

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 11-228V

Filed: November 6, 2012

To Be Published

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SHARON SEASE,

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Petitioner,

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Attorneys' Fees and Costs;

v.

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Reasonable Basis Determination

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SECRETARY OF HEALTH  
AND HUMAN SERVICES,

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Respondent.

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Ronald C. Homer, Boston, MA, for petitioner.

Jennifer L. Reynaud, Washington, DC, for respondent.

**MILLMAN, Special Master**

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

On April 4, 2011, petitioner filed a petition<sup>2</sup> under the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-10-34 (2006) ("Vaccine Act" or "Act"), alleging that she suffered from neurological injuries after receiving Gardasil (human papillomavirus vaccine) on April 17, 2008. On February 17, 2012, petitioner's counsel filed a status report stating that petitioner's counsel no longer intended to proceed with the case. Petitioner's counsel then filed an Interim

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<sup>1</sup> Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

<sup>2</sup> Initially, petitioner's mother Susan Shaw pursued her vaccine injury claim because petitioner Sharon Sease was a minor. Petitioner turned 18 years old on August 16, 2011. On October 24, 2011, the undersigned acted on Petitioner's Motion to Amend the Caption and ordered that the case caption be amended to reflect that petitioner had reached the age of majority.

Application for Final Attorneys' Fees and Costs on April 9, 2012, and a Supplemental Interim Application for Final Attorneys' Fees and Costs on June 8, 2012. Petitioner's counsel also filed a Motion to Withdraw as Attorney on June 8, 2012. The undersigned granted the Motion to Withdraw on June 11, 2012. Petitioner continued to move forward with her case pro se. On August 17, 2012, the undersigned issued a Decision dismissing petitioner's case for failure to prosecute and failure to make a prima facie case. The clerk entered judgment pursuant to Vaccine Rule 11(a) on September 20, 2012. The fee motions have been fully briefed and are now ripe for decision.

## **I. Background**

### **A. Factual History**

Petitioner was born on August 16, 1993.

On April 17, 2008, she received Gardasil vaccine. Med. recs. Ex. 3, at 11; Med. recs. Ex. 6, at 7. On the same day, petitioner went to Stark County Health Department complaining of occasional chest tightness. She was referred to the pediatric cardiology clinic for hypercholesterolemia and to the pediatric pulmonary clinic for exercise-induced asthma. Med. recs. Ex. 6, at 1-2.

On June 11, 2008, petitioner went to Aultman Hospital's Emergency Department with a severe headache following a syncopal episode. Petitioner complained of left-sided headache with photophobia and nausea. She said she could not breathe or talk and had tingling around her lips. Petitioner stated that the left side of her body was numb. She indicated that she had lost consciousness, though this was unwitnessed. Following petitioner's syncopal episode, her arm was shaking and she was weak and tired. Dr. Timothy Cooley diagnosed petitioner with a syncopal episode secondary to hyperventilation and migraine-type cephalgia. Med. recs. Ex. 5, at 13, 16-19.

On June 16, 2008, petitioner returned to Aultman Hospital for a follow-up to her June 11, 2008, ER visit. Petitioner's mother stated that the constellation of petitioner's symptoms started in mid-April after she received Gardasil vaccine and she had almost daily nausea since receiving Gardasil. Dr. Briana Yee-Providence investigated a possible causal connection between petitioner's symptoms and Gardasil vaccine. Dr. Yee-Providence stated that she reviewed the literature, that there did not appear to be any reported cases of these symptoms with the Gardasil vaccine, and that approximately two months had passed since petitioner received the vaccine. Med. recs. Ex. 2, at 8-9.

On June 18, 2008, petitioner had an EEG and chest x-rays. The EEG was normal, and no epileptiform activity was detected. Petitioner's chest x-rays were unremarkable. Med. recs. Ex. 2, at 10-11.

On June 25, 2008, Nurse J. Patrick filled out a VAERS Report. Nurse Patrick reported that petitioner's onset of symptoms was June 11, 2008, when she woke up weak and dizzy with breathing problems, passed out, had a severe headache, was confused, and fell several times. Med. recs. Ex. 6, at 15.

On July 7, 2008, petitioner had a follow-up appointment with Dr. Yee-Providence. Petitioner's mother complained that petitioner continued to suffer from loss of consciousness, fatigue, and shortness of breath. Dr. Yee-Providence noted that petitioner appeared to be lethargic, sleepy, had a decreased appetite, and was not herself. Petitioner reported that she felt somewhat depressed. Dr. Yee-Providence performed a physical examination and reported that the results from petitioner's CBC, EEG, and chest x-ray were all unremarkable. Dr. Yee-Providence concluded that she could find no medical reason for petitioner's fatigue and considered whether her fatigue was due to depression. Med. recs. Ex. 2, at 6.

