In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

Redacted Decision Issued: November 1, 2010
Originally Issued: September 27, 2010

MARY BROWNING, mother and next friend of her son, COLIN BRYNILDSON,	)	No. 07-453V
Petitioner,	)	PUBLISHED
v.	)	Attorneys' Fees and Costs; Reasonable basis;
SECRETARY OF HEALTH AND HUMAN SERVICES,	)	Mercury toxicity; Significant aggravation; Deny
Respondent.	)	

Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA for Petitioner.
Traci R. Patton, United States Department of Justice, Washington, D.C. for Respondent.

ATTORNEYS' FEES AND COSTS DECISION[1]

LORD, Chief Special Master.

I. INTRODUCTION AND OVERVIEW

On June 28, 2007, Petitioner filed a petition under the National Childhood Vaccine Injury Act ("Vaccine Act"), 42 U.S.C. § 300aa-10 et seq., on behalf of her son, Colin Brynildson. Petitioner alleged that influenza vaccinations administered in 1999 and 2001[2] caused her son to suffer from "mercury toxicity," leading to [language and behavioral disorders].[3] Petitioner's motion for a decision dismissing her petition was granted on November 3, 2009. Before me is Petitioner Mary Browning's Application for Attorneys' Fees and Costs ("Fee Application"), which was filed on May 3, 2010.

[1] Pursuant to Petitioner's request, certain medical information has been redacted from this decision to protect the vaccinee's privacy.

[2] The Trivalent Influenza vaccine was added to the Vaccine Injury Table on July 1, 2005. See 42 U.S.C. § 300aa-14; 42 C.F.R. § 100.3(a). When a revision to the Vaccine Injury Table adds a new vaccine or Table injury, a petitioner has two years to make claims based on the change. § 300aa-16(b).

[3] As noted in the Order issued on November 1, 2010, there were several iterations of this redacted decision. The redactions noted herein reflect my final decision regarding redaction. Consistent with the Order, the specific nature of Colin's alleged injury has been redacted from the text above; in its place I have inserted a description of his condition that was disclosed in previous, unredacted decisions. This insertion enables the reader to understand the reasoning underlying this decision. All other redactions in this decision are designated "[REDACTED]", and no other language has been inserted in place of the redacted material.

In the Fee Application, Petitioner requested a total award of $42,526.02. On June 1, 2010, Respondent filed a response to Petitioner's application, alleging that this case lacked a reasonable basis and opposing the award of fees in toto. On July 1, 2010, Petitioner filed a reply to Respondent's opposition. The question presented is whether Petitioner had a reasonable basis for filing and litigating this case when, from the outset to the date of dismissal, the record lacked evidence to support Petitioner's only sustainable claim: significant aggravation of a pre-existing injury.

In 2008, Colin's case was consolidated with those of his twin sisters, Maeve and Katherine (Kate) Brynildson, for the purposes of resolving general causation issues. Despite making a number of efforts, over an extended period of time, to obtain a medical opinion to support her claims, Petitioner was unable to produce sufficient evidence of causation in any of the cases. Following a status conference on September 16, 2009, Petitioner filed a motion to dismiss this case voluntarily. On November 3, 2009, I issued a decision granting Petitioner's motion and dismissing the case for insufficient proof.

Petitioner was represented by the firm Conway, Homer & Chin-Caplan, P.C. ("CHC"). Ronald C. Homer, Esq., was the attorney of record, but the billing records show that multiple attorneys worked on this case. Because Colin's case was consolidated with those of his siblings, I must evaluate the fee applications both individually and in the context of the consolidated cases.[4] Although I am issuing a separate decision in each of the three cases, I will refer from time to time in one decision to portions of another decision. In reaching a decision in Kate's, Maeve's, and Colin's cases, I have conducted a thorough review of the record in each case, as well as of the records in the other so-called "mercury toxicity" cases.

The record shows that Kate's and Maeve's cases, filed in 2002, were brought at a time when many petitioners believed thimerosal-containing vaccines ("TCVs") might be harmful to children. The record also shows that Petitioner wished to stay the cases pending the outcome of the Omnibus Autism Proceeding ("OAP").[5] When Petitioner failed to persuade special masters to stay adjudication of the twins' cases pending conclusion of the OAP, it is fair to say

[4] During a recent status conference with the parties in Kate's case, CHC informed me that Colin's case was part of a group of eight cases CHC referred to as the "mercury toxicity" cases. After reviewing the records, I found scant evidence that these eight cases were part of a recognized group. In any event, Mr. Homer indicated that all costs relating to general causation for "mercury toxicity" were billed to Kate's case, and that Colin's case contained only case-specific fees. See Browning (Katherine) v. Sec'y of Dep't of Health & Human Servs., No. 02-929V, Fee Decision [hereinafter "Kate's Fee Decision"].

