In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-841V
Filed: January 13, 2012

KATHERINE McKELLAR Petitioner, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	)	TO BE PUBLISHED Reasonable basis; Menactra vaccine; varicella virus vaccine; Tetanus-diptheria- acellular-pertussis (Tdap) vaccine; human papillomavirus (HPV) vaccine; herpetic stomatitis

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA, for Petitioner.
Debra A. Begley, United States Dep't of Justice, Washington, D.C., for Respondent.

DECISION ON REMAND[1]

LORD, Special Master.

I. BACKGROUND

A. Procedural Background

This case is at an early stage of development, as described below.

On December 7, 2009, Petitioner Katherine McKellar filed her Petition pro se, in forma pauperis. Attached to the petition was a Vaccine Adverse Event Reporting System (VAERS) report concerning four vaccinations Petitioner received on March 7, 2007.

On March 10, 2010, a consent motion was filed to substitute Attorney Ronald C. Homer in place of pro se Petitioner. On April 14, 2010, an order was issued granting a subpoena to obtain all Petitioner's medical records. On April 20, 2010, a scheduling order was issued requiring Petitioner to file a statement of completion of filing of medical records. Within 60 days of the statement of completion, the Secretary was ordered to file her report pursuant to Vaccine Rule 4(c). On May 19, 2010, the statement of completion was filed along with medical records.

[1] In accordance with Vaccine Rule 18(b), a petitioner has 14 days to file a proper motion seeking redaction of medical or other information that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Redactions ordered by the special master, if any, appear in the document as posted on the United States Court of Federal Claims' website.

On July 16, 2010, a scheduling order was issued requiring that an amended petition be filed by August 16, 2010. On August 16, 2010, an Amended Petition was filed with the Affidavit of Katherine McKellar. The Amended Petition alleged "immunological injury" resulting from "the administration of Menactra, Varicella, Tetanus-diptheria-acellular-pertussis ("Tdap") and Human Papillomavirus ("HPV") vaccines" on March 7, 2007. Am. Pet. 1, ECF No. 17.

The Secretary's Rule 4(c) Report was filed on September 7, 2010. Additional medical records were filed on November 18, 2010, in response to Respondent's request.

On December 7, 2010, an order was issued granting Petitioner's request for an extension of time, until January 5, 2011, to file an expert report.

On January 5, 2011, Petitioner filed another unopposed motion for extension of time to file her expert report. Mot. for Extension of Time, ECF No. 24. The motion stated, "counsel requires additional time to discuss further proceedings in this case with the petitioner" and "counsel has been unable to reach the petitioner to discuss how she would like to proceed." Id. at 1. This motion was granted and Petitioner was required to file a status report by February 4, 2011.

On February 4, 2011, Petitioner sought a third unopposed extension of time to file her expert report. The motion stated that counsel continued to be unable to contact Petitioner.

On February 14, 2011, Counsel filed a motion for interim fees and costs.

The Secretary filed her Opposition to the application for interim fees and costs on March 3, 2011, stating that (1) the Vaccine Act does not authorize such an award "given the procedural posture of this case;" (2) Petitioner has not demonstrated undue hardship; (3) Petitioner has not established that her claim was filed in good faith or with a reasonable basis; and (4) the application contains "several unreasonable or unnecessary items that should not be compensated." Resp't's Opp. to Pet'r's App. for an Award of Att'ys' Fees and Costs ("Resp't Opp.") 1, Mar. 3, 2011, ECF No. 27.

On March 7, 2011, Petitioner filed a status report stating counsel planned to withdraw as attorney of record and requesting additional time to respond to the Secretary's Opposition.

Petitioner filed her response to the Secretary's Opposition on March 25, 2011. Counsel also filed a supplemental motion for attorneys' fees, including the cost of responding to the Secretary's Opposition.

The Secretary responded to Petitioner's supplemental motion on March 31, 2011, incorporating all previous objections, adding that "petitioner has not met the requirements set forth under Avera," and that counsel spent an excessive amount of

time preparing the response to the Secretary's Opposition to Petitioner's request for interim fees. Resp't's Opp. to Pet'r's Supplemental App. for an Award of Att'ys' Fees and Costs 1, ECF No. 31.

On June 3, 2011, the special master's decision issued awarding interim fees.

On November 4, 2011, the Court reversed and remanded for "a renewed determination of petitioners' application for attorneys' and costs." McKellar v. Sec'y of Dep't of Health & Human Servs., --- Fed. Cl. ---, No. 09-841V, 2011 WL 5925323, at *14 (Fed. Cl. Nov. 4, 2011).

On December 9, 2011, Petitioner filed a status report stating that counsel finally was able to contact Petitioner and her mother, and that Petitioner "indicated she wishes to proceed with the underlying entitlement claim of her case." Status Report 1-2, ECF No. 42. The status report concluded, "At this time, counsel for the petitioner intends to remain as counsel of record for the petitioner in an attempt to facilitate an appropriate resolution of this matter." Id. at 2.[2]

During a status conference on January 5, 2012, counsel for Petitioner reported Petitioner intends to proceed with the claim, with or without representation. See Tel. Conf. Tr., Jan. 5, 2012, ECF No. 46.

