In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS
No. 08-86V
Filed: August 25, 2011
To be Published

GRANT HEATH, as parent and guardian of Quinn Heath, a minor,	*	
Petitioner,	*	Attorney Fees and Costs; Good Faith; Reasonable Basis; Expert Report as Constituting a Reasonable Basis; Expert's Reliance on Facts not Established; Loss of Reasonable Basis; Irrelevant Expert Literature; VAERS Research Not Compensable
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Michael G. McLaren, Esq., Memphis, TN, for petitioner.
Darryl R. Wishard, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION AWARDING ATTORNEY FEES AND COSTS[1]

Vowell, Special Master:

On February 13, 2008, Mr. Grant Heath ["Mr. Heath" or "petitioner"] filed a petition for compensation under the National Vaccine Injury Compensation Program, 42

[1] Because this decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

U.S.C. § 300aa-10, *et seq*.[2] [the "Vaccine Act" or "Program"], on behalf of his minor daughter, Quinn. The petition alleged that haemophilus influenzae type b ["Hib"], Prevnar, and Pediarix vaccines[3] that Quinn received on February 15, 2005, caused her to develop brain damage, apnea, and seizures.[4] Petition, ¶¶ 2-3.

After nearly a year of efforts to obtain statutorily required evidence, the parties requested a fact hearing to resolve conflicts in that evidence. *See* Order filed Dec. 4, 2009. Due to a hearing date conflict for the special master then presiding, this case was reassigned to me on March 25, 2010. I conducted the hearing in Raleigh, NC, on June 10, 2010. After the hearing, I issued a September 1, 2010 order setting forth factual findings concerning Quinn's condition before and after her February 15, 2005 vaccinations ["Fact Ruling"].

After reviewing my factual findings, respondent renewed an earlier motion to dismiss this case.[5] On November 3, 2010, petitioner filed his response to the renewed motion to dismiss ["Petitioner's Response"], stating that the petitioner "agree[s] that, under the facts set forth in the [Fact Ruling, he is] unable to provide expert support for [his] vaccine causation theory." Petitioner's Response at 3. I therefore dismissed the case for insufficient proof. Petitioner did not file a motion for review, and judgment entered on December 7, 2010.

An application for interim fees and costs had been pending for nearly a year at the time the petition was dismissed.[6] Petitioner withdrew the interim application and

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[2] National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

[3] Prevnar is the trademark for a preparation of the pneumococcal heptavalent conjugate vaccine. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (31st ed. 2007) ["DORLAND'S"] at 1536. Pediarix is the trademark for a preparation combining the diphtheria, tetanus, acellular pertussis, hepatitis B, and inactivated polio vaccines. PHYSICIANS' DESK REFERENCE (64th. ed. 2010) ["PDR"] at 1606.

[4] Petitioner's medical expert appeared to focus his theory of causation on the Pediarix vaccine. *See* Petitioner's Exhibit ["Pet. Ex."] 19 at 28.

[5] The earlier motion to dismiss was filed as a part of respondent's Vaccine Rule 4 report. Based on the evidence filed by that point, respondent persuasively argued that there was no evidence linking Quinn's injuries to any vaccination. In responding to the motion to dismiss, petitioner filed an expert report from Dr. F. Edward Yazbak, who opined that Pediarix was responsible for Quinn's injuries. *See* Pet. Exs.19-20 (Dr. Yazbak's initial reports).

[6]The interim fees request was pending at the time the case was transferred to me. In November, 2009, the law firm representing petitioner in this case filed for interim fees and costs in the cases the firm had pending before this court. Most of those applications were resolved by the parties in spite of respondent's

filed this final application for fees and costs on March 14, 2011, seeking $90,588.64 in fees and costs. Petitioner's Application for Fees and Expenses ["Fees App."], Tab 2 at 37-38.

Resolution of the interim fees and costs application had been delayed by the same issues raised by respondent with regard to the instant final fees and costs application—determining whether this petition meets the requirements of the statute pertaining to fees and costs awards to unsuccessful litigants. *See* § 300aa-15(e)(1). In the Vaccine Program, prevailing on the merits is not a requirement for an award for fees and costs, but unsuccessful litigants must demonstrate that their claim was brought in good faith (a subjective standard) and upon a reasonable basis (an objective standard). § 300aa-15(e)(1); *Perreira v. Sec'y, HHS*, No. 90-847V, 1992 WL 164436, at *1 (Cl. Ct. Spec. Mstr. June 12, 1992) (describing good faith as subjective and reasonable basis as objective), *aff'd*, 27 Fed. Cl. 29 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994). Thus, an unsuccessful Vaccine Act litigant seeking an award of fees and costs must, at a minimum, establish good faith and a reasonable basis for the claim.

