many of the filed hepatitis B cases were stayed, either formally or informally, and no substantive action occurred in a number of the individual hepatitis B cases. At the end of the time period, OSM returned to a claim by claim evaluation of the stayed hepatitis B cases that had not been addressed through omnibus proceedings.

For the purpose of scheduling further proceedings in the remaining, unresolved hepatitis B cases, several special masters, including the undersigned, conducted a coordinated, digitally-recorded status conference on March 27, 2006. See Order of 3/29/06. On March 29, 2006, the undersigned issued an Order in this particular case directing petitioner’s counsel to “consult with his client and file a status report, indicating how petitioner intends to proceed, by no later than Tuesday, May 30, 2006.” Order at 1 (emphasis omitted).

Petitioner’s counsel filed a status report on May 28, 2006, stating that his client no longer wished to pursue the Vaccine claim and requesting a thirty-day period of time within which to prepare a motion for judgment on the record. Petitioner’s Status Report of 5/28/06. By Order dated June 6, 2006, the undersigned afforded petitioner’s counsel the requested thirty-day period. Order of 6/6/06.

#### B. Request for Judgment on the Record in this Case

On June 22, 2006, petitioner filed the only set of medical records in this case. See Petitioner’s Exhibits (P. Ex.) 1-5. On that same day, petitioner also filed a Motion for Judgment on the Record (P’s Motion). On June 30, 2006, respondent filed Respondent’s Response to Petitioner’s Motion for Judgment on the Record (R’s Response). Respondent argued that “[p]etitioner provided no evidence – neither medical records nor medical opinion – to support his allegation that the hepatitis B vaccine caused his alleged injuries, and thus failed to support his claim as required by law.” R’s Response at 1-2 (citing 42 U.S.C. § 300aa-13(a)(1)).

The undersigned denied petitioner’s claim for Program compensation in an

unpublished decision issued on September 5, 2006. See Decision, filed Sept. 5, 2006 (“Decision”) at 6. The undersigned dismissed the case for “want of proof” because petitioner was “unable to produce any evidence that the hepatitis B vaccinations caused his injury.” Decision at 6.

### C. Request for Attorneys’ Fees and Costs in this Case

On April 19, 2007, petitioner’s counsel filed an Application for Attorneys’ Fees & Costs (“P. App.”)<sup>4</sup> requesting \$6,837.00<sup>5</sup> for attorneys’ fees, \$8.21 for costs borne by petitioner’s counsel, and \$130.00 for costs borne by petitioner. P. App. at 2, 12. Petitioner’s application included supporting documentation showing the nature of the costs incurred and the time that petitioner’s counsel expended for particular tasks in this case. On May 7, 2007, respondent filed Respondent’s Opposition to Petitioner’s Application for Attorneys’ Fees and Costs (R’s Response). Respondent argues that petitioner’s counsel’s application for fees and costs should be denied as lacking a reasonable basis, “[w]here, as here, a petitioner utterly fails to adduce any evidence of a vaccine-related injury from the filing of a bare-boned petition throughout the pendency of the claim.” R’s Response at 5.

Petitioner’s Application for Attorneys’ Fees and Costs is now ripe for decision on respondent’s motion for reconsideration, and is **GRANTED** for the limited purpose of setting forth in greater detail the undersigned’s reasoning in granting petitioner’s counsel’s request, reduced by \$324.50, for fees and costs.

## II. Discussion

The Vaccine Act authorizes an award of reasonable attorneys’ fees and costs. 42 U.S.C. § 300 aa-15(e)(1). The Act requires the award of attorneys’ fees and costs if a petitioner is awarded Program compensation. Id. ( When awarding compensation on a

---

<sup>4</sup> On April 19, 2007, petitioner’s counsel filed his fee petition electronically. The fee petition contained three individual exhibits, each paginated internally. However, the entire document was also paginated as a single filing. For citation purposes, the undersigned treated the document as a single filing, referring to the document’s continuous pagination for ease of reference.