On July 30, 2008, petitioner was examined by Dr. Blaise L. Congeni, an infectious disease specialist at Akron Children's Hospital. Dr. Congeni stated that on physical exam, petitioner was alert and active. He ordered a CBC, sedimentation rate blood test, and complete metabolic panel, which were all normal. He wrote to petitioner's primary care physician that he "believe[s] that there is potential here that this is vaccine related, although it is not clear exactly what the nature of the illness at this time is. I think for further clarification, we may need an additional neurologic evaluation . . . ." Med. recs. Ex. 8, at 15.

On September 23, 2008, petitioner had a consultation with Dr. Abdalla Abdalla, a neurologist. Petitioner described her symptoms beginning on April 17, 2008, when she received the Gardasil vaccine and experienced left-sided numbness and pain around the injection site. Petitioner reported that she experienced intermittent episodes of shortness of breath, chest tightness, and blurred vision. Petitioner also described a syncopal episode that occurred on June 18, 2008. Dr. Abdalla prescribed petitioner Imitrex "for severe headaches." After the examination, Dr. Abdalla noted that petitioner's headaches did not satisfy the criteria for migraine headaches. In his consideration, Dr. Abdalla wrote, "symptoms that occurred in April might well be secondary to Gardicil [sic] but I'm not sure I would reconcile [the] recent onset of headaches to that vaccination." Med. recs. Ex. 8, at 11-12.

On October 9, 2008, at the request of Dr. Abdalla, petitioner had a Sleep Deprived, Awake/Sleep EEG performed. Petitioner's awake and sleep EEG results were normal. Id. at 26.

On November 17, 2008, petitioner had a follow-up appointment with Dr. Abdalla. Petitioner complained of having headaches several times per week but reported no further syncopal episodes. Dr. Abdalla noted that petitioner's mother believed that the symptoms were secondary to the Gardasil vaccine and suggested that the mother approach the infectious diseases doctor about her concerns. Dr. Abdalla listed intermittent episodes of headaches and dizziness, syncopal episodes, and possible atypical migraine in his impression and indicated that petitioner's symptoms could be "possible side effects of Gardasil." Id. at 5.

On November 28, 2008, Cheryl Myers, M.A., filed a VAERS report. Ms. Myers reported seizure-like activity, dizziness, syncope, fatigue, severe headaches, abdominal pain, and breathing issues as petitioner's adverse symptoms. Ms. Myers indicated that the adverse event onset was June 11, 2008. Id. at 46.

## **B. Procedural History**

In her April 9, 2012, Interim Application for Final Attorneys' Fees and Costs ("Fee App."), petitioner requests \$13,368.50 in attorneys' fees and \$604.79 in attorneys' costs.

On May 17, 2012, respondent filed Respondent's Objection to Petitioner's Interim Application for Final Attorneys' Fees and Costs ("Resp."). Respondent first objects to an award of interim fees generally, arguing that the narrow procedural circumstances necessary to permit an interim fee award present in Avera v. Secretary of Health and Human Services, 515 F.3d 1343 (Fed. Cir. 2008), are not present in the instant case. Resp. 6-9.

In addition, respondent objects to a fee award because respondent alleges that petitioner has not met the Vaccine Act's reasonable basis requirement. Id. at 11. Respondent notes that the undersigned issued an Order to Show Cause due to insufficient evidence. Id. at 12. Respondent also cites to instances in the medical records where the treating doctors considered whether petitioner's symptoms were vaccine related and, according to respondent, rejected causation. Id. at 13.

On June 8, 2012, petitioner filed Petitioner's Reply to the Respondent's Objection to Petitioner's Interim Application for Final Attorneys' Fees and Costs ("Reply"). Petitioner contends that an interim fee award would be appropriate in this case because counsel has withdrawn and it is uncertain when the litigation will come to an end. Reply 3-5 (citing Hiland ex rel. Hiland v. Sec'y of HHS, No 10-491V, 2012 WL 542683, at \*3 (Fed. Cl. Spec. Mstr. Jan. 31, 2012), appeal docketed, No. 10-491-LB (Fed. Cl. Mar. 1, 2012)). Refuting respondent's argument that the claim has no reasonable basis, petitioner states that the effects of the human papillomavirus ("HPV") vaccine have not been extensively studied. Reply 7. Petitioner explains that she experienced most of the common side effects listed by the manufacturer of the vaccine, including headaches, nausea, dizziness, fainting episodes, and fatigue. Id. Petitioner also emphasizes the statements in the medical records by Dr. Abdalla and Dr. Yee-Providence as well as the two VAERS reports as "abundant evidence" that petitioner's claim had a reasonable basis. Id. at 8.

