IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

KAREN TIUFEKCHIEV,	*	
	*	
Petitioner,	*	No. 05-437V
	*	Special Master Christian J. Moran
v.	*	
	*	
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	Filed: February 28, 2011
	*	
Respondent.	*	
	*	

Clifford J. Shoemaker, Shoemaker & Associates, Vienna, Virginia, for petitioner;
Michael P. Milmoe, United States Department of Justice, Washington, DC, for respondent.

DECISION ON ATTORNEYS' FEES AND COSTS[*]

Karen Tiufekchiev sought compensation pursuant to the National Vaccine Injury Compensation Program, established in 42 U.S.C. §§ 300aa-1 et seq. (1994). Ms. Tiufekchiev claimed that the hepatitis B vaccine caused her to develop myalgia or fibromyalgia. Ms. Tiufekchiev was denied compensation in a published decision filed on July 24, 2008.

Ms. Tiufekchiev now seeks an award for her attorneys' fees and costs pursuant to 42 U.S.C. § 300aa–15(e). Ms. Tiufekchiev is awarded **$24,034.82 in attorneys' fees and $7,574.01 in costs**.

[*] 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).

I. Factual and Procedural Background

The facts about Ms. Tiufekchiev's medical history were set forth in the July 24, 2008 decision. Thus, the facts are summarized here. When Ms. Tiufekchiev was 38 years old, she received a dose of the hepatitis B vaccine. She began to experience some itching on her arms approximately two weeks later. She received a second dose of the hepatitis B vaccine. She again had itchiness. She also had a tingling sensation. She sought treatment from medical doctors with various specialties. Some doctors attributed her problem to degenerative disk disease. One doctor, Dr. Ruben Cintron, stated that Ms. Tiufekchiev "had a postvaccination reaction." Exhibit 5 at 1.

Ms. Tiufekchiev filed the petition for compensation and one medical record on April 1, 2005. She filed additional medical records approximately three weeks later. The case was transferred to the undersigned in 2006. Respondent filed her report, pursuant to Vaccine Rule 4, that summarized the medical records, including the statement of Dr. Cintron. Respondent argued that Ms. Tiufekchiev was not entitled to compensation. Respondent also stated that if "the Court intends to rely on treating physician statements as evidence of causation in this case, respondent requests the opportunity to investigate the basis of these statements with the treating physician." Resp't Rep't at 14.

Ms. Tiufekchiev filed a report from Dr. Joseph Bellanti, an immunologist. Dr. Bellanti opined that although a degenerative disc disease caused some of Ms. Tiufekchiev's problems, the hepatitis B vaccine caused "symptoms" of an unnamed condition. Exhibit 22 at 6.

Respondent filed the report of Dr. Lawrence Kagen, a rheumatologist. Dr. Kagen opined that the evidence did not support a conclusion that the hepatitis B vaccine caused Ms. Tiufekchiev's problems. According to Dr. Kagen, other factors such as a disc disease were much more likely to be the cause of Ms. Tiufekchiev's symptoms. Exhibit A at 10. The case was set for a hearing.

During a pre-trial conference on October 22, 2007, Ms. Tiufekchiev stated that she intended to rely upon written statements of her treating doctors to support her claim. Respondent, in accord with her report, requested an opportunity to explore the basis for those statements. Ms. Tiufekchiev opposed this request and explained that she was not calling any treating doctor to testify at the upcoming hearing. Thus, to preserve the status quo and to keep the hearing date, an order was issued directing neither party to contact any treating doctors and deferring resolution of respondent's request to communicate with any treating doctors until after the hearing. Order, filed October 23, 2007.

A hearing was held on October 30, 2007. After the hearing, the parties filed briefs on two different topics. First, respondent formally requested an opportunity to interview Dr. Cintron. Ms. Tiufekchiev opposed this motion, and, eventually, an oral argument was held on

this question. Second, the parties filed briefs addressing whether Ms. Tiufekchiev was entitled to compensation.

The decision on entitlement made moot the question of interviewing Dr. Cintron. Order, concomitantly filed July 24, 2008. The July 24, 2008 entitlement decision found that Ms. Tiufekchiev failed to establish the three elements set forth in Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Ms. Tiufekchiev's proof was particularly weak with regard to the third element, which is "a showing of a proximate temporal relationship between vaccination and injury." Ms. Tiufekchiev introduced no evidence directly addressing this point. Decision, 2008 WL 3522297, at *5-7.

Ms. Tiufekchiev's proof was also lacking with regard to the first Althen element, which is "a medical theory causally connecting the vaccination and the injury." On this point, Ms. Tiufekchiev introduced evidence in that Dr. Bellanti offered two theories, polyclonal activation and bystander effect. However, Ms. Tiufekchiev offered no evidence that these theories are reliable means to explain how the hepatitis B vaccine can cause Ms. Tiufekchiev's condition. Decision, 2008 WL 3522297, at *8-9.

The July 24, 2008 decision also found that Ms. Tiufekchiev failed to meet her burden of proof regarding the second element from Althen, which is "a logical sequence of cause and effect showing that the vaccination was the reason for the injury." On this element, Ms. Tiufekchiev presented an argument that had some value. However, Ms. Tiufekchiev's argument was, ultimately, not persuasive. Decision, 2008 WL 3522297, at *10-13.

