In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

Filed: September 27, 2010

MARY BROWNING, mother and next friend of her daughter, KATHERINE BRYNILDSON,	)	No. 02-929V
Petitioner,	)	PUBLISHED
v.	)	Attorneys' Fees and Costs; Reasonable basis;
SECRETARY OF HEALTH AND HUMAN SERVICES,	)	Mercury toxicity; Novel theory
Respondent.	)	

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA for Petitioner.
Lynn E. Ricciardella, United States Department of Justice, Washington, D.C. for Respondent.

ATTORNEYS' FEES AND COSTS DECISION[1]

LORD, Chief Special Master.

I. INTRODUCTION AND OVERVIEW

Petitioner Mary Browning filed this case under the National Childhood Vaccine Injury Act ("Vaccine Act" or the "Act"), 42 U.S.C. § 300aa-10 et seq., on behalf of her daughter, Katherine Brynildson (Kate). Petitioner alleged that thimerosal-containing vaccines ("TCVs") caused her daughter to suffer from "mercury toxicity," leading to a variety of developmental injuries. On March 19, 2010, I issued a decision granting Respondent's motion for summary judgment and denying entitlement. Subsequently, Petitioner timely filed an application for fees and costs. After Petitioner discussed the application with Respondent, Petitioner filed an amended fee application, to which Respondent did not object, in part because, according to Respondent, she expected that the objection would be unavailing.[2] Despite Respondent's lack of objection,

[1] 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 trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). In the absence of a timely motion, the entire ruling will be available to the public. Id.

[2] Status conferences regarding Petitioner's fee application were convened on June 21, 2010, July 9, 2010, and August 12, 2010. The July 9, 2010 and August 12, 2010 status conferences were recorded by the Court's Electronic Digital Recording System ("EDR"). The times noted in citations to those status conferences refer to the EDR record.

because the fees requested seemed unusually high compared to awards in similar cases, I undertook a detailed review of the record in this case before issuing this decision.[3]

The question is whether Petitioner had a reasonable basis for spending so much time and effort pursuing this case. It is an important question concerning, at its core, the extent to which a claimant alleging a "novel" theory of vaccine injury may be permitted to incur fees and costs in an unsuccessful quest for supporting medical evidence. I conclude that counsel persisted in incurring fees in this case long after it was apparent that the evidence would not sustain Petitioner's claim.

Petitioner filed this petition on August 2, 2002. Despite making a number of efforts over an extended period of time to obtain a medical opinion to support her claims, Petitioner was unable to produce sufficient evidence of causation in any of the cases. Therefore, on March 19, 2010, I granted Respondent's motion for summary judgment.

In 2008, Kate's case was consolidated at Petitioner's request with that of her twin sister, Maeve Brynildson (Maeve), and her older brother, Colin Brynildson (Colin), for the purposes of resolving general causation issues.[4] On May 3, 2010, Petitioner's counsel filed a motion for attorneys' fees in each Brynildson sibling's case. After discussion with Respondent, Petitioner's counsel reduced his request in Kate's case and filed, on June 1, 2010, "Petitioner's Second Amended Application for Attorneys' Fees and Costs" ("Fee Application"). In the Fee Application, Petitioner requested a total award of $132,000.00. Id. This amount represents $131,550.00 in attorneys' fees and costs, and $450.00 in Petitioner's costs. Id. Respondent did not object to Petitioner's second amended fee application. Id.

If a petitioner does not establish entitlement to compensation, "the special master or court may award . . . reasonable attorneys' fees and other costs . . . 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." § 300aa-15(e)(1). My task is to determine whether the Fee Application satisfies the criteria for compensation under this provision.

Petitioner was represented by the firm Conway, Homer & Chin-Caplan, P.C. ("CHC"). Ronald C. Homer, Esq., was the attorney of record, but the billing records show that multiple attorneys worked on this case. I describe below counsel's explanations, which focused at first on the assertion that all research costs for a group of "mercury toxicity" cases were aggregated in Kate's file. In further discussions, however, counsel agreed that all the fees and costs

[3] Special masters are not bound by Respondent's lack of objection. See § 300aa-15(e)(1); see Savin v. Sec'y of Dep't of Health & Human Servs., 85 Fed. Cl. 313, 317-18 (2008). At the status conference on August 12, 2010, counsel for Respondent explained the lack of objection and stated that it did not constitute acquiescence in Petitioner's request. See Status Conference on Aug. 12, 2010, at 12:04:03-12:04:33. Respondent explained further that she often relies on the Court to exercise its discretion in these matters. Id. at 12:08:40-12:09:20.

On June 1, 2010, before any of these status conferences, Respondent, in the consolidated case of Petitioner's brother, Colin, objected to the entire request for fees and costs, amounting to $42,565.02. In the case of Kate's sister, Maeve, Respondent has not objected to the request for $23,361.03. In total, CHC has requested $197,926.05 in fees and costs in these three cases.

[4] It is unclear why Petitioner filed Colin's case six years after filing his younger sisters' petitions. See Browning (Colin) v. Sec'y of Dep't of Health & Human Servs., No. 07-453V, Fee Decision.

included in Kate's request were in fact necessary to support Kate's claim. There was a lack of clarity and consistency in counsel's arguments. As I note below, however, in the end it makes no difference whether the research costs were or were not aggregated, because the costs I disallow are those incurred for filing the opposition to summary judgment in this case, after most of the research had been conducted.[5]

During the initial status conference, counsel informed me that it had billed to Kate's case all general causation research costs for a group of eight cases it referred to as the "mercury toxicity" cases. In other words, according to counsel, the amount requested for Kate's case only seemed high because all the costs of conducting research were billed to her case, instead of being spread among the cases in the "mercury toxicity" group. For the reasons below, I find that the aggregation of research costs in Kate's case is not relevant to the question whether this request for fees and costs should be granted.[6]

It is true that research pertinent to the Brynildsons' claims also was pertinent to other cases in the purported "group." That the costs of researching the common "mercury toxicity" causation issues were billed to Kate's case may explain why the fees and costs were so much higher in Kate's case than in others. But this proffered explanation does not justify the expenditure of such a large amount when none of the cases resulted in a sufficient expert report, or a single entitlement hearing (due to the complete absence of supporting medical evidence), or a single award. In other words, if, instead of billing all the purported research costs to Kate, counsel had divided the research costs among all the cases counsel included in the "mercury toxicity" group, I would have had the same questions in each case.

At the second status conference, CHC agreed that all the fees and costs charged to Kate's case were incurred in pursuit of her own claim, such that the same amount would have been spent in Kate's case no matter how many related cases involving "mercury toxicity" were filed in the Office of Special Masters ("OSM"). Status Conference on July 9, 2010, at 3:06:20-3:06:43. Indeed, it is logical to conclude that, if the research conducted was necessary to prove "general causation" for all the "mercury toxicity" claims, it must be that the research was necessary to prove any one of the claims.

The question, then, is whether there was a reasonable basis to pursue these cases, whether as a group or individually. In my approach to this question, I am guided by the provisions of the Vaccine Act, the legislative history, and the applicable case law. In particular, I am mindful of the importance of providing prompt and adequate compensation to injured vaccinees and the attorneys representing them. Those attorneys play a crucial and much-appreciated role in carrying out the purposes of the Act.

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[5] The billing records show that CHC performed a few hours of research in July 2009, but over 95% of the research had been done by April 2009.

[6] After reviewing the records, I found scant evidence that these cases were handled as a group. There was no procedure akin to a formal omnibus proceeding, as in the autism cases handled in the Omnibus Autism Proceeding. Some of the cases originally claimed to be in the "mercury toxicity" group currently are pending before other special masters or were decided separately years ago. The reason for my decision, however, is not that there was no formal "mercury toxicity" group; the existence vel non of such a group is no more than a distraction. The fees and costs claimed are excessive whether or not such a group existed, for the reasons discussed herein.

