# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

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| GLORIA LEE MCNETT, | * | |
| | * | No. 99-684V |
| Petitioner, | * | Special Master Christian J. Moran |
| | * | |
| v. | * | |
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| SECRETARY OF HEALTH AND HUMAN SERVICES, | * | Filed: February 4, 2011 |
| | * | |
| | * | Attorneys' Fees and Costs, |
| Respondent. | * | reasonable basis, statute of limitations |
| * * * * * * * * * * * * * * * * * * * * * * * * * | | |

Clifford J. Shoemaker, Shoemaker and Associates, Vienna, VA, for petitioner; Julia W. McInerny, United States Dep't of Justice, Washington, DC, for respondent.

PUBLISHED DECISION ON ATTORNEYS' FEES AND COSTS[1]

Ms. McNett sought compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa—10 et seq. (2006). Although her case remained pending for eight years, she failed to submit evidence that showed she was entitled to compensation. Thus, her case was dismissed.

[1] Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

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 clearly be an unwarranted invasion of privacy. When such a decision is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa–12(d)(4); Vaccine Rule 18(b).

Ms. McNett now seeks an award of her attorneys' fees and costs, because in the Vaccine Program a petitioner who does not receive compensation may still be awarded reasonable attorneys' fees and costs. 42 U.S.C. § 300aa—15(e). Respondent opposes this request entirely on the ground that one of the statutory requirements, a finding that the petition was supported by a "reasonable basis," was not met. Additionally, respondent argues that if Ms. McNett were found entitled to an award of attorneys' fees and costs, then her request should be reduced to a reasonable amount.

Respondent's first argument implicates the meaning of the term "reasonable basis." This term is neither defined in the statute nor has it been the subject of many decisions by the appellate courts. Without this guidance, "reasonable basis" is interpreted broadly and Ms. McNett is found to be entitled to an award of reasonable attorneys' fees and costs.

As to the reasonableness of Ms. McNett's requests, respondent's second argument that she has requested an unreasonable amount is meritorious. Thus, Ms. McNett's request is reduced. She is awarded **$19,010.00 in attorneys' fees, $3,578.85 in attorneys' costs, and $1,012.26 for her own costs.**

## I. Factual and Procedural History[2]

On December 3, 1992, Ms. McNett received the first dose of the hepatitis B vaccine at age 48. Exhibit 14 at 4. She did not report any problems immediately after this dose. See Second Amended Petition, filed Nov. 1, 2006, ¶¶ 20-22.

On January 7, 1993, Ms. McNett was administered the second dose of the hepatitis B vaccine. Exhibit 14 at 4. According to a report made to a doctor in September 1993, Ms. McNett experienced some aching in her fingers, shoulders, neck, and knees. Exhibit 28 at 1. This achiness is not recorded in any medical record created in January 1993, including a doctor's appointment on January 20, 1993, when Ms. McNett reported congestion in her head, lightheadedness, and nausea. See exhibit 7 at 56. Regardless, Ms. McNett recalled that the achiness subsided. Exhibit 28.

[2] This information is derived from Ms. McNett's medical records, the special master's November 28, 2007 decision denying compensation, the docket sheet, and the time records submitted by Ms. McNett's attorney.

On June 1, 1993, Ms. McNett received the third dose of the hepatitis B vaccine. Exhibit 14 at 4. According to an affidavit prepared in 2004, she started having aches and pains in her joints. She also became so tired that she could barely function. Exhibit 18.

Ms. McNett reported joint swelling, fatigue, fever and being thirsty all the time to a doctor on August 4, 1993. Exhibit 7 at 56. In September, she reported that she had been suffering generalized swelling, weight gain, and joint pain after the June 1993 vaccination. Exhibit 28 at 1.

In the year after September 1993, Ms. McNett reported having swollen joints once. See exhibit 7 at 52. In April 1995, Ms. McNett had a sudden onset of pain in her right knee. The doctor diagnosed a strain. Exhibit 1 at 34-39.

In the next years, Ms. McNett continued to have various problems, including problems with her knees. She also periodically reported problems in her joints. Among the doctors she saw for her health problems between 1993 and 1999 was Dr. Geoffrey Hammond. She saw him for, among other complaints, chest congestion, arthralgias, depression and his records contain information from more than 40 interactions. In March 1999, Ms. McNett saw Dr. Hammond saw for chest congestion, headache, and joint pain. Dr. Hammond's notes state "auto-immune response to hep[atitis] B vac[cine]." Exhibit 7 at 38. This is the first notation about a reaction to the hepatitis B vaccine in Dr. Hammond's notes. In May 1999, Dr. Hammond's note says "? Reaction to hep B vaccination." Exhibit 7 at 37. Dr. Hammond continued to treat Ms. McNett through February 2002, which was shortly before his records were requested in April 2002. Exhibit 7 at 1,8.