On January 11, 2012, during a telephone conference with Petitioner to schedule her participation in a status conference, my chambers was informed that Petitioner was engaged in discussions with an attorney regarding possible representation. Petitioner thereafter filed a motion for 60 days in which to seek substitute counsel, which was granted. Mot. for Ext., Jan. 11, 2012, ECF No. 43. Petitioner was afforded until March 12, 2012, to file a status report regarding her search for new counsel. Order, Jan. 11, 2012, ECF No. 44.

B. Remand Decision and Order

The Court reviewed the procedural and factual background. McKellar, 2011 WL 5925323, at *1-2. The Court described Avera v. Sec'y of Dep't of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008) and noted the Secretary's objection to an award of interim fees in this case. McKellar, 2011 WL 5925323, at *2-4. The Court described the applicable standards of review. "We review the special master's legal conclusion de novo, and use an abuse of discretion standard for discretionary rulings." Id. at *2 (citing Saunders ex rel. Saunders v. Sec'y of Dep't of Health & Human Servs., 25 F.3d 1031, 1033 (Fed. Cir. 1994)).

[2] Counsel's candor in bringing to the special master's attention the problems encountered in representing Petitioner in this case is appreciated, as is counsel's diligence in seeking to overcome those problems. Also appreciated is counsel's offer to withdraw from the representation when it appeared that it would not be feasible to proceed; such action promotes efficient processing of cases and prevents the incurring of needless fees and costs.

The Court stated that interim fees before an entitlement decision may be awarded under Avera and its progeny. McKellar, 2011 WL 5925323, at *2-3. The Court rejected the Secretary's argument that it was reversible error for a special master to award fees and costs "prior to either an award of compensation or entry of judgment denying compensation." Id. at *3. The Court noted that the Federal Circuit has twice addressed this issue, "first in Avera, and then in Shaw v. Secretary of Health & Human Services, 609 F.3d 1372 (Fed Cir. 2010)." Id.

The Court noted that Avera held that interim fees must be available to "'ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims.'" McKellar, 2011 WL 5925323, at *4 (quoting Avera, 515 F.3d at 1352). The Court noted further, however, that "[t]he ruling in Avera nevertheless suggests that there is not a presumption of entitlement to interim fees. Rather, the court noted that '[i]nterim fees are particularly appropriate in cases where proceedings are protracted and costly experts must be retained.'" Id. (citing and quoting Avera at 1352). Because petitioners in Avera "had not demonstrated undue hardship, the fees were not substantial, no experts were employed, and there was only a short delay in the award pending appeal," the Circuit affirmed the judgment that petitioners in Avera were not entitled to interim fees. Id. The Court concluded:

> Therefore, we view Avera to mean that some special showing is necessary to warrant interim fees, including but not limited to the delineated factors of protracted proceedings, costly experts, or undue hardship. If mere good faith and reasonable basis were all that is necessary, the Avera factors become superfluous and interim fees would be the norm.

McKellar, 2011 WL 5925323, at *4.

The Court noted that the Federal Circuit in Shaw recognized that a special master can "'often determine at an early stage of the proceedings whether a claim was brought in good faith and with a reasonable basis,'" but also "may determine that she cannot assess the reasonableness of certain fee requests prior to considering the merits of the vaccine injury claim." McKellar at *5; Shaw, 609 F.3d at 1377 (quoting Avera, 515 F.3d at 1352) . The Court stated that "Avera and Shaw, when construed together, provide that interim fees are allowed under the Act, and more specifically, that interim fees are permitted even before an entitlement decision is made." Id. at *6. As framed by the Court, the issue here "is whether interim fees are warranted in the circumstances of this case." Id.

The Court recognized the purpose of Avera in encouraging representation of injured vaccinees but stated that "[t]his purpose is not thwarted . . . by disallowing a grant of interim fees in the absence of a special showing under Avera." McKellar, 2011 WL 5925323, at *6. The Court noted the citation in my original decision to Silver v. Sec'y of Dep't of Health & Human Servs., No. 99-462V, 2009 WL 2950503 (Fed. Cl. Spec. Mstr. Aug. 24, 2009), but stated that "[i]t is not clear what concern the reference

to Silver is meant to address." Id. The Court noted that Silver concerned a petition by former attorneys who were not permitted to intervene to claim fees and costs until the "conclusion of the entitlement proceeding." Id. The Court stated, "the mere fact that an attorney plans to withdraw is not necessarily a hardship that triggers an award of interim attorneys' fees and costs. Moreover, none of the other factors mentioned in Avera were implicated in this case." Id. The Court stated:

> The present facts, however, go beyond a routine withdrawal and substitution of counsel. The special master has stated that 'Petitioner's medical records disclosed no evidence of a valid claim for compensation,' and further noted the 'weakness of the claim.' The special master has effectively rejected the petition on the merits, making it unlikely that substitute counsel will appear and, for that reason, making it likely that, if the case is dismissed, there will be no occasion for petitioner to seek fees. Under the circumstances, we will treat the petition as if it were from a routine final award of fees.