In CHC's view, it is appropriate to file a claim on behalf of a vaccinee without supporting medical evidence of vaccine causation, and then to delay adjudication of the claim until the science "catches up." This is the approach frequently expounded by counsel and was the strategy employed in the conduct of the "mercury toxicity" cases. See Boyd v. Sec'y of Dep't of Health & Human Servs., No. 03-2649V, 2010 WL 3565231 (Fed. Cl. Spec. Mstr. Aug., 16, 2010).[7] As discussed below, counsel exceeded the bounds of reasonableness in this case by continuing this strategy long after it was apparent that the science was not "catching up," and that, on the contrary, despite seven years of abundant efforts to find medical support for Petitioner's allegations, none existed.[8] Counsel's persistence resulted in undue amounts of time and effort being expended in this case without commensurate benefit to the vaccinees or the Vaccine Program. Unsubstantiated petitions that linger on the docket of the OSM clog the system, delay the adjudication of other cases, and result in requests for attorneys' fees and costs that far exceed the benefit received by those who are intended to be assisted by the Act. As set forth below, Congress did not have this scenario in mind when it created a program to provide quick and generous recompense to persons injured by vaccines. See generally H.R. REP. NO. 99-908, at 22 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6363 ("Because of the straightforward nature of the petition and the proceedings, the Committee does not anticipate that reasonable attorneys' fees will be large.")

On the other hand, Congress may not have envisioned the nature of the proceedings in cases, like this one, where a petitioner must prove causation-in-fact. It is difficult and sometimes expensive for petitioners to collect medical records and find experts willing to offer an opinion. It also may be difficult to obtain reports from the experts within court-imposed deadlines. Without the benefit of representation by experienced counsel, petitioners would find this process to be more difficult still. As a result, special masters frequently award unsuccessful petitioners the attorneys' fees incurred for developing cases -- I have done so in the other "mercury toxicity" cases -- when reasonable amounts for attorneys' fees and costs were

[7] In a status report filed on September 5, 2007, in Boyd, Mr. Homer acknowledged that the court wanted the petitioner to "obtain a preliminary [expert] opinion as to whether the petitioner has [sic] reasonable basis to proceed in the Vaccine Program." Boyd, 2010 WL 3565231, Resp. to Ct.'s Order, Sept. 5, 2007, at 7. Mr. Homer reported that, "Unfortunately, the petitioner is unable to comply with this request at this time." Id. Mr. Homer stated that he wanted to wait for more research to be done before filing an expert report, and that he could not submit an expert report because the "OAP is continuing" and "new evidence will certainly surface, evidence that may well be beneficial to [the petitioner]." Id. "In other words, for [the petitioner] it will be well worth the wait, and she expressly chooses to wait." Id. at 9.

[8] The argument that science eventually will prove that vaccines cause all the injuries alleged by petitioners is of course premised on the notion that vaccines do cause all those injuries. In the absence of evidence demonstrating this notion, the argument embodies a powerful bias. From an objective viewpoint, it seems just as likely that when the science "catches up," it may disprove vaccine injury causation. See, e.g., Stone v. Sec'y of Dep't of Health & Human Servs., 2010 WL 1848220 (Fed. Cl. Spec. Mstr. Apr. 15, 2010), appeal docketed, No. 04-1041V (Fed. Cl. May 17, 2010) (child's neurological condition, Severe Myoclonic Epilepsy of Infancy, was caused by recently-discovered genetic mutation of the SCN1A gene).

The reality is that no one knows what science eventually will prove, and the only certainty is that the science of tomorrow will humble the science of today. Special masters cannot delay indefinitely making decisions in vaccine cases to find out what the future holds. The Act instructs us to the contrary: we must decide cases based on the scientific knowledge available at present, even though the "field [is] bereft of complete and direct proof of how vaccines affect the human body." See Althen v. Sec'y of Dep't of Health & Human Servs., 418 F.3d 1274, 1280 (Fed. Cir. 2005).

requested.[9] Nonetheless, where substantial fees are amassed in cases that, after many years, cannot be supported factually or medically, it is the assigned special master's statutory responsibility to ask whether those fees fall within the boundaries set by Congress as appropriate for compensation under the Act.

In deciding this question, I must therefore strike a balance between the competing goals of encouraging counsel to represent vaccine injury claimants and discouraging the waste of resources in pursuit of unsupported claims. To reach a fair and informed decision, I have conducted a review of the record in each case brought by Petitioner on behalf of the Brynildson children as well as the records in other "mercury toxicity" cases for which requests for fees and costs have been submitted.

I conclude that this case had a reasonable basis at its commencement. The record shows that Kate's case was brought at a time when many petitioners were filing claims based on reports that TCVs might cause autism and other developmental disorders. Most of those cases were grouped into the Omnibus Autism Proceeding ("OAP").[10] Petitioner did not join the OAP, but CHC initially sought and obtained a stay to permit Petitioner to await the results of discovery in the OAP which, it was reasonably believed, might disclose evidence that could be used on behalf of the Brynildsons. For a variety of reasons, including the fact that Kate and her sister were deemed by their own treating physician not to have disorders on the autism spectrum, the OAP did not yield supporting evidence. Thereafter, CHC diligently attempted to find support in for the Brynildsons' cases. Under these circumstances, I find that most of the requested fee award is reasonable.

After a period of several more years, however, it became clear that, not only did the case lack factual support in the medical records, there also was no reliable medical theory supporting causation. The "writing was on the wall," at the very latest, by April 15, 2009, when Petitioner submitted the report of Richard C. Deth, Ph.D., a professor of pharmacology. This submission followed several warnings by special masters that only an expert report specific to Kate, and not one consisting solely of general exposition concerning alleged "mercury toxicity," would suffice to allow this case to proceed. Dr. Deth's report, however, made no mention of Kate Brynildson, her condition, or her vaccinations. At that point, no reasonable basis for continuing to pursue Kate's case remained, and I conclude that counsel is not entitled to fees for contesting entitlement after that date.[11]

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[9] See, e.g., Jakymowych v. Sec'y of Dep't of Health & Human Servs., No. 05-518V, 2010 WL 996398 (Fed. Cl. Spec. Mstr. Feb. 22, 2010); Russum v. Sec'y of Dep't of Health & Human Servs., No. 03-1403V, 2010 WL 1177320 (Fed. Cl. Spec. Mstr. Mar. 8, 2010).

[10] The OAP was established to manage thousands of claims brought by petitioners alleging that vaccines caused autism or similar neurodevelopmental disorders. Cedillo v. Sec'y of Dep't of Health & Human Servs., No. 98-916V, 2009 WL 331968, *8 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 2010 WL 3377325 (Fed. Cir. Aug 27, 2010). Among the allegations adjudicated in the OAP was that thimerosal-containing vaccines caused autism. Id. at *10.

[11] In the final stages of this proceeding, CHC asserted that two treating physicians, Dr. Susan L Youngs and Dr. John A. Green III, would provide expert reports in this case, but the doctors ultimately decided they were too busy to do so. In support of this application for fees and costs, but not in support of Kate's claim, Drs. Youngs and Green have now submitted letters stating that they would have supported Kate's case if they had had the time. See Exs. 133 & 134. I note that the expert report Dr. Youngs did actually submit in this case failed to provide medical evidence in support of Kate's claim. See Browning (Katherine) v. Sec'y of Dep't of Health & Human Servs., No. 09-929V, 2010 WL 1407973, *15 (Fed. Cl. Spec. Mstr. Mar. 19, 2010). The recent letters do not persuade me that there was a reasonable

Disallowing costs from that date forward in the entitlement phase results in a $33,976.50 decrease in the amount to be awarded for attorneys' fees and costs. I add back into the award $1,000, representing a generous estimate of what it would have cost to conclude this case in a timely fashion. This diminishes the amount requested by $32,976.50, resulting in a total award of $99,023.50.