According to the time sheets submitted with the motion for attorneys' fees, Ms. McNett first talked to an attorney on August 6, 1999. See Pet'r Appl'n at pdf 26; see also Pet'r Br., filed Aug. 14, 2009, at 2 . August 6, 1999 is also the day that Ms. McNett's petition was filed. August 6, 1999 was the day that the time for filing petitions alleging that the hepatitis B vaccine caused an injury before August 6, 1997 expired. 63 Fed. Reg. 25777, 25778 (clarifying the date on which the hepatitis B vaccine was added to the vaccine injury compensation table).

Ms. McNett's August 6, 1999 petition did not provide details about her claim. The petition was not accompanied by any medical records, although the Vaccine Act states that petition "shall contain . . . supporting documentation." 42 U.S.C. § 300aa—11(c). In its lack of documentation and its lack of details, Ms.

McNett's petition resembles many petitions filed just prior to the expiration of the statute of limitations for claims based upon the hepatitis B vaccine.

Ms. McNett was ordered to file additional documents by December 6, 1999. Order, filed Sep. 1, 1999. The attorneys' time sheets do not list any work being performed by them between September 1, 1999 and December 6, 1999. It is possible that Ms. McNett's attorneys requested that she obtain medical records, although such a request is not contained in the record and would presumptively be a privileged communication between attorney and client. In any event, on December 6, 1999, Ms. McNett did not file any medical records to support her claim.

For approximately two and a half years, Ms. McNett periodically filed status reports. During this time, the attorneys' timesheets show that they spent relatively few hours on her case. The records do not indicate that the attorneys requested medical records from any doctor seen by Ms. McNett.

In December 2001, an attorney recorded that she had emailed Ms. McNett regarding medical providers. Pet'r Appl'n at pdf 10. Ms. McNett filed her first set of medical records in May 2002. A time entry from May 15, 2002, appears to be the first time that an attorney recorded that he was reviewing medical records. See Pet'r Appl'n at pdf 18. Ms. McNett filed additional medical records periodically.

In 2004, Ms. McNett filed exhibits 12-17. Exhibit 13 is comprised of two pages of records from Dr. Hammond, one of them an August 25, 1999 letter addressed "To whom it may concern".[3] Dr. Hammond praised Ms. McNett's efforts to improve her health, including having a balanced diet and using "complementary and alternative nutritional therapy." Dr. Hammond requested that the recipient of the letter consider "reimbursing" Ms. McNett for these nutritional supplements to help Ms. McNett address her weight gain, generalized arthralgias, and profound fatigue. In this context, Dr. Hammond stated that these problems "appear[] historically to be caused or contributed to by an auto-immune response to hepatitis B vaccines." Dr. Hammond did not provide any explanation for his statement that linked Ms. McNett's ailments to the hepatitis B vaccines. Exhibit 13 at 1.

[3] This letter was not included with the original set of Dr. Hammond's records, which had been filed in June 2002, as exhibit 7.

In 2004, the case was assigned to Special Master Edwards, who remained the special master through the entitlement phase of the case. Special Master Edwards ordered that Ms. McNett file an amended petition, affidavits from all potential fact witnesses, and all outstanding medical records by May 28, 2004. Order, filed April 20, 2004.

In June 2004, Ms. McNett filed her first amended petition. She alleged that the hepatitis B vaccinations caused her multiple problems, including osteoarthritis and obesity. Also in June 2004, respondent filed her report pursuant to Vaccine Rule 4. Respondent recommended that Ms. McNett not be awarded compensation and argued that "nothing in petitioner's medical history suggests a connection between her Hep B vaccinations and the occurrence of her multiple symptoms, osteoarthritis, and obesity." Respondent specifically addressed Dr. Hammond's reports, stating that he made his statements without providing any "medical justification." Resp't Rep't at 9.

Approximately 18 months elapsed in which Ms. McNett's case made little, if any, progress. In response to an order, Ms. McNett filed a status report in January 2006. Ms. McNett's attorney reported that he was working with Dr. Greenspan "to find an expert" and is working with Dr. Hammond "to obtain further support for his opinion." Pet'r Status Rep't, filed Jan. 20, 2006.

An unrecorded status conference was held on May 10, 2006. On June 15, 2006, Special Master Edwards ordered that Ms. McNett file a status report regarding her "progress in preparing a notice of dismissal." Although a voluntary dismissal was expected, Ms. McNett reported that "she has decided to continue with her claim" and requested a fact hearing. Pet'r Status Rep't, filed July 17, 2006.