McKellar, 2011 WL 5925323, at *7 (citations omitted).

The Court reviewed the findings of reasonable basis and good faith, stating that the presence of good faith was not challenged. McKellar, 2011 WL 5925323, at *7.[3] The Court held that a "reasonable basis can exist even if medical records are not filed simultaneously with the petition." Id. "The presence of a reasonable basis is an objective consideration determined by the totality of the circumstances." Id. (citing Hamrick v. Sec'y of Dep't of Health & Human Servs., No. 99-683, 2007 WL 4793152, at *4 (Fed. Cl. Spec. Mstr. Nov. 19, 2007)). Initial absence of medical records is only "one factor a special master may consider . . . . We thus consider the question of reasonable basis at the time the fee request was made." Id.

The Court cited Perreira v. Sec'y of Dep't of Health & Human Servs., 33 F.3d 1375, 1377 (Fed. Cir. 1994), in which the Federal Circuit affirmed a special master's finding that compensation could be awarded to an unsuccessful petitioner only until the time of hearing, because the expert's opinion presented at hearing amounted to no more than "'unsupported speculation.'" McKellar, 2011 WL 5925323, at *8.

The Court reviewed the medical records in the instant case, concluding that references to a vaccine injury "appear to reflect statements made by petitioner to her doctors, not the doctors' medical conclusions." McKellar, 2011 WL 5925323, at *8. The court further noted my observation that such statements may be "'incomplete and taken out of context.'" Id.

The Court addressed three additional sources of support "for the petition's reasonable basis[:]" VAERS data, a report from the Centers for Disease Control noting concerns about HPV vaccination, and a report by the National Vaccine Information

[3] Neither "good faith" nor the reasonableness of the amount awarded appears to be within the scope of the Court's remand.

Center, "a non-governmental vaccine awareness organization." McKellar, 2011 WL 5925323, at *8-9. The Court stated that VAERS data is not considered reliable evidence of vaccine causation, that the CDC report cautioned against using VAERS data to make a causal connection between vaccination and injury and, in addition, did not mention petitioner's "major symptoms, namely stomatitis and other oral lesions." Id. at *9.[4] The Court stated further that the report from the "non-governmental vaccine awareness organization" also relied on VAERS data, which is "not sufficient alone to establish reasonable basis." Id. The Court noted that the organization in question was connected to Petitioner's counsel. Id. at *9 n.10.

The Court stated:

> After discussing the presumption of good faith and, with no further transition, the special master stated that although the medical records were likely taken out of context, 'more is required to justify refusal to award reasonable attorneys' fees.' She concluded that '[u]nder all the circumstances, . . . there was a reasonable basis to bring this claim. I therefore grant attorneys' fees notwithstanding the weakness of the claim, which is now evident.'

McKellar, 2011 WL 5925323, at *9 (citations omitted).

The Court opined, "We read the special master's opinion as applying the presumption of good faith to the independent inquiry into whether there was a reasonable basis for the petition." McKellar, 2011 WL 5925323, at *9. The Court identified this as "legal error because it effectively shifted the burden to the government to show that the petition did not have a reasonable basis." Id. The Court remanded, "in light of the apparent conflation of the reasonable basis inquiry into the good faith test . . . for a new determination in light of this opinion." Id.

In its conclusion, the Court stated: "For the reasons stated above, we grant respondent's motion for review. We reverse the decision of the special master, and remand for a renewed determination of petitioner's application for attorneys' fees and costs." McKellar, 2011 WL 5925323, at *9.

II. DISCUSSION

Rule 28.1(a) of the Vaccine Rules states, "If the assigned judge remands the case to the special master, the special master, after completing the remand assignment, must file a decision on remand resolving the case, unless the remand order directs otherwise." The Court in this instance remanded for "a renewed determination of petitioners' application for attorneys' fees and costs" under the correct test for determining "reasonable basis." McKellar, 2011 WL 5925323, at *14.

[4] Stomatitis is inflammation of the oral mucosa. Dorland's Illustrated Medical Dictionary 1801 (32nd ed. 2012).

A. Reasonable Basis Standard

In two decisions reducing or eliminating fees and costs because of the lack of reasonable basis, I discussed the pertinent legal standards at length. Those cases were handled by the same firm that represents Petitioner here, Conway, Homer & Chin-Caplan, P.C. (the "Homer firm"). See Browning v. Sec'y of Dep't of Health & Human Servs., No. 02-929V, 2010 WL 3943556 (Fed. Cl. Spec. Mstr. Sept. 27, 2010); Browning v. Sec'y of Dep't of Health & Human Servs., No. 07-453V, 2010 WL 4359237 (Fed. Cl. Spec. Mstr. Nov. 1, 2010).