<sup>5</sup> The undersigned notes that on page 2 of petitioner’s counsel’s Application for Attorneys’ Fees, counsel represents that his fees amount to \$6,837.00. On page 12 of the Application, petitioner’s counsel represents that his fees amount to \$6,842.00. For purposes of calculating petitioner’s counsel’s requested fees, the undersigned has used the former amount.

petition, a special master “shall also award as part of such compensation an amount to cover” reasonable attorneys’ fees and incurred costs.) (emphasis added). The Act permits the award of attorneys’ fees and costs when a petitioner does not prevail on his vaccine claim. See id.

When a petitioner’s vaccine claim fails, as in this case, the Act specifically provides:

If the judgment of the United States Court of Federal Claims 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.

Id. (emphasis added). As the language of the statute indicates, when a Program claim is not compensated, an award of attorneys’ fees and costs is not mandatory. Id. Rather, the decision to award requested attorneys’ fees and costs lies within the discretion of the reviewing special master. Id.; see also Saxton v. Sec’y of Dept. of Health and Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (“If the petition for compensation is denied, the special master ‘may’ award reasonable fees and costs if the petition was brought in good faith and upon a reasonable basis; the statute clearly gives him discretion over whether to make such an award.”) (citation omitted).

#### A. Petitioner’s Position

Petitioner’s counsel submitted his petition for fees on April 19, 2007, and “respectfully request[ed] that the Court grant all reasonable compensation as allowed by the Vaccine Act.” P’s App. at 1. The Clerk of the Court entered judgment in this matter on September 20, 2006, 211 days before petitioner’s counsel filed his petition for fees and costs.<sup>6</sup> Petitioner’s argument for the payment of fees and costs is based simply on the

---

<sup>6</sup> Vaccine Rule 13 states that “[a]ny request for attorneys’ fees and costs pursuant to 42 U.S.C. § 300aa-15(e)(1) shall be filed no later than 180 days after the entry of judgment or the filing of an order concluding proceedings under Vaccine Rule 10(a) or 29.” Vaccine Rule 13 (emphasis added). Although petitioner’s counsel’s request was filed nearly one month after the  
(continued...)

language of section 15(e)(1) of the Vaccine Act, which permits an award of reasonable fees and costs even if petitioner does not prevail on his Program claim.

## B. Respondent's Position

Rather than focus on the untimeliness of petitioner's counsel's application, respondent urges the court to deny the fee request because it "lack[s] a reasonable basis." R's Opp. at 5. Respondent argues that Section 15(e)(1) of the Vaccine Act "permits, but does not require, fees and costs to be awarded on a petition where entitlement has been denied provided that the 'petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.'" *Id.* at 3 (citing 42 U.S.C. § 300aa-15(e)(1)); See Di Roma v. Sec'y of Dept. of Health and Human Servs., 90-3277V, 1993 WL 496981, at \*1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993).

Respondent argues that for petitioner's claim to have a "reasonable basis," it must, at a minimum, be supported by medical records or medical opinion. R's Opp. at 4 (citing 42 U.S.C. § 300aa-13(a)(1)). Quoting Spagiare v. Sec'y of Dept. of Health and Human Servs., 90-468V, 1991 WL 146284, at \*2 (Cl. Ct. Spec. Mstr. July 17, 1991), respondent

---

<sup>6</sup>(...continued)

expiration of the afforded 180-day period under the Vaccine Rules for the filing of a petition for attorneys' fees and costs, respondent made no objection to the request on the ground of untimeliness. Untimely filed requests for attorneys fees are not uncommon in the Vaccine Program, and late-filed requests have rarely been denied for that reason alone. See, e.g., Gonzalez v. Secretary of Health and Human Services, 90-2331V, 1997 WL 438762 (Fed. Cl. Spec. Mstr. July 18, 1997) (Special master concluded, in case where the fees application was filed more than three years after the expiration of the twenty-one day time period formerly prescribed under the Vaccine Rules for the filing of fee applications, that he had discretion under § 300aa-15(e)(1) to grant fee requests, when appropriate under all the circumstances, even when the fee application was not timely-filed.).

