

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 10-377 V

Filed: August 23, 2012

For Publication

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LISA WOODS and JASON FORD, \*  
as parents and natural guardians of \*  
CASON EUGENE FORD, \*

Petitioners, \*

Remand Decision; Reasonable Basis  
for Petitioners' Claim

v. \*

SECRETARY OF HEALTH \*  
AND HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

Lisa Woods and Jason Ford, Chattanooga, TN, for petitioners (pro se).  
Julia W. McInerny, Washington, DC, for respondent.

**MILLMAN, Special Master**

### DECISION ON REMAND<sup>1</sup>

On December 16, 2011, the undersigned issued a Decision Awarding Interim Attorneys' Fees and Costs, finding that an interim fee award was appropriate and awarding \$15,859.15 to petitioners' former counsel. Respondent filed a Motion for Review of the undersigned's Decision on January 17, 2012. On June 4, 2012, the U.S. Court of Federal Claims issued an Opinion, remanding the case to the special master to consider whether petitioners' claim had a reasonable basis at the time of filing of the petition, and if so, whether the claim continued to have a reasonable basis throughout the litigation.

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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.

After evaluating the petition, petitioners' affidavits, and the medical records filed before counsel's withdrawal from the case, as well as the memoranda addressing the reasonable basis for petitioners' claim, the undersigned **FINDS** that petitioners had a reasonable basis for their claim. Petitioners are entitled to an award of attorneys' fees and costs pursuant to 42 U.S.C. § 300aa-15(e).

## **I. Background**

### **A. Factual Background**

Cason Ford was born on September 18, 2001.

On October 22, 2009, Cason received H1N1 and seasonal flu vaccines. Med. recs. Ex. 1, at 3, 6.

On January 28, 2010, Dr. Zara Memon examined Cason during his visit to Comprehensive Medical Care, P.C. Cason complained of having pain for the past week after playing soccer. He had trouble bending over. Dr. Memon diagnosed Cason with a muscle strain. Med. recs. Ex. 1, at 5.

On January 31, 2010, Cason was taken to Parkridge East Emergency Room. Cason complained of experiencing back and leg pain for the past two weeks. Med. recs. Ex. 2, at 55, 57. He received lower extremity x-rays and had lab work performed, which was normal. Med. recs. Ex. 4, at 7. He also had a lumbar puncture, which was unsuccessful. Med. recs. Ex. 2, at 62; Ex. 4, at 9.

On February 4, 2010, Cason returned to Comprehensive Medical Care and complained of back pain, muscle pain for two weeks, falling down, being unable to walk, and a poor appetite. Dr. Memon noted that Cason had weakness bilaterally in his legs, decreased sensation below his thighs, and no reflexes in his knees and ankles. Dr. Memon diagnosed Cason with bilateral leg weakness and paresthesia. Dr. Memon sent Cason to T.C. Thompson Children's Hospital for a CT of his abdomen and neurological consultation. Med. recs. Ex. 1, at 4.

Cason was admitted to the hospital from February 4 to February 9, 2010. During admission, Cason's parents reported that Cason had become progressively weaker in his lower limbs. He had fallen several times and his gait was abnormal. This pain began two weeks before his hospital admission. During the initial physical examination, Cason had normal range of motion but his lower body strength was diminished. His gait was abnormal, slow, and seemed painful as his right leg dragged. He had an abdominal CT scan, which was normal. A lumbar puncture was attempted by three different physicians, but was unsuccessful. Med. recs. Ex. 5, at 27-28.

Cason was seen by Dr. Spencer E. Rodgers at T.C. Thompson Children's Hospital. Dr. Rodgers noted that the patient had no URI symptoms and did not complain of chest pain, palpitation, cough, congestion, vomiting, diarrhea, or pain on urination. The patient did complain of headaches, dizziness, and lower extremity muscle pain and muscle weakness.

During the physical examination, Dr. Rodgers could not elicit a deep tendon reflex in the lower extremities, the patellar reflex, or the Achilles reflex. He could elicit a 2+ deep tendon reflex in the upper extremities. The patient had appropriate strength and sensation in his lower extremities. Dr. Rodgers recommended repeating a lumbar puncture. He noted that there was a concern for Guillain-Barré syndrome (“GBS”). Med. recs. Ex. 4, at 8–9; Ex. 5, at 25–26.

