



## I. Procedural History.

Medical records were filed on compact disc shortly after the petition was filed. None of these records attributed the onset of Crystal's seizure disorder to her April 14, 2008 vaccinations.<sup>3</sup> Instead, her initial seizure was attributed to a fever from an infectious disease, although several records noted that the seizure occurred in close temporal proximity to the allegedly causal vaccinations. See Pet. Exs. 3, p. 6; 4, p. 16; 5, pp. 147-48.

In her Vaccine Rule 4(c) report, filed October 28, 2010, respondent recommended that entitlement to compensation be denied, arguing that petitioners had "failed to proffer a medical opinion or theory sufficient to establish a logical cause and effect relationship between Crystal's vaccines and her condition." Rule 4 Report at 12.

I afforded petitioners the opportunity to cure this defect in their causation in fact case by ordering them to file an expert report linking Crystal's vaccinations to her condition. Order, filed Oct. 29, 2010. Between December 2010 and March 2011, petitioners requested and received three extensions of time to file this expert report. In granting their third such request, I indicated that I would grant additional extensions of time only if the requests were accompanied by a letter from the expert confirming his retention and explaining why more time was required to complete an expert report. Order, filed Mar. 31, 2011.

On April 29, 2011, petitioners again requested additional time to file an expert report. Because their request did not include the information required by my March 31, 2011 order, I struck the request, but granted petitioners the opportunity to refile their request, accompanied by the letter from their expert. They complied on May 5, 2011, by filing a letter from their retained expert indicating that his report would be filed by May 13, 2011. I therefore granted petitioners' fourth requested extension. Order, filed May 6, 2011.

Instead of filing the expert report on May 13, 2011, petitioners requested a delay to discuss the expert's report with their attorney. They proposed to file a status report on June 13, 2011, updating the court on future proceedings. I granted their unopposed fifth request for a delay.

On June 13, July 13, and August 5, 2011, petitioners requested delays to obtain new counsel. I granted each of these requests. However, in granting the August 5, 2011 request, I informed petitioners that I would not grant any further extensions if new counsel had not been obtained. Instead, I indicated that I would set a new deadline for

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<sup>3</sup> The only medical records that reflect a possible causal relationship are found at Petitioners' Exhibit ["Pet. Ex."] 4, p. 18. The pediatrician who saw Crystal on May 2, 2008, indicated that there was a "known but rare risk of post vaccine [seizures]" and on June 4, 2008, a different health care provider in the same pediatric practice indicated that future varicella and MMR vaccines would be deferred. I note that these records are from the same pediatric practice that earlier attributed her initial seizure to fever produced by an illness (conjunctivitis and an upper respiratory infection), not the MMR vaccine. See Pet. Ex. 4, p. 16.

filing their expert report. Order, filed Aug. 15, 2011.

On September 12, 2011, petitioners filed a status report indicating that they had not yet found a new attorney. I therefore ordered them to file an expert report or substitution of counsel, or otherwise show cause why this case should not be dismissed for failure to prosecute. Order, filed Sep. 19, 2011. Petitioners responded to the show cause order on October 4, 2011, indicating that they had not yet found an attorney, and would therefore proceed pro se. Their counsel indicated his intent to file a motion to withdraw as attorney of record “once the issue of interim fees and costs is resolved.” Show Cause Response, filed Oct. 4, 2011. The case currently remains open, but petitioners cannot prevail without an expert, and, thus far, efforts to find one willing to opine have been unavailing.

## **II. Request for Interim Fees and Costs.**

Petitioners filed an Interim Application for Final Attorneys’ Fees and Costs [“Interim Fees and Costs App.”] on September 29, 2011, noting that the application represents the “final” application for the Conway, Homer & Chin-Caplan, P.C. firm. The application requested \$20,227.70 in attorneys’ interim fees, \$6,468.21 in interim attorneys’ costs, and \$182.00 in petitioners’ interim costs.<sup>4</sup> Thus, the total sought at that point was \$26,877.91.