[5] The OAP was established to manage thousands of claims brought by petitioners alleging that vaccines caused autism or similar neurodevelopmental disorders. Cedillo v. Sec'y of Dep't of Health & Human Servs., No. 98-916V, 2009 WL 331968, *8 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), aff'd, 2010 WL 3377325 (Fed. Cir. Aug 27, 2010). Among the allegations adjudicated in the OAP was that thimerosal-containing vaccines caused autism. Id. at *10.

The OAP Master File contains all the filings in the OAP that are relevant to this discussion. The publicly accessible website, www.uscfc.uscourts.gov/omnibus-autism-proceeding, contains the OAP Master File (under the "docket" link), which includes orders, decisions, and periodic updates issued by the special masters assigned to the autism docket.

that Petitioner attempted to achieve a de facto stay instead.[6] Given the context in which Kate's and Maeve's cases were filed and litigated, I found most of the fees requested in those cases to have a reasonable basis. See Kate's Fee Decision; Browning (Maeve) v. Sec'y of Dep't of Health & Human Servs., No. 02-928V, Fee Decision.

By the time Petitioner filed Colin's case, however, the bulk of discovery in the OAP was complete. Mr. Homer and CHC were privy to the state of discovery in the OAP, as each of CHC's name partners was a member of Petitioners' Steering Committee ("PSC"), and CHC was then finishing the June 2007 hearing in Cedillo v. Secretary of Department of Health & Human Services, No. 98-916V, one of the OAP test cases. After four years of discovery in the OAP, Mr. Homer, who is one of the most experienced Vaccine Program practitioners, had a better understanding of what the science would support than he did when Kate's and Maeve's cases were filed in 2002. In 2007, Mr. Homer was aware of the dearth of scientific evidence that could support a link between thimerosal and "mercury toxicity," and more particularly, between "mercury toxicity" and speech and behavioral disorders. Thus, from the outset of Colin's case in 2007, counsel knew that it was unlikely Petitioner's claim could be supported.

Colin's case was significantly more problematic than his sisters' for another reason. The medical records clearly showed that Colin suffered language disorders and behavioral problems before he received the flu vaccinations that allegedly caused his injury. Amended Pet. at 3. If a symptom or manifestation of an injury appears before vaccination, a petitioner cannot claim that the vaccination caused the injury, see Shalala v. Whitecotton, 514 U.S. 268, 274 (1995) (interpreting the statutory requirements for proving a Table Injury), but she may claim that the vaccination significantly aggravated a preexisting injury, see id. at 277-78 (O'Connor, J., concurring). See also § 300aa-11(c)(1)(C)(ii)(I). In response to several court orders to file an amended petition alleging significant aggravation (including orders extending the time to submit the amended petition), Petitioner stated in a status report, filed on June 19, 2009, that she intended to amend her petition to include a "significant aggravation" theory, but that she needed more time to collect and evaluate the necessary medical records. Thus, two years after filing this case, Petitioner still lacked the information to file an amended petition addressing a fact evident from the start: the signs of Colin's alleged vaccine injury were diagnosed two months before his first influenza vaccination.

Counsel knew from the beginning that Petitioner would be required to show evidence that TCVs significantly aggravated Colin's pre-existing condition, yet, counsel failed to make a reasonable determination at the time of filing or thereafter as to whether the case could proceed in the absence of such evidence. I agree with Respondent that this case lacks a reasonable basis and that, as a result, Petitioner is statutorily ineligible for an award of attorneys' fees.

II. FACTUAL AND PROCEDURAL HISTORY

A. Factual Background

Five years before filing this case, Petitioner filed, on August 2, 2002, petitions on behalf of Colin's two sisters, Kate and Maeve. The facts of this case are better understood in the

[6] Kate's and Maeve's cases initially were stayed pending the resolution of discovery issues in the OAP. See Browning (Katherine), No. 02-929V, Order, Sept. 12, 2003. After the initial stay was lifted, Petitioner attempted to further stay the cases.

context of the record in Kate's and Maeve's cases. Those facts are set forth in my decision in Kate's case. The specific facts relevant to Colin's case follow.