Ms. McNett was ordered to file a status report identifying the factual issues requiring resolution. She was also ordered to file an amended petition that clearly identified the injury for which she was seeking compensation. Order, filed Aug. 8, 2006. The second amended petition did not identify Ms. McNett's injury and so did not provide "adequate notice of her claim." The special master "demand[ed] additional development guided by an appropriate medical expert, like a rheumatologist." Ms. McNett responded that she is already working with an

attorney who is also a doctor to identify an appropriate expert.[4] Order, filed Nov. 21, 2006.

In early 2007, Ms. McNett filed various status reports explaining that she had not presented an expert and requesting additional time to retain an expert. On May 2, 2007, Ms. McNett was ordered to support any future requests for additional time with a statement from the potential expert on the expert's letterhead. Thereafter, Ms. McNett reported that she had decided not to pursue her claim. Ms. McNett's attorney was waiting for a signed statement before dismissing her claim. Pet'r Status Rep't, filed May 18, 2007.

Ms. McNett filed a motion for judgment on the record on June 20, 2007. This motion recited facts about her condition, which appear to be copied from an earlier petition, and presented an argument that she was entitled to compensation. The respondent opposed this motion.

Special Master Edwards issued a decision denying compensation on November 28, 2007. This decision stated that Ms. McNett was required to establish, by a preponderance of the evidence, a reliable medical theory. Decision slip op. at 4, citing, among other cases, Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005), and Knudsen v. Sec'y of Health & Human Servs., 35 F.3d 543, 548 (Fed. Cir. 1994). The decision found that the records from Ms. McNett's treating doctors including the reports from Dr. Hammond did not present a reliable medical theory. The decision noted that Dr. Hammond did not explain the basis for his conclusion with the result that the special master could not "judge adequately the reliability of Dr. Hammond's conclusion." Id. at 7. This decision concluded the entitlement phase of the case.

The next phase of the case, the one resolved in the present decision, began when Ms. McNett filed a motion for attorneys' fees and costs on April 28, 2008. Ms. McNett requested $28,560.30 in attorneys' fees and $5,203.85 in attorneys' costs. Pet'r Appl'n at pdf 35. Ms. McNett also requested reimbursement of $1,012.26 in costs borne by her personally. Id. at pdf 5-6. This motion was the genesis of several rounds of briefing, which occurred before this case was reassigned to the undersigned in December 2010. The matter is now ready for disposition.

[4] Although the order does not mention the name of this person, the context indicates that this person was Dr. Greenspan.

Respondent opposed the motion for attorneys' fees and cost for two reasons. First, respondent argued that Ms. McNett does not qualify for any award because her case does not satisfy one of the conditions for an award, namely, that her case be supported by a reasonable basis. For the reasons explained in section II below, respondent's argument is not persuasive. Second, respondent argued that even if Ms. McNett is entitled to an award in some amount, her request is unreasonably high. For the reasons explained in sections III and IV below, respondent's arguments in this setting are more persuasive and Ms. McNett's request is reduced to a reasonable amount.

## II. Entitlement to Attorneys' Fees and Costs

In the Vaccine Program, when petitioners fail to establish that they are entitled to compensation, special masters are afforded discretion to award petitioners reasonable attorneys' fees and costs. When compensation is not awarded,

> 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.

42 U.S.C. § 300aa-15(e)(1).

Here, respondent's initial response to Ms. McNett's motion for attorneys' fees and costs argued that "there was no basis for petitioner's claim, let alone a reasonable basis." Resp't Opp'n, filed June 23, 2008, at 11.[5] Nevertheless, for the reasons explained below, the evidence supports a finding that Ms. McNett satisfied the reasonable basis standard.

### A. Criteria for Determining Reasonable Basis

"Reasonable basis" has received relatively little attention from appellate authorities that interpret the Vaccine Act. The most prominent decision on this topic is Perreira v. Sec'y of Health & Human Servs., 33 F.3d 1375 (Fed. Cir.

[5] Respondent did not challenge Ms. McNett's good faith.

1994). Due to its status as the only Federal Circuit case discussing reasonable basis, the facts about this case are set forth in detail even though Perreira's facts do not exactly match the facts of Ms. McNett's case.

The Perreiras alleged that the diphtheria-pertussis-tetanus ("DTP") vaccine harmed their daughter, Carly, who had received it in 1982. Initially, the Perreiras maintained that Carly started having seizures four days after the second dose of DTP. The basis of this assertion was the testimony of Carly's mother. The chief special master found that Ms. Perreira's testimony was not correct and found, instead, that the seizures started 20 days after the second dose of DTP. Perreira v. Sec'y of Health & Human Servs., No. 90-847V, 1991 WL 117740, at *1 & n.2 (Cl. Ct. Spec. Mstr. June 13, 1991).