On June 8, 2012, petitioner filed a Supplemental Interim Application for Final Attorneys' Fees and Costs ("Supp. Fee App."). Petitioner requests \$1,916.60 in supplemental attorneys' fees for work on petitioner's Reply.

After petitioner's counsel had fully briefed the interim fee motion, petitioner's counsel filed a Motion to Withdraw on June 8, 2012. The undersigned granted the Motion to Withdraw on June 11, 2012.

On June 25, 2012, respondent filed Respondent's Opposition to Petitioner's Supplemental Interim Application for Final Attorneys' Fees and Costs ("Sur-Reply"). Respondent reiterates the objections in her initial response and states that the objections are equally applicable to petitioner's supplemental fee application. Sur-Reply 1.

The undersigned issued a second Order to Show Cause on July 9, 2012, ordering petitioner to contact the undersigned's law clerk by August 9, 2012. Order to Show Cause 5.

On August 17, 2012, the undersigned issued a Decision dismissing petitioner's case for failure to prosecute and failure to make a prima facie case. No motion for review was filed. The clerk of the court entered judgment pursuant to Vaccine Rule 11(a) on September 20, 2012. Accordingly, although petitioner's applications for fees and costs were filed as interim applications, they are now considered by the undersigned to be final applications.

On September 28, 2012, respondent filed Respondent's Supplemental Opposition to Petitioner's Application for Final Attorneys' Fees and Costs ("Opp'n"). Respondent recognizes that the arguments in respondent's previous oppositions to petitioner's applications for fees and costs that specifically oppose the interim nature of the fees and costs are moot since judgment has entered. Opp'n 2. Respondent continues to object to any award of attorneys' fees and costs because respondent alleges that petitioner has failed to meet the statutory requirement that the petition was brought with a reasonable basis.

## **II. Discussion**

### **A. Legal Standard for Attorneys' Fees and Costs**

#### **1. In General**

The Vaccine Act permits an award of "reasonable attorneys' fees" and "other costs." 42 U.S.C. § 300aa-15(e)(1). It is not necessary for a petitioner to prevail in the case-in-chief in order to receive a fee award as long as petitioner brought the claim in "good faith and there was a reasonable basis for the claim." *Id.* The special master has "wide discretion in determining the reasonableness" of attorneys' fees and costs. Perreira v. Sec'y of HHS, 27 Fed. Cl. 29, 34 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994); *see also Saxton ex rel. Saxton v. Sec'y of HHS*, 3 F.3d 1517, 1519 (Fed. Cir. 1993) ("Vaccine program special masters are also entitled to use their prior experience in reviewing fee applications.").

#### **2. Good Faith and Reasonable Basis Determinations**

The Vaccine Act provides that a special master may award reasonable attorneys' fees and costs if the special master determines that the petition was "brought in good faith and there was a reasonable basis for the claim . . ." 42 U.S.C. § 300aa-15(e)(1). Respondent alleges that "petitioner has not met the statutory requirements of establishing that the petition was brought in

good faith and with a reasonable basis.” Opp’n 4.

### **a. Good Faith**

Good faith has been interpreted to mean that the petitioner holds an honest belief that a vaccine injury occurred. Turner v. Sec’y of HHS, No. 99-544V, 2007 WL 4410030, at \*5 (Fed. Cl. Spec. Mstr. Nov. 30, 2007). As such, the good faith requirement is subjective. Hamrick v. Sec’y of HHS, No. 99-683V, 2007 WL 4793152, at \*3 (Fed. Cl. Spec. Mstr. Nov. 19, 2007). A petitioner is “entitled to a presumption of good faith.” Grice v. Sec’y of HHS, 36 Fed. Cl. 114, 121 (1996).

In the present case, respondent has not presented any evidence to overcome petitioner’s presumption of good faith. Respondent provides a description of the Vaccine Program’s good faith requirement, see Opp’n at 2-3, but does not argue that petitioner or petitioner’s counsel acted frivolously or in bad faith. Respondent instead focuses her opposition to an award for attorneys’ fees and costs on whether petitioner had a reasonable basis to file the petition.