Colin was born on [REDACTED] 1997, and he received the standard scheduled immunizations for the first five years of his life. Amended Pet. at 1. On August 6, 1999, Colin [REDACTED] was diagnosed with an [REDACTED] and [REDACTED] speech disorder. Id. at 3. According to the medical history given by Petitioner at that time, Colin had difficulty expressing himself, had trouble sitting still, and [REDACTED]. Pet'r Ex. 10 at 51. Although the evaluator diagnosed Colin with both an [REDACTED] and [REDACTED] language disorder, she noted that Colin had excellent attention skills and was cooperative. Mary Browning Aff., Jan. 8, 2008, at 2 (Pet'r Ex. 17); Pet'r Ex. 10 at 52.

On November 2 and December 3, 1999, Colin received two half-doses of an adult flu vaccine. Pet'r Ex. 5 at 35-36. Petitioner maintained that after these vaccinations Colin's behavior deteriorated, leading to intensified [REDACTED]. Browning Aff. at 3. In January 2001, Colin received a full adult dose of the flu vaccine. Pet'r Ex. 5 at 30. According to Petitioner, after this vaccination, Colin's behavior took a "nose dive." Browning Aff. at 4. In January 2002, Colin was prescribed [REDACTED]. Pet'r Ex. 5 at 28. Petitioner maintained that, [REDACTED], Colin now has overcome many aspects of his earlier disorders, [REDACTED]. Browning Aff. at 6-7.

In January 2007, CHC began working on Colin's case. On June 28, 2007, CHC filed, without supporting medical records or an affidavit, a petition for compensation alleging that flu vaccinations caused Colin to suffer from "mercury toxicity." On October 17, 2007, the court ordered Petitioner to file "outstanding medical records and [an] amended petition[] by Monday, November 26, 2007." On November 26, 2007, Petitioner filed 16 exhibits of medical records, but noted that some records were missing. Petitioner requested and was granted an enlargement to January 7, 2008, to file an amended petition.

On January 7, 2008, Petitioner filed an amended petition alleging that Colin suffered from "mercury toxicity" as a result of flu immunizations administered on November 2, 1999, December 3, 1999, and January 9, 2001. Amended Pet. at 1. On January 24, 2008, Petitioner filed some additional records and a status report stating that she was still waiting for one set of medical records. On January 31, 2008, Petitioner filed a motion to transfer the case to then Special Master Edwards. Petitioner averred that it would be more efficient for Special Master Edwards to hear the case because he was handling Maeve's and Kate's cases, and Petitioner's theory of causation was the same in all three cases. This motion was granted. On February 2, 2008, Petitioner filed the outstanding set of medical records.

On April 3, 2008, Petitioner was ordered to file, by May 16, 2008, a "comprehensive status report informing the special master about petitioner's progress in assessing the factual and medical bases for petitioner's claim grounded upon a significant aggravation theory." Order, Apr. 3, 2008. On May 15, 2008, Petitioner filed a medical article from the OAP, written by Waly et al., and an article regarding the thimerosal content of licensed vaccines.[7]

[7] M. Waly, et al., Activation of Methionine Synthase by Insulin-like Growth Factor 1 and Dopamine: a Target for Neurodevelopmental Toxins and Thimerosal, J. Molecular Psychology, Vol. 9, 358-370 (2004) (Pet'r Ex. 22).

On May 16, 2008, Petitioner filed a status report summarizing the facts relevant to Colin's case. Petitioner admitted that Colin suffered from an [REDACTED] and [REDACTED] speech disorder before his flu vaccinations. Pet'r Status Report, May 16, 2008, at ¶3. Petitioner stated that, at the time of diagnosis, Colin had excellent attention skills and was cooperative, but admitted that he [REDACTED] and had trouble sitting still. Id. Petitioner asserted that, after the shots, Colin's behavior deteriorated into what was diagnosed as [REDACTED]. Id. at ¶¶4-8. Counsel asserted that the recently filed Waly article showed that thimerosal affected a metabolic process, disruption of which had been linked to development of attention deficit disorder. Id. at ¶8. On May 16, 2008, Petitioner filed a motion to consolidate Colin's case with Kate's and Maeve's cases. This motion was granted. Petitioner was ordered to file all medical opinions supporting her claim that Colin sustained a significant aggravation of his condition by July 31, 2008. An entitlement hearing was scheduled for November 5, 2008.

On June 30, 2008, CHC filed a motion to consolidate the Brynildson siblings' cases with those of three other petitioners. On July 17, 2008, all the cases were transferred to Special Master Abell. On August 26, 2008, the court held a joint status conference in all six cases. Order, Sept. 3, 2008. Special Master Abell ordered the petitioners to file, by October 27, 2008, all medical records and fact witness affidavits, as well as a brief addressing the common aspects of scientific causation among the cases, and he ordered Respondent to note her position regarding the timeliness of Colin's case. "In the meantime, the Court [vacated] all previous deadlines." Id. On October 22, 2008, Petitioner filed updated medical records.