In a March 22, 2011 filing, respondent opposed the award of fees and costs, asserting that (1) petitioner did not maintain the petition in good faith; (2) petitioner's expert did not provide a reasonable basis for the petition for compensation; (3) if good faith and a reasonable basis existed at the time of filing the petition, it no longer existed after September 30, 2008, when medical records were filed; (4) the hourly rate requested on behalf of one associate in the law firm representing petitioner was too high; (5) the total hours of attorney and paralegal time were unreasonable; (6) Dr. Yazbak's expert fee was inadequately supported; and (7) certain travel expenses were improperly billed to this case.[7] Respondent's Objections to Petitioner's Application for Fees and Costs ["Res. Obj."] at 8-23.

Another round of filings by both parties ensued, with petitioner filing his Reply on April 1, 2011 and respondent filing her Sur-Reply on April 5, 2011. Each of these filings was accompanied by various exhibits supporting the position of the filing party. The issues are now ripe for decision.

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objections to the award of interim fees. This case was not so easily resolved because respondent contended that there was no reasonable basis for the claim. Because the scheduled fact hearing could have bearing upon petitioner's good faith belief and reasonable basis, I deferred ruling on the interim fee request until the facts were determined.

[7] In his reply, petitioner conceded that certain travel costs were mistakenly billed to this case and withdrew them. Petitioner's Reply to Respondent's Objections, filed Apr. 1, 2011 ["Pet. Reply"] at 16-17. These costs totaled $643.60. *See* Fees App., Tab 2, at 37-38, 58, 64; Res. Obj. at 23.

Under the facts and circumstances of this case, I hold that petitioner had a good faith belief in vaccine causation at the time the petition was filed and throughout its prosecution. I further hold that petitioner's expert's opinions were sufficient to provide a reasonable basis for filing and maintaining this petition, even though his opinions were unpersuasive and, as I ultimately determined, based on a factually incorrect view of the circumstances surrounding the claimed vaccine injury. For the reasons set forth below, I award fees and costs, but in an amount less than petitioner requests.

I. Threshold Issues Presented.

Respondent's threshold challenge to an award of fees and costs in this case involves the good faith and reasonable basis for filing and maintaining this claim. Therefore, this inquiry must begin with a determination of petitioner's good faith in asserting that Quinn's injuries were the result of vaccination, rather than nonaccidental trauma or other medical treatment she received prior to her cardiopulmonary collapse. Given the circumstances of this case, I could not find that this petition was brought in good faith if I find that petitioner caused Quinn's injuries.

A. Good Faith Belief.

The required "good faith" in filing a petition for compensation is subjective good faith. *Hamrick v. Sec'y, HHS*, No. 99-683V, 2007 WL 4793152, at *3 (Fed. Cl. Spec. Mstr. Jan. 9, 2008); *Di Roma v. Sec'y, HHS*, No. 90-3277V, 1993 WL 496981, at *1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993); *Chronister v. Sec'y, HHS*, No. 89-41V, 1990 WL 293438, at *1 (Cl. Ct. Spec. Mstr. Dec. 4, 1990). Due to its subjective nature, this is a very low standard.

Ordinarily, in Vaccine Act cases, petitioners have little difficulty in surmounting the low bar of a good faith belief in vaccine causation. Decisions finding a lack of good faith are rare. *See, e.g.*, *Moran v. Sec'y, HHS*, No. 07-363V, slip op. at 8-10 (Fed. Cl. Spec. Mstr. Dec. 12, 2008) (finding no good faith when law firm advised petitioner that no expert would opine in his favor and petitioner failed to prosecute the petition he thereafter filed pro se); *O'Dell v. Sec'y, HHS*, No. 89-42V, 1991 WL 123581, at *1 n.2 (Fed. Cl. Spec. Mstr. June 19, 1991) (finding no need to resolve whether there was good faith, but noting the parents could not have filed in good faith because the minor child's death was the result of administration of heroin).