II. STATUTORY BACKGROUND

The Vaccine Act was enacted both to ensure that the nation had a stable supply of safe, effective vaccines and to provide injured persons with compensation "quickly, easily, and with certainty and generosity." H.R. REP. NO. 99-908, at 1-2. It was intended that the speed, low transaction costs, and relative certainty and generosity of the system would make it an attractive alternative to the tort system. Id. at 10. In designing the Act, Congress sought to spare injured persons, who often have mounting health expenses, from delays, court payments, and the expense of attorneys' fees. Id. at 4. To further that end, the Vaccine Act forbade an attorney from charging a petitioner a fee, and instead permitted the court to award reasonable attorneys' fees and costs both to successful and unsuccessful petitioners. § 300aa-15(e); H.R. REP. NO. 99-908, at 20. While Congress mandated an attorneys' fee award for a successful petitioner, it left to the special masters' discretion the award of attorneys' fees to an unsuccessful petitioner. H.R. REP. NO. 99-908, at 20. Congress intended to ensure that petitioners could obtain qualified assistance, but to limit attorneys' fees to cases that were filed in good faith and with a reasonable basis. Id.; see § 300aa-15(e).

III. FACTUAL AND PROCEDURAL HISTORY

A. Proceedings on Entitlement

The facts and procedural history of this case are set out in detail in the decision on entitlement. Browning (Katherine) v. Sec'y of Dep't of Health & Human Servs., No. 09-929V, 2010 WL 1407973 (Fed. Cl. Spec. Mstr. Mar. 19, 2010) [hereinafter "Entitlement Decision"]. I summarize the relevant facts below.

Petitioner filed her initial petition on August 2, 2002, without medical records, affidavits, or other documentation. See § 300aa-11(c)(1). Petitioner filed some medical records 10 months later, on June 23, 2003. On September 12, 2003, the case was transferred to then Special Master Sweeney, and was stayed "pending the resolution of discovery issues" in the OAP. Order, Sept. 12, 2003. It is significant that the cases were stayed pending resolution of "discovery" in the OAP. It apparently was not envisioned that the stay would extend for the duration of the OAP.

On October 20, 2003, Petitioner filed an amended petition. Nothing more happened until the case was transferred to then Special Master Edwards on October 27, 2005, following Special Master Sweeney's appointment to the United States Court of Federal Claims. In early 2006, the Secretary moved the court to require Petitioner to file the medical records of Kate's

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expectation that this case ultimately would be supported by medical evidence. I base this conclusion on the actual record before me of eight years of delay resulting in nothing of substance, and no credible evidence during the pendency of the case that Drs. Youngs and Green ever would have been ready to submit expert opinions. See infra section IV.B.2.

brother, Colin, in an effort to determine whether a genetic basis existed for the children's disabilities. Resp't Motion, Mar. 9, 2006. Petitioner filed a response in which she opposed the motion on the grounds that the relief requested by the Secretary would violate Colin's constitutional right to privacy, among other rights, citing Griswold v. Connecticut, 381 U.S. 479 (1965), and stating that "Colin's genetic predispositions, if any, are not relevant to the petitions of either sister." Pet'r Resp., Apr. 14, 2006, at 6. Petitioner characterized as "utter nonsense" the Secretary's assertion that Colin's records might shed light on the issue of whether vaccines versus genetic factors caused the problems of all three siblings. Id. at 6.[12] For reasons that do not appear in the record, Respondent's motion was not granted.[13]

On December 13, 2006, Special Master Edwards issued an order directing Petitioner to file, by February 23, 2007, a status report regarding the results of Petitioner's "preliminary medical investigation of the case." Order, Dec. 13, 2006. "The special master expects petitioner to represent at a minimum that petitioner has retained a medical expert to review the case and to assist in the development of a medical theory." Id. On February 23, 2007, Petitioner filed a status report stating she had retained the services "of an expert, Dr. Susan L. Youngs, to render opinions in this case." Petitioner was provided until April 2, 2007, to file Dr. Youngs's report.

On April 2, 2007, Petitioner filed a status report representing that, on March 2, 2007, "Dr. Youngs informed counsel that it is her opinion that petitioner [sic] has symptoms that place her on the autism spectrum." Petitioner stated that she would move to transfer the case into the OAP after receiving all updated medical records. Pet'r Status Report, Apr. 2, 2007, at 2. On April 30, 2007, Petitioner represented she had received the records and would file the motion for transfer to the OAP within 30 days. Pet'r Status Report, Apr. 30, 2007. On May 1, 2007, the special master issued an order requiring Petitioner to file the medical records and a motion to transfer to the OAP by June 1, 2007.

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[12] Vaccine cases are conducted under seal to protect the privacy of claimants and their families. See § 300aa-12(d)(4)(A); Rule 18(a). It is common in vaccine cases to obtain evidence concerning family members who suffer disorders similar to those of petitioners, to enable the medical experts to evaluate whether the cause is genetic rather than vaccine-related. See generally, § 300aa-12(d)(3)(B)(ii) ("In conducting a proceeding on a petition a special master . . . may require the submission of such information as may be reasonable and necessary").

[13] Respondent's Motion was supported by five specific references in Kate and Maeve Brynildson's medical records in which medical providers noted a family pattern of developmental delay in the Brynildson children, including Colin, Kate's older brother. See Resp't Mot., Mar. 9, 2006. One doctor stated: "It is my impression; Maeve, [and] likely her twin sister, has a static encephalopathy, which is genetic, but not yet defined, with resulting global developmental delay, especially speech and language and social." Id. at 1. Additional records quoted in the Respondent's Motion noted Colin's speech and social problems, as well as a family medical history of "febrile seizures in Mrs. Brynildson and Kate's paternal grandfather." Id.

In January 2007, eight months after the Respondent's Motion was denied, CHC began recording time in connection with preparation of a petition on Colin's behalf, filed on June 28, 2007. On May 16, 2008, Petitioner's counsel filed a motion to consolidate the cases of the three Brynildson siblings: Maeve, Kate, and Colin. Petitioner stated at that time: "All three Brynildson siblings: allege mercury toxicity as the result of vaccines containing Thimerosal; suffered similar injuries, including speech, language, and attention deficits; have been treated by the same physician; and will likely present the same experts at hearing." Pet'r Mot. to Consolidate, May 16, 2008, at ¶1.

On June 1, 2007, Petitioner moved for an enlargement of time to "respond" to the Court Order of May 1, 2007. This motion was granted. Order, June 11, 2007. Petitioner filed the motion to transfer the case to the OAP on July 20, 2007, and asserted, without citing any medical authority, that Kate's condition, "[m]ercury poisoning from Thimerosal," is a disorder "similar to autism[;] indeed, autism may well be simply a form of mercury poisoning." Pet'r Mot. to Transfer to OAP ("Motion to Transfer") at 2-3. The Secretary opposed the transfer and asserted that there was no evidence to support the "vague contention" that Kate's disorder was "similar" to autism. Resp. and Opp'n to Pet'r Mot. to Transfer, Aug. 3, 2007, at 5-6. The Secretary accurately stated that, "Neither petitioner's Motion to Transfer nor the medical records indicates a diagnosis of an autism spectrum disorder." Id. at 6.

At a status conference on August 22, 2007, the special master discussed the motion to transfer, noting that Kate's medical records did not disclose a diagnosis of an autism spectrum disorder. Order, Apr. 4, 2008 (summarizing the case history). Therefore, the special master orally denied Petitioner's Motion. Id.[14]

In subsequent status conferences, on November 19, 2007, January 29, 2008, and April 3, 2008, the special master reviewed Petitioner's progress in the medical investigation of the case. Order, Apr. 4, 2008. On April 4, 2008, the special master issued an order again directing Petitioner to file the opinion of her medical expert. Id. He noted that he had specifically required the retention of an expert and the filing of an expert report. He noted that, instead of filing an expert report, Petitioner had claimed that Kate had autism and moved to transfer the case to the OAP. Id.