After the July 24, 2008 decision was issued, Ms. Tiufekchiev could have filed a motion for review. Vaccine Rule 23. Her attorneys' time sheets indicate that the attorneys considered such an action. However, Ms. Tiufekchiev did not file a motion for review. Thus, judgment in favor of respondent was entered on September 10, 2008.

On March 8, 2009, Ms. Tiufekchiev filed the pending motion for attorneys' fees and costs. Respondent filed an opposition on March 23, 2009.

In context of extending the time for Ms. Tiufekchiev to file a reply brief, the undersigned issued an order directing Ms. Tiufekchiev to address the performance of her attorney. This order noted that Ms. Tiufekchiev had failed to introduce any evidence to support Ms. Tiufekchiev's burden for the third prong from Althen. Therefore, the order requested comments as to whether the amount of attorneys' fees and costs should be reduced. Order, filed May 1, 2009.

Ms. Tiufekchiev did not respond to the May 1, 2009 order within the time expected, despite receiving several extensions to do so. After the last deadline was missed, the undersigned, sua sponte, extended the time for a response due to the "importance of the issue." Order, filed July 21, 2009. Ms. Tiufekchiev filed a reply on August 14, 2009. Respondent filed a sur-response.

Respondent's sur-response called into question whether Ms. Tiufekchiev's case satisfied the reasonable basis standard. Respondent postulated that if there were no evidence to satisfy the temporal relationship prong of Althen,

> petitioner's case may well have lacked a reasonable basis at the time of filing. In any event, if petitioner could not produce any evidence to satisfy the temporal relationship prong, no reasonable basis for proceeding existed at least at the time that petitioner's counsel knew, or reasonably could be expected to know, that petitioner could not satisfy her burden of proof on the temporal relationship requirement.

Resp't Sur-reply, filed Oct. 2, 2009, at 3. This questioning about the reasonable basis, in turn, prolonged the dispute about attorneys' fees. The parties submitted another set of briefs.

Consideration of Ms. Tiufekchiev's motion for attorneys' fees was further delayed because of the pendency of Supreme Court's decision in Hardt v. Reliance Standard Life Co., __ U.S. __, 130 S.Ct. 2149, which was issued on May 24, 2010. It appeared that Hardt would offer guidance about the circumstances in which a court may award attorneys' fees to a plaintiff who does not prevail on the merits of the lawsuit and this guidance might be useful in interpreting the "reasonable basis" standard in the Vaccine Act. After Hardt was issued, the parties filed yet another round of briefs.

Finally, after review of the briefs had started, Ms. Tiufekchiev was given, sua sponte, an opportunity to supplement the fee petition to include requests for time preparing the briefs related to the fee application itself. This request was extended because Ms. Tiufekchiev's earlier briefs had not requested additional compensation and because the briefs were filed in response to orders. After Ms. Tiufekchiev amended her fee application, respondent replied. With these briefs, the case is ready for adjudication.

The main issue is whether Ms. Tiufekchiev is entitled to any attorneys' fees and costs. She is entitled to only a portion. Her entitlement is limited because, as explained in section II below, she satisfied the reasonable basis standard for only some of the case. Ms. Tiufekchiev lacked a reasonable basis to proceed to the hearing. This finding regarding reasonable basis is a prerequisite to the other disputed issues, which are the amount of attorneys' fees (section III) and the amount of costs (section IV).

II. Entitlement to Attorneys' Fees and Costs

In the Vaccine Program, when petitioners fail to establish that they are entitled to compensation, special masters enjoy 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 has argued that Ms. Tiufekchiev's case lacked a reasonable basis.[1] Resp't Sur-Reply, filed Oct. 2, 2009, at 3. As discussed below, although Ms. Tiufekchiev's case was supported by a reasonable basis at some time, the reasonable basis had ceased before the case proceeded to a hearing.

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. 1994). Due to its importance, the facts about this case are set forth to facilitate the interpretation of reasonable basis.

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.

[1] Respondent did not challenge Ms. Tiufekchiev's "good faith" in bringing the petition.

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 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 context for the Federal Circuit's discussion of "reasonable basis" in its Perreira decision.

The Federal Circuit also affirmed the chief special master's decision that the expert report did not provide the Perreiras with a reasonable basis for continuing the case 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.[2] Perreira demonstrates that a petitioner's introduction of an expert's opinion does not automatically give the petitioner a reasonable basis for proceeding. Some expert opinions – the ones that are merely "unsupported speculation" – fall short of reaching the level of reasonable basis.

After Perreira, relatively few cases have discussed "reasonable basis." Those cases have stated that reasonable basis is an objective test. In contrast, "good faith," which is paired in the statute with "reasonable basis," is a subjective finding. See Turner v. Sec'y of Health & Human Servs., No. 99-544V, 2007 WL 4410030, at *6-8 (Fed. Cl. Spec. Mstr. Nov. 30, 2007). One way to establish the reasonable basis for a petition is to present medical records or opinions as required by sections 11(c) and 13(a) of the statute.