However, if I were to decide the good faith basis for this claim based on the medical records alone, petitioner would likely fail to clear that very low bar. When the initial medical records in this case were finally filed, they established that Quinn was the victim of nonaccidental trauma, not a vaccine injury. The social services and police

records filed later indicated that petitioner himself was, at least initially, the prime suspect in the infliction of the trauma.[8]

Nevertheless, I find that the good faith requirement is met in this case, due largely to later developments in the criminal investigation, a specific action taken by petitioner evincing a belief in a vaccine injury, and the opinions of an expert consulted by petitioner and his wife. Although I do not find this expert's opinions persuasive, under the unique circumstances present in this case, they support a finding that petitioner had a good faith belief in vaccine causation of Quinn's injuries.

1. Facts.

Quinn Heath was born prematurely and was small for her gestational age of 30 weeks. She was treated in the pediatric intensive care unit of the University of North Carolina Hospital ["UNC"] for several weeks and discharged to her parents' care on January 16, 2005. *See* Pet. Ex. 10, pp. 18-22. Quinn and her parents lived in on-base housing at Seymour Johnson Air Force Base, located in Goldsboro, NC, where Mr. Heath was then on active duty. Transcript of the June 10, 2010 hearing ["Tr."] at 14.

On February 15, 2005, Quinn visited her pediatrician for her two-month well child visit. She received Hib, Prevnar, and Pediarix vaccines at this visit. Pet. Ex. 8, pp. 17-20. Quinn returned to her pediatrician's office on February 22, 2005, when she received a dose of Synagis.[9] Pet. Ex. 8, p. 21.

Quinn was in the sole care of her mother, Susan Heath ["Mrs. Heath"] for most of the day on February 23, 2005. *See* Pet. Ex. 15 at 52; Tr. at 38-40. Mr. Heath returned home from work around 9:30 PM and assumed care of Quinn after showering. Mrs. Heath left the house shortly before 10:00 PM. *See* Pet. Ex. 15 at 52; Tr. at 168-69, 210. Soon after 10:00 PM that evening, Mr. Heath was feeding Quinn a bottle when she vomited and stopped breathing. He attempted to resuscitate Quinn and called 911. Pet. Exs. 10, p. 3997; 15 at 49; Res. Ex. A at 112; Tr. at 170-71.

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[8] Petitioner's Exhibits 15-17, consisting of the local police investigation, court records, and social services records, respectively, were filed on July 9, 2009. The military law enforcement investigation records were filed by respondent as Respondent's Exhibit ["Res. Ex."] A on June 19, 2009.

[9] Although witnesses sometimes referred to Synagis as a vaccine, it is actually a monoclonal antibody used to protect premature and other high risk infants against respiratory syncytial virus infections. PDR at 2082. In any event, it is not a vaccine covered under the Vaccine Act.

Quinn was transported by ambulance to a local hospital. Pet. Ex. 15 at 50; Res. Ex. A at 110, 120-21. After emergency treatment there, she was transported by air ambulance to UNC for specialized care. Pet. Ex. 10, pp. 4736-41.

Tests performed at UNC showed that Quinn had two small subdural hematomas, with results consistent with fresh blood. Pet. Ex. 10, pp. 511-12, 514-15, 4733. She also had bilateral retinal hemorrhages in all layers of her retinas. *Id.*, pp. 3967-69. A treating physician observed a bruise on the left side of Quinn's forehead, measuring about one centimeter, as well as two "linear diagonal bruises on [Quinn's] anterior thighs" which appeared to be symmetrical. *Id.,* p. 3999. Subsequent bone scans showed evidence consistent with a healing fracture of her right ulna. Pet. Ex. 10, pp. 509-10; Pet. Ex. 15 at 151. All of Quinn's treating physicians at UNC, including a pediatric intensive care attending, an ophthalmologist, and a pediatrician specializing in cases of abuse, concluded that Quinn was the victim of nonaccidental trauma. Pet. Ex. 10, pp. 302, 3969, 4735. No treating doctor linked Quinn's injuries to the vaccines she received on February 15, 2005 or to the dose of Synagis she received on February 22, 2005. *See generally* Pet. Exs. 9, 10.