Respondent opposes the award of interim fees and costs, arguing that the Vaccine Act does not authorize the award of fees and costs in a case in this procedural posture; that petitioners have not established any of the criteria for an interim award; and that petitioners have not established that this case was filed in good faith and upon a reasonable basis. Moreover, respondent objects to compensating several of the items claimed, in addition to a general assertion that the attorney and paralegal hours billed are not reasonable. Respondent’s Opposition to Petitioners’ Interim Application for Final Attorneys’ Fees and Costs [“Res. Opp.”].

Because I intend to grant counsel’s motion to withdraw from this case, I afforded petitioners’ counsel the opportunity to respond to respondent’s objections. See Order, filed Oct. 25, 2011 (granting petitioners’ oral motion for an extension to file a reply brief). Vaccine Rule 15 prohibits intervention in a Vaccine Act proceeding. See Appendix B, Rules of the United States Court of Federal Claims. If this rule is read to include former counsel as interveners, once the court permits counsel to withdraw, the ability of former counsel to make any filings independent of the former client could be problematic.<sup>5</sup> The

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<sup>4</sup> The Vaccine General Order # 9 statement, filed on October 4, 2011, verifies that petitioners, thus far, have personally incurred costs of \$182.00. Additionally, receipts documenting petitioners’ and attorneys’ costs were included as exhibits to the application.

<sup>5</sup> In *Silver v. Sec’y, HHS*, No. 99-462V, 2009 WL 2950503, \*9-10 (Fed. Cl. Spec. Mstr. Aug. 24, 2009), the special master declined, based on the prohibition against intervention found in Vaccine Rule 15, to allow two former counsel to intervene in a pending Vaccine Act case to seek payment of interim fees and costs. Prior to the *Avera* decision authorizing interim fees, former counsel’s fees and costs were customarily included in the fees and costs requests filed on behalf of petitioners by the substituted counsel at the

parting of ways between petitioners and their attorney in this case appears to be amicable, but it is easy to envision a scenario in which a disgruntled former client might be unwilling to aggressively pursue the fees and costs award on behalf of the former attorney.<sup>6</sup>

Petitioners' supplemental response ["Pet. Supp. Resp."] addressed each of respondent's challenges to the award of interim fees and costs. Petitioners requested an additional \$1,534.60 in fees for this comprehensive supplemental response, bringing the total requested to \$28,412.51. Respondent filed a short supplemental response on November 18, 2011, which incorporated all objections set forth in her initial objection.

### III. Analysis of the Legal and Factual Issues Presented.

#### A. Interim Fees and Costs Are Permitted in Vaccine Act Cases.

Although the Vaccine Act itself is silent on the issue of interim awards of fees and costs, it is now clear that interim fees and costs may be awarded in Vaccine Act cases. *Avera v. Sec'y, HHS*, 515 F.3d 1343, 1352 (Fed. Cir. 2008). Prevailing on the merits is not a requirement for any Program award for fees and costs, but unsuccessful litigants must demonstrate that their claim was brought in good faith, a subjective standard, and upon a reasonable basis, an objective standard. § 15(e)(1); *Perreira v. Sec'y, HHS*, No. 90-847V, 1992 WL 164436, at \*1 (Cl. Ct. Spec. Mstr. June 12, 1992) (describing good faith as subjective and reasonable basis as objective), *aff'd*, 27 Fed. Cl. 29 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994). Thus, a Vaccine Act litigant seeking an award of fees and costs before entitlement to compensation is determined must, at a minimum, establish good faith and a reasonable basis for the claim. See *Avera*, 515 F.3d at 1352.

#### B. An Award of Interim Fees is Not Mandatory.

It is also clear that interim fees and costs need not be awarded in all circumstances, although the factors that delineate when an interim award is appropriate remain somewhat muddled. See *Shaw v. Sec'y, HHS*, 609 F.3d 1372, 1375 (Fed. Cir. 2010); *Avera*, 515 F.3d at 1352. The Federal Circuit has opined that "[i]nterim fees are particularly appropriate in cases where proceedings are protracted and costly experts must be retained." *Avera*, 515 F.3d at 1352. It has also held that "[w]here the claimant

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conclusion of the case. Here, however, it appears that petitioners will proceed pro se. By filing an interim "final" fees and costs application, petitioners' current counsel avoids the need to intervene, to convince former clients to file an application for the firm's fees and costs, or to establish some basis for filing a fees and costs application at a time when no longer counsel of record in the case.