It is true that the language of the statute affords a special master certain discretion in awarding attorneys' fees and costs for Program claims that ultimately fail. It is also true that the statute does not define the period of time within which an application for fees and costs must be brought. The Vaccine Rules, however, limit the time for filing "[a]ny request" for attorneys' fees and costs to "180 days" following the entry of judgment or an order concluding proceedings. Vaccine Rule 13. Accordingly, petitioner's counsel is on notice that, notwithstanding the generous enlargements of time afforded in Program practice for the filing of attorneys' fee applications, late filed fee petitions are subject to challenge on the ground of untimeliness.

asserts that although “it is reasonable to permit petitioners to supplement their petitions to meet the statutory requirements, it is also reasonable to put on them the risk of not being compensated for attorneys’ fees and costs if they file a petition without the necessary supporting documentation and are later unable to produce such documentation.” R’s Opp. at 4.

C. Determining Whether the Vaccine Claim was Filed in “Good Faith” and on a “Reasonable Basis”

1. Defining the Statutory Terms

An award of attorneys’ fees and costs is discretionary when a Program claim is not compensated, and the Vaccine Act conditions the award upon a determination that petitioner’s counsel filed the claim in good faith and with a reasonable basis for filing the claim. See 42 U.S.C. § 300aa-15(e)(1). The Vaccine Act does not define the terms “good faith” or “reasonable basis.” See 42 U.S.C. § 300aa-33 (defining particular terms under the Act). Nor does the Act’s legislative history provide further illumination. Accordingly, consistent with the rules of statutory construction, the undersigned considers the plain language of the statutory provision and affords ordinary meaning to the statutory terms “good faith” and “reasonable basis.” See 2A Sutherland Statutory Construction § 46:1 (7th ed. 2007) (“In the absence of a specific indication to the contrary, words used in the statute will be given their common, ordinary and accepted meaning, and the plain language of the statute should be afforded its plain meaning.”).

The Federal Circuit instructs that “the plain meaning of a statute is to be ascertained using standard dictionaries in effect at the time of the statute’s enactment.” Telecare Corp. v. Leavitt, 409 F.3d 1345, 1353 (Fed Cir. 2005) (citing Lamar v. United States, 241 U.S. 103, 113 (1916)). The undersigned consults Black’s Law Dictionary (5th ed. 1979) to ascertain the plain meaning of the terms in question. Black’s defines the term “good faith” as “an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.” Black’s Law Dictionary 623 (5th ed. 1979). Although it does not supply a definition for the term “reasonable basis,” Black’s does define “reasonable” and “basis” individually. Black’s defines “reasonable” as “[f]air, proper, just, moderate, suitable under the circumstances,” id. at 1138, and Black’s defines “basis” as “[a] fundamental principle; groundwork; support ; the foundation or groundwork of anything” id. at 138. The

dictionary definition suggests that a showing of “good faith,” as contemplated by section 15(e)(1) of the Vaccine Act, may be established by showing that the petitioner honestly believed that he had suffered a vaccine-related injury. Moreover, the dictionary definition suggests that the “reasonable basis” required for the payment of attorneys’ fees under section 15(e)(1) of the Vaccine Act may be established by presenting proof that the ground (or underlying condition) for the filing of the petition was “proper . . . under the circumstances.”

The case law offers further interpretative guidance on the meaning of the terms “good faith” and reasonable basis” in section 15(e)(1) of the Act.<sup>7</sup> Special masters are counseled to evaluate whether a petition was brought in good faith and on a reasonable basis by reviewing each petition on an individual basis because the statutory requirements of section 15(e)(1) are not presumed to be present. See Collins v. Sec’y of Dept. of Health and Human Servs., 91-821V, 1992 WL 164512, at \*2 n.5 (Cl. Ct. Spec. Mstr. June 23, 1992).

a. Good Faith

Consistent with the plain meaning of the term set forth in Black’s Law Dictionary, the “good faith” requirement of section 15(e)(1) is a subjective standard that focuses upon whether petitioner honestly believed he had a legitimate claim for compensation. See Di Roma, 1993 WL 496981, at \*1. Evidence that petitioner held an honest belief that he has sustained a vaccine-related injury is sufficient to establish that his vaccine claim was brought in good faith. Id. Moreover, when there is no evidence of record that a petitioner has acted in bad faith, a special master may make a presumptive factual finding of good faith. See Grice v. Sec’y of Dept. of Health and Human Servs. 36 Fed. Cl. 114, 121 (1996) (If “there is no evidence of record that petitioners have acted in violation of th[e good faith] standard[,] [p]etitioners are entitled to a presumption of good faith as is the government.”).