> 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 DiRoma v. Sec'y of Dep't of Health & Human Servs., No. 90-3277V, 1993 WL 496981, at *1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). 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).
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> 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).[5] 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)).
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> 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

[5] The decision in Stevens was affirmed. Stevens v. Sec'y of Dep't of Health & Human Servs., 996 F.2d 1236 (Fed. Cir. 1993).

hearing when petitioner's counsel knew his expert's opinion was legally insufficient). [n.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).

> [n.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).

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).

Browning, 2010 WL 3943556, at *12-13.

In sum, to proceed with a reasonable basis, a petitioner need not establish entitlement to compensation, or even that a claim is likely to succeed. A petitioner must show that the claim is feasible, not frivolous. Perreira, 33 F.3d at 1377 (noting counsel's duty to avoid "frivolous litigation"); see Bruesewitz v. Wyeth LLC, --- U.S. ---, 131 S. Ct. 1068, 1074 (2011) ("Attorney's fees are provided, not only for successful cases, but even for unsuccessful claims that are not frivolous."). "The presence of a reasonable basis is an objective consideration determined by the totality of the circumstances." McKellar, 2011 WL 5925323, at *7 (citing Hamrick, 2007 WL 4793152, at *4).

The distinction between likelihood of success and feasibility is key. The reasonable basis requirement looks "'not at the likelihood of success [of a claim] but more to the feasibility of the claim. Turner, 2007 WL 4410030, at *6 (quoting DiRoma, 1993 WL 496981, at *1. As a result, a case may have very little likelihood of success at the beginning and still have a reasonable basis. There is flexibility in the concept of reasonable basis, as well as variation. As time goes on, a case that was deemed to have a reasonable basis at the outset may be found to lack a reasonable basis after several years in which no expert has been found and no expert report, or a deficient expert report, has been filed. Such a case may have been feasible at the outset but is no longer feasible after several years. See Browning, 2010 WL 3943556, supra.

A second key concept is that a reasonable basis must exist at every phase of the litigation. Perreira is a good example. The special master partially granted the request for attorneys' fees and costs, finding that the case was initially filed in good faith and with a reasonable basis. Perreira, 33 F.3d at 1376. Upon reviewing the petitioners' expert's opinion prior to hearing, the special master found that the expert opinion did not provide a reasonable basis to support the claim. The special master therefore awarded only the fees and costs incurred up to the point of the hearing. Id.[6]

The Federal Circuit affirmed, agreeing that "once petitioners-appellants reviewed the expert opinion upon which their case depended, they no longer had a reasonable basis for claiming causation in-fact." Perreira, 33 F.3d at 1377. Perreira demonstrates that the concept of reasonable basis applies to the facts as they appear at the point in time when the fees and costs were incurred. After the time counsel in Perreira received the patently insufficient expert report, no additional fees and costs should have been incurred.[7] Examination of the facts to determine whether a reasonable basis exists may

[6] One of the Browning cases, No. 02-929V, was similar: Fees and costs were awarded only until the expert report was submitted, at which time counsel for petitioner should have been on notice that the claim lacked the required evidentiary support. Browning, 2010 WL 3943556, at *14-15. In the second Browning case, No. 07-453V, the entire amount claimed for fees and costs was disallowed because it should have been clear to counsel from the outset that the only claim available to petitioner under the circumstances could not be proven, based on the long history of counsel's unsuccessful attempts to obtain expert support for similar allegations. Browning, 2010 WL 4359237, at *11.

[7] For the purposes of this discussion, it is irrelevant that the substantive law concerning the need for medical literature to support a claim may have changed since Perreira was decided. See generally

occur at different junctures in the course of case development, but fees and costs may be reimbursed only if a reasonable basis existed at the time the fees and costs actually were incurred.

A reasonably diligent search has disclosed that, in the recorded history of the Vaccine Program, there are virtually no decisions in which the Secretary heretofore has challenged on appeal a special master's finding that a reasonable basis was present. Such instances must exist, but they did not appear in the available decisions.

One instructive case has been identified, however, in which the Secretary appealed a special master's award of fees and costs on the ground that the case lacked jurisdiction. In Jessup v. Sec'y of Dep't of Health & Human Servs., 26 Cl. Ct. 350 (1992), Judge Yock reversed an award of attorneys' fees because the petition was filed outside the statute of limitations. The special master in Jessup had dismissed the petition with prejudice but awarded attorneys' fees in the amount that reflected the time a competent attorney would spend in order to "'reasonably conclude'" that the petition was time barred. Id. at 351. In addition, the special master awarded costs associated with the reasonable investigation and resolution of the matter. Id. The Court held that the lack of jurisdiction divested the special master of the authority to award fees and costs under the Vaccine Act. Id. at 352-53. The Court expressly found, however, that the special master's "interpretation" of section 15(e)(1) was not "arbitrary, capricious, or an abuse of discretion." Id. at 352. In other words, had the defect not been jurisdictional, attorneys' fees and costs would properly have been awarded up until the time it appeared that it was not feasible to proceed.[8]

B. Petitioner's Evidence To Date

The details of Petitioner's allegations were contained in a VAERS report that was attached to her pro se Petition. The report stated that the vaccinee received a second dose of Gardasil on March 7, 2007, as well as live varicella virus vaccine, Menactra, and DTaP vaccinations. Pet. Attach.