<sup>6</sup> A remedy outside the Program could be available. Not being privy to the representation agreement between petitioners and their attorney, I decline to speculate any further regarding the possibility of that in this case. However, in order to effectuate one of the purposes of § 15(e) of the Vaccine Act—ensuring the access of vaccine-injured individuals to adequate representation (see *Saunders v. Sec'y, HHS*, 25 F.3d 1031, 1035 (Fed. Cir. 1994)—some mechanism to permit the payment of fees and costs to former counsel, at least on a final basis, must exist.

establishes that the cost of litigation has imposed an undue hardship and that there exists a good faith basis for the claim, it is proper for the special master to award interim attorneys' fees." *Shaw*, 609 F.3d at 1375. Nonetheless, "[t]he special master may determine that she cannot assess the reasonableness of certain fee requests prior to considering the merits of the vaccine injury claim." *Id.* at 1377.

In a recent Court of Federal Claims decision, Judge Bruggink analyzed the request for interim fees in a case in a procedural posture similar to this one. Applying the decisions in *Avera* and *Shaw*, he concluded that interim fees may be awarded before entitlement to compensation is determined. *McKellar v. Sec'y, HHS*, --- Fed. Cl. ---, 2011 WL 5925323 at \*6 (Fed. Cl. Nov. 4, 2011). He also noted that the special masters have "uniformly rejected" respondent's position that interim fees may not be awarded pre-entitlement. *McKellar*, 2011 WL 2925323, at \*6 n.8, (citing to *Crutchfield v. Sec'y, HHS*, No. 09-39, 2011 WL 3806351 (Fed. Cl. Spec. Mstr. Aug. 4, 2011), which lists numerous decisions of special masters on this issue). However, Judge Bruggink held that the withdrawal of counsel is "not necessarily a hardship that triggers an award of interim attorneys' fees and costs." *McKellar*, 2011 WL 2925323, at \*6.

The Federal Circuit explained in *Avera* that a protracted proceeding is one factor that can make a case "particularly appropriate" for an interim award. *Avera*, 515 F.3d at 1352. Given that the petition for compensation in this case was filed about 19 months ago, the proceedings here have not been unduly protracted. Whether the case will be speedily resolved is more difficult to determine. With the exception of updated medical records, it appears that all relevant medical records have been filed, and thus, should petitioners succeed in finding an expert to favorably opine on causation,<sup>7</sup> it is likely that the issue of causation can be resolved without undue delay. Thus, I find that the proceedings in this case have not been protracted.

Petitioners have incurred the cost of one expert,<sup>8</sup> and may incur other expert costs. However, this cost does not, standing alone, mandate the payment of fees and costs on an interim basis.

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<sup>7</sup> Although petitioners have not directly stated that the first expert, Dr. John Gaitanis, was not able to opine in favor of causation, experience suggests that the failure to file his report is circumstantial evidence so indicating. I note that I do not draw any adverse inferences regarding the issue of causation from this supposition, as experience also indicates that competent medical professionals often hold divergent opinions on vaccine causation.

<sup>8</sup> The invoice submitted indicates 12 hours were billed by Dr. Gaitanis at a rate of \$400.00 per hour. Interim Fees and Costs App. Tab B at 17. This is not an insignificant sum, but, unless one reads *Avera* so as to require interim fees in virtually every case in which an expert opines, it is not so excessive as to mandate the payment of fees and costs on an interim basis.