---

<sup>7</sup> The decisions of the United States Court of Appeals for the Federal Circuit are binding. See Guillory v. Sec’y of Dept. of Health and Human Servs., 59 Fed. Cl. 121, 124 (2003), aff’d, 104 Fed. Appx. 712 (2004). The decisions of the United States Court of Federal Claims and the decisions of other special masters are persuasive authorities. See id.; Hanlon v. Sec’y of Dept. of Health and Human Servs., 40 Fed. Cl. 625, 630 (1998).

In response to the undersigned's Order of September 13, 2007, affording petitioner's counsel an opportunity to respond to respondent's motion for reconsideration, petitioner's counsel explained that shortly before he filed this petition, he received a communication by electronic mail from petitioner's mother informing counsel that her son received a hepatitis B vaccine series. Petitioner's Reply to Respondent's Objection to Application for Attorneys' Fees and Costs (P's Resp.) at 3. Petitioner's mother further informed counsel that after petitioner received his hepatitis B vaccine series, his doctors discovered a mass in his left testicle that his treating pathologist described as an autoimmune, "connective tissue disorder." Id. An analysis of the removed tissue from her son indicated that the mass dated back to a period of time that petitioner's mother recognized as coinciding with the time frame within which petitioner received the hepatitis B vaccine series. Id. This electronic communication is probative of a genuine belief by petitioner's family, and presumably by petitioner himself, that he may have suffered a vaccine-related injury. The filing of this claim on the basis of petitioner's sincere belief that he suffered an injury related to his hepatitis B vaccination satisfies, in the view of the undersigned, the good faith requirement set forth in section 300aa-15(e)(1).

b. Reasonable Basis

In contrast to the subjective standard afforded the "good faith" requirement, the "reasonable basis" requirement "is objective, looking not at the likelihood of success [of a claim] but more to the feasibility of the claim." Di Roma, 1993 WL 496981, at \*1. The "reasonable basis" determination "does not depend on petitioner's state of mind." Fournier v. Sec'y of Dept. of Health and Human Servs., 90-1050V, 1992 WL 93242, at \*1 (Cl. Ct. Spec. Mstr. Apr. 17, 1992); Barnes v. Sec'y of Dept. of Health and Human Servs., 90-1101V, 1999 WL 797468, at \*1 (Fed. Cl. Spec. Mstr. Sept. 17, 1999). Nor does the "reasonable basis" determination depend on petitioner's filing of evidence that actually establishes entitlement to compensation. Rather, section 15(e)(1) of the Vaccine Act expressly contemplates that counsel may file a claim on grounds that are reasonable but ultimately are determined not to merit Program compensation. For the prosecution of this type of vaccine claim, that is, a claim brought on reasonable grounds even if not ultimately compensable grounds, petitioner's counsel may recover under the Vaccine Act reasonably requested attorneys' fees and costs.

2. Factors to Consider

When evaluating whether counsel has satisfied the “reasonable basis” requirement, the special master may consider a number of factors. Among the considered factors are the circumstances under which counsel filed the petition. The special master may look at who filed the claim, in particular, whether counsel filed the claim or whether the petitioner acting pro se filed the claim before retaining counsel. The special master may consider how long a period of time was afforded for the conduct of a pre-filing investigation and for the filing of the claim. The 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. See, e.g., Brown v. Sec’y of Dept. of Health and Human Servs., 99-539V, 2005 WL 1026713 (Fed. Cl. Spec. Mstr. Mar. 11, 2005) (recognizing that while the filing of a “skeletal petition,” one without supporting documentation, may be adequate to stop the running of the statute of limitations, that filing alone does not establish a reasonable basis, within the meaning of the statute for the filing of the claim, and requiring petitioner to demonstrate by the subsequent filing of a medical record, affidavit, expert opinion or other documentation that a plausible connection exists between the received vaccination and the alleged injury).