On May 16, 2008, Petitioner submitted a report from Dr. Youngs. In her report, Dr. Youngs stated, "Both [twins] had been tested and the results suggested that neither twin were [sic] 'on the [autism] spectrum.'" Pet'r Ex. 23 at 1. It was Dr. Youngs's opinion that the twins "did not display the more common signs of mercury toxicity, nor did their blood work reveal frank evidence of mercury toxicity." Id. Further, she stated that "Maeve and Kate are not autistic," even though they had speech and language problems, which are "prominent signs in autistic children." Id. at 2.[15] Two medical articles were filed with the report, but the report did not explain how the articles pertained specifically to Kate's case.

[14] During this same time, CHC was litigating the other "mercury toxicity" cases. In Boyd, counsel argued that the OAP would produce new evidence, and the petitioner wished to await the conclusion of the OAP before filing an expert report. Boyd, 2010 WL 3565231, Pet'r Resp. to Ct.'s Order, Sept. 5, 2007, at 7-9. Based on counsel's recurring argument in Boyd that he needed to wait for the science to develop, it seems that by 2008 counsel recognized the weakness of the "mercury toxicity" claims. Notably, in April 2008, counsel filed an expert report in Boyd in which the expert stated that the evidence was "suggestive" but "still falls well short of a level that could justify a causation opinion that implicates exposure to mercury as a substantial contributing factor in the development of [these vaccinees' speech, language, and attention] disorders." See Boyd, 2010 WL 3565231, Pet'r Ex. 40 (Dr. Kinsbourne's Report).

[15] Dr. Youngs's report thus contradicted counsel's earlier representation to the special master that, in the doctor's opinion, Kate's symptoms placed her "on the autism spectrum." See Pet'r Status Report, Apr. 2, 2007.

Also on May 16, 2008, Petitioner filed a motion to consolidate the three Brynildson siblings' cases.[16] On June 11, 2008, this motion was granted. A consolidated entitlement hearing was scheduled for November 3, 2008, and Petitioner again was ordered to file a medical expert's opinion by July 30, 2008. Order, June 11, 2008. Instead of filing an expert's opinion by this deadline, on June 30, 2008, CHC filed a motion to consolidate the three Brynildson cases with those of three other petitioners.[17]

On July 17, 2008, this case was transferred to Special Master Abell, after Special Master Edwards left the OSM. On July 30, 2008, in response to Dr. Youngs's report, Respondent filed, in both Kate's and Maeve's cases, a motion for summary judgment for insufficient proof. On August 26, 2008, the court held a joint status conference in all six cases subject to Petitioner's motion to consolidate. Order, Sept. 3, 2008. Special Master Abell ordered all the petitioners to file, by October 27, 2008, all medical records and fact witness affidavits, as well as a brief addressing the common aspects of scientific causation among the cases. Id. He also ordered Respondent to note her position regarding the timeliness of some of the cases. Id. "In the meantime, the Court [vacated] all previous deadlines." Id. Further proceedings were held to determine whether to consolidate the cases.

At a status conference on December 8, 2008, Petitioner stated that, based on guidance from the special master, she would reconsider her motion to consolidate. Order, Dec. 22, 2008. CHC then withdrew the motion to consolidate the six cases. Pet'r Resp. to Ct.'s Order, Jan. 2, 2009. At a status conference on January 9, 2009, the special master decided to leave in effect the earlier order consolidating the Brynildson siblings' cases. Order, Jan. 26, 2009. Special Master Abell directed Petitioner to file a "specific, legally sufficient expert report." Order, Jan. 26, 2009.

On April 15, 2009, Petitioner filed Dr. Deth's report, in which he stated that "the effects of thimerosal closely parallel the metabolic abnormalities found in autistic children," and that this congruence was convincing evidence that thimerosal causes the major features and symptoms of autism. Pet'r Ex. 34 at 2. On June 17, 2009, Special Master Abell memorialized a status conference in which he stated that Dr. Deth's expert report was "generalized and nonspecific" and therefore did not satisfy the Court's previous order to file a "specific, legally sufficient expert report." Order, June 17, 2009.

Petitioner represented that a new report from Dr. Youngs would be filed. Petitioner was ordered to file, on or before June 19, 2009, an expert report clearly explaining a medical theory causally connecting vaccination and Kate's injury. On June 19, 2009, Petitioner explained that she could not comply with the special master's Order because "[i]n addition to Dr. Youngs'[s] busy clinical practice, she is also engaged in fundraising for a new center on developmental disorders, as well as a new teaching program." Pet'r Resp. to Ct.'s Order, June 19, 2009, at 1. Petitioner stated further that she had contacted "a pediatric neurologist to determine what, if any, availability there is to review Katherine's records and render an expert opinion." Id. at 1-2.

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[16] In light of the motion for consolidation, I question the bona fides of Petitioner's hyperbolic Opposition, filed in March 2006, characterizing as "utter nonsense" the Respondent's request for information concerning Colin Brynildson. Two years later, Petitioner alleged that all three siblings' suffered "similar injuries." See supra note 13. I address more serious objections to the handling of Colin's claim in my opinion on the fee petition in his case. See Browning (Colin), No. 07-453V, Fee Decision.

[17] Those cases are Boyd, No. 03-2649V; Jakymowych, No. 05-518V; Russum, No. 03-1403V.

On June 22, 2009, this case was transferred to me. On June 26, 2009, I ordered Petitioner to respond to the motion for summary judgment no later than August 10, 2009. At that time, Respondent's motion for summary judgment had been pending without response (and without a motion to extend the time for response as set forth in Vaccine Rule 20(b)(1)), for 23 months.[18] In the same order, I granted Petitioner, over the Respondent's objection, an extra 60 days in which to submit an additional expert report. On August 10, 2009, Petitioner filed a response to the motion for summary judgment, including the report and testimony given by Dr. George Lucier in the mercury death test case, Kolakowski v. Secretary of the Department of Health & Human Services, No. 99-625V.[19]

On August 24, 2009, Petitioner moved for an extension of time to permit Dr. John A. Green III, "one of Katherine's treating physicians[,] to supply an expert report on her behalf." I denied the motion for 60 more days in which to submit that expert report, because at that point, Kate's petition had been pending for more than seven years, and Special Master Abell had ordered Petitioner more than nine months earlier to submit an additional expert report, which Petitioner failed to do. Order, Sept. 14, 2009.

No further activity occurred in this case until March 19, 2010, when I issued a decision granting the Secretary's motion for summary judgment in Kate's case and denying entitlement. That decision was not appealed, and judgment entered on April 30, 2010.

B. Proceedings Regarding the Fee Application

On May 3, 2010, Petitioner filed an application for attorneys' fees and costs in each Brynildson case. On June 1, 2010, Petitioner filed the amended Fee Application at issue here. In the Fee Application, Petitioner requested a total award of $132,000.00. On June 21, 2010, and July 9, 2010, I held status conferences to clarify some issues relating to the Fee Application. On July 21, 2010, Petitioner filed, in all three Brynildson cases, letters from Dr. Youngs and Dr. Green. Pet'r Exs. 133 and 134.[20] Both doctors indicated that they had been

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[18] Section 300aa-12(d) of the Act specifically states that the rules governing proceedings before special masters "shall . . . include the opportunity for summary judgment." § 300aa-12(d)(2)(C). The opportunity for summary judgment required by the Act is meaningless if, after nearly two years, a special master may not require that a response be filed.