## C. The Good Faith and Reasonable Basis Requirements.

In this case, deferring a decision on awarding interim fees and costs is also appropriate because some issues concerning the reasonable basis for bringing and maintaining this claim exist. Judicial economy and the incomplete nature of the record at this point militate in favor of ruling on the pending fee request after I reach a decision on entitlement.<sup>9</sup>

### 1. Good Faith.

Due to its subjective nature, the standard for good faith is very low. A petitioner is entitled to a presumption of good faith. *Grice v. Sec'y, HHS*, 36 Fed. Cl. 114, 121 (1996); see also *Heath v. Sec'y, HHS*, No. 08-85V, 2011 WL 4433646, at \*2 (Fed. Cl. Spec. Mstr. Aug. 25, 2011); *Hamrick v. Sec'y, HHS*, No. 99-683V, 2007 WL 4793152, at \*3 (Fed. Cl. Spec. Mstr. Jan. 9, 2008); *Di Roma v. Sec'y, HHS*, No. 90-3277V, 1993 WL 496981, at \*1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993); *Chronister v. Sec'y, HHS*, No. 89-41V, 1990 WL 293438, at \*1 (Cl. Ct. Spec. Mstr. Dec. 4, 1990). I find that the petitioners have demonstrated good faith in filing this claim, and continue to demonstrate good faith.

### 2. Reasonable Basis.

Reasonable basis is determined using an objective standard. Even if a reasonable basis for filing a petition exists, that basis may be lost as the case progresses and more information concerning the merits of the petition is obtained. See *Perreira*, 33 F.3d at 1377. As Special Master Moran noted in *Hamrick*, “[s]etting a relatively low standard for [finding] a reasonable basis in filing a petition (as opposed to prosecuting a petition) is supported by public policy and cases interpreting roughly analogous rules from civil litigation.” 2007 WL 4793152, at \*5. Applying a lenient standard is particularly appropriate when the impending expiration of the statute of limitations prevents an attorney from conducting an adequate investigation of the basis for the claim. *Id.* *Shaw* teaches that if reasonable basis and good faith are demonstrated at the time of the interim award request, an award may be granted. See 609 F.3d at 1375.

The record as it now exists in this case raises some concerns about the reasonable basis for bringing and maintaining this claim, and I therefore elect to defer awarding interim fees, at least until I have decided the issue of entitlement. This will not only allow me to consider as complete a record as is possible, it will avoid the necessity to conduct a thorough evaluation of the strength of petitioners’ case at this juncture,

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<sup>9</sup> Let there be no mistake: I am NOT requiring a favorable entitlement ruling in order to find a reasonable basis, nor am I requiring an entitlement ruling in every case before awarding interim fees and costs. I have awarded interim fees and costs prior to an entitlement ruling, and expect that I will do so again in circumstances where I find such action appropriate. Here, however, petitioners have not presented a sufficient case for an award of interim fees even if there were no questions about the reasonable basis for this petition.

which might affect their ability to find new counsel. This does not imply that a reasonable basis has not or cannot be established, but, at present, there are sufficient concerns to warrant deferral, particularly given that there appears to be no undue hardship established.

This case was not filed on the eve of the statute of limitations. The vaccines alleged to be causal were administered on April 14, 2008. The claim was filed on June 10, 2010, but the billing records reflect that initial contact between petitioners and the law firm representing them occurred just a few months after administration of the vaccines alleged to be causal. See Interim Fees and Costs App. Tab A. The law firm then spent more than 20 months obtaining medical records and additional information from petitioners, during which the petition and petitioners' affidavit were drafted, and several legal issues identified, and the case was repeatedly passed between attorneys and paralegal staff. See, e.g., 11/9/09 entry noting "possible 6 month issue" (*id.* at 6); 3/12/10 entry noting "inconsistency between parents statement and records" (*id.* at 8). This pre-filing processing generated a substantial amount of the fees and costs claimed.<sup>10</sup> Notably, what is lacking is any referral to a medical professional for an opinion regarding causation.<sup>11</sup>