The quality and quantum of evidence sufficient to meet the reasonable basis standard can be placed on a continuum with other evidentiary standards. Section 15(e) creates three groups of

[2] 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 n.3 (Fed. Cir. 2010).

petitioners who are divided by the evidence in their case. The first group of petitioners is comprised of those petitioners who receive compensation. These successful petitioners are entitled to an award of attorneys' fees and costs. These petitioners are successful because they advance a preponderance of the evidence. 42 U.S.C. § 300aa–13(a)(1)(A).

Petitioners who have not received compensation comprise the second and third groups. In terms of an evidentiary standard, these petitioners have not met their burden of submitting preponderant evidence. The class of unsuccessful petitioners is further divided by section 15(e) into two groups. Some unsuccessful petitioners have a "reasonable basis" for their petition. If they are found to have a reasonable basis, the special master has discretion to award attorneys' fees and costs. Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1520 (Fed. Cir. 1993) (citing Perreira, 27 Fed. Cl. at 31 (1992)). By conditioning an award of attorneys' fees and costs to unsuccessful petitioners upon a finding of reasonable basis, section 15(e) necessarily creates another group of petitioners. These are unsuccessful petitioners whose claims are not supported by a reasonable basis.

To summarize, the three groups of petitioners for purposes of awarding attorneys' fees and costs are: (1) successful petitioners, who are entitled to an award of attorneys' fees and costs, (2) unsuccessful petitioners whose cases are supported by a reasonable basis and who may be awarded attorneys' fees and costs, and (3) unsuccessful petitioners whose cases are not supported by a reasonable basis and who are not entitled to an award of attorneys' fees and costs. Consequently, the reasonable basis threshold must fall someplace between "no evidence" and "preponderant evidence." In locating this standard, Perreira offers guidance because Perreira demonstrates that "some evidence" – which in Perreira was the opinion of a doctor – does not fulfill the reasonable basis standard always.

These standards will be used to evaluate Ms. Tiufekchiev's request for attorneys' fees and costs. Because she did not receive compensation, she is entitled to attorneys' fees and costs only if she establishes a reasonable basis for her claim that the hepatitis B vaccine caused her injury.

B. Whether Ms. Tiufekchiev Satisfies the Reasonable Basis Standard

The primary question is whether Ms. Tiufekchiev possessed a reasonable basis to take this case to hearing. As explained below, the answer is no, largely because the facts of Ms. Tiufekchiev's case are comparable to the facts in Perreira. The finding that Ms. Tiufekchiev's case lacked a reasonable basis to proceed to a hearing is the foundation for the secondary question. Respondent argues that if the "case lacked a reasonable basis for a hearing, then the case may well have lacked a reasonable basis at the time of filing." Resp't Sur-reply, filed Oct. 2, 2009, at 3. This argument is rejected based upon recent decisions by special masters.

1. Reasonable Basis to Proceed to a Hearing

Here, Ms. Tiufekchiev cannot establish a reasonable basis for her claim that her case satisfied the temporal relationship prong from Althen. The simple reason for finding that Ms. Tiufekchiev's case does not meet the evidentiary standard is that for this element, there is no evidence. Without any evidence on an element that Ms. Tiufekchiev is required to prove, an objective observer cannot believe that Ms. Tiufekchiev had any chance of prevailing.

The record appears to be quite clear that there is no evidence. Several searches have been made looking for evidence regarding the appropriate temporal relationship. Ms. Tiufekchiev did not cite any evidence in her brief filed after the hearing. See Pet'r Br., filed March 18, 2008. The basis for the underlying decision denying Ms. Tiufekchiev compensation was a finding that Ms. Tiufekchiev did not present any evidence regarding the appropriate temporal relationship. Decision, 2008 WL 3522297, at *5-7. Ms. Tiufekchiev's attorneys explored filing a motion for review, but did not file a motion for review. See Pet'r Appl, at pdf 9 (listing time spent preparing motion for review). One logical inference is that a motion for review was not filed because the attorneys realized that it was not likely to succeed because the decision was accurate.

In the context of the attorneys' fees motion, Ms. Tiufekchiev was invited to discuss evidence regarding the appropriate temporal relationship. Order, filed May 1, 2009. Ms. Tiufekchiev's brief argues that Dr. Bellanti's opinion was "based on the theory of rechallenge, which by its nature implies the appropriate temporal relationship." See Pet'r Br., filed Aug. 14, 2009, at 7. In another brief, Ms. Tiufekchiev argues that the onset of Ms. Tiufekchiev's symptoms occurred after she received the hepatitis B vaccine. Pet'r Br., filed July 30, 2010, at 7-10.

These arguments are not persuasive. It has long been held that the manifestation of a condition after the vaccination is not sufficient, by itself, to establish a causal relationship between the vaccination and the condition. Grant v. Sec'y of Health & Human Servs., 956 F.2d 1144, 1148 (Fed. Cir. 1992). The third prong of Althen requires that the interval between vaccination and onset of disease is a "medically appropriate" amount of time. See Bazan v. Sec'y of Health & Human Servs., 539 F.3d 1347 (Fed. Cir. 2008) (finding that the special master did not err in finding that the petitioner had failed to establish that her injury developed in a "medically appropriate" time after vaccination). In a decision issued before the hearing in Ms. Tiufekchiev's case, the Federal Circuit explained that "without some evidence of temporal linkage, the vaccination might receive blame for events that occur weeks, months, or years outside of the time in which scientific or epidemiological evidence would expect an onset of harm." Pafford v. Sec'y of Health & Human Servs., 451 F.3d 1352, 1358 (Fed. Cir. 2006). This "evidence of temporal linkage" was missing from Ms. Tiufekchiev's case as discussed in the July 24, 2008 decision, and another review of the record has not located any evidence that was overlooked in the July 24, 2008 decision.