On October 24, 2008, Respondent filed a status report. Respondent stated that the medical records established that Colin had been diagnosed with an [REDACTED] and [REDACTED] language disorder almost two months before his first influenza vaccination. Resp't Status Report, Oct. 24, 2008. She noted that the medical records showed that "at the time of the diagnosis, [Colin] [REDACTED] and had trouble sitting still." Id. at 1 (quotations omitted). Respondent noted that Petitioner's claim of significant aggravation was "completely unsubstantiated by the medical records or medical opinion," and she reserved the right to object to the reasonableness of Petitioner's claim. Id. at 2 n.1.

On October 27, 2008, Petitioner filed a "response" to the September 3, 2008 order. In support of consolidation, Petitioner asserted that "mercury, a known neurotoxin, is associated with global neurological deficits." Pet'r Resp. to Ct.'s Order, Oct. 27, 2008, at 2. All of the vaccinees alleged they suffered from "mercury toxicity," Petitioner asserted, so the evidence relating to whether TCVs can cause neurological problems could be the same for all six cases. Id. Petitioner conceded that the issues in each case were not identical and proposed that each case be tried separately as to specific causation, after a consolidated hearing on general causation. Id. at 2-3. Petitioner asserted that a consolidated hearing would be the most efficient way to proceed. Id. at 3.

At a status conference on December 8, 2008, Petitioner stated that, based on guidance from the special master, she would reconsider her motion to consolidate. Order, Dec. 22, 2008. Petitioner was ordered to file a status report, by January 2, 2009. On January 2, 2009, Petitioner filed a "response" to the court's order, withdrawing her motion to consolidate the six cases, but requesting that the three Brynildson siblings' cases remain consolidated. Petitioner stated that the children all had the same developmental pediatrician, who had agreed to serve as their expert. Pet'r Resp. to Ct.'s Order, Jan. 2, 2009. Petitioner also stated that the general issue of whether TCVs can cause neurological injuries would be the same for each child. Id.

At a status conference on January 9, 2009, the court left in place the order consolidating the Brynildson siblings' cases, but deferred ruling on whether they would remain consolidated. Order, Jan. 26, 2009. Respondent noted factual dissimilarities between Petitioner's allegations and some of the medical records filed. Id. Special Master Abell ordered Petitioner to file, by March 9, 2009, an amended petition "describing the onset of Colin's alleged injury, the symptoms and effects of that injury, including significant aggravation (if any) of a preexisting injury, and his current condition and diagnosis." Id. Special Master Abell reminded Petitioner that she would be required eventually to submit a legally sufficient expert report. Id.

On March 6, 2009, Petitioner was granted until April 15, 2009, to file an amended petition. On April 15, 2009, Petitioner filed another "response" to the court's order, which stated that, because Colin's records were extensive, counsel required additional time to file an amended petition that described the onset, symptoms, and effects of Colin's injury. Pet'r Resp. to Ct.'s Order, Apr. 15, 2009. Petitioner also filed, as she did in Kate's and Maeve's cases, Dr. Richard Deth's expert report and the testimony of Dr. George Lucier from the thimerosal death test case, Kolakowski v. Secretary of Department of Health & Human Services, No. 99-625V. Special Master Abell gave Petitioner until June 19, 2009 to file an amended petition.

On June 19, 2009, Petitioner filed some additional medical records and a status report requesting more time to file an amended petition. Petitioner stated that she intended to amend her petition to include a "significant aggravation" theory, but that she needed more time to collect and evaluate the necessary medical records. Status Report, June 19, 2009.

On June 22, 2009, the three Brynildson cases were transferred to me. On June 26, 2009, I issued an order allowing Petitioner in this case until July 24, 2009, to submit any additional medical records, and until August 24, 2009 to file a medical expert report. On August 24, 2009, Petitioner moved for a 60-day enlargement, claiming that, after an initial review of the case, Dr. John A. Green III had advised counsel that he did not have time to participate in the case. I granted Petitioner's motion for an enlargement of time to file an expert report, allowing until October 26, 2009. Order, Sept. 14, 2009. On October 26, 2009, Petitioner filed a motion for a decision dismissing her petition. On November 3, 2009, I granted Petitioner's motion and dismissed the case for insufficient proof.