[19] Dr. Lucier's report and testimony focused on thimerosal and death. Dr. Lucier did not present a theory or a biological mechanism showing how TCVs could cause developmental disorders. Nor did his report and testimony, which were prepared for a different case, address the facts of this one. See Entitlement Decision, 2010 WL 1407973, at *13.

[20] These letters were submitted only after it was clear that this application for fees was under careful consideration. Petitioner submitted for the first time a letter from Dr. Green in which he stated, "I could not meet the deadline and therefore had to decline to serve as a medical expert for the Brynildson family." Pet'r Ex. 134 at 1. This letter, and a similar letter from Dr. Youngs, see Pet'r Ex. 133, suggests an attempt by Petitioner to justify retroactively her inability to establish a record that could result in entitlement.

I denied Petitioner additional time to submit Dr. Green's report on August 24, 2009, after Petitioner asserted that Dr. Green "simply did not have the time to adequately address the issues in this case." Pet'r Mot. for Extension of Time, Aug. 24, 2009. For nearly a year after that (including the period of seven months before I dismissed the case), Petitioner submitted nothing from Dr. Green. At any time after the denial of the requested enlargement on August 24, 2009, Petitioner could have filed a letter from

willing to serve as expert witnesses in the cases, but did not have time to meet the deadlines set by the court.[21]

On August 12, 2010, at the request of Petitioner, I convened a status conference in Maeve's case. Counsel wished to inquire as to the status of the fee application in Maeve's case. I informed counsel that, because of the close relationship among the fee applications in the three Brynildson cases, the decisions regarding the fee applications were related and therefore would be issued together, at the earliest opportunity.[22]

During the status conferences, CHC protested that it was unfair that I questioned the amount sought, when Respondent had not objected to it. CHC argued that it had incurred the high costs in this case only because, starting in 2006, Special Master Edwards had required the presentation of expert evidence. Status Conference on July 9, 2010, at 3:11:00-3:12:03 (Now, "because the Court ordered us to move these cases along, and as a result, we incurred fees and costs, that now looking back, it's like, that even though we wanted them stayed, it is now to say, oh, you shouldn't have at that point"). Counsel also noted that in 2006 and 2007, the firm was "paralyzed" as it was preparing for the first hearing in an OAP test case. Id. at 2:52:12-2:53:30.[23] Mr. Homer argued that, when the cases were transferred from Special Master Edwards to Special Master Abell, he "reinstated the stay." Id. at 2:38:48-2:40:19.[24]

Counsel maintained that, when determining whether their past actions were reasonable, one has to look at the state of the science at that time. Id. at 3:08:41-3:08:55. For the duration

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Dr. Green such as the one filed belatedly on July 21, 2010. Indeed, Dr. Green's letter could most appropriately have been submitted in support of Petitioner's request for an enlargement of time in August 2009. It was not. These circumstances make it appear that Dr Green's letter simply is an after-the-fact attempt to create retroactively a reasonable basis for a claim that had no reasonable basis during its pendency.

[21] Dr. Youngs had already filed one report which, as I discussed at length in the entitlement decision, actually contradicted the Petitioner's allegations. See Pet'r Ex. 24; infra section IV.B.2. Dr. Youngs's recent letter, dated July 19, 2010, now contradicts her earlier report, stating at page 2 of the letter that "the Brynildson children suffered mercury toxicity." Similarly, her recent letter stated that the twins "were on the autistic spectrum." This is not what Dr. Youngs said in the letter submitted as evidence in this case. Pet'r Ex. 24; Entitlement Decision, 2010 WL 1407973, at *15.

For whatever reason, these physicians were not willing and/or able to provide medical evidence supporting Kate's claim. The Act does not require a special master to wait indefinitely for an expert to find time to submit a report; as discussed above, see supra sections I-II, to do so actually would be contrary to the purposes of the Act. Here, the amount of time permitted for this purpose (eight years) was considerably more than adequate.

[22] I have advanced consideration of these fee requests ahead of entitlement decisions in other cases to accommodate counsel's expressed need for prompt payment of the fees requested. See Status Conference on Aug. 12, 2010, at 12:11:20-12:14:31.

[23] The hearing was in Cedillo, No. 98-916V, and it was held over three weeks in June 2007.

[24] As indicated above, Special Master Abell did not "reinstate the stay." Ms. Chin-Caplan, the CHC partner who did most of the work on these cases, confirmed that Special Master Abell simply vacated the deadlines in the various cases to provide CHC an opportunity to support more thoroughly its motion for consolidation, Status Conference on July 9, 2010, at 2:49:13-2:49:38, a motion that CHC subsequently withdrew, see Pet'r Resp. to Ct. Order, Jan 2, 2009.

of this case, the firm did not wish to proceed until it "had time for the science to develop." Id. at 3:11:00-3:11:40. Counsel asserted that when Special Master Edwards began to require case development, Respondent agreed that the cases should be stayed. Id. at 3:11:00-3:12:03.[25] Counsel argued that this was "a subgroup almost of the [OAP], and then Special Master Edwards pushes it along." Id. at 3:12:47-3:13:20. "[I]t was Special Master Edwards who decided . . . to move these cases . . . and all that we asked was that we stay these cases." Id. at 3:11:00-3:11:40. CHC maintained that once the special master had forced Petitioner to file an expert report, the firm had an ethical obligation to research the issue of "mercury toxicity" to try to find a viable claim. Id. at 3:15:06-3:15:19. In sum and substance, CHC claimed it would be unfair for the OSM to require Petitioner to incur fees, only now to deny payment.

Because I allow Petitioner's fees and costs through April 2009, and Special Master Edwards' involvement ended in 2008, his role is irrelevant to this fee decision. But counsel's conduct during the time period Special Master Edwards was assigned is pertinent. I find that Petitioner erroneously blames Special Master Edwards for Petitioner's own decision to file claims alleging a theory of causation for which there was no support in the medical community, and to continue to pursue those claims after a diligent and protracted but entirely fruitless search for corroborating medical evidence. In contrast to the autism cases, which were supported by published reports of a possible link between vaccines and autism, the Brynildson claims were crafted by Petitioner, without scientific support. Petitioner reasoned that, if vaccines could cause autism, they could also cause the range of other developmental disorders suffered by the Brynildson children.[26] It was not unfair under these circumstances to require Petitioner to provide some substantiation from the medical community that the theory she espoused was supportable. See 42 U.S.C. § 300aa-12(d)(3)(B)(ii) ("In conducting a proceeding on a petition a special master . . . may require the submission of such information as may be reasonable and necessary"). It was not Special Master Edwards' fault that Petitioner never was able to substantiate her claims.

C. Other "Mercury Toxicity" Cases

Petitioner's counsel has maintained that this case is part of an informal "mercury toxicity" case group. According to CHC, the "mercury toxicity" group currently consists of eight cases: Boyd, No. 03-2649V; Browning (Maeve), No. 02-928V; Browning (Kate), No. 02-929V; Browning (Colin), No. 07-453V; Jakymowych, No. 05-518V; Russum, No. 03-1403V; Schelich, No. 03-1707V; and Wilkerson, No. 05-232V. I examine counsel's assertion because it provides pertinent contextual information for this decision. As I stated earlier, I find very little evidence that such "mercury toxicity" cases existed as a group in the OSM. See supra note 6.

It appears that the idea of a "mercury toxicity" group first surfaced in an order issued on September 12, 2003. In that order, the court stayed eight cases pending the outcome of the OAP, stating that those cases were part of "a special category, which alleges that "mercury toxicity" caused petitioners' developmental-delay injury."[27] After that order, it appears that only

[25] Respondent disputed that, after 2003, she ever acquiesced to a stay. Status Conference on July 9, 2010, at 3:12:10-3:12:47.

[26] As I explained in the decision on entitlement, this reasoning is unpersuasive. See Entitlement Decision, 2010 WL 1407973, at *12-13.