### **b. Reasonable Basis**

#### **i. Legal Framework**

Respondent contends that the petition filed in the present case lacked a reasonable basis. Unlike good faith, the reasonable basis requirement is “objective, looking 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 v. Sec’y of HHS, No. 90-3277V, 1993 WL 496981, at \*1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993)). When a petitioner prevails on the merits, reasonable basis is presumed. However, when a petitioner loses on the merits, or moves for interim fees before a special master has ruled on entitlement, the special master must determine whether the petition had a reasonable basis.

A special master may consider a number of factors when determining reasonable basis, including the factual basis, medical support, jurisdictional issues, and the circumstances under which a petition is filed. Turner, 2007 WL 4410030, at \*6-8 (citations omitted). Special masters historically have been “quite generous in finding a reasonable basis for petitioners.” Id. at \*8 (citation omitted).

To demonstrate a reasonable basis for the claim for purposes of §300aa–15(e), a petitioner need only demonstrate based on the totality of the circumstances that her claim was feasible.<sup>3</sup> See Turner, 2007 WL 4410030, at \*6. “Feasibility,” not likelihood of success by a

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<sup>3</sup> In her Supplemental Opposition to Petitioner’s Application for Final Attorneys’ Fees and Costs, respondent suggests that “[t]o have a ‘reasonable basis,’ petitioners’ claim must, at a minimum, be supported by medical records or medical opinion.” Opp’n 3 (citing 42 U.S.C. § 300aa–13(a)(1)). Contrary to respondent’s suggestion, the term “reasonable basis” is not defined in the Vaccine Act. The only guidance on the meaning of the term “reasonable basis” appears in case law. The case law stresses that a determination of reasonable basis should be based on the totality of the circumstances, not a minimum

preponderance of the evidence threshold, is the standard. See id.

After considering the medical records, notations of petitioner's treating physicians, and other evidence in the record within the framework of the function and purpose of the National Childhood Vaccine Injury Compensation Program, the undersigned finds that petitioner had a reasonable basis for her claim from the initial filing phase through the withdrawal of petitioner's counsel.

## **ii. Treating Physician Opinions and Medical Records**

Petitioner's treating physician opinions and medical records demonstrate the feasibility of petitioner's claim and provide support for petitioner's assertion that her case had a reasonable basis. Respondent contends that "petitioner's treating physicians repeatedly considered and rejected vaccination causation in this case." Opp'n 3. However, multiple physicians recognized HPV vaccine as a feasible cause of petitioner's symptoms. These opinions and notations are of particular importance because the Federal Circuit has recognized that "treating physicians are likely to be in the best position to determine whether 'a logical sequence of cause and effect shows[s] that the vaccination was the reason for the injury.'" Capizzano v. Sec'y of HHS, 440 F.3d 1317, 1326 (Fed. Cir. 2006) (quoting Althen v. Sec'y of HHS, 418 F.3d 1274, 1280 (Fed. Cir. 2005)); see Andreu ex rel. Andreu v. Sec'y of HHS, 569 F.3d 1367, 1375-76 (Fed. Cir. 2009). As such, the undersigned gives the opinions of treating physicians significant weight. See Andreu, 569 F.3d at 1375-76.

On July 30, 2008, Dr. Blaise Congeni, an infectious disease specialist, opined that petitioner's symptoms were potentially vaccine-related. Dr. Congeni wrote, "I believe that there is potential here that this is vaccine related, although it is not clear exactly with the nature of the illness at this time." Med. recs. Ex. 8, at 15. Dr. Congeni recommended to petitioner's referring physician that they submit a VAERS report and "see if there is any information from the FDA or from [the] manufacturer to determine what our next step might be." Id.

Dr. Abdalla Abdalla, a neurologist, also indicated that HPV vaccine could be the cause of petitioner's symptoms. After examining petitioner on September 23, 2008, Dr. Abdalla wrote in his consideration that "symptoms that occurred in April might well be secondary to Gardicil [sic] but I'm not sure I would reconcile [the] recent onset of headaches to that vaccination." Id. at 12. Later, on November 17, 2008, Dr. Abdalla reiterated that petitioner's injuries could be vaccine related. Dr. Abdalla wrote in his impression that petitioner's symptoms could be "possible side effects of Gardasil." Id. at 5. In his treatment plan, after increasing petitioner's Topamax dosage and referring her to a psychologist, Dr. Abdalla suggested that petitioner "approach Dr. Congeni again with regards to her Gardasil side effects." Id.