Given this sequence of events, the Perreiras attempted to establish a significant aggravation claim. This alternative claim was based upon the sequence that two weeks after the third dose of DTP, Carly had more seizures. The chief special master rejected the Perreiras' claim because there was no support for their expert's opinion that DTP causes harm that would first appear two weeks later. Id.

The Perreiras sought an award of their attorneys' fees and costs. The chief special master found that the Perreiras had a reasonable basis for filing their petition. Perreira, 1992 WL 164436, at *2 (Cl. Ct. Spec. Mstr. June 12, 1993). The decision does not state the reason for finding reasonable basis but the facts suggest that this finding may have been premised upon the assertion that Carly's seizures started four days after the second dose of vaccination.

The chief special master found that the reasonable basis ceased after the expert submitted a report. The chief special master noted that the expert's theory "amounted to his own unsupported speculation." Id. at *1. The chief special master noted that the Perreiras' attorney should have recognized that the expert's theory "was legally insufficient to establish causation." The chief special master also stated that the Perreiras' attorney recognized that this case "was a 'bad case.'" Id. at *2. Thus, the chief special master found that the Perreiras did not have a reasonable basis to proceed to a hearing, despite the opinion of an expert. Id. at *3-4.

The Perreiras filed a motion for review of the denial of a portion of the attorneys' fees and costs. The Court of Federal Claims found that the chief special master's determination that the case lacked a reasonable basis was not arbitrary. The Court of Federal Claims rejected the petitioners' arguments, including an

argument that "counsel had an absolute right to rely on the expert's opinion in pursuing the case." Perreira v. Sec'y of Health & Human Servs., 27 Fed. Cl. 29, 33 (1992).

These decisions are the background for the Federal Circuit's discussion of "reasonable basis" in its Perreira decision. The Federal Circuit affirmed the chief special master's decision that the Perreiras lacked a reasonable basis to proceed to a hearing, despite an expert report, because "the expert opinion was grounded in neither medical literature nor studies." The Federal Circuit explained that "[t]he special master did not require counsel to verify the validity of the expert's opinion, but only required the opinion to be more than unsupported speculation." Perreira, 33 F.3d at 1377.

The teachings of Perreira remain valid.[6] Perreira demonstrates that a case that begins with a reasonable basis may lose the reasonable basis as the case progresses. Although this holding affects Ms. McNett's case to some extent, the more fundamental question is how to determine whether there is a reasonable basis initially.

Perreira does not help determine whether Ms. McNett's case was supported by a reasonable basis because she did not ever obtain a report from an expert opining that a vaccine harmed her. Without a report from an expert, Ms. McNett was never close to prevailing upon her claim. See 42 U.S.C. § 300aa—13(a) (stating that special masters may not award compensation "based upon the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion"). Thus, Ms. McNett's case may be classified into a group of cases in which petitioners file their petitions without the documentation required by the Vaccine Act and then attempt, while the case is pending, to develop their claim. See Lamar v. Sec'y of Health & Human Servs., No. 99-583V, 2008 WL 3845165, at *4 n.13 (Fed. Cl. Spec. Mstr. July 30, 2008) (noting that "cases interpreting the good faith and reasonable basis requirements leniently encourage 'gaming the system' by failing to require counsel to adequately investigate and substantiate the petition at the onset.").

[6] Despite being issued more than 15 years ago, Perreira has not been overruled by an en banc decision of the Federal Circuit and was cited in one of the more recent Federal Circuit decisions originating in the Vaccine Program. See Cedillo v. Sec'y of Health & Human Servs., 617 F.3d 1328, 1339 (Fed. Cir. 2010).

This type of case has been discussed in some decisions by special masters. One decision, which was cited in respondent's opposition, places the risk of a finding that the case lacks a reasonable basis on the petitioner's attorney. In Everett v. Sec'y of Health & Human Servs., No. 91-1115, 1992 WL 35863 (Cl. Ct. Spec. Mstr. Feb. 7, 1992), Ms. Everett alleged that a 1989 tetanus booster caused her daughter an adverse reaction. The medical records "failed to show any relationship, temporal or causal, between [the child's] condition and her tetanus booster shot. They indicate that her symptoms did not commence until at least 5 weeks after the booster shot." Because Ms. Everett did not submit a medical opinion supporting her claim, she was not awarded compensation. Id. at *1.