On February 5, 2010, a lumbar puncture was performed while Cason was under general anesthesia. The successful lumbar puncture revealed an increased protein level of 230 in Cason’s cerebrospinal fluid (“CSF”). Cason received intravenous immunoglobulin (“IVIG”) for 5 days. His strength and range of motion returned. Med. recs. Ex. 5, at 28.

On February 24, 2010, Cason returned to T.C. Thompson Children’s Hospital for a follow up visit at the clinic. In his report, Dr. Paul D. Knowles, a pediatric neurologist, recounted that there was a significant abnormality in Cason’s CSF, a protein count of 230 with no cells, which was indicative of GBS. During the February 24 visit, Cason did not yet have a normal running gait. He had regained reflexes in the lower extremities, which were 2+ throughout. Dr. Knowles stated that Cason was still not at baseline and recommended outpatient physical therapy. Med. recs. Ex. 4, at 5.

On March 1, 2010, Cason was seen by a physical therapist, Lindsey Sharpe, at Erlanger Health System. Cason’s parents were concerned because Cason still had trouble walking, going up and down stairs, bending over, putting his socks on, and getting in and out of the bathtub. Cason’s mother said that his symptoms had improved over the last few weeks and had plateaued. Med. recs. Ex. 5, at 14–15.

On April 6, 2010, Cason had another clinic visit. Dr. Knowles noted that Cason’s gait was significantly better but still not quite normal. Med. recs. Ex. 4, at 3.

On September 10, 2010, Cason saw his pediatrician Dr. Memon. He complained of lower leg pain, weakness, and falling. In her assessment, Dr. Memon wrote “leg weakness ? [ ] GBS.” She called Dr. Knowles, who could see him the next week. Med. recs. Ex. 10, at 2.

## **B. Procedural Background**

### **1. Case on the Merits**

On June 18, 2010, petitioners filed their petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-10 to -34 (2006) (“Vaccine Act” or “Act”), alleging that flu vaccine caused their son Cason to develop GBS.

Initially, petitioners were represented by counsel. Due to an inability to communicate with petitioners, petitioners’ counsel filed a Motion to Withdraw on October 4, 2011 as well as an Application for Attorneys’ Fees and Costs. The undersigned granted counsel’s Motion to Withdraw on October 5, 2011.

The undersigned held a telephonic status conference on December 12, 2011 in which Ms.

Woods participated. Ms. Woods stated that she wanted to continue pursuing her case and would look at the vaccine attorney list provided to her. Ms. Woods also informed the undersigned that Mr. Ford was incarcerated; Mr. Ford did not participate in the status conference. The undersigned scheduled another status conference for January 24, 2012, at 11:30 a.m. (EST) with the approval of Ms. Woods and respondent's counsel.

Ms. Woods did not appear for the January 24, 2012 status conference. Over the course of the next six months, the undersigned issued several Orders, including two Orders to Show Cause, directing petitioners to contact her law clerk to schedule a status conference or advise the law clerk that they retained an attorney. Although the law clerk was able to contact Ms. Woods on April 9, 2012, Ms. Woods did not appear for the scheduled telephonic status conference on April 18, 2012 at 2:30 p.m. (EDT), a date and time chosen with her approval.

The law clerk obtained Mr. Ford's contact information, which was updated in the record pursuant to an Order filed on February 14, 2012. In addition, the undersigned directed the clerk to send copies to Mr. Ford of all court orders filed since petitioners' attorney withdrew, or October 5, 2011. Mr. Ford did not contact chambers.

Ultimately, the undersigned dismissed petitioners' case. After petitioners failed to respond to the second Order to Show Cause issued on May 3, 2012, the undersigned issued a Decision on June 14, 2012 dismissing the case for failure to prosecute and failure to make a prima facie case.