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threshold. See, e.g., Woods v. Sec'y of HHS, No. 10-377V, 2012 WL 4010485, at \*6-7 (Fed. Cl. Spec. Mstr. Aug. 23, 2012); Davis v. Sec'y of HHS, No. 07-451V, 2012 WL 2878612, at \*634 (Fed. Cl. 2012) (citing McKellar v. Sec'y of HHS, 101 Fed. Cl. 297, 303 (2011)); Hamrick, 2007 WL 4793152, at \*4.

Dr. Briana Yee-Providence also questioned whether petitioner's symptoms were vaccine related, though she was unable to find any similar case reports. On June 16, 2011, Dr. Yee-Providence noted that petitioner had suffered a constellation of symptoms since receiving the vaccine. Med. recs. Ex. 2, at 8. Dr. Yee-Providence reported that she did a literature review and did not find any reported cases of individuals who received Gardasil vaccine and experienced side effects similar to petitioner's symptoms of shortness of breath, nausea and weakness. Med. recs. Ex. 2, at 8. Dr. Yee-Providence also indicated she would do a literature review for Gardasil case reports with similar syncopal symptoms to petitioner's. Id. When Dr. Yee-Providence saw petitioner three weeks later for a follow up appointment on July 7, 2011, Dr. Yee-Providence indicated that after an "extensive literature search," she did not find case reports reporting side effects similar to petitioner's. Id. at 6. Dr. Yee-Providence was unable to find any medical reason for petitioner's fatigue symptoms. Id.

In sum, though not sufficient to establish a prima facie case of vaccine causation, petitioner's treating physician notes indicate the feasibility of petitioner's claim, substantiating the reasonableness of her filing a petition and proceeding with her claim.

### **iii. Reasonable Basis over the Course of Litigation**

A petitioner must ensure that a reasonable basis for a claim exists during the course of litigation. A filed petition containing only bare allegations of a vaccine injury or death still has a reasonable basis at the time of filing if a petitioner obtains and files supporting medical records or an expert opinion as the case proceeds. Turner, 2007 WL 4410030, at \*8 (citation omitted). Conversely, a petition with a reasonable basis at the beginning of litigation may lack a reasonable basis at a later phase if an expert report has not been filed for a prolonged time or an expert report is unsupported and deficient. See Pereira, 27 Fed. Cl. at 31-34 (affirming a special master's denial of fees after the submission of an unsupported expert opinion based on the finding there was no reasonable basis to continue the case).

Petitioner did not produce an expert report supporting causation. Generally, the absence of an expert report does not amount to a lack of a reasonable basis for the claim. See, e.g., Lamar v. Sec'y of HHS, No. 99-583V, 2008 WL 3845165, at \*4-5 (Fed. Cl. Spec. Mstr. July 30, 2008). Often, special masters are able to review a petitioner's medical records and develop an impression of the case based on their experience. The Federal Circuit acknowledged in Avera 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." Avera, 515 F.3d at 1352.

In the instant case, there was a reasonable basis to file the petition based on the medical records, as discussed supra, but petitioner needed a medical expert report in support of vaccine causation to make a prima facie case. See Decision 5. On August 16, 2011, the undersigned ordered petitioner to file an expert report within 90 days. Order 1. Despite receiving extensions, petitioner's counsel was unable to file an expert report for nearly four months. On December 13, 2011, petitioner's counsel filed a status report requesting that the deadline for filing an expert report be suspended and indicating that counsel needed additional time to discuss how to proceed

in the case with petitioner. Status Rep. 1. On December 14, 2011, the undersigned granted petitioner's motion and ordered petitioner to file a status report by January 17, 2012. Order 1.

Despite repeated attempts, petitioner's counsel was unable to reach petitioner before January 17, 2012, to discuss how to move forward with the case. On February 17, 2012, petitioner filed a status report informing the court of counsel's intent to withdraw from the case as counsel. In the status report, petitioner's counsel indicated that counsel finally spoke with petitioner on January 25, 2012, but petitioner did not provide counsel with any updates regarding the future of the case, as she stated she would prior to the next status conference. Status Rep. 1. Petitioner's counsel notified the court of the decision to withdraw as counsel prior to the undersigned's issuance of an Order to Show Cause on February 28, 2012, and reiterated this intention in petitioner's March 29, 2012, Response to the Order to Show Cause. Response to Order to Show Cause 1.