The lack of evidence on a required element distinguishes Ms. Tiufekchiev's case from the numerous other cases in which petitioners presented a comprehensive expert opinion but, after weighing the testimony, the special master was not persuaded by the petitioners' evidence. In these cases, the weight of the evidence usually warrants a finding of reasonable basis even if the weight of the evidence did not satisfy the preponderance of the evidence standard. In contrast, in Ms. Tiufekchiev's case, on the issue of the medically appropriate time, there was no evidence. The evidence did not have to be weighed. Thus, Ms. Tiufekchiev's evidence did not even come close to satisfying the preponderance of the evidence standard.

The lack of evidence links Ms. Tiufekchiev's case to one of the earliest cases discussing the reasonable basis standard. In this case, a special master indicated that reasonable basis should be measured by examining the case through the posture of summary judgment standards. Essentially, if a petitioner's case could be dismissed on the basis of summary judgment, then the petitioner's case lacked a reasonable basis. Chronister v. Sec'y of Health & Human Servs., No. 89-41V, 1990 WL 293438, at *1 (Cl. Ct. Spec. Mstr. Dec. 4, 1990). Here, the lack of evidence on an essential element of Ms. Tiufekchiev's case made it vulnerable to dismissal on summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (stating summary judgment is appropriate "against a party who fails to make a showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").[3]

In the absence of evidence that could support a finding on the temporal relationship prong, Ms. Tiufekchiev presents two other arguments. First, Ms. Tiufekchiev observes that respondent's brief did not challenge Ms. Tiufekchiev's evidence regarding the temporal relationship. Pet'r Br., filed Aug. 14, 2009, at 7, citing Resp't Br., filed May 27, 2008, at 17. Although this point is accurate, it is irrelevant. Ms. Tiufekchiev bears the burden of presenting evidence that entitles her to compensation, or failing that showing, the burden of demonstrating that her case was supported by a reasonable basis. Murphy v. Sec'y of Health & Human Servs., 30 Fed. Cl. 60, 62 (1993), aff'd, 48 F.3d 1236 (Fed. Cir. 1995) (table). Ms. Tiufekchiev failed to meet this burden.

Ms. Tiufekchiev's second argument is that "if the Special Master had concerns about Dr. Bellanti's testimony, questions could have been directed to him during or after the hearing, something that all Special Masters, including this Special Master, have done." Like the previous argument, this argument is not based upon the evidence. Furthermore, the argument implicitly

[3] Alternatively, because Dr. Bellanti testified, the appropriate analogy may be to Rule 52(c) of the Rules of the Court of Federal Claims. This rule, which applies to proceedings in the Vaccine Program only as an analogy, states "If a party has been fully heard on an issue during trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable ruling on that issue." For a case interpreting Rule 52(c), see IMS Engineers-Architects, P.C. v. United States, 92 Fed. Cl. 52, 74-75 (2010).

shifts responsibility for developing petitioner's case from her attorney to the special master. This is not appropriate. The burden for presenting evidence rests with the petitioner.[4]

Ultimately, Ms. Tiufekchiev's case is comparable to Perreira. In Perreira, the petitioners presented testimony of an expert but this testimony did not support a finding of reasonable basis. Similarly, here, Ms. Tiufekchiev presented the testimony of Dr. Bellanti and Dr. Bellanti's opinion does not meet a reasonable basis. His testimony, indeed the entire record, lacked any testimony about the medically appropriate interval. Ms. Tiufekchiev's counsel knew or should have known that without evidence on this point, petitioner could not prevail. Thus, there was no reasonable basis to proceed to hearing.[5] Consequently, the outcome in Ms. Tiufekchiev's case, like the result in Perreira, is that attorneys' fees and costs may not be awarded for the hearing.

2. Reasonable Basis for Filing the Case

The finding that Ms. Tiufekchiev's case lacked a reasonable basis for the hearing is the starting point for respondent's second argument. Respondent contends that if Ms. Tiufekchiev did not possess evidence to establish an appropriate medical interval, her "case may well have lacked a reasonable basis at the time of filing." Resp't Sur-Reply, filed Oct. 2, 2009, at 3; accord Resp't Br., filed July 30, 2010, at 9.

The factors a special master should consider in determining whether a petitioner possessed a reasonable basis for filing a petition have not been articulated by the Federal Circuit. The answer to this question is not found in Perreira because the special master found that there was a reasonable basis initially and this finding was not appealed. So, the Federal Circuit did not have occasion to discuss the reasonable basis standard at the onset of a case.