[27] Most of the cases in the original group are not in the "mercury toxicity" group currently identified by counsel. The eight cases referenced in the September 12, 2003 order are: Haynes v. Sec'y of Dep't of Health & Human Servs., No. 99-010V (now pending in Mercury Death Omnibus Proceeding before

one other "mercury toxicity" order was issued.[28] After September 12, 2003, the record in this case lacks mention of a "mercury toxicity" group.

CHC has claimed that the amount requested in the Fee Application reflects work done for all of the "mercury toxicity" cases. Consequently, the record in each case provides pertinent context, describing the circumstances in which these fees were incurred. In all the cases, entitlement was denied. There is substantial overlap in the medical literature and expert reports filed in each case. In none of the cases was a legally sufficient expert report filed.

Maeve Brynildson's case is substantially the same as this one. For fees and costs in Maeve's case, CHC has requested an award of $23,361.03.

Colin Brynildson's case was filed on June 28, 2007, and alleged that Colin suffered from "mercury toxicity" resulting in Attention Deficit and Hyperactivity Disorder ("ADHD") and Oppositional Defiant Disorder. Browning (Colin), No. 07-453V, Amended Pet. For fees and costs in Colin's case, CHC has requested an award of $42,562.57.

Boyd was filed on November 10, 2003, alleging that the vaccinee "sustained symptoms of mercury toxicity including speech delay and gross motor deficiencies." Boyd, 2010 WL 3565231, Amended Pet. For attorneys' fees and costs in Boyd, CHC estimates that it will request $40,992.29.

Jakymowych was filed on May 5, 2005. The petitioner alleged that the vaccinee suffered "mercury toxicity" and Attention Deficit Disorder as a result of receiving TCVs. Jakymowych, 2010 WL 996398, Amended Pet. In July 2009, petitioner filed a motion to dismiss the petition, which I granted. On February 22, 2010, I granted the fee application in Jakymowich, awarding the requested amount of $23,619.53.[29] The fee application made no mention of the "mercury toxicity" group, nor did counsel reserve the right to seek, in another case, additional fees for general causation research costs.

Russum was filed on June 6, 2003. The petitioner alleged that TCVs caused the vaccinee to suffer from "mercury toxicity," resulting in ADHD and gross motor skill problems. Pet'r Mot. to Consolidate, June 30, 2008; see Russum, 2010 WL 1177320, Amended Pet. The

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Special Master Abell); Nesslage v. Sec'y of Dep't of Health & Human Servs., No. 99-678V (case was dismissed after CHC withdrew as attorney); Shirley v. Sec'y of Dep't of Health & Human Servs., No. 99-730V (Amended to Presley) (case settled after claim amended to a post-MMR encephalopathy); Haynes v. Sec'y of Dep't of Health & Human Servs., No. 00-358V (claim amended and case now pending before Special Master Millman); Abruzzo v. Sec'y of Dep't of Health & Human Servs., No. 02-857V (case moved forward individually on a "mercury toxicity" theory, but after receiving "a preliminary report from the pediatric neurologist" in December 2006, petitioner moved for a decision on the record and the case was dismissed); Browning (Maeve), No. 02-928V (dismissed); Browning (Katherine), No. 02-929V (dismissed); and Schelich v. Sec'y of Dep't of Health & Human Servs., No. 03-1707V (dismissed). Schelich and the Brynildson twins' cases are the only three cases in the current "mercury toxicity" group that also appeared in the September 2003 order.

[28] In Boyd, petitioners' request that their case be transferred to Special Master Sweeney to be "included in the thimerosal/mercury toxicity grouping" was granted. Boyd, 2010 WL 3565231, Order, Dec. 13, 2004.

[29] CHC originally requested $27,619.53, but reduced the request to prevent an objection by Respondent.

facts are discussed in detail in my entitlement decision issued on March 8, 2010. Russum, 2010 WL 1177320. As analyzed in the decision, CHC employed dilatory tactics similar to those used in Kate's case.

In Russum, CHC filed for and was granted numerous extensions to submit an expert report. Again, a lack of complete candor mars CHC's conduct vis-à-vis the special master. In support of one request for enlargement, for example, CHC stated, "Dr. Kinsbourne has filed reports in [Boyd and Jakymowych] that indicate that Dr. Kinsbourne's preliminary review of the literature suggests a causal link between mercury and speech, language, and attention disorders." Russum, 2010 WL 1177320, Pet'r Status Report & Mot. for Extension of Time, Apr. 7, 2008, at 1-2. In those reports, Dr. Kinsbourne actually stated, as noted above, "Though suggestive, the evidence so far still falls well short of a level that could justify a causation opinion that implicates exposure to mercury as a substantial contributing factor in the development of their disorders." Boyd, 2010 WL 1177320, Pet'r Ex. 40. At best, CHC's characterization of Dr. Kinsbourne's opinion exaggerated the strength of the existing evidence of causation. Dr. Kinsbourne, I note further, did not ever provide an opinion supporting vaccine causation in any of these cases. I granted the application for attorneys' fees and costs in Russum, awarding the requested amount of $23,656.49.[30]

In Schelich, the petitioner alleged that TCVs caused the vaccinee to suffer neurological injuries, including speech delay and gross motor skill dysfunction. Schelich, No. 03-1707V, Amended Pet. The case raised a statute of limitations question. After a fact hearing, the court issued, on June 24, 2009, a ruling that the case was timely filed. The petitioner did not file any medical literature or an expert report on the issue of causation, and moved voluntarily to dismiss on October 30, 2009. On January 20, 2010, the fee application was granted, awarding the requested amount of $37,388.77.[31]

All told, CHC has incurred approximately $427,000 in fees and costs for these eight cases. After subtracting Wilkerson, which was dismissed on statute of limitations grounds, and accounting for CHC's voluntary reduction of some fees, the total that CHC is charging the Program for the seven cases is almost $325,000.[32] None of these cases progressed to an entitlement hearing. In none of these cases was a viable expert report filed. The factual and medical basis for each claim was extremely weak, and counsel repeatedly was placed on notice of these deficiencies by the special masters.

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[30] When I awarded the fees and costs claimed in Jakymowych and Russum, I had no idea that a few months later I would receive a petition seeking $132,000.00 in fees and costs including, according to CHC, costs that were incurred in Jakymowych, Russum, and other "mercury toxicity" cases. My decision awarding fees in Jakymovych and Russum included the standard language stating that, "This amount is intended to cover all legal expenses. . . . [and] an attorney [may not] charg[e] or collect[] fees (including costs) which would be in addition to the amount awarded herein" See infra note 40. Consistent with counsel's duty of candor to the court, it was incumbent on CHC to bring to my attention that the amounts sought in Jakymoych and Russum actually represented only part of the fees and costs incurred in these cases (if, as counsel now contends, all the research on "general causation" for Jakymowych, Russum, and the other "mercury toxicity" cases was billed to Kate Brynildson's file).

[31] CHC originally requested $40,147.67, but amended the request to prevent an objection by Respondent.

[32] See Wilkerson v. Sec'y of Dep't of Health & Human Servs., 593 F.3d 1343 (Fed. Cir. 2010).

IV. DISCUSSION

A. Standard for Awarding Attorneys' Fees

The Vaccine Act mandates the award of reasonable attorneys' fees and costs to successful petitioners. § 300aa-15(e). If a petitioner does not establish entitlement to compensation, the special master may award reasonable attorneys' fees and costs if the petition was brought in good faith and there was a reasonable basis for the claim. § 300aa-15(e)(1); Saxton v. Sec'y of Dep't of Health & Human Servs., 3 F.3d 1517, 1520-21 (Fed. Cir. 1993). If the petition for compensation is denied, a petitioner does not have a right to an award of attorneys' fees and costs; the Vaccine Act leaves such an award to the special master's discretion. Saxton, 3 F.3d at 1520. Even if good faith and a reasonable basis are found, a fee award is not mandatory. § 300aa-15(e)(1); Di Roma v. Sec'y of Dep't of Health & Human Servs., No. 90-3277V, 1993 WL 496981, *1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). "Because public policy concerns warrant against an attorneys' fees proceeding escalating to the level of full litigation, the special master is given 'reasonably broad discretion' to determine the proper amount of an award." Carrington v. Sec'y of Dep't of Health & Human Servs., 85 Fed. Cl. 319, 322-23 (2008) (quoting Wasson v. Sec'y of Dep't of Health & Human Servs., 24 Cl. Ct. 482, 483 (1991), aff'd, 988 F.2d 131 (Fed. Cir. 1993)).