When Ms. Everett sought attorneys' fees and costs, the special master found that her claim was not supported by a reasonable basis. Relying upon 42 U.S.C. § 300aa—13(a)(1), Everett declared that "to have a 'reasonable basis', a claim must, at a minimum, be supported by medical records or medical opinion." Everett also contained the following reasoning, on which respondent relies:

> While it is reasonable to permit petitioners to supplement their petitions 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. In a case such as this where the medical records do not provide the required substantiation of the claim, a petitioner who has not, prior to the filing of a petition for compensation under the Program, obtained a medical opinion that a vaccine caused injury, and who is subsequently unable to obtain such an opinion, cannot be said to have had a reasonable basis for the claim at the time the petition was filed.

Id. at 2 (footnote deleted without notation). In addition to denying the award of attorneys' fees, Everett also denied an award of costs. Everett recognized that "it may have been necessary to incur some costs to determine whether or not there was a reasonable basis to file a petition." However, Everett reasoned that awarding costs "would only encourage the filing of non-meritorious petitions for the sole purpose of recovering out of pocket costs. To discourage such filing, the court will

not award costs in connection with a petition which never should have been filed." Id.

Everett's statement of law – that "to have a 'reasonable basis', a claim must, at a minimum, be supported by medical records or medical opinion" – has not been reviewed by an appellate authority.[7] Neither the Federal Circuit nor the Court of Federal Claims has reviewed a decision of a special master in a case in which the petitioners did not produce either medical records or a medical opinion to support their claim. Even without intervention by an appellate authority, the stark definition of reasonable basis found in Everett has been tempered in other decisions by special masters.

The special master who decided Everett did not follow Everett in a case in which the attorney's initial work was performed approximately one month before the expiration of the time for filing a case within the statute of limitations. "Because of the time constraints, it was reasonable for the petitioner to file an incomplete petition in this case." Hearell v. Sec'y of Health & Human Servs., No. 94-1420V, 1993 WL 129645, at *1 (Fed. Cl. Spec. Mstr. April 6, 1993). Other special masters have considered the pendency of the statute of limitations in determining whether the petition was supported by a reasonable basis. E.g., Lamar, 2008 WL 3845165, at *3 (stating "Given the impending statute of limitations and the lack of contrary authority, I am willing to attribute petitioner's good faith belief to her counsel, based on the severe constraints on his time to investigate this case."); Turner v. Sec'y of Health & Human Servs., No. 99-544V, 2007 WL 4410030, at *6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) (stating "a filing on the eve of the running of the statute of limitations may be supported by less information than would be expected if counsel had more time to conduct a pre-filing investigation of the factual underpinnings and the medical basis for a vaccine claim"); Hamrick v. Sec'y of Health and Human Servs., No. 99-683V, 2007 WL 4793152, *5 (Fed. Cl. Spec. Mstr. Nov. 19, 2007) (stating "petitioners' attorneys are entitled to the benefit of the doubt when they file a petition just before the statute of limitations expires").

[7] The chief special master followed the same reasoning in finding that a petition lacked a reasonable basis in Smith v. Sec'y of Health & Human Servs., No. 91-57V, 1992 WL 210999, at *2 (Cl. Ct. Spec. Mstr. Aug. 13, 1992) (stating "petitioner alleged that non-Table injuries were caused by the DPT vaccine. . . . However, there are no medical records that support petitioner's assertions and petitioner did not provide a medical expert opinion on causation. §§ 11(c)(1)(C)(ii)(I)."

Whether the statute of limitation is a factor for special masters to consider is uncertain. The cases that have permitted the statute of limitations to affect the definition of reasonable basis have not been reviewed by an appellate authority. Further, some special masters' decisions have refrained from looking to the statute of limitations as a factor to consider in evaluating reasonable basis. E.g. Brown v. Sec'y of Health & Human Servs., No. 99-593V, 2005 WL 1026713, at *2 (Fed. Cl. Spec. Mstr. March 11, 2005) (stating "The Court generally accepts skeletal petitions (those filed sans records). . . . Yet, while such a filing is adequate to stop the running of the statute of limitations, it does not by itself establish a 'reasonable basis' within the meaning of the statute.")

Absent guidance from an appellate authority, the undersigned holds that the statute of limitations is a factor to consider in determining whether a case was filed with a reasonable basis. Two reasons supporting this holding are that the term "reasonable" is a broad term, suggesting that Congress intended special masters to consider a wide spectrum of factors and that a lenient standard for reasonable basis will promote the public policy of having attorneys represent petitioners in the Vaccine Program. See Hamrick, 2007 WL 4793152, at *4-7 (discussing these reasons in more detail); cf. Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1353 (Fed. Cir. 2008) (noting that one purpose of the Vaccine Act was "to ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims.")