In the absence of instruction from the Federal Circuit, special masters have looked to a variety of factors with an eye toward finding reasonable basis for at least part of the case. See, e.g., Lamar v. Sec'y of Health & Human Servs., No. 99-584V, 2008 WL 3845157, at *4-5 (Fed. Cl. Spec. Mstr. July 30, 2008). In the absence of any guidance from an appellate authority, these more recent cases will be followed.

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[4] For example, Perreira does not state that a special master may find a case lacked reasonable basis only after first warning the petitioner.

[5] In this regard, it is worth noting again that Ms. Tiufekchiev's case failed because she failed to present any evidence on one of the three Althen elements. The case resolved because of a lack of evidence, not a weighing of evidence. Decision, 2008 WL 3522297, at *5-7. For example, if the evidentiary presentation had stopped after Dr. Bellanti's testimony had concluded, the result would have been the same. Although respondent presented the testimony of Dr. Kagen, his testimony was not evaluated in the decision.

Ms. Tiufekchiev had a reasonable basis for developing her claim. Her retention of Dr. Bellanti, an immunologist, led to his filing a report that asserted that the hepatitis B vaccination caused her symptoms. Under the facts and circumstances of this case, Dr. Bellanti's report validates the efforts to acquire medical records and to file pre-trial pleadings.[6] In short, the case was supported by a reasonable basis until the time of hearing.

Given the finding that Ms. Tiufekchiev's case was supported by a reasonable basis for part of the litigation, Ms. Tiufekchiev may be awarded attorneys' fees and costs for this portion of the case at the discretion of the special master. 42 U.S.C. § 300aa–15(e)(1) (stating the special master "may" award attorneys' fees); Saxton, 3 F.3d at 1520 (stating "the statute clearly gives [a special master] discretion over whether to make such an award"). The reasonable amount of attorneys' fees and the reasonable amount of costs are taken up in section III and section IV, respectively.

III. Reasonable Amount of Attorneys' Fees

Reasonable attorneys' fees are determined using a two-part process. The initial determination uses the lodestar method – "'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). The second step is adjusting the lodestar calculation upward or downward. Id. at 1348.

When a party seeks an award of attorneys' fees, the fee-applicant bears the burden of showing the reasonableness of the request. "The burden is not for the court to justify each dollar or hour deducted from the total submitted by counsel. It remains counsel's burden to prove and establish the reasonableness of each dollar, each hour, above zero." Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1210 (10th Cir. 1986).[7]

With regard to the amount of attorneys' fees, the parties have disputes about the reasonable attorneys' fees for Mr. Shoemaker and for his associates. The more contentious issues relate to Mr. Shoemaker's fees. Thus, they are taken up first.

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[6] Dr. Bellanti's report, however, contained no information about the appropriate temporal relationship between the administration of the hepatitis B vaccine and the onset of Ms. Tiufekchiev's symptoms. Without any evidence on this point, there was no reasonable basis to proceed to a hearing.

[7] Although Mares did not interpret the attorneys' fee provision of the Vaccine Act, fee-shifting statutes are interpreted similarly. Avera, 515 F.3d at 1348.

A. Mr. Shoemaker's Attorneys' Fees

1. Part One: Determining the Lodestar

a. Reasonable Hourly Rate for Mr. Shoemaker

In her motion for attorneys' fees and costs, Ms. Tiufekchiev requests compensation for Mr. Shoemaker at various hourly rates, ranging from $250 in 2004 to $336.58 in 2009. Pet'r App'n at pdf 2-6. Ms. Tiufekchiev did not support these requested rates with specific evidence, such as affidavits from other attorneys about the reasonable rate. Instead, Ms. Tiufekchiev implicitly relies upon an arrangement that Mr. Shoemaker has reached with the Department of Justice in which Mr. Shoemaker will propose certain hourly rates and the Department of Justice will not object to those rates. See Sabella v. Sec'y of Health & Human Servs., No. 02-1627V, 2008 WL 4426040, at *6 (Fed. Cl. Spec. Mstr. Sept. 23, 2008), aff'd in non-relevant part and rev'd in non-relevant part, 86 Fed. Cl. 201, 207-08 (2009).

Special masters have consistently accepted this arrangement as a reasonable method for setting Mr. Shoemaker's hourly rates. See Sabella; see also Rodriguez v. Sec'y of Health & Human Servs., No. 06-559V, 2009 WL 2568468, at *14 n. 46 (Fed. Cl. Spec. Mstr. July 27, 2009) (discussing Mr. Shoemaker's hourly rate), motion for review denied, 91 Fed. Cl. 453 (2010), aff'd, No. 2010-5093, 2011 WL 420676 (Fed. Cir. Feb. 9, 2011). Consequently, these rates will be used in the first part (the lodestar part) of the two-step process for determining the reasonable amount of attorneys' fees set in Avera.

b. Determination of the Reasonable Number of Hours for Mr. Shoemaker

The second factor in the lodestar formula is the reasonable number of hours. Quoting a decision by the United States Supreme Court, the Federal Circuit has explained some of the limits of the number of hours for which compensation may be sought.

> The [trial forum] also should exclude from this initial fee calculation hours that were not "reasonably expended.". . . . Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority."