On May 3, 2010, Petitioner filed the Fee Application at issue. In the Fee Application, Petitioner requested $40,963.45 in attorneys' fees, and $1,562.57 in attorneys' costs, for a total award of $42,526.02. Fee Application at 1. Respondent contested the Fee Application. On June 21, 2010, July 9, 2010, and August 12, 2010, I held status conferences with the parties in Kate's case to clarify some issues relating to the fee application in that case. On July 21, 2010, Petitioner filed, in all three Brynildson cases, letters from Dr. Susan L. Youngs and Dr. Green. Pet'r Exs. 38 and 39. Both doctors indicated that they had been willing to serve as expert witnesses in the cases, but did not have time to meet the deadlines set by the court.[8]

B. Respondent's Opposition to Petitioner's Fee Application

On June 1, 2010, Respondent filed a response to the Fee Application, opposing an award of attorneys' fees and costs. Respondent argued that Petitioner's claim lacked a

[8] Neither physician expressed support for a significant aggravation theory pertaining to Colin's case. I noted additional concerns about these letters, filed long after the dismissals of the Brynildson/Browning cases, in my decision on Kate's claim. See Kate's Fee Decision, slip op. at 10-12.

reasonable basis and, therefore, any award of fees would be inappropriate under § 300aa-15(e)(1)(B).

Respondent stated that a special master may award attorneys' fees to an unsuccessful petitioner only if the claim was brought in good faith and there was a reasonable basis for the claim. Resp't Opp., June 1, 2010, at 2. To have a reasonable basis, a petitioner's claim must be supported by medical records or a medical opinion. Id. "Although it is reasonable to permit petitioners to supplement their petitions in order to meet the statutory requirements, 'it is also reasonable to put on them the risk of not being compensated for attorneys' fees and costs if they file a petition without the necessary supporting documentation and are later unable to produce such documentation.'" Id. at 3 (quoting Spagiere v. Sec'y of Dep't of Health & Human Servs., No. 90-468V, 1991 WL 146284, *2 (Cl. Ct. Spec. Mstr. July 17, 1991)). Respondent argued that a finding of no reasonable basis most often occurs when counsel fails to make fundamental inquiries prior to the filing of the petition. Resp't Opp., at 3.

Respondent maintained that none of the medical records in this case attributed causation of Colin's disorders to vaccinations. Id. at 5. The medical records showed that at the time Colin first was diagnosed with language disorders, it also was noted that Colin [REDACTED] and had trouble sitting still. Id. at 7. Given that Colin was diagnosed before receiving his flu vaccinations, Colin exhibited the signs of his alleged injury prior to vaccination. Id. In addition, Respondent asserted that Petitioner's two expert reports were too general to be probative, and neither report addressed the facts of Colin's case. Id. at 8. In sum, Respondent argued that, "petitioner's counsel simply did not make the basic inquiries required by an attorney prior to filing the petition, nor did he do so with specific evidence thereafter, such that the entire case rested on nothing more than petitioner's unsubstantiated claims. As such, all fees and costs should be denied." Id. at 8.[9]

C. Petitioner's Reply

On July 6, 2010, Petitioner replied to Respondent's opposition. In sum, Petitioner discussed the congressional intent behind the Vaccine Program, alleging that the burden of proof on petitioners in vaccine cases is reduced, and that the availability of attorneys' fees ensures that petitioners have access to a capable bar. Pet'r Reply, July 6, 2010, at 3-7. Petitioner argued that, after the motion to consolidate the six cases was filed, "It is telling . . . that Special Master Abell vacated all previous deadlines . . . , [r]ecognizing the complexity of the issues involved in these five [sic] cases." Id. at 11 n.15.[10] Petitioner argued that because Respondent filed, in July 2008, motions for summary judgment in Maeve's and Kate's cases but not in Colin's case, Respondent must not have contested the reasonable basis for Colin's claim at that time. Id. at 11-12.

Counsel claimed that as he continued to communicate with Petitioner in January 2009, "through no fault of [] counsel," it was discovered that some medical records relating to "significant aggravation" were missing from the file. Id. at 13, 20. Counsel asserted that, after obtaining and filing some records on March 6, 2009, counsel needed more time to locate other

[9] In the alternative, Respondent argued that the fees incurred were unreasonably high, and she requested that, in the special master's discretion, they be reduced. Id. at 10-11.

[10] As noted in Kate's decision, Special Master Abell simply vacated existing deadlines to permit Petitioner time to evaluate further her request for consolidation. See Kate's Fee Decision, slip op. at 9, 11 n.24.

"important missing records." Id. at 14. On June 18, 2009, Petitioner filed additional records, but she requested more time to collect any remaining outstanding records before filing an amended petition alleging a "significant aggravation" theory. Id. at 16-17. Petitioner argued that "the additional information was crucial to [her] case." Id. at 17.