> Within two weeks of injections, both lips swelled for one day. Within 4 weeks of injection, lips cracked and by the fifth week after injection the patient was hospitalized for severe stomatitis. The patient has never suffered these symptoms before, nor has she seeked [sic] care for the problem prior to this. The patient became dehydrated and needed I.V. care. The patient had blister type lesions that started on the outside of the

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Andreu v. Sec'y of Dep't of Health & Human Servs., 569 F.3d 1367, 1379 (Fed. Cir. 2009) (stating that "a claimant need not produce medical literature or epidemiological evidence to establish causation under the Vaccine Act").

[8] Under the Federal Circuit's recent decision in Cloer v. Sec'y of Dep't of Health & Human Servs., 654 F.3d 1322 (Fed. Cir. 2011) the statute of limitations no longer is considered jurisdictional. See Cloer, 654 F.3d at 1340-44.

lips and continued to spread to the back of the throat. . . . The original reporting source was not provided.

Id.

In her Affidavit filed on August 16, 2010, Petitioner stated that she was "an active, outgoing and healthy teenager," before her vaccinations on March 7, 2007. Pet'r Ex. 9 at 1. "That day," she received "four different vaccinations, including, Menactra, Varicella, Tetanus-diphtheria-acellular-pertussis and HPV vaccines." Id.

"The morning after the injections," Petitioner averred, "I woke up with a large knot on my upper arm, located at one of the injection sites. By the end of that day, a dark red rash had circled it." Pet'r Ex. 9 at 1. Petitioner reported that "several weeks" later, she developed blisters in and around her mouth and throat. Id. She went to the emergency room on April 12, 2007, and "was assessed with herpetic stomatitis and was prescribed medication." Id. at 2. She felt progressively worse and was admitted to the hospital on April 14, 2007. Id.

"Since receiving the vaccinations, my life has changed," Petitioner stated. Pet'r Ex. 9 at 2. She experiences "bouts of blisters" and is "unable to stay in the sun." Id. She reported sadness and frequent crying, and averred that her "career goal of joining the Air Force may no longer be possible because the doctor advised me to not receive additional vaccinations." Id.

Petitioner's Exhibit 1 contains medical records from Victor Valley Community Hospital. Petitioner's discharge summary dated April 12, 2007, confirms the diagnosis of viral stomatitis. Pet'r Ex. 1 at 3. The records date the onset of "blisters on lips and tongue" as April 11, 2007. Id. at 8. The clinical impression was herpetic stomatitis. Id. at 15.[9]

Petitioner's Exhibit 2 contains medical records from Kaiser Permanente. They indicate Petitioner was admitted to Kaiser Foundation Hospital – Fontana Medical Center on April 14, 2007. Pet'r Ex. 2 at 1. The records reference "Oral herpetic outbreak" with severe pain. Id. at 6. Petitioner was treated with acyclovir. Id. at 7. Petitioner tested positive for herpes simplex virus. Id. at 9.

She suffered another outbreak in June 2008. Pet'r Ex. 2 at 11-12. On June 3, 2008, the provider notes, under History, "Complains of blisters for past 4 days. History of adverse reaction to vaccines one year ago and was hospitalized. Had severe lip swelling with throat swelling." Id. at 13. The doctor's assessment included herpes simplex, malaise and fatigue – "rule out rheumatoid disorder," depression, paresthesia of lower limb, and low back pain. Id. at 14.

[9] Herpetic stomatitis is characterized by the formation of yellowish vesicles that rupture and produce ragged painful ulcers. Dorland's at 1801.

Petitioner's Exhibit 3 contains medical records from St. Mary's Medical Center Emergency Department. They indicate Petitioner was seen for mouth blisters on April 14, 2007. Pet'r Ex. 3 at 5. She was treated with acyclovir. Id. at 9. The physical exam documents "severe multiple intraoral ulcers," with a clinical impression of "severe herpetic stomatitis, dehydration, oral candidiasis." Id. at 17.[10]

Petitioner's Exhibit 4 is an immunization record showing that Petitioner received TDAP, HPV, meningococcal conjugate and varicella zoster vaccines on March 7, 2007. Pet'r Ex. 4 at 1.

Petitioner's Exhibit 5 contains medical records from Dr. Julie Anne Monroe. The first page of the records shows a "VAERS Line List Report" reporting symptoms following vaccination with varicella, Tdap, HPV4, and MNQ on March 7, 2007. Pet'r Ex. 5 at 1. The onset date is listed as March 11, 2007. Id. The symptoms were the same as those described by Petitioner in her Affidavit. "The original reporting source was not provided." Id. The report of examination by the practitioner notes under "Chief Complaint: . . . "Had severe [reaction] to multiple injections 2007." Id. at 2.[11]

Petitioner's Exhibit 8 contains records from Kaiser Permanente of Petitioner's severe outbreak of stomatitis in April 2007. Pet'r Ex. 8 at 11. Some of these records duplicate those contained in other exhibits on file.[12] Many of these records are illegible. The exhibit includes requests from VAERS for records pursuant to "an investigation into an adverse event that the patient experienced after vaccination." Id. at 15-18.