## **2. Interim Fee Application**

Along with her Motion to Withdraw, petitioner's former counsel filed an Application for Attorneys' Fees and Costs on October 4, 2011, requesting \$14,530.30 in attorneys' fees and \$1,148.65 in attorneys' costs.

On December 7, 2011, respondent filed Respondent's Opposition to Petitioners' Application for Attorneys' Fees and Costs ("Resp't Opp'n"). Respondent did not object to the reasonableness of the amount of fees and costs sought by petitioners' former counsel, only the issuance of a fee award at this juncture of the litigation. Resp't Opp'n 3-12.

The undersigned issued a Decision Awarding Interim Attorneys' Fees and Costs on December 16, 2011, rejecting respondent's arguments that an interim award was not appropriate in this case and awarding the amount of fees and costs requested by petitioners' former counsel. See Woods v. Sec'y of HHS, No. 10-377V, 2011 WL 6957598 (Fed. Cl. Spec. Mstr. Dec. 16, 2011).

Respondent sought review of the undersigned's decision and filed a Motion for Review on January 17, 2012.

## **3. Court's Opinion on Respondent's Motion for Review**

The Court of Federal Claims issued its Opinion on June 4, 2012, upholding the

undersigned's determination that a special master may award interim fees under the Vaccine Act and that petitioners had demonstrated the requisite circumstances for a fee award. The Court remanded the case for a determination of the reasonable basis of petitioners' claim. Woods v. Sec'y of HHS, No. 10-377V, 2012 WL 3217645, at \*7 (Fed. Cl. June 4, 2012).

After discussing the procedural background of the case, the Court addressed respondent's contention that the Vaccine Act prohibits awarding fees on an interim basis to counsel who have withdrawn from the case. The Court found that respondent's argument was "foreclosed" by the Federal Circuit's decisions in Avera and Shaw, stating that the Federal Circuit in Shaw "expressly reaffirmed its holding in Avera that the Vaccine Act permits interim fees and rejected the identical argument that Respondent is reiterating here." Id. at \*4 ("Respondent's continuing recitation of its argument . . . is baseless.") (citing Shaw v. Sec'y of HHS, 609 F.3d 1372, 1374-55 (Fed. Cir. 2010)).

The Court then turned to respondent's challenge that petitioners' former counsel did not demonstrate that petitioners' claim had a reasonable basis. The Court found that the special master based her conclusion that petitioners had a reasonable basis for their claim on the fact that the parties had engaged in settlement discussions, without discussing or citing to petitioners' allegations of injury, medical records, or legal authority. Id. at \*5. The Court stated that "[s]ettlement negotiations, standing alone, cannot equate to a finding that there was a reasonable basis for Petitioners' claim." Id. (citations omitted). The Court explained that a finding of reasonable basis based solely on the parties' willingness to engage in settlement discussions would discourage respondent from pursuing future settlements in Vaccine Act cases. Id. at \*5.

Next, the Court discussed the requirement of "reasonable basis" in the fee provision of the Vaccine Act. The Court noted that an expert report had not been filed in the case but that the special master could assess whether the claim had a reasonable basis using the petition itself and the medical records. Id. at \*5-6. The Court also indicated that the special master could request that respondent file her Rule 4(c) Report, which could also aid in the determination of reasonable basis. Id. at \*6.

The Court also addressed respondent's argument that a petitioner must demonstrate "extenuating" circumstances to justify an interim fee award. Id. at \*6-7. The Court concluded that "Respondent overstate[d] the burden imposed by Avera with regard to establishing the requisite circumstances for awarding interim fees." Id. at \*6. The Court explained that "the Federal Circuit in Avera and Shaw did not enunciate the universe of litigation circumstances which would warrant an award of interim attorney's fees." Id. (citation omitted). The Court found that the special master acted reasonably when concluding that "delaying a fee award to counsel who had ended their representation for an indeterminable time until the case was resolved, sufficed to constitute the type of 'circumstances' to warrant a fee award." Id. at \*7.

In its Conclusion, the Court upheld the determination that interim fees are permitted under the Vaccine Act and that the requisite circumstances were present for an interim fee award. Id. The Court remanded the case to the undersigned for a determination of whether the claim had a reasonable basis. Id.