Additionally, when supporting documentation is absent at the time of the filing of the petition, the special master may consider the information upon which counsel relied in preparing the vaccine petition. The information on which counsel relied in preparing the vaccine claim speaks to the type of pre-filing investigation of the claim that counsel conducted. 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. See Lamb v. Sec’y of Dept. of Health and Human Servs., 24 Cl. Ct. 255, 258-259 (1991) (referring to and quoting the requirement of RCFC 11 that counsel certify that a filed pleading is based on “knowledge, information, and belief formed after reasonable inquiry, . . . is well grounded in fact and is warranted by existing law”); Di Roma, 1993 WL 496981, at \*1 (“[B]asic inquiries are required prior to the filing of any paper under the Act.”). A reasonable pre-filing inquiry involves an investigation of the factual basis for a Program claim or the medical support for a vaccine petition. See Baron v. Sec’y of Dept. of Health and Human Servs., 90-1078V, 1992 WL 333122 (Cl. Ct. Spec. Mstr. Oct. 27, 1992) (reasonableness of basis for claim demonstrated by medical records or medical opinion supporting a plausible connection between the received vaccine and the alleged injury).

If documentation is filed in connection with a claim, whether at the time of filing the petition or sometime after the filing of a bare petition, the special master examines the

filed documentation to determine whether it lends support to the asserted claim. The Vaccine Act contemplates that a filed petition shall contain “an affidavit[] and supporting documentation” demonstrating that the vaccinee suffered a vaccine-related injury or death. See 42 U.S.C. § 300aa-11(c)(1). The Act specifically requires that a vaccinee show that he: (1) received a vaccine set forth in the Vaccine Injury Table; (2) received the vaccine in the United States; (3) suffered the injury for more than six months; and (4) has not previously collected a damages award in a civil action for a vaccine-related death. Id. Additionally, the Act requires a petitioner to file, concurrent with the filing of the petition, the “vaccination records associated with the vaccine allegedly causing the injury, pre- and post-injury physician or clinic records (including all relevant growth charts and test results), all post-injury inpatient and outpatient records (including all provider notes, test results, and medication records), if applicable, a death certificate, and if applicable, autopsy results.” 42 U.S.C. § 300aa-11(c)(2). Moreover, if the person who suffered the injury is a child, the Vaccine Act requires, along with the filing of the petition, the filing of “maternal[,] prenatal and delivery records, [and] newborn hospital records (including all physicians' and nurses' notes and test results).” Id. By filing a petition together with documentation that bolsters the asserted vaccine claim, a petitioner may satisfy the reasonable basis requirement in section 15(e) of the Vaccine Act for an award of attorneys' fees and costs even if petitioner fails to prevail on the merits of his claim. See, e.g. Baron, 1992 WL 333122 (stating that a showing by petitioner that an asserted claim was supported by the medical records or by an expert opinion satisfies the reasonable basis requirement).

The more common practice by petitioners before OSM, however, is to file petitions that contain allegations of a vaccine-related injury and are accompanied by incomplete documentation or no documentation at all. The supporting documentation is filed later when petitioner's medical records are obtained from petitioner's various health care providers. Generally, in Program cases, the mere failure to file medical records at the time of filing the petition does not preclude an award of attorneys' fees. Rather, the court has “generally accept[ed] skeletal petitions (those filed sans records)” and has permitted petitioners to show through “any number” of later submitted evidentiary filings, such as medical records or expert opinions, that a reasonable basis existed for the filed claim. Turpin v. Sec'y of the Dep't of Health and Human Servs., 99-564V, 2005 WL 1026714, at \*2 (Fed. Cl. Spec. Mstr. Feb. 10, 2005).

“[S]pecial masters have historically been quite generous in finding a reasonable basis for petitions.” Id. See also Jessen v. Sec'y of Dept. of Health and Human Servs., 94-1029V, 1997 WL 48940 (Fed. Cl. Spec. Mstr. Jan. 17, 1997) (declining to adopt “a very strict” interpretation of the reasonable basis requirement and finding a reasonable