Saxton, 3 F.3d at 1521 (emphasis in original) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)). One reason a trial court possesses discretion to reduce the number of hours is that a

trial court "is somewhat of an expert in the time that is required to conduct litigation." Case v. Unified School Dist. No. 233, Johnson County, Kansas, 157 F.3d 1243, 1256 (10th Cir. 1998). A decision by a special master to reduce the number of hours is entitled to deference because special masters are familiar with the litigation. Saxton, 3 F.3d at 1521 (reversing decision of a judge of the Court of Federal Claims ruling that the special master acted arbitrarily in reducing number of hours); Guy v. Sec'y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997).

Here, Ms. Tiufekchiev's case can be divided into three discrete periods of time. The first period is the time from the beginning of the case until the hearing. As discussed above, Ms. Tiufekchiev's case was supported by a reasonable basis during this time. The second period is the time from the hearing through the conclusion of the entitlement phase. As discussed above, Ms. Tiufekchiev's case was not supported by a reasonable basis during this period. The third and final period is the time spent litigating the attorneys' fees and costs.

(1) Development of Ms. Tiufechiev's case

From the date when Mr. Shoemaker first communicated with Ms. Tiufechiev until October 29, 2007, the day before the hearing, Mr. Shoemaker spent 40.5 hours developing her case. Given Mr. Shoemaker's various hourly rates, the amount requested for Mr. Shoemaker is $12,287.00.

Respondent questioned the reasonableness of three activities performed by Mr. Shoemaker in the phase of developing the case: (a) meeting with Dr. Penoel, (b) traveling and meeting with Dr. Bellanti, and (c) reviewing materials from Dr. Greenspan. Resp't Opp'n at 2. Ms. Tiufekchiev has supplied a reasonable explanation for the meetings with Dr. Bellanti, who works in Washington, D.C. near Mr. Shoemaker. Ms. Tiufekchiev has not persuasively explained the reasonableness of working with Dr. Penoel whose records were never filed into this case. Ms. Tiufekchiev also has not persuasively demonstrated that Dr. Greenspan's involvement was necessary as discussed below. Because a large portion of Dr. Greenspan's work was redundant, Mr. Shoemaker's associated work is also redundant. So, a deduction of $600.00 for Mr. Shoemaker's work with Dr. Penoel and $186.00 for Mr. Shoemaker's work with Dr. Greenspan will be made. Consequently, for this period of time, Mr. Shoemaker is compensated $11,501.00.

(2) Hearing until Conclusion of Entitlement Phase

The next phase spans from October 30, 2007, the date of the hearing, until July 25, 2008. During this time, Mr. Shoemaker spent 24.1 hours, worth $7,664.93. Mr. Shoemaker's primary activities were participating in the October 30, 2007 hearing and addressing respondent's motion to interview Dr. Cintron.

As found above, Ms. Tiufekchiev's case was not supported by a reasonable basis. The case should not have proceeded to hearing because Mr. Shoemaker knew or should have known

that the case lacked any evidence on Althen prong 3. When a case lacks a reasonable basis, special masters may not award attorneys' fees and costs. See Perreira.

Nevertheless, Ms. Tiufekchiev is awarded compensation for Mr. Shoemaker's work relating to Dr. Cintron. Mr. Shoemaker had a reasonable basis for opposing respondent's motion to interview Dr. Cintron because in the usual course of proceedings, respondent's request to gather information from Dr. Citron would have been resolved before the hearing, not after the hearing. This practice was not followed in Ms. Tiufekchiev's case because the parties' positions regarding Dr. Citron were not clear until the October 22, 2007 pre-trial conference. Before this conference, Ms. Tiufekchiev had neither declared her intention to rely upon written statements of Dr. Citron nor announced that she was not calling Dr. Citron as a testifying witness. Respondent also had not transformed the request presented in her report to explore the basis of any treating doctor's statement into a formal motion requesting permission to interview Dr. Citron. For these reasons, Ms. Tiufekchiev will be compensated for Mr. Shoemaker's work regarding Dr. Citron. This amount is $3,740.03.

(3) Attorneys' Fees

Ms. Tiufekchiev's fee application includes a request for compensation for time spent by Mr. Shoemaker in preparing the fee application. Respondent objected to the amount of time (two hours) spent by Mr. Shoemaker in reviewing the fee petition. Ms. Tiufekchiev stated that Mr. Shoemaker was reviewing the billing because "the attorney who is ultimately responsible for the application [should] make sure it is in good order." Pet'r Reply at 3.

Two hours to review this fee application is toward the high bound of a reasonable amount of time. Previously, Mr. Shoemaker has been directed to submit fee applications that are more accurate. Valdes v. Sec'y of Health & Human Servs., No. 99-310V, 2009 WL 1456437, at *4 (Fed. Cl. Spec. Mstr. April 30, 2009), aff'd in part, rev'd in part and remanded, 89 Fed. Cl. 415, 425 (2009). Apparently, Mr. Shoemaker is spending more time reviewing submissions made by his firm. Thus, this activity will be compensated entirely.[8]

c. Calculation of Mr. Shoemaker's Lodestar Value

Ms. Tiufekchiev is awarded compensation for the following activities of Mr. Shoemaker:

[8] Respondent noted that "Assuming petitioner's time records and cost expenditures are kept contemporaneously, as required, it is unclear to respondent why such a task took two hours." Resp't Surreply at 7. As Mr. Shoemaker's time records become more accurate, the time spent in reviewing fee applications will decline. However, work in Ms. Tiufekchiev's case began in 2005, and Mr. Shoemaker, apparently, required two hours to confirm the accuracy of those older entries.