Had petitioner's counsel continued to bill for active attempts to litigate the case rather than wind it down and withdraw after February 17, 2012, there would not have been a reasonable basis to continue because attempts to find a medical expert had been fruitless and petitioner was not helpful with how to proceed in her January 25, 2012 conversation with counsel. This would have been a situation like the one addressed in Perreira where counsel continued to pursue a claim in which the medical evidence was insufficient to establish a reasonable basis. Perreira, 33 F.3d at 1377; see also Everett. Sec'y of HHS, No. 91-1115, 1992 WL 35863 (Fed. Cl. Spec. Mstr. 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). However, petitioner's counsel acted reasonably and informed the undersigned of counsel's intent to withdraw when it became apparent that an expert would not provide an opinion supporting vaccine causation and the case would not have a reasonable basis going forward.

Herein, petitioner had filed medical records and her mother's affidavit, which contained sufficient information to allow the undersigned to evaluate reasonable basis for the period in which former counsel incurred fees and costs. Because petitioner's counsel had a reasonable basis to file the petition but began to wind the case down and withdrew once counsel was unable to provide an expert report to support vaccine causation and the claim was no longer feasible, petitioner had a reasonable basis for her claim for the full duration of petitioner's counsel's representation of petitioner.

#### **iv. Reasonable Basis Involving a New Addition to the Vaccine Injury Table: Program Intent**

The circumstances of petitioner's case show that vaccine causation was feasible throughout the portion of the litigation in which petitioner was represented by counsel, particularly in light of Congress's intent, and the Federal Circuit's interpretation of that intent, behind the provision of attorneys' fees and costs within the Vaccine Program. The Federal Circuit has recognized that "[t]he overarching purpose of the Vaccine Act and the National Childhood Vaccine Injury Compensation Program it created is to award compensation 'to

vaccine-injured persons quickly, easily, and with certainty and generosity.’” Cloer v. Sec’y of HHS, 675 F.3d 1358, 1362 (Fed. Cir. 2012) (quoting H.R. Rep. No. 99-908, at 3 (1986)). One significant aspect of this congressional intent that the Federal Circuit has identified was to ensure competent counsel in Vaccine Act cases: “[O]ne of the underlying purposes of the Vaccine Act was to ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims.” Avera, 515 F.3d at 1352 (citing Saunders v. Sec’y of HHS, 25 F.3d 1031, 1035 (Fed. Cir. 1994); see Turner, 2007 WL 4410030, at \*11 (quoting Iannuzzi v. Sec’y of HHS, No. 02-780V, 2007 WL 1032379, at \*11 (Fed. Cl. Spec. Mstr. Mar. 20, 2007), rev’d on other grounds, 78 Fed. Cl. 1 (2007) (“Moreover, an important purpose of the Vaccine Act’s provision of fees and costs awards for counsel representing petitioners is ‘not to benefit the *attorneys* involved, but to *ensure that Vaccine Act petitioners will have adequate access to competent counsel.*”). Attorneys within the Vaccine Program must be fairly compensated for their work in order to ensure that attorneys will continue to provide competent counsel in future Vaccine Act cases.

Congress’s intent to ensure adequate access to competent counsel within the Vaccine Program is informative in cases such as this one where a vaccine has recently been added to the Vaccine Injury Table, there has been no adjudication of claims involving the vaccine, and the vaccine has not been as thoroughly researched as others on the Vaccine Injury Table. In these situations, reasonable basis can be more difficult to determine, but attorney’s fees and costs should be paid in these close calls, where there is a reasonable basis, to ensure that members of the bar will continue to represent petitioners in novel cases.

Petitioner’s counsel reviewed the limited research on HPV vaccine, spoke with petitioner and her mother, and reviewed petitioner’s medical records with physician statements supporting feasible vaccine causation. The HPV vaccine was introduced to the market in 2006. As such, petitioner points out that it has not been as extensively studied as other vaccines. Reply 6-7. Nonetheless, petitioner’s treating physicians thought it possible that petitioner had a vaccine injury although none of them opined that it was probable that HPV vaccine caused petitioner’s injury. The notations of Dr. Congeni, Dr. Abdalla, and Dr. Yee-Providence all support the feasibility of a vaccine injury. Dr. Congeni found “that there is potential here that this is vaccine related.” Med. recs. Ex. 8, at 15. Dr. Abdalla indicated that petitioner’s symptoms could be “possible side effects of Gardasil.” Id. at 5. Dr. Yee-Providence noted that petitioner had suffered a constellation of symptoms after receiving the vaccine and did a literature review in search of reported cases of individuals who received Gardasil vaccine and experienced symptoms similar to petitioner’s. Med. recs. Ex. 2, at 8.