#### **4. Subsequent Filings**

On June 13, 2012, the undersigned issued an Order, instructing respondent to file a memorandum on the question whether petitioners' claim has a reasonable basis in lieu of her Rule 4(c) Report.

Pursuant to the Order, respondent filed her Memorandum on Reasonable Basis ("Resp't's Mem.") on July 9, 2012. Respondent states that petitioners "arguably" had a reasonable basis when they filed their petition. Resp't's Mem. 8. Respondent argues that once petitioners subsequently filed the medical records, their claim lacked a reasonable basis because the contemporaneous medical records do not support the allegation that their son suffered from a vaccine injury and petitioners did not file an expert report supporting causation. Id.

Respondent states that Cason complained of persistent pain for the previous week during a medical visit on January 28, 2010. Id. at n.10 (citing Ex. 1, at 5). Using January 21, 2010 as the date of the first symptom, respondent contends that the onset of Cason's illness was three months after he received his seasonal flu vaccination. Respondent also notes that Cason received H1N1 vaccine, which is not covered in the Vaccine Program. Id. at 9.

On August 2, 2012, petitioners' former counsel filed a Response to Respondent's Memorandum on Reasonable Basis ("Resp. to Resp't's Mem.").<sup>2</sup> Counsel insists that a reasonable basis for petitioners' claim existed at the time of the fee request and characterizes respondent's brief as conceding this point. Resp. to Resp't's Mem. 4–5. Counsel also stresses that the petitioners' claim was feasible based on the medical records filed up to the point of counsel's withdrawal from the case. Id. at 6. Counsel contends that the medical records demonstrate that Cason received a vaccine on the Vaccine Injury Table, Cason was diagnosed with GBS, Cason's demyelinating injury was in temporal proximity to his vaccination, and he suffered symptoms for more than six months. Id. at 6–7.

## **II. Analysis**

### **A. Reasonable Basis Standard**

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). When a petitioner prevails on the merits, reasonable basis is presumed. 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 was brought in good faith and had a reasonable basis.

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<sup>2</sup> Petitioners' former counsel filed a Motion for Leave to File a Response on July 23, 2012, requesting leave to file a response to respondent's memorandum on reasonable basis. On July 27, 2012, Judge Williams issued a Notice, stating that the motion must be resolved by the special master, not the Court. The undersigned granted the motion on July 30, 2012 and ordered that petitioners' former counsel file her response by August 2, 2012.

The requirement of “reasonable basis” 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 HHS, No. 99–544V, 2007 WL 4410030, at \*6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) (quoting DiRoma v. Sec’y of HHS, No. 90–3277V, 1993 WL 496981, at \*1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993)); see also 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.”). 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. Id. at \*6–8 (citations omitted); see also McKellar v. Sec’y of HHS, 101 Fed. Cl. 297, 303 (2011) (“The presence of a reasonable basis is an objective consideration determined by the totality of the circumstances.”) (citation omitted). Special masters historically have been “quite generous in finding a reasonable basis for petitioners.” Turner, 2007 WL 4410030, at \*8 (citation omitted).

Additionally, counsel must ensure that a reasonable basis 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. Id. (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 Perreira v. Sec’y of HHS, 33 F.3d 1375 (Fed. Cir. 1994) (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).

## **B. Analysis of the Reasonable Basis of Petitioner’s Claim**

As an initial matter, it is appropriate to define the time interval for which a reasonable basis determination is necessary. Petitioners filed their petition on June 18, 2010. On October 4, 2011, petitioners’ former counsel filed both a Motion for Leave to Withdraw and an Application for Attorneys’ Fees and Costs. The fee application included billing entries for fees and costs incurred between February 15, 2010 and September 28, 2011. In her Decision Awarding Interim Attorneys’ Fees and Costs, the undersigned awarded the amount requested and documented in the fee application, that is, the amount of fees and costs incurred up until counsel filed her motion to withdraw.