C. Analysis of Reasonable Basis in This Case

1. Petitioner's Claim Was Supported by a Reasonable Basis.

Based on Petitioner's vaccinations, her illness following the vaccinations, her affidavit, and the notations in her medical file indicating that there may have been a possible association between her vaccinations and her severe illness (even if only by history), Petitioner has carried the burden of establishing a reasonable basis to proceed in this case. There is no jurisdictional impediment to Petitioner's application for compensation. Moreover, the HPV vaccine is a relatively new addition to the Program. It does not have the "track record" of vaccines that have been widely used for decades,

[10] Candidiasis is a fungal infection, usually a superficial infection of the skin or mucous membranes. Dorland's at 285.

[11] Petitioner's Exhibit 6 contains records of Petitioner's dental treatment. Petitioner's Exhibit 7 contains orthodontic records. As explained by Petitioner, these records were submitted because of the manifestations of Petitioner's disorder in the oral cavity. See Pet'r's Resp. to Resp't's Mot. for Review ("Pet'r Resp.") 17-18 n.18, Aug. 8, 2011, ECF No. 36.

[12] As explained by Petitioner, "it is common practice – and good practice – for physicians to incorporate in their own records . . . copies of medical records from other doctors. For this reason, virtually **all** petitioners' medical records contain voluminous identical copies." Pet'r Resp. at 17-18 n.18 (emphasis in original).

and it has been the subject of significant controversy. See Turner, 2007 WL 4410030, at *6-8 (noting that special masters consider all the circumstances under which a petition was filed). There is no reason why this case could not proceed to hearing and a possible award. Petitioner's claim is feasible, not frivolous.

The same reasoning applies in this case as in Jessup, discussed above. The fees and costs are compensable because they were supported by a reasonable basis, at least up to the time counsel sought to withdraw. The process of conducting a reasonable investigation, interviewing witnesses, collecting medical records, drafting an amended petition, preparing the petitioner's affidavit, are all, in this case, steps that needed to be taken to determine whether the claim was viable and prosecute it diligently. It may be that additional steps are warranted; that remains to be seen. But the work that has been done until now is supported by a reasonable basis.[13]

These matters should have been laid out more clearly in my original decision. The Court unfortunately was misled by my failure to set forth the rationale for my statement that "'Petitioner's medical records disclosed no evidence of a valid claim for compensation.'" McKellar, 2011 WL 5925323 at *7. I meant the statement to express that, as the record stands, it could not furnish grounds for an award of compensation. See 42 U.S.C. §300aa-13(a)(1) (compensation may not be awarded "based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion"). The statement is similar to communications routinely made to counsel over the course of developing a case for hearing. Special masters frequently identify the strengths and weaknesses of the record to guide petitioners in the Vaccine Program. See Vaccine Rule 5(a) (requiring special master within 30 days of the Secretary Rule 4(c) report to hold a status conference to, inter alia, "review the materials submitted and evaluate the parties' respective positions; and present tentative findings and conclusions"). It is a common practice for special masters to inform petitioners if their cases are deficient under Althen v. Sec'y of Dep't of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005), and to notify them of the evidence that must be submitted if their cases are not to be dismissed.

The Court also was misled by my statement that petitioners frequently rely on notations in medical records to prove that treating physicians recognized a vaccine injury, when such records actually may simply document petitioners' own statements to medical personnel. Again, because I failed to communicate the context for the statement, this acknowledgement led to the conclusion that the case already had been decided against Petitioner on the merits. Because of my experience in the Vaccine Program, I am aware that many such notations are of dubious value in determining causation, but in reaching a decision, I consider each statement to evaluate its

[13] In my original decision, I stated that the existence of a reasonable basis to proceed further was doubtful. McKellar v. Sec'y of Dep't of Health & Human Servs., No. 09-841V, 2011 WL 3425606, at *2 (Fed. Cl. Spec. Mstr. June 3, 2011). If substitute counsel is obtained by the Petitioner, that attorney will be on notice of this observation.

pertinence and probative weight.[14] The same is true of VAERS reports: as the Court noted, they rarely are probative on the issue of causation, but they must be considered.[15]

2. The Secretary's Challenge to Reasonable Basis Is Unavailing.

The Secretary's opposition to the award of interim fees implied that the diagnosis of herpetic stomatitis rendered Petitioner's claim unsustainable. Resp't Opp. at 11-12. The diagnosis does not preclude an award for vaccine injury, however. As a matter of law, under Shyface v. Sec'y of Dep't of Health & Human Servs., 165 F.3d 1344 (Fed. Cir. 1999), a petitioner need not show that vaccination was even the preponderant cause of injury, but only that vaccination was a substantial causal factor. Shyface, 165 F.3d at 1351 (rejecting Secretary's argument that "in a non-Table case involving concurrent causes, unless the petitioner can prove that the vaccine was the predominant or principal cause of injury, the petitioner has not presented the requisite prima facie case"). See generally Riley v. Sec'y of Dep't of Health & Human Servs., No. 09-276V, 2011 WL 2036976 (Fed. Cl. Spec. Mstr. Apr. 29, 2011) (awarding attorneys' fees at the conclusion of litigation over Secretary's objection).