### B. Whether Ms. McNett Satisfies the Reasonable Basis Standard

When these criteria are applied to Ms. McNett's case, she is found to have a reasonable basis for filing her petition. Two factors are relevant to this finding.

First, there is the pendency of the statute of limitations. According to the attorneys' time sheets, the earliest work done by Ms. McNett's attorney was August 6, 1999.[8] See Pet'r Appl'n at pdf 26; see also Pet'r Br., filed Aug. 14, 2009, at 2. On this same day, Ms. McNett's attorneys prepared and filed a generic petition on her behalf. Ms. McNett's attorneys had no time to request medical records, let alone any time to review the medical records. Thus, Ms. McNett's

[8] Respondent's initial opposition maintained that Ms. McNett's attorney had "six weeks" to review medical records before filing the petition. Resp't Br., filed June 23, 2008, at 9 n.7. This assertion appears to be mistaken.

case is similar to Lamar, Turner, and Hamrick, in which the petitioners' attorneys were given the benefit of the doubt in filing a petition just before the running of the statute of limitations.

The second reason for finding that the filing of Ms. McNett's case was supported by a reasonable basis is that Ms. McNett eventually produced records from one doctor who provided some support for her claim. Dr. Hammond attributed some problems to an "auto-immune response" to the hepatitis B vaccine. Exhibit 7 at 38, accord exhibit 13 at 1. Dr. Hammond's views provided an objective reason for pursuing Ms. McNett's claim and contribute to finding a reasonable basis supported Ms. McNett's petition.

Dr. Hammond's reports distinguish Ms. McNett's case from Everett. In Everett, the petition was found to lack a reasonable basis because, in part, the medical records "failed to show any relationship, temporal or causal, between [the child's] condition and her tetanus booster shot." Everett, 1992 WL 35863, at *1. The same cannot be said in Ms. McNett's case, for Dr. Hammond asserted that there was a causal relationship. Consequently, Ms. McNett's case was supported by a reasonable basis.

## III. Determining the Amount of Attorneys' Fees

The next step is determining the amount of attorneys' fees to which Ms. McNett is entitled. Ms. McNett originally requested $28,560.30 in attorneys' fees. Pet'r Appl'n at pdf 35.[9] Respondent objected to an award in this amount. Resp't Resp., filed June 27, 2008 (identifying specific activities to which respondent objected).

Reasonable attorneys' fees are determined using the lodestar method – "'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" Avera, 515 F.3d at 1347-48 (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). In determining the reasonable number of hours, "[t]he [trial forum] also should exclude from this initial fee calculation hours that were

[9] During the briefing on attorneys' fees, Ms. McNett made supplemental requests for the briefs that she filed, including her reply, filed July 3, 2008, ($1,035.00); her response, filed August 14, 2009 ($975.00); and her response to a motion to strike, filed August 19, 2009 ($336.58). These supplemental requests total $2,346.58.

not 'reasonably expended.'" Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)).

Special masters are permitted to reduce the claimed number of hours to a reasonable number of hours by means of a bulk reduction. Special masters are not required to assess fee petitions line-by-line. Saxton, 3 F.3d at 1521 (approving special master's elimination of 50 percent of the hours claimed); see also Guy v. Sec'y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997) (affirming special master's reduction in the number of hours from 515.3 hours to 240 hours); Edgar v. Sec'y of Health & Human Servs., 32 Fed. Cl. 505 (1994) (affirming special master's awarding only 58 percent of the numbers of hours for which compensation was sought). When the trial court uses a percentage reduction, the trial court should provide a "'concise but clear' explanation of its fee reduction." Internat'l Rectifier Corp. v. Samsung Electronics, Co., 424 F.3d 1235, 1239 (Fed. Cir. 2005) (quoting Gates v. Deukmejian, 987 F.2d 1392, 1400 (9th Cir. 1993) and following Ninth Circuit law). In reducing the number of hours allowed, a trial court is not required to explain how many hours are appropriate for any given task. Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1259 (10th Cir. 2005); Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1202-03 (10th Cir. 1986) (affirming district court's reduction in the number of hours claimed for pre-trial preparation by 77 percent).

Here, lengthy and particular discussion of respondent's identified objections is not necessary. Other cases have addressed some of them. For example, Valdes v. Sec'y of Health & Human Servs., 89 Fed. Cl. 415, 425 (2009), determined that an attorney employed by Shoemaker & Associates who performs work consistent with the work of a paralegal should be compensated at rates for a paralegal, not an attorney. Another example is the finding that Mr. Shoemaker has billed for the same activity in more than one case involving the hepatitis B vaccine. Lamar, 2008 WL 3845157, at *6-7.