Development of the Case	$11,501.00
Dr. Citron	$3,740.03
Attorneys' Fees	$740.48
TOTAL	$15,981.51

2. Part Two: Adjustments to the Lodestar

After the lodestar amount is determined, the trial forum may adjust the lodestar upward or downward. Avera, 515 F.3d 1348, citing Blum. Departures away from the lodestar are appropriate in "rare cases." Welch v. Metropolitan Life Ins. Co., 480 F.3d 942, 946 (9th Cir. 2007). One factor that may be considered in lowering the lodestar amount is the quality of representation. Id. at 948; see also Gisbrecht v. Barnhart, 535 U.S. 789, 808 (2002) (stating, in the context of case seeking social security benefits, that "[c]ourts that approach fee determinations by looking first to the contingent-fee agreement, then testing it for reasonableness, have appropriately reduced the attorney's recovery based on the character of the representation and the results the representative achieved.").

Here, the finding that Ms. Tiufekchiev's case lacked a reasonable basis to proceed to a hearing makes further adjustment to the lodestar calculation unnecessary. Thus, Ms. Tiufekchiev is awarded the full lodestar value of Mr. Shoemaker's work.

B. Attorneys' Fees for Mr. Shoemaker's Associates

Ms. Tiufekchiev has also requested an award for work performed by people supporting Mr. Shoemaker, primarily associate attorneys Renee Gentry and Sabrina Knickelbein. Respondent has not challenged the hourly rates sought for work performed by Ms. Gentry or Ms. Knickelbein. Similar to the question about Mr. Shoemaker's compensation, the predominant issue is the reasonable basis for activities after the October 30, 2007 hearing.

Before the October 30, 2007 hearing, these people spent 44.75 hours developing Ms. Tiufekchiev's case. These hours are credited in full for an award of $8,856.75.

After the October 30, 2007 hearing, Ms. Gentry and Ms. Knickelbein spent nearly 13 hours working on the issue relating to Dr. Citron. Ms. Tiufekchiev is award $2,830.00 for this work. Other work performed during this time was not supported by a reasonable basis and, therefore, is not compensable.

The work related to winding up the case, such as preparing an election to file a civil action, is also compensable. Work preparing the request for attorneys' fees and costs is also

compensable. This finding also extends to include the extensive briefing submitted by Ms. Tiufekchiev regarding reasonable basis.

Ms. Tiufekchiev is awarded the following amounts for people associated with Mr. Shoemaker:

Development of the Case	$8,856.75
Dr. Citron	$2,830.00
Attorneys' Fees (initial)	$131.00
Attorneys' Fees (supplemental)	$5,092.31
TOTAL	$8,053.31

Consequently, Ms. Tiufekchiev is awarded $24,034.82 ($15,981.51 + $8,053.31) in attorneys' fees.

IV. Costs

Ms. Tiufekchiev has also requested an award of her attorneys' costs, totaling $12,442.77. She did not seek reimbursement for any costs personally incurred. For the reasons explained below, Ms. Tiufekchiev is awarded **$7,574.01**.

Ms. Tiufekchiev's costs can be grouped in three components. The largest single item is the cost for Dr. Bellanti's work, which is $7,350.00. The next item is work performed by Dr. Mark Greenspan, which is $4,200.00. The final set is comprised of miscellaneous expenses such as postage and the cost of obtaining medical records. Items within the last set have been adequately documented and are reimbursed in full.

Ms. Tiufekchiev is awarded most, but not all, of the amount requested for Dr. Bellanti's work. For the reasons explained in section II above, Ms. Tiufekchiev's claim for costs is circumscribed by the finding that her case lacked a reasonable basis to proceed to a hearing. Thus, Dr. Bellanti's time spent at the hearing is not compensable.

Dr. Bellanti's invoice indicates that he spent six hours at the hearing on October 30, 2007. Because there was not a reasonable basis to proceed to the hearing, Ms. Tiufekchiev cannot be awarded reimbursement for this expense. Thus, $1,800 (6 hours at $300 per hour) is deducted from the amount of compensation requested for Dr. Bellanti's work.

For Dr. Greenspan, Ms. Tiufekchiev requests an award of $4,200 for Dr. Greenspan's work. Pet'r Fee Appl'n at pdf page 15. Dr. Greenspan's invoice shows that he performed

different tasks. First, in February 2007, he spent 8.5 hours reviewing the medical records, constructing a chronology, and analyzing the case. Second, in April 2007, he researched medical articles linking fibromyalgia and the hepatitis B vaccination. He spent 1.25 hours on this task. Third, he reviewed the material presented by respondent's expert and spent 2.25 hours doing so. Pet'r Fee Appl'n at pdf page 14-15.