basis where petitioner advanced a reasonable, but legally incorrect, theory); Chronister v. Sec’y of Dept. of Health and Human Servs., 89-41V, 1990 WL 293438 (Cl. Ct. Spec. Mstr. Dec. 4, 1990) (finding a reasonable basis for the filing of a vaccine claim for which petitioner’s expert offered an opinion relying on the parents’ factual account even though the special master declined to credit the parents’ factual account); Smith v. Sec’y of Dept. of Health and Human Servs., 89-96V, 1990 WL 293858 (Cl. Ct. Spec. Mstr. Oct. 31, 1990) (finding a reasonable basis existed in light of the “ample credible medical evidence” contained in the supplied medical records that petitioner may have suffered from polio within thirty days of vaccination with the received oral polio vaccine). But also see Murphy v. Sec’y of Dept. of Health and Human Servs., 30 Fed. Cl. 60 (1993), aff’d, 48 F.3d 1236 (Fed. Cir. 1995) (declining to award attorneys’ fees where offered expert opinion was based on a factual account that the special master found unreliable).

The afforded generosity in finding a reasonable basis for a vaccine claim, however, does not extend to the circumstance in which petitioner’s counsel fails to make any evidentiary filings whatsoever in support of the filed claim before the conclusion of the proceeding. See Turpin, 2005 WL 1026714, at \*\*1-2 (pro se petitioner filed a claim, without any medical records, on the eve of the filing deadline and then retained counsel who, in contravention of several orders, failed to file any medical records but sought attorneys’ fees after a dismissal for failure to prosecute the action). Neither does the afforded generosity under the Vaccine Program extend to circumstances in which the submitted records are not medical records, but are educational records and immunization records that contain no mention of a reaction to the administered vaccination, Jones v. Sec’y of Dept. of Health and Human Servs., 90-2206V, 1992 WL 63270 (Cl. Ct. Spec. Mstr. Mar. 10, 1992), counsel relies on an unqualified expert who has been disqualified in other vaccine cases, Hermes v. Sec’y of Dept. of Health and Human Servs., 90-866V, 1992 WL 49175 (Cl. Ct. Spec. Mstr. Feb. 19, 1992), a clear contradiction exist between the contemporaneous medical records and the parents’ allegations that the child received a particular vaccination, Collins v. Sec’y of Dept. of Health and Human Servs., 1992 WL 164512, at \*1, and the medical records contain “quite obvious” alterations, Carter v. Sec’y of Dept. of Health and Human Servs., 90-3659V, 1996 WL 402033 (Fed. Cl. Spec. Mstr. June 28, 1996).

Moreover, the special master assesses the reasonableness of counsel’s actions as additional information is acquired about a claim. 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. Perreira v. Sec’y of Dept. of Health and Human Servs., 33

F.3d 1375, 1377 (Fed. Cir. 1994) (holding that “when 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.”).

### 3. The Circumstances under which Counsel Filed This Petition

In evaluating whether a reasonable basis existed for the filing of this petition, the undersigned considers first the circumstances under which counsel filed the claim. The Program claim for which counsel now seeks fees and costs sought compensation for an injury alleged to have been caused by a series of received hepatitis B vaccinations.

Hepatitis B became a covered vaccine on the Vaccine Injury Table on August 6, 1997. See Final Rule, 63 FR 25777 (May 11, 1998). Any claim for an injury alleged to have resulted from a hepatitis B vaccination received within the eight years prior to August 6, 1997, the date on which hepatitis B became a covered vaccine under the Program, must have been filed within two years after the date that the vaccine became covered under the Program. See 42 U.S.C § 300aa-16(b).

To preserve the claims of a number of petitioners filing hepatitis B claims, several counsel filed, shortly before the time for filing such claims expired, bare petitions on behalf of numerous petitioners alleging injuries resulting from the receipt of one or more hepatitis B vaccinations. Many of the petitions were filed within days of the August 6, 1999 deadline and stated that the nature of the suffered injuries would be more fully described in subsequent filings. Petitioner’s counsel in this case filed numerous petitions in this manner. The claim of petitioner in this case, which was filed on July 29, 1999 and is one of the bare petitions filed shortly before the filing deadline, contained only the dates of petitioner’s hepatitis B vaccinations and an allegation of an “adverse reaction.”

In response to the undersigned’s Order of September 13, 2007, affording petitioner’s counsel an opportunity to respond to respondent’s motion for reconsideration, petitioner’s counsel explained:

The weeks and days leading up to August 6, 1999 were a bit of a nightmare for this firm (and undoubtedly others as well), as the phone kept ringing off the hook with people who wanted someone to represent them and file their claims before the deadline. For the people who contacted us during that

time, it was completely impossible to obtain records and get expert evaluations of the claims before they were filed.