Thus, when analyzing whether there was a reasonable basis to support an award of attorneys’ fee and costs, the undersigned will address the phase of litigation<sup>3</sup> during which petitioners’ former counsel incurred attorneys’ fees and costs: the interval prior to the filing of the Motion for Leave to Withdraw and the Application for Attorneys’ Fees and Costs on October 4, 2011. See McKellar v. Sec’y of HHS, No. 09–841V, 2012 WL 362030, at \*8 (Fed. Cl. Spec.

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<sup>3</sup> As described in the procedural history above, several phases of litigation took place subsequent to counsel’s withdrawal on October 5, 2011, including a lengthy process of locating and contacting petitioners, respondent’s Motion for Review of the interim fee decision, the Court’s Opinion remanding the case, and additional briefing regarding the reasonable basis of petitioners’ claim. The undersigned’s analysis of reasonable basis does not address these later phases of litigation.

Mstr. Jan. 13, 2012) (“ . . . fees and costs may be reimbursed only if a reasonable basis existed at the time the fee and costs actually were incurred”), *rev’d on other grounds*, \_\_\_ Fed. Cl. \_\_\_, 2012 WL 1884703 (Fed. Cl. May 3, 2012); see also McKellar v. Sec’y of HHS, 101 Fed. Cl. 297, 303 (2011) (“We thus consider the question of reasonable basis at the time the fee request was made.”).

At the time petitioners’ former counsel submitted her motion to withdraw, petitioners had filed their petition, their affidavits, and several sets of medical records. The medical records show that Cason received H1N1 and seasonal flu vaccine on October 22, 2009. Med. recs. Ex. 1, at 3, 6. Although the H1N1 monovalent influenza vaccine administered during the 2009–10 flu season is not on the Vaccine Injury Table, the seasonal trivalent influenza vaccine is on the Table and is covered in the Vaccine Program.<sup>4</sup> See 42 C.F.R. § 100.3.

Respondent cites the fact that Cason received a vaccine that is not covered by the Vaccine Program as an indication that petitioners’ claim lacked a reasonable basis. Resp’t’s Mem. 9. To prevail on entitlement, a petitioner must show, among other things, that a covered vaccine was “not only a but-for cause of the injury but also a substantial factor in bringing about the injury.” Shyface v. Sec’y of HHS, 165 F.3d 1344, 1352 (Fed. Cir. 1999) (rejecting the “predominant cause” standard proposed by respondent). Petitioners could have proceeded on the theory that both vaccines were substantial factors in bringing about Cason’s injury. The fact that Cason received H1N1 vaccine along with the seasonal flu vaccine does not defeat the reasonable basis of his claim.

In addition, the medical records strongly suggest that Cason suffered from GBS. Cason’s treating neurologist noted that there was a concern for GBS based on the ascending weakness and pain in his lower extremities. Med. recs. Ex. 4, at 9. The results of the lumbar puncture performed on February 5, 2010 revealed an increased protein level of 230 in his cerebrospinal fluid, which was consistent with a diagnosis of GBS. Med. recs. Ex. 5, at 28. After Cason received IVIG treatments for five days, his strength and range of motion returned. Id.

Cason experienced symptoms of GBS for more than six months as required by the Vaccine Act. See 42 U.S.C. 300aa–11(c)(1)(D). When Cason saw his pediatrician Dr. Zara Memon on September 10, 2010, he complained of lower leg pain, weakness, and falling. Under her assessment, Dr. Memon wrote “leg weakness ? [ ] GBS.” Med recs. Ex. 10, at 2. This complaint of leg weakness in September 2010 occurred more than eight months after his

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<sup>4</sup> Only the trivalent influenza vaccine is on the Vaccine Injury Table. 42 C.F.R. § 100.3. The trivalent influenza vaccine can include the H1N1 and other influenza strains in the same vaccine, and if it does, any reaction to it is covered under the Vaccine Act. During the flu season from the end of 2009 through the spring of 2010, the H1N1 virus was not included in the 2009–10 seasonal flu vaccine “because it was identified after manufacturers had started making the seasonal flu vaccine.” Questions & Answers: Vaccine against 2009 H1N1 Influenza Virus, Centers for Disease Control and Prevention, [http://www.cdc.gov/h1n1flu/vaccination/public/vaccination\\_qa\\_pub.htm](http://www.cdc.gov/h1n1flu/vaccination/public/vaccination_qa_pub.htm). Instead, the H1N1 monovalent influenza vaccine was manufactured and administered solely during the 2009–10 flu season. Individuals who allege a vaccine injury from the H1N1 monovalent influenza vaccine administered during the 2009–10 flu season have recourse for compensation under the Countermeasures Injury Compensation Program run by the Health Resources and Services Administration

hospitalization and treatment. Petitioners could have relied on this medical record to meet the six-month requirement.