Not every case requires an expert opinion in order to demonstrate a reasonable basis for awarding fees and costs (see, e.g., *Lamar v. Sec'y, HHS*, No. 99-583V, 2008 WL 3845165, at \*11-14 (Fed. Cl. Spec. Mstr. July 30, 2008) and *Lamar v. Sec'y, HHS*, No. 99-584, 2008 WL 3845157, at \*11-14 (Fed. Cl. Spec. Mstr. July 30, 2008) (awarding fees and costs, including costs for an expert consultant, although no expert report was filed)). In the *Lamar* cases, the claims were filed on the eve of the expiration of the statute of limitations. This court has been extraordinarily generous in finding a reasonable basis to file the claim under such circumstances. E. g., *Hamrick*, 2007 WL 4793152, at \*5. Under circumstances where the record does not otherwise support a finding of a reasonable basis, an expert opinion may provide sufficient support, even if the opinion is not persuasive or not based on the facts as ultimately found. *Heath*, 2011 WL 4433646, at \*8. However, it does not appear that petitioners in the instant case made any efforts to obtain a medical review prior to filing their petition.<sup>12</sup>

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<sup>10</sup> Even if I ultimately determine that there was a reasonable basis for filing and maintaining this petition, not all of the approximately \$11,500.00 in fees generated during this extensive pre-filing period may be compensable.

<sup>11</sup> The invoice from Dr. Gaitanis indicates that he began his review of this case on February 5, 2011. Interim Fees and Costs App. Tab B at 17. The billing records reflect that work on obtaining an expert did not begin until August 13, 2010, two months after the petition was filed, and about two years after the law firm began reviewing petitioners' case. Interim Fees and Costs App. Tab A at 14.

<sup>12</sup> Although there may be policy reasons for encouraging attorneys to take Vaccine Act cases by liberally interpreting the reasonable basis requirement, there are also policy concerns that militate against providing incentives for filing petitions without any reasonable basis. Courts should not encourage attorneys to file cases without requiring the attorney to exercise due diligence to ensure that a colorable basis for the petition exists. See, e.g., *Jessup v. Sec'y, HHS*, 26 Cl.Ct. 350, 352 (1992) (noting that U.S. Claims Court Rule 11 imposed an obligation on counsel to inquire into the facts and law before filing suit and suggesting that Vaccine Act petitioners' counsel have a similar obligation); *Turner v. Sec'y, HHS*, 99-

Furthermore, as the Federal Circuit has noted, a reasonable basis to continue a petition must be something more than “unsupported speculation.” *Perreira*, 33 F.3d at 1377; see also *Stevens v. Sec’y, HHS*, 1992 WL 159520, at \*4 (Fed. Cl. Spec. Mstr. June 9, 1992).

There are three other factors that contribute to my concerns about whether there was a reasonable basis for this case when filed, and nothing filed to date alleviates those concerns. First, the treating specialists attributed Crystal’s initial seizure to a febrile illness, not the MMR vaccine.<sup>13</sup> Second, although petitioners attribute Crystal’s developmental delay to her seizure disorder, the record strongly indicates otherwise, in that she was developmentally delayed prior to administration of the allegedly causal vaccines.<sup>14</sup> Third, the MMR vaccine has a long “track record” in the Program, and one suggesting that the initial febrile seizure occurred far too soon for the vaccine to be responsible.<sup>15</sup> I note that the MMR vaccine was listed on the initial Vaccine Injury Table

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544V, 2007 WL 4410030 (Fed. Cl. Spec. Mstr. Nov 30, 2007) (citing *Baron v. Sec’y, HHS*, 90-1078V, 1992 WL 333122, at \*7 (Cl. Ct. Spec. Mstr. Oct. 27, 1992) (reasonableness of basis for claim demonstrated by medical records or medical opinion supporting a plausible connection between the received vaccine and the alleged injury)).

<sup>13</sup> Crystal was clearly ill at the time of her initial seizure. See Pet. Ex. 5, pp. 143,147-48. On April 22, 2008, less than a week after her release from Children’s Hospital of Pittsburgh, Crystal saw her pediatrician for a fever, cough, and irritability. He recorded that her recent seizure episode was most likely due to illness, not her MMR vaccination. Pet. Ex. 4, p. 16.