A review of the attorneys' timesheets shows that an unreasonable amount of time was spent on Ms. McNett's case. After her case was filed without any medical records, several years passed during which her attorneys did not substantively advance her case. Although the attorneys communicated with the client and conferred with each other, the case did not progress in any meaningful way. See order, filed April 20, 2004. When ordered to submit an amended petition that described her claim, the attorneys largely avoided defining Ms. McNett's claim.

In 2005, Mr. Shoemaker sought assistance from Mark Greenspan, who is both an attorney and a doctor. Pet'r Appl'n at pdf 45 (affidavit of Mark Greenspan). In September 2005, Mr. Shoemaker was discussing "problems with case with Dr. Greenspan." Pet'r Appl'n at pdf 20 (entry for Sept. 7, 2005). These discussions were a precursor to lengthy discussions between Mr. Shoemaker and Ms. McNett in January 2006. Id. at pdf 21. In this month, Ms. McNett reported that Dr. Greenspan was attempting to obtain additional supporting information from Dr. Hammond. Pet'r Status Rep't, filed Jan. 20, 2006.[10]

In May 2006, Ms. McNett's attorney was prepared to dismiss the case. See order, filed June 15, 2006. Ms. McNett did not submit a dispositive motion until approximately one year later. During this time, Ms. McNett's attorneys performed additional tasks but this work occurred after the case ceased having a reasonable basis.[11] Her case was dismissed for failing to submit preponderant evidence on November 28, 2007.

In short, Ms. McNett's case was filed without any medical records due to the press of the statute of limitations. She eventually filed medical records from several doctors. One doctor, Dr. Hammond, offered statements that could have been useful to establishing that she was entitled to compensation. However, when she was required to obtain an expert opinion to address topics not covered by Dr. Hammond, Ms. McNett's case faltered.

In being dismissed for failing to produce either a medical record or a medical opinion to support her claim, Ms. McNett's case resembles several other

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[10] Dr. Greenspan's invoices do not show that he was working on this task in January 2006. However, Dr. Greenspan stated in April 2006, he learned that a "Doctor Howard" has been dead "over ten years." Pet'r Appl'n at pdf 40-43.

[11] After the attorneys realized that Ms. McNett's case was unlikely to succeed, her attorneys faced a difficult situation. They owed a duty to Ms. McNett, their client, to represent her zealously and they simultaneously were obliged not to controvert an issue in litigation "'unless there is a basis for doing so that is not frivolous.'" In such situations, special masters do not abuse their discretion in refraining from awarding attorneys' fees for work performed when the case lacked a reasonable basis. Perreira v. Sec'y of Health & Human Servs., 27 Fed. Cl. at 35 (quoting Rule 3.1 of the ABA Model Rules of Professional Conduct), aff'd, 33 F.3d at 1377.

cases involving the hepatitis B vaccine. In those cases, special masters have awarded a range of attorneys' fees and costs. At the lower end of the spectrum, Hamrick, 2007 WL 4793152, *10, and Turner, 2007 WL 4410030, at *12, awarded approximately $5,000 and approximately $6,500, respectively. Examples of higher awards include Lamar, 2008 WL 3845165, at *16 (awarding approximately $15,000 in attorneys' fees and costs from request of approximately $17,500), and Goss v. Sec'y of Health & Human Servs., No. 99-407V, unpubl. (Fed. Cl. Spec. Mstr. Dec. 17, 2007) (awarding approximately $17,000 in attorneys' fees and costs and noting that respondent did not object to an award in this amount).

Ms. McNett's case more resembles Lamar or Goss than Hamrick or Turner. Dr. Hammond's reports suggest that Ms. McNett's case warranted an investment of some time to see whether Ms. McNett could be entitled to compensation. A review of these cases and the attorneys' timesheets suggests that the reasonable amount of effort from the attorneys to litigate the case through the entitlement phase was $17,000.

Ms. McNett has also requested $2,346.58 for work in litigating the dispute about attorneys' fees. See footnote 7 above. Ms. McNett is awarded the amount she requested for her reply brief and her response to a special master's order . No compensation is awarded for the opposition to the motion to strike ($336.58). Respondent's motion to strike was based upon Ms. McNett's failure to file a brief within the permitted time. See order, filed June 30, 2009, and order, filed Aug. 13, 2009. Thus, the need to file an opposition to respondent's motion to strike is attributable to Ms. McNett's counsel. If Ms. McNett were a paying client, it is unlikely that she would pay her attorney to correct his mistake. Thus, Ms. McNett is awarded $2,010 ($2,346.58 - $336.58) for litigating her fee request.