Only Mr. and Mrs. Heath had access to Quinn during the time of or immediately before her cardiopulmonary collapse. When confronted with evidence that Quinn's collapse was due to nonaccidental trauma, neither protested. Res. Ex. A at 13 (interview with Dr. Jean Smith); 132 (opinion letter of Jean Smith). Based on the medical opinions that Quinn was the victim of nonaccidental trauma, a criminal investigation ensued, pursued by both the Air Force and local authorities. *See* Pet. Ex. 15; Res. Ex. A. Initially, suspicion focused on petitioner, but over a period of months, the investigations began to focus on Mrs. Heath's possible role in Quinn's injuries, particularly after a physician explained that as much as two hours could have elapsed between an inflicted injury and Quinn's collapse. *See* Pet. Ex. 15 at 39. No criminal charges against either petitioner or his wife were ever filed, although both lost custody of Quinn.[10]

Mr. Heath complied with all court requirements, and he regained legal custody of Quinn on June 7, 2007, with the stipulation that he cannot remove Quinn from the facility where she now resides without physician consent. Pet. Ex. 16 at 1-2, 10-12. Mrs. Heath has never regained legal custody of Quinn. Tr. at 56-60.

The Heaths initially claimed that Quinn began acting differently after her Synagis injection. Pet. Ex. 15 at 44, 51-57; Res. Ex. A at 40. They later attributed Quinn's decline to the February 15 vaccinations, with the Synagis injection precipitating a more

[10] The Heaths lost legal custody of Quinn in the spring of 2005. *See* Tr. at 51; Pet. Ex. 16 at 128-30.

rapid decline in her health. Tr. at 30-34, 97-98, 133, 165-68. Mrs. Heath also suggested that if Quinn was shaken, the husband of a woman who babysat for her was probably responsible. *See* Pet. Ex. 15 at 160 (sworn statement of Katie Waters). At some point during the criminal investigations, Mr. Heath asserted to friends and co-workers that "vaccinations" were responsible for Quinn's condition, but whether he was then referring to the Synagis injection or the vaccines received a week earlier is not clear. *See* Res. Ex. A at 14 (interview of Terence Sims); 15 (interviews of Shawn Hogan and Ronald Carlson); 16 (interview of Glenn Heath, Mr. Heath's father, who identified the causal "vaccinations" as the one received the day prior to Quinn's collapse).

2. Analysis of Good Faith Belief.

a. Relative Culpability of Petitioner and Mrs. Heath.

In finding facts pertaining to the symptoms Quinn displayed prior to her collapse, I did not find it necessary to determine who, if anyone, injured Quinn. It is necessary now. Mr. and Mrs. Heath each had an opportunity to have caused Quinn's devastating injuries. If Mr. Heath was himself responsible for Quinn's injuries, this petition could not have been brought in good faith. On the other hand, if Mrs. Heath caused Quinn's injuries, and did not tell her husband of her involvement, Mr. Heath could have a good faith belief in vaccine causation.

Several factors make Mrs. Heath's culpability more likely. Quinn was fussy and irritable on the day of her collapse,[11] and had been in the care of her mother all day. Quinn was in her father's sole care for only minutes before the 911 call. Thus, Mrs. Heath had both the opportunity to injure Quinn and was under the stress of being the primary caregiver for a fussy and irritable infant for more than 24 hours before Quinn's collapse.[12] Mrs. Heath was sometimes volatile.[13] Friends and acquaintances described

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[11] *See* Pet. Ex. 15 at 51-52; Res. Ex. A at 7. Ms. Harrison, a physical therapist who visited on the afternoon of February 23, 2005, reported that during her visit, Mrs. Heath explained that Quinn was fussy, hadn't slept all night, and that both the baby and Mrs. Heath were tired. Pet. Ex. 15 at 82.

[12] Respondent's expert, Dr. Robert Block, noted in his report that caring for an irritable infant can contribute to nonaccidental trauma. Res. Ex. B at 4. Mrs. Heath purportedly told her friend, Katie Waters, that Quinn's crying on the day before her collapse was "driving [her] nuts." Pet. Ex. 15 at 160 (sworn statement of Katie Waters).

[13] Mrs. Heath was hostile to the ambulance personnel trying to resuscitate and transport Quinn, and had to be restrained. Pet. Ex. 15 at 59, 81; Res. Ex. A at 197. She was hostile to the hospital personnel attempting to obtain a history that evening. Res. Ex. A at 11-12 (interview of Katie Waters). She was confrontational with the health care providers at UNC, prompting security personnel to remove her and to limit family visits. *Id.* at 10. A psychological evaluation conducted for purposes of the custody

her as hostile, threatening, impatient, intimidating, and mentally unstable. They indicated that she appeared to be unconcerned about Quinn's welfare. Res. Ex. A at 11-12 (Katie Waters interview), 12 (Amber Tate interview), 13 (Jillian Box interview). A hospital social worker at UNC described Mrs. Heath as a "loose ca[n]non." *Id.* at 11. In contrast, Mr. Heath was described as "very mellow tempered," a "good father," and dominated by his wife. *Id.* at 12 (Katie Waters interview), 13 (Brent Waters interview), 15 (Ronald Carlson interview).