Ms. Tiufekchiev has not established the reasonableness of Dr. Greenspan's work in preparing a chronology from the medical records. This work repeated work done by Dr. Bellanti. Experts should not be compensated for duplication in work. Morse v. Sec'y of Health & Human Servs., 89 Fed. Cl. 683, 687 (2009); Kantor v. Sec'y of Health & Human Servs., No. 01-679V, 2007 WL 1032378, at *4-8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).

The second task performed by Dr. Greenspan was searching for medical articles. Ms. Tiufekchiev is entitled to compensation for this work because Dr. Greenspan's work did not duplicate work performed by other people. Notably, neither Dr. Bellanti nor Ms. Gentry located articles found by Dr. Greenspan. For the process of searching for medical articles, Dr. Greenspan will be compensated at $275 per hour. This rate is in accord with other decisions. Savin v. Sec'y of Health & Human Servs., No. 99-537V, 2008 WL 2066611, at *4-5 (Fed. Cl. Spec. Mstr. April 22, 2008) (awarding Dr. Greenspan $275 for searching for literature), aff'd, 85 Fed. Cl. 313 (2008); Ray v. Sec'y of Health & Human Servs., No. 04-184V, 2006 WL 1006587, at *11-12 (Fed. Cl. Spec. Mstr. Mar. 30, 2006) (compensating expert at $250 for searching for literature).

The remaining task of Dr. Greenspan is reviewing the reports of the expert retained by respondent. Pet'r Fee Appl'n at pdf page 15. Of all the tasks performed by Dr. Greenspan, this task is probably the one that is most appropriately performed by a nontestifying expert.[9] As a nontestifying expert, Dr. Greenspan could acknowledge any relative strengths in respondent's position (or any relative weaknesses in Ms. Tiufekchiev's position) with more candor than Dr. Bellanti because Dr. Greenspan is insulated from having to disclose his assessment. Moreover, Dr. Bellanti's invoice does not include time spent reviewing respondent's expert report. Thus, Dr. Greenspan's work did not duplicate work performed by Dr. Bellanti.

Dr. Greenspan, presumably, drew upon his training as a doctor and as a lawyer in reviewing the report of respondent's doctor. Dr. Greenspan's knowledge about medicine allowed him to evaluate the accuracy and reliability of the report. His experience as an attorney assisted "in crafting lines of examination for opposing witnesses." Pet'r Reply at 6. Thus,

[9] Ms. Tiufekchiev asserted that "the use of such consultants is standard operating procedure in both civil litigation and in this program." Pet'r Reply at 5. This assertion is not accurate. Among petitioners' attorneys who appear with some regularity in the Vaccine Program, only Mr. Shoemaker routinely seeks compensation for non-testifying consultants. Other attorneys represent their clients competently and achieve results comparable to the results achieved by Mr. Shoemaker.

because of Dr. Greenspan's specialization in two fields, a reasonable rate of compensation for Dr. Greenspan is $350 per hour for reviewing reports of other doctors.

Ms. Tiufekchiev has demonstrated that the following is a reasonable amount of compensation for Dr. Greenspan.

Summary of Award for Dr. Greenspan

Activity	Number of Hours	Hourly Rate	Subtotal
Reviewing Medical Records (duplicative)	0.0	--	
Gathering Articles	1.25	$275	$343.75
Reviewing Expert's Report	2.25	$350	$787.50
TOTAL			$1,131.25

In sum, Ms. Tiufekchiev is awarded $5,550.00 for Dr. Bellanti, $1,131.24 for Dr. Greenspan, and $892.77 in miscellaneous costs. **The total is $7,574.01 in costs.**

V. Conclusion

Because Ms. Tiufekchiev did not receive compensation on her claim that the hepatitis B vaccine injured her, one condition for an award of her attorneys' fees and costs is that she establish that her petition was supported by a reasonable basis. 42 U.S.C. § 300aa-15(e)(1). Here, Ms. Tiufekchiev had a reasonable basis for the development of her case. This reasonable basis ceased when she proceeded to a hearing without support for one of the elements necessary for her to prevail. This result is in accord with Perreira, which states "Congress must not have intended that every claimant, whether being compensated or not under the Vaccine Act, collect attorney fees and costs by merely having an expert state an unsupported opinion that the vaccine was the cause in-fact of the injury. The words of the statute require more." 33 F.3d at 1377.

The finding that Ms. Tiufekchiev's case lacked a reasonable basis necessarily reduces the amount of attorneys' fees and costs that can be awarded pursuant to the Vaccine Act. After this change and other smaller adjustments are made, Ms. Tiufekchiev is awarded **$24,034.82 in attorneys' fees and $7,574.01 in costs**.[10] A check in this amount shall be made payable to Ms.

[10] The reduction does not burden Ms. Tiufekchiev because "No attorney may charge any fee for services in connection with a petition . . . which is in addition to any amount awarded as compensation by the special master." 42 U.S.C. § 300aa–15(e)(3); accord Beck v. Sec'y of Health & Human Servs., 924 F.2d 1029 (Fed. Cir. 1991).

Tiufekchiev and her attorney jointly. The Clerk's Office is instructed to enter judgment in accord with this decision unless a motion for review is filed.

IT IS SO ORDERED.

S/ Christian J. Moran
Christian J. Moran
Special Master