Petitioner maintained that this petition was filed in good faith and had a reasonable basis at every step of the case. Id. at 19. Petitioner argued that there were no precedents to guide petitioners who asserted "mercury toxicity" claims until the autism "mercury toxicity" cases were decided in 2010. Id. Petitioner argued that this case had a complex procedural history, with motions to consolidate and four different special masters. Id. at 19-20. Petitioner asserted that after receiving TCVs, Colin was diagnosed with "mercury toxicity." Id. at 19 (citing Pet'r Ex. 7, at 23-26 (medical records from Dr. Youngs)).[11]

Petitioner argued that the science in this area is extremely complex, and the expert opinions filed did show that TCVs can cause "mercury toxicity" resulting in developmental disorders. Pet'r Reply, July 6, 2010, at 20. Petitioner asserted that she had identified two medical experts willing to give opinions for Colin, but that they could not because of court-imposed deadlines. Id. at 21. "Only after [Petitioner's] counsel exhausted every reasonable avenue to prove his case, did [] counsel recommend a voluntary dismissal of [Colin's] claim." Id. Counsel argued that he "put forth nothing but the 'highest effort' when preparing this case," and he should not be punished because his client revealed critical information in 2009, and because the experts he located could not meet court-imposed deadlines. Id. at 19-21.

III. DISCUSSION

A. Standard for Awarding Attorneys' Fees

The Vaccine Act mandates the award of reasonable attorneys' fees and costs to successful petitioners. § 300aa-15(e). If a petitioner does not establish entitlement to compensation, the special master may award reasonable attorneys' fees and costs if the petition was brought in good faith and there was a reasonable basis for the claim. § 300aa-15(e)(1); Saxton v. Sec'y of Dep't of Health & Human Servs., 3 F.3d 1517, 1520-21 (Fed. Cir. 1993). If the petition for compensation is denied, a petitioner does not have a right to an award of attorneys' fees and costs; the Vaccine Act leaves such award to the special master's discretion. Saxton, 3 F.3d at 1520. Even if good faith and a reasonable basis are found, a fee award is not mandatory. § 300aa-15(e)(1); Di Roma v. Sec'y of Dep't of Health & Human Servs., No. 90-3277V, 1993 WL 496981, *1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993).

Whether a petition was filed in good faith is a subjective inquiry. Di Roma, 1993 WL 496981, at *1. It is satisfied if the petitioner honestly believes she has suffered a compensable

[11] The contemporaneous medical records do not support counsel's assertion that Colin was diagnosed with "mercury toxicity." Petitioner cited a document in which a treating physician noted that Colin's [REDACTED] and [REDACTED] levels were elevated, and that he might have suffered from "heavy metal toxicity." Pet'r Ex. 7 at 23-26. The medical records show that Colin's metal levels were tested on multiple occasions, but none of Colin's lab reports showed that his mercury levels were elevated. See, e.g., Pet'r Ex. 7 at 58, 100, 103, 106, and 145. Although "heavy metal toxicity" or "HMT" appears a number of times in Colin's medical records, "mercury toxicity" does not. Petitioner's failure to establish as an evidentiary matter the key fact underlying her petition -- that Colin's disorders were caused by elevated mercury levels -- was fatal to the claim. Petitioner's failure to act in accordance with the medical evidence she submitted was not reasonable.

vaccine injury. Id. The good faith requirement is an easy test to satisfy. In this case, Petitioner believed that Colin suffered a vaccine-injury, thereby satisfying the good faith requirement. The more difficult question is whether the claim had a reasonable basis.

The term "reasonable basis" is not defined in the statute or directly by the case law. "[T]he 'reasonable basis' requirement 'is objective, looking not at the likelihood of success of a claim but more to the feasibility of the claim.'" Turner v. Sec'y of Dep't of Health & Human Servs., No. 99-544V, 2007 WL 4410030, *6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) (quoting Di Roma, 1993 WL 496981, at *1). Counsel has an ongoing obligation to ensure that the claim is founded upon a reasonable basis. As more evidence about a claim is discovered, "the reasonable basis that may have been sufficient to bring the claim [can] cease[] to exist, [and] it can[] [no longer] be said that the claim is maintained in good faith." Perreira v. Sec'y of Dep't of Health & Human Servs., 33 F.3d 1375, 1377 (Fed. Cir. 1994).