<sup>14</sup> On April 14, 2008, when the allegedly causal vaccinations were administered, Crystal’s pediatrician thought she was developmentally delayed. The medical records contain no opinion that the trajectory of Crystal’s development was altered by the initial seizure, that Crystal’s “seizure threshold” was altered by the initial seizure, or that subsequent seizures could be attributed to anything other than the febrile illnesses she experienced during them. The records note a strong family history of seizure disorders, mental retardation, and developmental delays. Pet. Ex. 5, pp. 952, 1005. The records also reflect a genetic chromosomal abnormality of unknown clinical significance. *Id.*, p. 996.

<sup>15</sup> Crystal’s initial seizure occurred within 24-48 hours of her MMR and varicella vaccinations. Based on my experience in the Vaccine Program, I am aware of the temporal association between certain vaccines, notably the diphtheria, pertussis, and tetanus [“DTaP”] vaccine, and fever. In turn, fever may lead to febrile seizures. In DTaP cases, the fever generally occurs within 72 hours after the vaccination. There are a plethora of cases in which special masters have found the DTaP vaccine caused or triggered febrile seizures. *E.g. Simon v. Sec’y, HHS*, No. 05-941V, 2007 WL 1772062 (Fed. Cl. Spec. Mstr. June 1, 2007); *Teller v. Sec’y, HHS*, No. 06-804, 2009 WL 255622 (Fed. Cl. Spec. Mstr. Jan. 13, 2009); *Sucher v. Sec’y, HHS*, No. 07-58V, 2010 WL 1370627 (Fed. Cl. Spec. Mstr. Mar. 15, 2010). However, Crystal did not receive a DTaP vaccination. Instead, she received attenuated live viral vaccines. Although attenuated live viral vaccines can and do cause fevers, they do so after a period of some days, rather than within the shorter time frame for DTaP vaccines. This difference is because the mechanism by which DTaP likely triggers fever is very different from that by which a live viral vaccine such as the MMR vaccine does so. The delay in onset of fever after an MMR vaccine is caused by the viral replication process, which takes several days to generate sufficient levels of virus to provoke an immune response. This response may include fever, which in turn, may provoke a febrile seizure. This distinction is reflected in the Vaccine Injury Table itself: Pertussis-containing vaccines have “encephalopathy” as an associated injury, if the encephalopathy occurs within 72 hours of vaccine administration. 42 C.F.R. § 100.3. The MMR vaccine also has encephalopathy listed as an associated injury, but requires onset between 5-15 days after the vaccination. *Id.* In reviewing the ample body of special master decisions involving MMR and seizure disorders, I have located none where a Special Master found causation where onset is within 24-48

found in the statute (§ 14(a)). Thus, over 22 years of history exist involving the MMR vaccine, much of which is available to any attorney contemplating filing a petition asserting a vaccine injury therefrom. While prior decisions (or the lack thereof) by special masters are not binding precedent, they reflect a considerable body of medical and scientific evidence concerning the MMR vaccine and the conditions it may cause or aggravate, and the circumstances under which it may do so.

#### **IV. Conclusion.**

The justification here for an interim award is weak. Proceedings have not been protracted; only one expert has been retained and the costs associated therewith are not excessive. Additionally, as this is an interim application, made prior to any decision on entitlement, in future filings petitioners may be able to establish more of a basis for filing and maintaining their petition than exists at present, obviating the need for an extensive review of this issue.

I emphasize that I am not opining that there is no reasonable basis in this case, only that I have some concerns about that basis at present. Because the other justifications for an interim award are weak, I decline to perform the type of review of the evidentiary record that I would undertake for a ruling on the record, a decision on entitlement, or one on a final fees and costs application. In most final—and even in most interim—fees and costs applications, the record is sufficiently developed that reasonable basis or lack thereof can be easily ascertained. That is not the case here.

I thus defer ruling on the interim fees and costs position at this time. I will revisit the issue of awarding fees and costs for the efforts of the law firm currently representing petitioners at the conclusion of the entitlement phase of this case.

**IT IS SO ORDERED.**

**/s Denise K. Vowell**  
Denise K. Vowell  
Special Master

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hours. If such cases exist, they may support a reasonable basis for filing and maintaining this petition.