All claims filed by this counsel have been filed in “good faith” . . . .

Petitioner’s Reply to Respondent’s Objection to Application for Attorneys’ Fees and Costs (P’s Resp.) at 2.

In this case, petitioner’s counsel filed the petition shortly before the time for filing hepatitis B claims expired and, on the basis of an email communication received from petitioner’s mother informing:

Brandon was in excellent health and extremely active from birth on. Brandon was given a series of 3 Hepatitis B vaccines on the following dates with these batch numbers: 2/12/93-1429V; 3/18/93-1650V; and 8/16/93-0634W. The type of vaccine was Recombivax, the manufacturer was MSD. In December of 1997 doctors discovered a lump in his left testicle. He was immediately seen by a urologist who felt the mass was malignant and Brandon was scheduled for surgery the next morning. The mass was NOT malignant, but because of the tremendous size of the growth and its extensive invasiveness, the left testicle was “ravaged” and had to be removed. The pathologist described the mass as a “connective tissue disorder,” which is an autoimmune response. The pathologist further informed us that some of the tissue from the mass was as much as 5 years old. This date would coincide with the date of the Hep B vaccines. The urologist stated this was possible and that there is no way of knowing whether the right testicle will ultimately be affected--only time will tell.

P’s Resp. at 3-4. Counsel acknowledges that based on a “miscommunication. . . , counsel was led to believe that these shots were given to Brandon shortly after his birth, [and] the claim was filed for him as a minor.” Id. at 3.

Here, after filing a bare petition, petitioner later filed a set of medical records and, at the same time, moved for judgment on the record on the ground that he could not offer an expert opinion causally associating his hepatitis B vaccinations with his injury. The filed medical records include a record of petitioner’s hepatitis B vaccinations and evidence that his mother completed a VAERS report stating that petitioner suffered a

“collagen disorder,” a “testis disorder” and a “neoplasm” as a result of receiving the hepatitis B vaccination series. On review, the support in the medical records for petitioner’s claim is quite bare. To the credit of petitioner’s counsel, however, upon recognizing the dearth of support in the medical records for petitioner’s claim and unable to obtain an expert to opine on vaccine-related causation, counsel promptly moved for judgment on the record.

In this circumstance, where counsel has demonstrated that he filed the petition in good faith but without an opportunity for further investigation of the claim because, through no fault of his own, the time for filing the claim expired within a very short period, and upon filing records that provide minimal support for petitioner’s claim, counsel has not unduly prolonged the proceeding but has moved promptly for judgment on the record, the undersigned is reluctant to deny a reasonable award of attorneys’ fees for counsel’s circumscribed work on the claim.

Support for the filing of a claim exists in the email communication sent to counsel prior to the filing of the petition and in the filed records which include evidence of petitioner’s receipt of the vaccinations and evidence that his mother filed a VAERS claim reporting petitioner’s alleged vaccine injury. This support would appear to be sufficient to establish the reasonable basis requirement of section 300aa-15(e)(1). See also Di Roma, 1993 WL 496981, at \*1. Moreover, an important purpose of the Vaccine Act’s provision of fees and costs awards for counsel representing petitioners is

not to benefit the attorneys involved, but to ensure that Vaccine Act petitioners will have adequate access to competent counsel. Access to such counsel is crucial in enabling petitioners to prosecute their claims successfully, and in maximizing the amount of petitioners’ awards in successful cases. Attorneys will agree to represent petitioners in such cases, however, only if they are ensured an adequate recompense for their time. Accordingly, when attorneys spend a reasonable amount of time and cost in representing Vaccine Act petitioners, such attorneys must be fairly compensated for their expenditure, in order to encourage attorneys to participate in future Vaccine Act cases.