B. Analysis

1. Petitioner's Claim Was Maintained in Good Faith.

Whether a petition was filed in good faith is a subjective inquiry. Di Roma, 1993 WL 496981, at *1. It is satisfied if the petitioner honestly believes she has suffered a compensable vaccine injury. Id. The good faith requirement is an easy test to satisfy. In this case, Petitioner and her counsel believed when this case was filed that Kate suffered a vaccine-injury, thereby satisfying the good faith requirement. The more difficult question is whether the claim had a reasonable basis.

2. The Claim Had Reasonable Basis At The Outset.

a. Definition of Reasonable Basis

The term "reasonable basis" is not defined in the statute; the case law, however, gives some interpretive guidance. "[T]he 'reasonable basis' requirement 'is objective, looking not at the likelihood of success of a claim but more to the feasibility of the claim.'" Turner v. Sec'y of Dep't of Health & Human Servs., No. 99-544V, 2007 WL 4410030, *6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) (quoting Di Roma, 1993 WL 496981, at *1). Counsel has an ongoing obligation to ensure that the claim is founded upon a reasonable basis. As more evidence about a claim is discovered, "the reasonable basis that may have been sufficient to bring the claim [can] cease[] to exist, [and] it can[] [no longer] be said that the claim is maintained in good faith." Perreira v. Sec'y of Dep't of Health & Human Servs., 33 F.3d 1375, 1377 (Fed. Cir. 1994).

To determine whether a claim has a reasonable basis, courts have looked to a number of factors, "including the factual basis, the medical support and jurisdictional issues." Di Roma, 1993 WL 496981, at *1. The court also should consider the circumstances under which a petition was filed. See Turner, 2007 WL 4410030, at *6. A petitioner does not need to establish causation to show a claim has a reasonable basis. A reasonable basis can still exist, for example, where an expert interprets ambiguous evidence to reach a result that differs from the

court's interpretation, or where the trier of fact decides that the strength of testimony is insufficient to support a particular finding. See Stevens v. Sec'y of Dep't of Health & Human Servs., No. 90-221V, 1992 WL 159520, *3 (Fed. Cl. Spec. Mstr. June 9, 1992). Historically, special masters have been "quite generous in finding a reasonable basis for petitioners." Turner, 2007 WL 4410030, at *8 (quoting Turpin v. Sec'y of Dep't of Health & Human Servs., No. 99-564V, 2005 WL 1026714, *2 (Fed. Cl. Spec. Mstr. Feb. 10, 2005)).

Special masters have been less generous to petitioners when counsel fails to investigate the facts or continues to prosecute a case after it should have been recognized that the evidence was manifestly insufficient. See, e.g., Perreira, 33 F.3d at 1377 (denying fees incurred at hearing when petitioner's counsel knew his expert's opinion was legally insufficient).[33] In Perreira, the Federal Circuit affirmed a special master's ruling that once petitioner's only expert submitted an opinion that was legally insufficient, the case no longer had a reasonable basis. Id. Nor does the submission of an expert report, by itself, establish a reasonable basis for the claim; the report must fit the facts of the case. See Perreira, 33 F.3d at 1377; Stevens, 1992 WL 159520 (denying fees due to lack of reasonable basis when expert report was based solely on mother's affidavit, with no reference to the medical records).

Counsel has a "duty to the court to avoid frivolous litigation." Perreira, 33 F.3d at 1377. "Rather than waste the court's time and efforts, an attorney should use reasoned judgment in determining whether to . . . pursue a claim." Murphy, 30 Fed. Cl. at 62. However, "the [Vaccine] 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." Turner, 2007 WL 4410030, at *11. In any event, counsel's "ethical obligation to be a zealous advocate" does not give counsel "a blank check to incur expenses without regard to the merits of [the] claim." Perreira v. Sec'y of Dep't of Health & Human Servs., 27 Fed. Cl. 29, 34-35 (1992), aff'd, 33 F.3d 1375 (Fed. Cir. 1994).

b. A Reasonable Basis Existed at the Outset and Continued During OAP Discovery.

In evaluating this petition, I take into account the pendency of the OAP during the time Kate's case was under adjudication. The OAP started in 2002.[34] As stated above, in that time

[33] See also Murphy v. Sec'y of Dep't of Health & Human Servs., 30 Fed. Cl. 60, 61 (1993), aff'd 48 F.3d 1236 (Fed. Cir. 1995) (affirming special master's finding of no reasonable basis when the medical and other written records contradicted the claims in the petition); Everett v. Sec'y of Dep't of Health & Human Servs., No 91-1115V, 1992 WL 35863 (Fed. Cl. Spec. Mstr. Feb. 7, 1992) (denying fees when the medical records did not support petitioner's claim of an adverse reaction to vaccination and no expert report was filed); Stevens, 1992 WL 159520, at *3-*4 (denying fees when counsel relied on a medical expert's opinion that had "no plausible factual support" and counsel failed to adequately investigate the facts); Collins v. Sec'y of Dep't of Health & Human Servs, No. 91-821V, 1992 WL 164512 (Fed. Cl. Spec. Mstr. June 23, 1992) (denying fees when the injuries alleged in the petition were not supported by medical records or expert opinion); cf. Turner, 2007 WL 4410030, at *10 (finding a reasonable basis when, after filing a skeletal petition, counsel promptly investigated the case, and "counsel [did] not unduly prolong[] the proceeding but [] moved promptly for judgment on the record" after being unable to find an expert).

[34] The OAP Master File contains all the filings in the OAP that are relevant to this discussion. The publicly accessible website, www.uscfc.uscourts.gov/omnibus-autism-proceeding, contains the OAP

period many petitioners filed claims based on reports of a link between vaccines and autism, and related disorders.[35]

By the end of 2006, discovery issues in the OAP had been mostly resolved. See Autism Update, OAP Master File, filed Nov. 27, 2006, at 2. As of September 28, 2007, no discovery issues were pending. Autism Update, OAP Master File, filed Sept. 28, 2007. On August 8, 2007, the expert report of Richard Deth, Ph.D., was filed in the OAP. On September 12, 2007, many medical articles were filed. Although the record stayed open for post-hearing submissions, by spring 2008, the discovery process in the second theory was mostly complete. See OAP Master File.

Given counsel's involvement with the OAP, counsel had knowledge of the state of discovery in the OAP. Counsel knew that, by the time Special Master Edwards lifted the stay in this case, almost all discovery issues in the OAP had been resolved. Counsel also was aware of the development of the science and medical literature. When the record in the OAP closed in 2009, counsel was familiar with the evidence that could be used to support the claim that TCVs could lead to autism.

Due to the pendency of the OAP, and the potential usefulness of evidence adduced in the OAP to provide a medical basis for Kate's allegations, I find that it was reasonable for Petitioner to pursue her case until the discovery process in the OAP was completed, which was in the spring of 2008. See OAP Master File. By that time, counsel for Petitioner knew that the evidence in the OAP was far from sufficient to sustain the theory that Kate's developmental disorders were caused by TCVs.[36]

After Petitioner filed Dr. Youngs's report, on May 16, 2008, various special masters permitted Petitioner's counsel to present more evidence, but each one reminded counsel that Petitioner had not filed a "legally sufficient expert report." See, e.g., Order, Jan. 26, 2009; Order, June 17, 2009.[37] Respondent's motion for summary judgment, filed on July 30, 2008, also alerted counsel to this case's deficiencies.