In sum, petitioner had a reasonable basis for her claim for the full duration of petitioner’s counsel’s representation of petitioner. Petitioner’s medical records and notations by her treating physicians support the feasibility, and, thus, the reasonable basis of petitioner’s claim. Congress’s intent behind the provision of attorneys’ fees and costs also supports a finding that petitioner’s counsel be awarded attorneys’ fees and costs in a case that had a reasonable basis though by a slim margin. Therefore, petitioner shall be awarded reasonable attorneys’ fees and costs.

## **B. Reasonable Attorneys' Fees**

The Federal Circuit has approved the lodestar approach to determine “reasonable attorneys' fees” and costs under the Act. Avera, 515 F.3d at 1347. The lodestar approach involves a two-step process. First, a court determines an “initial estimate . . . by ‘multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.’” Id. at 1347-48 (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). Second, the court may make an upward or downward departure from the initial calculation of the fee award based on specific findings. Avera, 515 F.3d at 1348.

### **1. Attorneys' Fees and Costs for Conway, Homer & Chin-Caplan**

#### **a. Determination of a Reasonable Hourly Rate**

A reasonable hourly rate is “the prevailing market rate defined as the rate prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” Id. (citation and quotation omitted). In Avera, the Federal Circuit found that in Vaccine Act cases, a court should use the forum rate, i.e., the District of Columbia rate, in determining an award of attorneys' fees. Id. at 1349. At the same time, the court adopted the Davis County exception to prevent windfalls to attorneys who work in less expensive legal markets. Id. (citing Davis County Solid Waste Mgmt. & Energy Recovery Spec. Serv. Dist. v. U.S. Envtl. Prot. Agency, 169 F.3d 755 (D.C. Cir. 1999)). In cases where the bulk of the work is completed outside the District of Columbia, and there is a “very significant difference” between the forum hourly rate and the local hourly rate, the court should calculate an award based on local hourly rates. Avera, 515 F.3d at 1349 (finding the market rate in Washington, DC to be significantly higher than the market rate in Cheyenne, Wyoming).

In the instant case, petitioner requests reimbursement for work performed in Boston, Massachusetts by several attorneys and non-attorneys at various hourly rates: Amy Fashano (\$208.00-\$218.00); Christina Ciampolillo (\$200.00-\$209.00); Kevin Conway (\$335.00-\$346.00); Meredith Daniels (\$203.00); Ronald C. Homer (\$305.00-\$315.00); Sylvia Chin-Caplan (\$305.00); a law clerk or clerks (\$136.00); and paralegals (\$105.00-\$110.00).

Respondent does not object to petitioner's requested hourly rates. See Opp'n. The undersigned reviewed the fee applications and finds that the requested hourly rates are reasonable and consistent with the rates at which these attorneys and staff have been compensated in past cases. See Calise v. Sec'y of HHS, No. 08-865V, 2011 WL 2444810, at \*6 (Fed. Cl. Spec. Mstr. June 13, 2011); Soto v. Sec'y of HHS, No. 09-897V, 2011 WL 2269423, at \*5 (Fed. Cl. Spec. Mstr. June 7, 2011). Accordingly, the undersigned will use the requested hourly rates to calculate an award for attorneys' fees.

#### **b. Hours Reasonably Expended**

The lodestar approach requires that the reasonable hourly rate be multiplied by the number of hours “reasonably expended on the litigation.” Avera, 515 F.3d at 1347-48 (quotation

and citation omitted). Counsel must submit fee requests that include contemporaneous and specific billing entries and indicate the task performed, the number of hours expended on the task, and who performed the task. See Savin ex rel. Savin v. Sec’y of HHS, 85 Fed. Cl. 313, 315-18 (Fed. Cl. 2008). Counsel must not include in their fee request hours that are “excessive, redundant, or otherwise unnecessary.” Saxton, 3 F.3d at 1521 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). It is “well within the special master’s discretion to reduce the hours to a number that, in [her] experience and judgment, [is] reasonable for the work done.” Saxton, 3 F.3d at 1521. Furthermore, a special master may reduce hours sua sponte, apart from objections raised by respondent and without providing petitioner notice and opportunity to respond. See Sabella v. Sec’y of HHS, 86 Fed. Cl. 201, 208-09 (Fed. Cl. 2009); see also Savin, 85 Fed. Cl. at 315-19 (quoting Duncan v. Sec’y of HHS, No. 99-455V, 2008 WL 4743493, at \*1 (Fed. Cl. 2008) (finding that “the Special Master has an independent responsibility to satisfy himself that the fee award is appropriate and not limited to endorsing or rejecting respondent’s critique”)).