Typically, petitioners are permitted to supplement their petitions after they are filed. Although it is reasonable to permit petitioners to supplement their petitions in order to meet the statutory requirements, "it is also reasonable to put on them the risk of not being compensated for attorneys' fees and costs if they file a petition without the necessary supporting documentation and are later unable to produce such documentation." Spagiere, 1991 WL 146284, at *2. Experienced counsel should be able to discern when a case lacks the necessary underpinnings, and "rather than waste the court's time and efforts, an attorney should use reasoned judgment in determining whether to . . . pursue a claim." Murphy, 30 Fed. Cl. 60, 62 (1993), aff'd, 48 F.3d 1236 (Fed. Cir. 1995). Counsel has a "duty to the court to avoid frivolous litigation." Perreira, 33 F.3d at 1377.

To determine whether a claim has a reasonable basis, courts look to a number of factors, "including the factual basis, the medical support and jurisdictional issues." Di Roma, 1993 WL 496981, at *1. Claims lack a reasonable basis when petitioners, after having an opportunity to submit evidence, produce neither medical records nor an expert report that is legally sufficient to support causation. Perreira, 33 F.3d at 1377 (affirming special master's finding that once petitioner's only expert submitted opinion that was legally insufficient to establish causation, the case no longer had reasonable basis); Everett v. Sec'y of Dep't of Health & Human Servs., No 91-1115, 1992 WL 35863 (Fed. Cl. Spec. Mstr. Feb. 7, 1992) (denying fees when the medical records did not support petitioner's claim of an adverse reaction to vaccination and no expert report was filed). This is not to say that a petitioner must establish causation to show a claim has a reasonable basis. A reasonable basis can exist, for example, where an expert interprets ambiguous evidence to reach a result that differs from the court's interpretation or where the trier of fact decides that the strength of testimony is insufficient. See Stevens v. Sec'y of Dep't of Health & Human Servs., No. 90-221V, 1992 WL 159520, *3 (Fed. Cl. Spec. Mstr. June 9, 1992).

Historically, special masters have been "quite generous in finding a reasonable basis for petitioners." Turner, 2007 WL 4410030, at *8 (quoting Turpin v. Sec'y of Dep't of Health & Human Servs., No. 99-564V, 2005 WL 1026714, *2 (Fed. Cl. Spec. Mstr. Feb. 10, 2005)). This generosity does not extend to situations in which counsel fails to investigate the facts or continues to prosecute a case after it should have been recognized that the evidence was manifestly insufficient. See, e.g., Perreira, 33 F.3d at 1377 (denying fees incurred at hearing when petitioner's counsel knew his expert's opinion was legally insufficient).[12] Nor does the

[12] See also Murphy, 30 Fed. Cl. at 61 (affirming special master's finding of no reasonable basis when the medical and other written records contradicted the claims in the petition). See generally Stevens, 1992

submission of an expert report, by itself, establish a reasonable basis for the claim; the report must be corroborated by the facts of the case. Perreira, 33 F.3d at 1377; Stevens, 1992 WL 159520 (denying fees based on lack of reasonable basis when expert report was based solely on mother's affidavit, with no reference to the medical records). However, "the [Vaccine] Program's interest in promoting attorney representation in vaccine cases, as contemplated by the attorneys' fees provision of the statute, must be balanced carefully against the court's examination of the reasonableness of the basis for bringing the vaccine petition." Turner, 2007 WL 4410030, at *11.

B. Petitioner's Claim Never Had a Reasonable Basis.

The petition in this case was filed on June 28, 2007. In her amended petition, Petitioner alleged that Colin's influenza vaccinations, administered in November 1999, December 1999, and January 2001, caused Colin to suffer from "mercury toxicity." Petitioner stated that Colin received the routine childhood vaccinations, including twelve vaccines that contained thimerosal: three hepatitis B shots, five diphtheria-tetanus-acellular pertussis shots, and four hemophilus influenza type B shots. Amended Pet. at 1, 2 n.3.[13] In her affidavit, Petitioner represented that, "We know that the mercury in his infant shots set up the perfect storm" that [REDACTED]. Browning Aff., at 6.

"[T]he crux of Colin's medical theory" was that he suffered from "mercury toxicity." Pet'r Reply, July 6, 2010, at 15 n.19. Petitioner alleged that the mercury contained in TCVs can cause "mercury toxicity," which can then cause autism and developmental disorders such as speech and attention disorders. Id. at 10. Petitioner maintained that "mercury toxicity" led to Kate's and Maeve's development, speech, and language disorders, and that it also led to Colin's attention and behavioral disorders.