Respondent's primary basis for her argument that petitioners' claim lacked a reasonable basis is that the medical records filed do not suggest that Cason's injury was vaccine-related and petitioners did not file an expert report supporting causation. Resp't's Mem. 8–9. Respondent's argument, however, mistakes demonstrating a reasonable basis for the claim with proving entitlement. To prove entitlement to compensation under § 300aa–13(a)(1), a petitioner must show by preponderant evidence “(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury.” Althen v. Sec’y of HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005). To demonstrate a reasonable basis for the claim for purposes of § 300aa–15(e), a petitioner must simply show that, based on the totality of the circumstances, their claim was feasible.<sup>5</sup> See Turner, 2007 WL 4410030, at \*6. “Feasibility,” not likelihood of success, is the standard. See id.

The circumstances of petitioners' case show that petitioners' claim was clearly feasible throughout the phase of litigation for which petitioners' former counsel requested attorneys' fees and costs. In their petition, petitioners alleged that Cason's GBS was causally related to the influenza vaccination he received. Pet. ¶ 8. Based on the undersigned's experience, allegations of vaccine-related GBS are common in this Program. In past cases, special masters have found that influenza vaccine can cause GBS. See, e.g., Heinzelman v. Sec’y of HHS, No. 07–01V, 2008 WL 5479123, at \*5 (Fed. Cl. Spec. Mstr. Dec. 11, 2008), aff'd, 98 Fed. Cl. 808 (2011), aff'd on other grounds, 681 F.3d 1374 (Fed. Cir. 2012). More often in flu vaccine-GBS cases, the parties are able to reach an informal resolution.

Respondent challenges whether petitioners' claim had a reasonable basis given that the onset of Cason's illness was roughly three months after his flu vaccination.<sup>6</sup> Resp't's Mem. 9. If petitioners had proceeded further in prosecuting their case, petitioners would have had to establish an appropriate temporal proximity between the flu vaccination and Cason's injury. At the time of counsel's withdrawal, however, the parties had not fully developed the record as they were trying to reach an informal agreement for an early resolution of the case.

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<sup>5</sup> In her Memorandum, respondent suggests that “[t]o have a ‘reasonable basis,’ petitioners’ claim must, at a minimum, be supported by medical records or medical opinion.” Resp't's Mem. 7 (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 threshold. See, e.g., Davis v Sec’y of HHS, No. 07–451V, 2012 WL 2878612, at \*6 (Fed. Cl. June 29, 2012) (citing McKellar v. Sec’y of HHS, 101 Fed. Cl. 297, 303 (2011)); Hamrick v. Sec’y of HHS, No. 99–683V, 2007 WL 4793152, at \*4 (Fed. Cl. Spec. Mstr. Nov. 19, 2007).

<sup>6</sup> When Cason was taken to the Parkridge East Emergency Room on January 31, 2010, he complained of experiencing back and leg pain for the past two weeks. Med. recs. Ex. 2, at 56. This medical record suggests that the onset of Cason's illness was sometime in mid-January 2010, slightly less than three months after his flu vaccination on October 22, 2009. Petitioners could have disputed onset, however, as a factual issue.

It is difficult to know how this case would have progressed had petitioners' former counsel continued to represent petitioners. For instance, settlement negotiations may have proven unsuccessful. In that case, the parties would have proceeded on a formal litigation track, retaining experts to opine on the case and scheduling an entitlement hearing. Petitioners could have disputed the onset of Cason's injury as a factual issue during the hearing, or petitioners could have retained an expert to testify on the appropriateness of a three-month onset following vaccination. The fact that petitioners' former counsel had not fully proven, by preponderant evidence, the appropriateness of the timing of the injury at an early stage in the litigation is not fatal to the reasonable basis of petitioners' claim.