In sum, Ms. McNett is awarded **$19,010 in attorneys' fees.** This is $17,000 for the entitlement phase and $2,010 in the attorneys' fees phase.

## IV. Determining the Amount of Costs

Because Ms. McNett was found to be entitled to an award of her attorneys' fees, she is also entitled to an award of costs. 42 U.S.C. § 300aa-15(e)(1). Ms. McNett requests $5,203.85 in attorneys' costs. Pet'r Appl'n at pdf 2.[12] Ms. McNett also requests reimbursement of $1,012.26 in costs borne by her personally. Id. at pdf 5-6. Respondent objects to requests for attorneys' costs, but not to any of Ms. McNett's own costs. Resp't Supp. Resp., filed June 27, 2008.

The predominant item included among the attorneys' costs is an invoice from Dr. Greenspan for $4,125.00. Pet'r Appl'n at pdf 40-44. Dr. Greenspan requested compensation at an hourly rate ($250.00) that is consistent with rates awarded to some attorneys. Respondent objected to compensating Dr. Greenspan entirely. Resp't Supp. Opp'n, filed Aug. 7, 2009, at 21-25; Resp't Supp. Resp., filed June 27, 2008.

The decision to retain Dr. Greenspan was reasonable in part. He spent 10 hours reviewing medical records and drafting an opinion letter. To some extent, this work duplicates work performed by Mr. Shoemaker, who also reviewed the medical records. On the other hand, Dr. Greenspan adds something to the medical record review because he is a doctor and Mr. Shoemaker is not. Thus, Dr. Greenspan will receive some compensation for this work. Additionally, in April 2006, Dr. Greenspan spent two hours attempting to track down doctors who treated Ms. McNett. The invoice states that he "[s]earch[ed] for Kalamazoo Academy of Medicine [and] call[ed] Executive Director looking for contact telephone numbers for Doctor Sinnanian and Doctor Howard." Nothing suggests that these tasks required specialized medical training. Thus, Dr. Greenspan will be compensated because his work was not superfluous but he will be compensated at a rate for a paralegal. Additionally, Dr. Greenspan performed some work after May 2006, which is when the problems in Ms. McNett's case were recognized. Because this work was performed after the case was not supported by a reasonable basis, Dr. Greenspan is not compensated for this work. Consequently, Ms. McNett is awarded $2,500 in compensation for Dr. Greenspan's work. This is $1,625 less than the amount requested.

A secondary item is a request for $787.50 from Legal Nurse Associates, Inc. Pet'r Appl'n at pdf 52. Ms. McNett, personally, paid $250.00 of this charge. Id. at

[12] A lower amount appears at Pet'r Appl'n at pdf 35.

6. Respondent objected to this item. Resp't Supp. Resp., filed June 27, 2008. Ms. McNett explained that this service was hired to assist in preparing a chronology of medical records. Pet'r Reply, filed July 3, 2008, at 7; Pet'r Resp., filed Aug. 14, 2009, at 10-11. The charge is reasonable. See Desmore v. Sec'y of Health & Human Servs., No. 99-588V, 2006 WL 5668063, at *3 (Fed. Cl. Spec. Mstr. Aug. 14, 2006).

Ms. McNett has also requested award for other miscellaneous costs, such as the cost of obtaining medical records and photocopying. Respondent did not interpose an objection and these requests are adequately documented. Thus, these other costs are awarded in the amount requested.

In sum, Ms. McNett requested $5,203.85 in attorneys' costs. The only adjustment is a deduction of $1,625.00 for Dr. Greenspan's work. **Ms. McNett is awarded $3,578.85 in attorneys' costs. She is also awarded $1,012.26 for her own costs.**

## V. Conclusion

Ms. McNett failed to establish that she was entitled to compensation. Nevertheless, her case was supported by a reasonable basis and she is awarded compensation for her attorneys' fees and costs. A reasonable amount of attorneys' fees to develop her case, to recognize that the case was not going to succeed, to conclude the entitlement phase of the case, and to litigate the dispute over attorneys' fees is **$19,010.00.** Ms. McNett is also awarded **$3,578.85 in attorneys' costs and $1,012.26 for her own costs.**

The Clerk's Office is instructed to enter judgment in accord with this decision unless a motion for review is filed. A check in the amount of $22,588.85 ($19,010.00 + $3,578.85) shall be made payable to Ms. McNett and her attorney. A separate check in the amount of $1,012.26 shall be made payable to Ms. McNett solely.

IT IS SO ORDERED.

s/ Christian J. Moran
Christian J. Moran
Special Master