As noted in the amended petition, when the medical records first documented that Colin had language disorders, [REDACTED], and trouble sitting still, he already had received eleven childhood vaccines containing thimerosal. Thus, before his influenza vaccinations, Colin had already exhibited what Petitioner argued were signs of "mercury toxicity." Aside from Petitioner's bare assertion that Colin[REDACTED] became worse after the influenza vaccinations, there is no evidence that she reported this to health care providers and no other evidence addresses Colin's condition before and after his influenza vaccinations. Petitioner directed her evidence toward proving that the thimerosal in childhood vaccines can cause

---

WL 159520, at *3-*4 (denying fees when counsel relied on a medical expert's opinion that had "no plausible factual support" and counsel failed to adequately investigate the facts); Collins v. Sec'y of Dep't of Health & Human Servs., No. 91-821V, 1992 WL 164512 (Fed. Cl. Spec. Mstr. June 23, 1992) (denying fees when the injuries alleged in the petition were not supported by medical records or expert opinion); cf. Turner, 2007 WL 4410030, at *10 (finding a reasonable basis when, after filing a skeletal petition, counsel promptly investigated the case, and "counsel [did] not unduly prolong[] the proceeding but [] moved promptly for judgment on the record" after being unable to find an expert).

[13] Of those twelve thimerosal containing childhood vaccines, Colin received eleven between [REDACTED] 1997 and July 14, 1998, and he received the twelfth on January 28, 2002. Amended Pet. at 2 n.3. Colin received the influenza vaccinations at issue in 1999 and 2001.

"mercury toxicity," but she submitted no evidence that the thimerosal in Colin's influenza vaccines could have worsened or did worsen his condition.[14]

The record shows that counsel failed to investigate the facts necessary to support the only claim Colin could maintain. At no point was Petitioner able to offer evidence as to the onset of Colin's "mercury toxicity," the symptoms and effects of "mercury toxicity," or whether the alleged harm from two doses of a thimerosal containing vaccine was sufficient to significantly aggravate or contribute to a condition putatively caused by eleven previous doses of such vaccines. Two years after filing this case, Petitioner stated she needed more time to collect and evaluate the medical records before amending her petition to include a significant aggravation theory. Petitioner's counsel filed this case knowing Colin's prior medical history. Counsel did not then and does not now have a reasonable basis for asserting that two doses of a TCV caused significant worsening of Colin's putative "mercury toxicity."

As this case progressed, counsel was alerted repeatedly to the insufficiency of the evidence and the pleadings. In April 2008, counsel filed an expert opinion in another "mercury toxicity" case, which stated the evidence, while "suggestive," "falls well short of a level that could justify . . . implicat[ing] exposure to mercury as a substantial contributing factor in the development of [speech, language, and attention problems]." Boyd v. Sec'y of Dep't of Health & Human Servs., No. 03-2649V, 2010 WL 3565231, Pet'r Ex 40 (Dr. Marcel Kinsbourne's Report). As discussed in Kate's Fee Decision, by May 2008, counsel had little reason to believe that thimerosal caused "mercury toxicity" or that thimerosal or "mercury toxicity" caused disorders like Colin's. In October 2008, Respondent filed a status report notifying Petitioner that her claim of significant aggravation "remains completely unsubstantiated by the medical records or medical opinion," and she "has provided no evidence that the facts represented in her affidavit could be deemed medically to reflect a significant aggravation of Colin's pre-vaccination condition." Resp't Status Report, Oct., 24, 2008. Respondent then "reserve[d] the right to raise objections related to the reasonableness of petitioner's claim . . . at a later point." Id. Further, Special Master Abell informed counsel in three separate orders of the need to file an amended petition and a legally sufficient expert report. See Order, Jan. 26, 2009; Order, Mar. 6, 2009; Order, June 17, 2009.

Petitioner had no reasonable factual or medical basis for maintaining this case, and counsel was placed on notice of the deficiencies by special masters and Respondent. Under these circumstances, I can find no reasonable basis to have incurred over $40,000 in fees. My decision, fortunately, does not impose any financial loss on Petitioner. See 42 U.S.C. § 300aa-15(e)(3). Nor does the evaluation of the lack of merit in this claim diminish my sympathy for Petitioner and her family, or my appreciation of counsel's efforts to provide her assistance.

IV. CONCLUSION

I agree with Respondent that this case lacks a reasonable basis, and therefore, Petitioner is statutorily ineligible for an award of attorneys' fees. Accordingly, Petitioner's fee application is **DENIED**.

[14] Colin also received one dose of the DTaP vaccine on January 28, 2002, after he received the influenza vaccines. Amended Pet. at 2. Petitioner made no attempt to distinguish any harm from this final DTaP vaccine from the harm allegedly caused by the influenza vaccinations.

In the absence of a motion for review filed pursuant to Vaccine Rule 23, the Clerk is directed to enter judgment according to this decision.[15]

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Chief Special Master

[15] Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.