Moreover, the absence of an expert report in petitioners' case does not indicate a lack of reasonable basis. Expert opinion often provides the necessary support for a petitioner's allegation of vaccine injury in a causation-in-fact case. However, an expert opinion "in and of itself does not determine reasonableness." Murphy v. Sec'y of HHS, 30 Fed. Cl. 60, 62 (1993) (citation omitted) (rejecting petitioners' argument that their claim had a reasonable basis as a matter of law because they submitted an expert opinion), aff'd, 48 F.3d 1236 (Fed. Cir. 1995). This is especially true in cases where an expert opinion relies on facts which are inconsistent with the contemporaneous medical records, see id., or where the basis of an expert opinion is "unsupported by either medical literature or studies, and therefore, of no value in establishing causation-in-fact," Perreira, 33 F.3d at 1377.

Both Murphy and Perreira involved circumstances where petitioners had proffered problematic expert opinions and were denied attorneys' fees for relying on such deficient opinions.<sup>7</sup> In this case, petitioners did not file an expert report. During the relevant phase of litigation, petitioners' former counsel chose to explore the possibility of settlement before searching for an expert and incurring further litigation costs.

Even if a petitioner has not filed an expert report, a special master can still conclude that a claim had a reasonable basis. 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." 515 F.3d at 1352 (discussing the availability of interim fees under the Vaccine Act). This statement supports the notion that a reasonable basis for a claim can exist early on in litigation, before a petitioner proceeds further along a formal litigation track by filing an expert report. Herein, petitioners had filed their affidavits and Cason's medical records, which contained enough information to allow the undersigned to evaluate reasonable basis for the period in which former counsel incurred fees and costs. The lack of an expert report at the time of counsel's withdrawal did not make petitioners' claim any less feasible.

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<sup>7</sup> In Murphy, the special master denied petitioners' application for attorneys' fees of costs entirely, finding that their claim lacked a reasonable basis. Murphy v. Sec'y of HHS, 30 Fed. Cl. 60, 61 (1993), aff'd, 48 F.3d 1236 (Fed. Cir. 1995). In Perreira, the special master awarded attorneys' fees and costs up to the point of petitioners' hearing and then denied their request for attorneys' fees and costs incurred after the hearing. The special master found that petitioners' claim no longer had a reasonable basis after they reviewed their expert's opinion, which was unsupported by either medical literature or studies. Perreira v. Sec'y of HHS, 33 F.3d 1375, 1376-77 (Fed. Cir. 1994).

In sum, at the time of counsel's withdrawal, the medical records filed to date supported the feasibility, and thus, the reasonable basis, of petitioners' claim. Petitioners had proof that Cason received a vaccine on the Vaccine Injury Table. The contemporaneous medical records supported petitioners' allegations that Cason suffered from GBS and that he experienced symptoms for more than six months. Moreover, petitioners alleged a neurological injury that is commonly associated with receipt of the flu vaccine and for which claimants in the past have been compensated. The fact that petitioners did not file an expert report in support of causation does not defeat the reasonable basis of their claim. Up to the point of counsel's withdrawal, there was a reasonable basis for petitioners' claim for purposes of § 300aa-15(e).

### CONCLUSION

The Court remanded this matter to the undersigned to determine whether petitioners' claim had a reasonable basis. The undersigned **FINDS** that there was a reasonable basis for petitioners' claim at the time of filing of the petition and up to the point that petitioner's former counsel filed her motion to withdraw. Petitioners are entitled to the amount of attorneys' fees and costs requested in the Application for Attorneys' Fees and Costs: **\$15,859.15**. The award shall be in the form of check made payable to petitioners and the law firm Maglio, Christopher & Toale, PA. 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>8</sup>

**IT IS SO ORDERED.**

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

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Laura D. Millman  
Special Master

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<sup>8</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.