Iannuzzi v. Sec’y of Dept. of Health and Human Servs., 02-780V, 2007 WL 1032379 (Fed. Cl. Spec. Mstr. Mar. 20), rev’d on other grounds, 78 Fed. Cl. 1 (2007). In the view of the undersigned, the Program’s interest in promoting attorney representation in vaccine cases, as contemplated by the attorneys’ fees provision of the statute, must be balanced

carefully against the court's examination of the reasonableness of the basis for bringing the vaccine petition. Because the undersigned finds that petitioner's counsel has satisfied both the good faith and the reasonable basis requirements of section 300aa-15(e)(1), an award of reasonable attorneys' fees and costs is granted.

#### 4. The Reasonableness of the Requested Fees and Costs in This Case

The Vaccine Act imposes a further limitation on the award of attorneys' fees and costs by requiring that a special master consider the reasonableness of the requested amount of fees and costs. Any conferred award must be limited to the time spent by counsel on a claim and the costs incurred in connection with a claim that are determined to be within the bounds of reason. See 42 U.S.C. § 300 aa-15(e)(1). When evaluating whether the number of hours of work for which counsel seeks to be paid were reasonably expended, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." Hensely v. Eckerhart, 461 U.S. 424, 434 (1983). "It is well within the special master's discretion to reduce the hours to a number that, in his experience and judgment, was reasonable for the work done." Saxton, 3 F.3d at 1521.

Although respondent challenges the reasonableness of the filing of this petition, respondent does not address the reasonableness of the requested fees. In evaluating the instant fee application, the undersigned finds that some of the billing entries supporting counsel's request for fees appear to contain unreasonable duplications of effort. The undersigned refers specifically to four particular instances of what appears to be duplicative billing entries.

First, petitioner's counsel billed 0.50 hours twice on November 9, 2001, to "[r]eview notice of appearance; review file to check on status of the records and exhibits filed." P's App. at 8.

Second, on October 2, 2003, "SSK," another firm attorney, billed 0.50 hours to "[p]repare Motion to Amend Caption." P's App. at 11. Subsequently, on June 22, 2006, SSK billed 0.3 hours to "prepare[] and electronically file Motion to Amend Caption." P's

App. at 12.<sup>8</sup> Petitioner's counsel filed the motion on June 22, 2006, and the undersigned granted the motion on June 28, 2006.

Third, on May 7, 2006, petitioner's counsel billed .10 hours twice to "[r]eview order of 20060501- designating as ECF." P's App. at 9.

Fourth, on May 28, 2006, petitioner's counsel billed 0.50 hours of time to have a "P[rivate]C[onference] with client; prepare SR; e-mail everyone with jobs to do to conclude case." P's App. at 9. The next line entry with the same date reflects petitioner's counsel billing 0.4 hours to "[p]repare SR re client's intent to dismiss; e-mail Sabrina to follow up." Id. at 10.

The time spent repeating these tasks described does not appear to be a reasonable expenditure of time on the tasks performed, and the undersigned cannot award fees for the performance of discrete tasks more than once on the same day in three of the noted instances. Declining to award the fees associated with the second, duplicative billing entry for the four referenced billing entries, the undersigned reduces petitioner's counsel's fee request by the following amounts:

- (1) \$125.00 for one of the entries billed by petitioner's counsel on November 9, 2001, to "[r]eview notice of appearance; review file to check on status of the records and exhibits filed." P's App. at 8.
- (2) \$49.50 for 0.3 hours SSK billed to "prepare[] and electronically file Motion to Amend Caption." P's App. at 12.
- (3) \$30.00 for one of the .10 hours billed by Mr. Shoemaker to "[r]eview order of 20060501- designating as ECF." P's App. at 9.
- (4) \$120.00 for 0.40 hours of time to have a "P[rivate]C[onference] with client; prepare SR; e-mail everyone with jobs to do to conclude case." P's App. at 10.

---

<sup>8</sup> In making a reduction for duplicative entries, the undersigned eliminated the second entry, as it was the more nominal amount.

Accordingly, petitioner's counsel's fee request is reduced by \$324.50.

**III. CONCLUSION**

Based on the undersigned's review of petitioner's fee application and respondent's objections, and for the foregoing reasons, petitioner is awarded \$6512.50 in attorneys' fees and \$8.21 in attorneys' costs. The award shall be made payable jointly to petitioner and his attorneys. Additionally, petitioner is awarded \$130.00 in petitioner's costs. The award shall be made payable solely to petitioner.

**IT IS SO ORDERED.**

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