Respondent objects to any fee award but does not specifically object to the number of hours expended by petitioner’s counsel. The undersigned reviewed petitioner’s fee applications and finds some of the billed hours requested to be unreasonable. In the undersigned’s previous experience with petitioner’s counsel’s law firm, the firm regularly assigns multiple attorneys and paralegals to work on a case. See, e.g., Lilley v. Sec’y of HHS, No. 09-31V, 2012 WL 1836323, at \*5 (Fed. Cl. Spec. Mstr. Apr. 20, 2012). In the present case, three partners, three associates, and at least one law clerk and paralegal submitted billable time slips. This practice leads to duplicative billing entries as each individual working on the case bills for the time it takes to become familiar with different aspects of it. These hours are “excessive, redundant, or otherwise unnecessary.” See Saxton, 3 F.3d at 1521 (quoting Hensley, 461 U.S. at 434).

On June 16, 2011, Ms. Fashano and a paralegal both billed 0.2 hours for a case meeting regarding the “status of outstanding meds.” Fee App., Tab A, at 8. That same day, a paralegal billed 0.1 hours for a case memo to update the attorney on the status of record collection. Id. The time billed for a meeting and memo on the same day, both in regard to the status of medical record collection, is duplicative. Accordingly, the undersigned reduces the award by \$10.70, measured by the paralegal’s billing entry for the case memo.

On August 16, 2011, Ms. Fashano and a law clerk both billed 0.2 hours for a case meeting. In the explanation petitioner provided in the billing records, Ms. Fashano entered, “case meeting w/law clerk re: case workup/deadlines.” Id. at 11. In contrast, the law clerk’s billing entry indicated, “with attorney re: affidavit and amended petition.” Id. The descriptions of the case meeting do not align or have a clear overlap, which counsel’s other case meeting entries all do. Accordingly, the undersigned reduces the award by \$69.40, measured by the billing entries by Ms. Fashano and the law clerk for the case meeting.

On December 1, 2011, Ms. Fashano billed 0.2 hours for editing petitioner’s affidavit and a memo to “AD” regarding the revised caption. Id. at 15. The time editing the client’s affidavit is reasonable; however, editing an internal memo regarding the previous revision to the caption is not reasonable, particularly given that Ms. Fashano had billed for an office-wide memo regarding the caption change on October 25, 2011. Accordingly, the undersigned reduces the

award by \$21.10, measured by half of the billing entry, 0.1 hours, for the editing done by Ms. Fashano.

On May 18, 2012, Mr. Homer billed 0.1 hours to review respondent's response to petitioner's motion for interim attorneys' fees and costs and write a memo to Ms. Fashano. Supp. Fee App., Tab A, at 1. On May 22, 2012, Ms. Fashano billed 0.3 hours to review respondent's objection to interim fees and prepare for a response. Id. The time billed by two attorneys for review of the respondent's response to petitioner's motion for interim attorneys' fees and costs is duplicative, especially considering Mr. Homer wrote Ms. Fashano a memo about the filing. Accordingly, the undersigned reduces the award by \$31.50, measured by Mr. Homer's billing entry for reviewing respondent's response to petitioner's motion for interim attorneys' fees and costs.

Petitioner's counsel's fee request is reduced by a total of \$132.70.

### III. Conclusion

The undersigned finds that there was a reasonable basis for petitioner's claim for the duration of petitioner's counsel's representation of petitioner in this matter. Petitioner is entitled to attorneys' fees and costs. Using the requested hourly rates and incorporating the reductions in hours above, the undersigned calculates the following award for Conway, Homer & Chin-Caplan:

Fees for Conway, Homer & Chin-Caplan	
Total Requested Fees and Costs in Original Fee Application	\$13,973.29
Total Requested Fees and Costs in Supplemental Fee Application	\$1,916.60
Total Reductions from Discussion Above	\$132.70
Reasonable Attorneys' Fees and Costs for Conway, Homer & Chin-Caplan	<b>\$15,757.19</b>

Accordingly, the undersigned awards:

**\$15,757.19**, representing reimbursement for attorneys' fees and costs. The award shall be in the form of a check made jointly payable to petitioner and Conway, Homer & Chin-Caplan, PC.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.<sup>4</sup>

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_

\_\_\_\_\_  
Laura D. Millman  
Special Master

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<sup>4</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party filing a notice renouncing the right to seek review.