In addition, a Petitioner may obtain compensation for significant aggravation of a pre-existing condition under section 11(c)(1)(C)(ii)(I) of the Act. Petitioner may have a feasible claim that but for her vaccination, she would not have suffered an outbreak of herpes, or it would not have been as severe. Indeed, some special masters are more likely to award compensation to petitioners with an intercurrent illness at the time of vaccination, on the theory that other illnesses make recipients susceptible to vaccine injury.[16]

The Secretary also noted that Petitioner's "first medical treatment after her vaccination was approximately one month" after her vaccinations. Resp't Opp. at 2. The time frame of several weeks following vaccination by no means precludes a finding of entitlement to compensation. The appropriate time frame varies depending on the nature of the vaccines and the injury. Experts in vaccine injury cases frequently and hotly dispute the question of what constitutes an appropriate time frame for the

[14] Simply by way of further explanation, the Homer firm makes a practice of including in pleadings all notations in a petitioner's medical record that reference vaccines and placing them in boldface type. See, e.g., Am. Pet., Aug. 16, 2010, ECF No. 17. The practice apparently is intended to further the argument that treating medical personnel identified the cause of petitioner's injury as vaccination, à la Andreu. My original decision attempted simply to communicate that the Homer firm's practice of indiscriminate highlighting does not assist in evaluating whether vaccination actually caused the injury.

[15] In a particular case, a VAERS report may corroborate witness statements. Depending on the context, VAERS reports also may be evidence of contemporaneous assessments by medical professionals. I evaluate the evidentiary value of such reports on a case by case basis.

[16] See, e.g., Mouille v. Sec'y of Dep't of Health & Human Servs., No. 05-1204V, 2009 WL 4456207, at *15 (Fed. Cl. Spec. Mstr. Nov. 17, 2009) ("the bacterial infection was a substantial factor, but the vaccine also was a substantial factor in modulating the child's immune system so that he could no longer fight off the bacterial infection").

particular injury following vaccination. See, e.g., Myer v. Sec'y of Dep't of Health & Human Servs., No. 06-148V, 2011 WL 3664358, at *11-12 (Fed. Cl. Spec. Mstr. July 28, 2011) (awarding compensation where onset of injury occurred approximately seven months after vaccination).

3. Long-Standing Practice in the Vaccine Program Supports Finding Reasonable Basis in This Instance.

The Secretary's challenge to reasonable basis suffers from a lack of appropriate context. In the context of cases in which special masters award fees and costs this case is routine, particularly when one considers the early stage of its development. At the conclusion of such a case, if entitlement is denied, the Secretary normally pays fees and costs without objection.

I discuss below a case with facts comparable to those presented here for the purpose of illustrating how radically the Secretary's challenge to the finding of a reasonable basis in this case departs from traditional practice in the Vaccine Program. In Doe/78 v. Sec'y of Dep't of Health & Human Servs., No. XX-XXXV, slip op. (Fed. Cl. Spec. Mstr. July 26, 2010), entitlement to compensation was denied, although two medical experts testified, ineffectively, on petitioners behalf.[17] Following the decision denying entitlement in Doe 78, attorneys' fees and costs were awarded without objection from the Secretary. If there was a reasonable basis to award fees and costs in Doe 78 and cases like it, it follows a fortiori that there is a reasonable basis to award fees and costs in this case.

Doe 78 involved a vaccinee who suffered from a herpes infection that undeniably caused her encephalitis. (The Homer firm did not represent petitioners in Doe/78; another firm of experienced practitioners in the Vaccine Program did.) Petitioners were parents of a 21-month old apparently well child who received three vaccines on May 2, 2007, and became ill a couple of days later, experiencing a seizure. Doe/78, slip op. at 3. Her condition continued to deteriorate and on the morning of May 10, 2007, she was drooling and unable to make eye contact. Id. She continued to seize and was rushed to the hospital, where a test on her cerebrospinal fluid indicated a viral infection. Id. at 3-4. She suffered additional seizures and over the next few weeks her mental status deteriorated. Id. at 4. In the months following her discharge, the child suffered a progressive encephalopathy and extensive brain damage consistent with herpetic encephalitis. Id. Her disorder ultimately "'manifested as permanent neurological injuries including daily seizure events.'" Id. at 5.

