

REASONABLE BASIS: WHAT IT IS, HOW TO GET IT, AND HOW TO KEEP IT

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Background

“The special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.” § 15(e)(1)

- ▶ Vaccine Program is unique ... awards payable to unsuccessful petitioners
- ▶ Congressional intent: “to ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims.” *Cloer v. Sec’y of Health Human Servs.*, 675 F.3d 1358, 1362 (Fed. Cir. 2012)

What is Reasonable Basis?

- ▶ Recent case law has helped clarify the standard
 - ▶ *Simmons v. Sec’y of Health & Human Servs.*, 875 F.3d 632 (Fed. Cir. 2017)
Reasonable basis involves an objective inquiry
 - ▶ Reasonable basis determination does not involve an evaluation of counsel’s conduct
 - ▶ *Amankwaa v. Sec’y of Health & Human Servs.*, 138 Fed. Cl. 282 (2018)
CFC prohibited the consideration of SOL and all directly related conduct of counsel
 - ▶ Permissible considerations: factual basis, medical and scientific support, novelty of the vaccine, novelty of the theory of causation
 - ▶ *Bekiaris v. Sec’y of Health & Human Servs.*, 2018 WL 4908000 (2018) Petitioner must “adduce medical evidence going to causation beyond temporal proximity.”
 - ▶ *Santacroce v. Sec’y of Health & Human Servs.*, 2018 WL 405121 (2018)
Is the claim feasible?
 - ▶ *Chuisano v. Sec’y of Health & Human Servs.*, 116 Fed. Cl. 276 (2014)
Petitioner must furnish some evidence in support of the claim; not sufficient to provide statement by Petitioner plus temporal proximity. What is some evidence?
 - ▶ Less than preponderance
 - ▶ More than none

How Do You Get It?

- ▶ **There must be a reasonable basis for the claim for which the petition was brought**
- ▶ Objective Evidence
 - ▶ Medical records or medical opinion
- ▶ **Must support the claim articulated in the petition; Vaccine Act requires:**
 - ▶ Vaccine was administered in the U.S.
 - ▶ Injury from vaccination lasted more than 6 months
 - ▶ Injury is linked to the vaccination
 - ▶ Petitioner has not been compensated

How Do You Get It?

▶ **Totality of the Circumstances**

- ▶ Is this test still applicable post-*Simmons*?
- ▶ Same factors, except no consideration attorney conduct or other subjective factors?
 - ▶ Factual basis of the claim
 - ▶ Medical and scientific support for the claim
 - ▶ Novelty of the vaccine
 - ▶ Scientific understanding of the vaccine and its potential consequences
 - ▶ The availability of experts and medical literature
 - ▶ Novelty of the theory of causation

How Do You Keep It?

- ▶ Continue to review evidence
- ▶ *Perreira v. Sec’y of Health & Human Servs.*, 33 F.3d 1375, 1377 (Fed. Cir. 1994) (holding petitioners had no reasonable basis once they reviewed their evidence, which was wholly unsupported by medical literature).
- ▶ *Hamrick v. Sec’y of Health & Human Servs.*, 2007 WL 4793152, at *4 (Fed. Cl. Spec. Mstr. Nov. 19, 2007) (observing that “Petitioner’s counsel must review periodically the evidence supporting [P]etitioner’s claim”).
- ▶ Know when to speak to Petitioner about dismissal

Tips for Practitioners

- ▶ Identify issues most relevant to reasonable basis before filing
 - ▶ Too long between vaccination and onset
 - ▶ Type of injury that is not compensated
 - ▶ No diagnosis
 - ▶ No theory
 - ▶ If you have a novel case, have literature and/or a good expert already lined up
 - ▶ If it's really hard to find an expert, double check your theory
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QUESTIONS?