Master File (under the "docket" link), which includes orders, decisions, and periodic updates issued by the special masters assigned to the autism docket.

[35] Two CHC partners, Mr. Homer and Mr. Kevin Conway, Esq., were involved with the OAP from the start. See Autism General Order #1. Throughout most of the OAP, all three partners at CHC were on the Petitioners' Steering Committee ("PSC"), which was charged with obtaining and presenting evidence concerning general causation. See Cedillo, 2009 WL 331968, at *8. After four years of extensive discovery, in July 2006, the PSC proposed a general causation hearing take place in June 2007. Id. at *9. In January 2007, the PSC proposed breaking the general evidence hearings into three separate categories, but this was amended to just two categories. Id. at *9. The first was that the measles-mumps-rubella vaccine and TCVs could cause autism, and the second was that TCVs alone could cause autism. Id. at *9. Hearings in the first theory started in June 2007. Id. at *10. Hearings in the second theory, which concerned the theory that TCVs caused autism, were held in May and July 2008. See OAP Master File.

[36] Dr. Kinsbourne had so stated in a report that CHC filed in Boyd and Jakymowych in April 2008. See supra section III.C.

[37] A strong argument can be made that there was no reasonable basis for this claim as of May 16, 2008, when Petitioner submitted Dr. Youngs's report stating that the twins did not show signs of "mercury toxicity." See supra section III.A. In adopting a later cut-off date, I have made a deliberate

On April 15, 2009, Petitioner submitted another expert report. This was the report of Dr. Deth, which discussed thimerosal and autism generally. The focus of Dr. Deth's report was on mercury and autism. The report was not specific to Kate, it did not mention Kate or her disabilities, and it plainly did not address whether "mercury toxicity" caused them.

At a status conference on April 30, 2009, I informed CHC that Dr. Deth's report was insufficient to support vaccine causation in Kate's case. Order, June 17, 2009. Counsel then asserted that Dr. Youngs would file a second report. Id. Unable to meet the filing deadline, Petitioner was granted an enlargement. Order, June 26, 2009. Petitioner then requested yet another enlargement, which was denied. It was clear at that point that Petitioner was unable after many years to adduce a legally sufficient expert opinion. Petitioner presented no facts to persuade me that a sufficient expert report actually would be submitted by a date certain. On the contrary, on review of the record, it appeared that, if I agreed to another enlargement, that enlargement would be followed by a request for another enlargement, and the case would continue indefinitely.

c. The Reasonable Basis Ceased After Dr. Deth's Report Was Submitted on April 15, 2009.

At the time Dr. Deth's unspecific report was filed, considering all the futile efforts that had been made to provide a reliable medical opinion supporting causation, there no longer was a reasonable basis for continuing Kate's claim. After numerous attempts to secure supporting evidence, Petitioner lacked factual evidence to substantiate the injury alleged in the petition, as well as a medical expert opinion to address the statutory requirements for compensation. See § 300aa-11(c)(1)(C)(ii)(I); Althen, 418 F.3d at 1281.[38]

In the absence of reliable medical support stating a biological theory of vaccine injury, a claim may not be maintained under the Act, as Petitioner's counsel was well aware. See Althen, 418 F.3d at 1281. Special masters are entitled to require a medical explanation that pertains specifically to the case. Moberly v. Sec'y of Dep't of Health & Human Servs., 592 F.3d 1315, 1322-23 (Fed. Cir. 2010). The only report submitted by Petitioner that even mentioned Kate by name was Dr. Youngs's report, which was, as noted in the entitlement decision, inadequate to support the claim factually or legally. None of the reports, other than Dr. Youngs's, discussed Kate's condition or concluded that it was caused by vaccines. No expert report that came close to satisfying the Althen criteria ever was submitted in this case or, so far as the record discloses, even was close to submission. There was no reasonable basis under these circumstances to continue to incur fees and costs, simply to maintain Kate's case on the OSM docket.

"The [Vaccine] 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

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decision to be as generous as I can in awarding fees for this case, with due regard for counsel's representations concerning the circumstances obtaining at the time the fees were incurred.

[38] Petitioner alleged that TCVs caused Kate to suffer from "mercury toxicity." Amended Pet. at 1. No treating physician or medical expert stated for the record that Kate had "mercury toxicity." As noted above, Dr. Youngs's report stated that Kate tested negative for and showed no signs of "mercury toxicity." See Pet'r Ex. 24 (Dr. Youngs's Report).

petition." Turner, 2007 WL 4410030, at *11. Following submission of Dr. Deth's insufficient expert report on April 15, 2009, coming as it did on top of all the other failed attempts to establish a factual or scientific basis for Kate's claim, counsel no longer had a reasonable basis to continue the case.

Between April 15, 2009, and March 19, 2010, when the entitlement decision issued, CHC incurred $33,976.50 in fees. Much of that amount was incurred preparing a response opposing the motion for summary judgment. A reasonable evaluation of the merits of the case at that time required dismissal, not opposition. The Opposition to Summary Judgment itself was filled with extraneous, vague assertions about "mercury toxicity." Opposition to Summ. J., Aug. 10, 2009. Most of the Opposition consisted of a summary of Dr. Lucier's testimony in the thimerosal death cases and Dr. Deth's report, neither of which pertained directly to this case. See id. at pp. 4-22. In essence, the Opposition consisted of unfocused argument that failed to address the issues, resulting in the grant of summary judgment.[39]

Under law, I may award attorneys' fees for an unsuccessful petition only if it had a reasonable basis. No reasonable basis existed in this case after April 15, 2009, at the latest. After that date, the amount awarded must be limited to reasonable expenditures to terminate the case. A generous award to compensate for the effort necessary to terminate the case is $1,000. Accordingly, Petitioner will be awarded the amount of $1,000 in place of the $33,976.50 billed for contesting entitlement after April 15, 2009.

In the Fee Application, Petitioner requested a total award of $132,000.00, representing $131,550.00 in attorneys' fees and costs and $450.00 in Petitioner's costs. After subtracting the disallowed fees, I award Petitioner $99,023.50, which represents $98,573.50 in attorneys' fees and costs and $450.00 in Petitioner's costs.

V. CONCLUSION

Accordingly, I **GRANT IN PART** and **DENY IN PART** the Fee Application. Pursuant to Vaccine Rule 13, Petitioner is awarded a total of $99,023.50 in attorneys' fees and costs. The judgment shall reflect that Petitioner is awarded $98,573.50 for attorneys' fees and costs in a check made payable jointly to Petitioner and Petitioner's counsel, and that Petitioner is awarded $450.00 for costs in a check made payable to Petitioner.[40]

[39] I anticipate counsel's argument that the $33,976.50 that I disallow would not have been incurred had I not required Petitioner, after 23 months, to file an opposition to Respondent's motion for summary judgment. Faced with the choice of permitting this case to continue indefinitely or requiring Petitioner to present evidence to show why judgment should not be summarily entered against her, I chose the latter course. See Vaccine Rule 1(b), which states: "In any matter not specifically addressed by the Vaccine Rules, the special master or the court may regulate the applicable practice, consistent with these rules and with the purpose of the Vaccine Act, to decide the case promptly and efficiently." It was counsel's decision to incur the costs of filing an opposition, rather than dismissing the case.

[40] This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally Beck v. Sec'y of Dep't of Health & Human Servs., 924 F.2d 1029 (Fed. Cir. 1991).

In the absence of a timely motion for review filed pursuant to Vaccine Rule 23, the Clerk is directed to enter judgment according to this decision.[41]

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Chief Special Master

[41] Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.