All the experts agreed that the child had succumbed to herpes encephalitis. See Doe/78, slip op. at 5. The parties agreed further that the vaccines did not directly infect the child with herpes. Id. Petitioners presented two experts with several different theories of vaccine causation: vaccination rendered the child vulnerable to herpes

[17] Because redaction rendered the decision irretrievable, Doe/78 is attached hereto as Court Exhibit A. The decision was redacted before the Office of Special Masters adopted its current policy regarding redaction. An unredacted copy of the decision has been lodged separately with the Court.

infection, somehow triggered a latent, pre-existing herpes infection, or aggravated her response to herpes infection, such that, instead of getting a cold sore from herpes, she developed devastating encephalitis. Id. at 7-8. Petitioners relied on the Federal Circuit's decision in Shyface, arguing that as long as vaccination was a substantial factor in bringing about the child's injury, it did not matter that she also suffered from herpes encephalitis. Id. at 8.

Doe/78 is described at length because it demonstrates that the fact pattern in the instant case – a record seemingly lacking in reliable evidence of vaccine injury, with no treating physician identifying vaccination as causal, and highly suggestive of an alternative cause for the claimant's condition – is not unusual in the Vaccine Program. In Doe/78, nothing in the medical records substantiated a vaccine injury. In Doe/78, there was a known biological agent – herpes virus – that all the experts agreed had caused the child's illness. Yet, Doe/78 went to a hearing. Two experts testified at the hearing, providing testimony that was highly unpersuasive, and the claim was denied. See Doe/78, slip op. at 2. Despite all the weaknesses of Doe/78, the Program paid fees and costs in the amount of $169,721.85, without objection from the Secretary. Attorneys' Fees and Costs Decision, No. 08-414V, slip op. (Fed. Cl. Spec. Mstr. Dec. 7, 2010).[18]

Doe/78 is not at all unusual, in my experience.[19] The award of fees and costs reflects the generosity with which special masters and the Secretary traditionally have approached the issue of reasonable basis. Under this approach, it is recognized that denial of fees and costs is not appropriate when a claim is colorable, i.e., not frivolous, at the outset, even if the evidence appears weak. In the early stages of a case, it is understood that the claim is unproven. In the late stages of a case, the claim must be proved, or it will be dismissed. Reimbursement of fees and costs will not be granted beyond the time it is clear that the necessary proof is not forthcoming.[20] The determination of that point in time in any given case depends on many facts and circumstances and the judgment of the special master, at least in the first instance.

Reasonable basis cannot be determined in the abstract, but derives meaning in relation to the universe of cases in the Vaccine Program. As discussed above, the concept of "reasonable basis" has been informed by the practice in the Office of Special Masters over a long period of time in a wide variety of cases. The concept is complex.

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[18] The Attorneys' Fees and Costs Decision is attached hereto as Court Exhibit B. The judgment awarding fees and costs in Doe/78 is attached hereto as Court Exhibit C. The Attorney's Fees and Costs Decision and judgment were not redacted.

[19] Doe/78 was the first case I heard as a special master. If the issue were to arise today, I might not award compensation for one or both of the expert opinions.

[20] As indicated by the Federal Circuit in Shaw, a special master has discretion to determine when, in the course of a proceeding, it is appropriate to conduct an assessment of reasonable basis. McKellar, 2011 WL 5925323, at *5 (citing Shaw, 609 F.3d at 1376). See also Silver, 2009 WL 2950503, at *6 (determination of reasonable basis postponed to avoid prejudicing adjudication of the claim on the merits).

It resists pat formulations and encompasses competing policies. In requiring a reasonable basis to support the award of fees and costs, Congress intended to facilitate the entry of claimants into the Vaccine Program but to prevent abuse of Program resources. With both these goals in mind, Petitioners should not be barred from proceeding before they even have had the chance to complete the collection and submission of medical records and obtain an expert opinion. Establishing a low barrier at the outset of a case provides the access necessary to carry out the congressional intent. See Saunders v. Sec'y of Dep't of Health & Human Servs., 25 F.3d 1031, 1035 (Fed. Cir. 1994) (noting the "purpose of the Act [] to ensure that vaccine-injury claimants will have readily available a competent bar to prosecute their claims"); see generally McKellar, 2011 WL 5925323 at *3 (discussing Avera). As the case progresses, more is required to support a reasonable basis to proceed.

As the Supreme Court recently affirmed in Bruesewitz, the Vaccine Act in large measure bars the courthouse door to individuals who may have been injured by vaccination, many of whom are compelled to be vaccinated if they wish to go to school or work in their chosen field of endeavor. In exchange for broad protection against tort liability for manufacturers, a result deemed by Congress necessary for the preservation of the nation's health, the Vaccine Program was created as a friendly forum for the resolution of vaccine injury claims. See Bruesewitz, 131 S. Ct. at 1073 (noting that the Vaccine Act was enacted "to stabilize the vaccine market and facilitate compensation"). In the special context of the Vaccine Program, Petitioner has a reasonable basis to support her claim.

III. CONCLUSION

Having found that the Petitioner's claim was supported by a reasonable basis at the time the application for fees and costs was made, I **GRANT** Petitioners request for $18,255.53. 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.[21]

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Special Master

[21] 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.