I did not find Mrs. Heath to be a truthful witness at the fact hearing. In evaluating conflicting accounts of events, I found Mrs. Heath to lack credibility, based on her demeanor on the witness stand, a tendency to exaggerate,[14] internal inconsistencies in her testimony, and the conflicts between her trial testimony and other accounts of the events in question. Evidence suggested that she had no compunction misleading other courts.[15] *See* Fact Ruling at 4-5.

Although I rejected considerable portions of the testimony of both Mr. and Mrs. Heath, the rejected portions of Mr. Heath's testimony largely concerned matters reported to him by his wife. *See, e.g.*, Tr. at 167, 205 (Mr. Heath testifying that his wife called health care providers to report problems after the February 15 vaccinations, but that he was not present when the calls were placed). I note that Mr. Heath, while under oath, denied injuring Quinn (Tr. at 172, 178), and that Mrs. Heath was never asked directly whether she was responsible for Quinn's injuries, and never volunteered that she did not injure Quinn.[16]

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proceedings on September 22, 2005, concluded that "diagnoses of Major Depressive Disorder, Severe, Recurrent; and Personality Disorder, NOS with Schizotypal Traits are the best fit for Ms. Heath, at this time." Pet. Ex. 16 at 114.

[14] For example, in my Fact Ruling I specifically found that Mrs. Heath had exaggerated her personal medical history. *See* Fact Ruling at 4 n.11. Mrs. Heath described having had three or four miscarriages at increasingly later stages before becoming pregnant with Quinn. Tr. at 12, 120-21. However, her medical records reflect only two early miscarriages. *See* Pet. Ex. 6, pp. 2, 9. Mrs. Health also testified that she developed cervical cancer while pregnant with Quinn. Tr. at 17. However, her medical records indicate that she had a human papillomavirus ["HPV"] infection during her pregnancy, but not cervical cancer. *See* Pet. Exs. 5, pp. 8-9; 6, pp. 2, 9. While HPV can cause cervical cancer (*see* DORLAND'S at 1393), it is not itself cervical cancer, and there is nothing else in the records consistent with a cervical cancer diagnosis during pregnancy.

[15] Mrs. Health testified that she missed a court appearance related to the Heaths' attempts to regain custody of Quinn because she was pregnant and didn't want social services to know that. Tr. at 59. Court records reflect that Mrs. Heath reported that she was bedridden and her immune system was failing for unknown reasons. Pet. Ex. 16 at 5.

[16] The transcript reflects the following exchanges during the direct examination of Mrs. Heath.

b. Actions Evincing a Belief in Vaccine Causation.

One of Mr. Heath's first actions after regaining legal custody of Quinn was to interpose an objection to the administration of any more vaccinations. Pet. Ex. 13, p. 4508. I note that this action was taken in July 2007, shortly after he regained legal custody of Quinn, and prior to the filing of the petition in this case. *See* Tr. at 198-99. Given that Quinn is housed in an area with other children, she is exposed to any communicable diseases the other residents or caregivers may have. A rational and caring parent would not place a child at risk of illnesses preventable by vaccination in the absence of a sincere and honest—albeit mistaken—belief that the vaccinations place the child at risk of a vaccine-related injury. Mr. Heath's efforts to regain custody of Quinn (*see* Pet. Ex. 16), his despondency over her condition,[17] and his efforts to maintain contact with Quinn in the residential center (*see* Tr. at 180-82), do not suggest indifference.

Mr. and Mrs. Heath separated for about five months in 2006, but they were again living together at the time of the fact hearing and had been since at least March 2, 2009. Tr. at 136; Petitioners' Statement Regarding How to Proceed and Motion to Amend Petition, filed Mar. 10, 2009. Although their reunion is certainly not definitive evidence

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Q: You weren't there when Quinn had her catastrophic incident.

A: No.

Q: Did anybody ever suggest that you had anything to do with that incident?

A: No, because their expert Jean Smith said that any trauma that happened, the results would have happened immediately. It's not like something that I could have done and then passed on.

Tr. at 55.

Q: Were there any charges ever brought against you by any police department, Air Force or anybody else that you did anything to harm Quinn?

A. No.

Tr. at 62.

[17] Mr. Heath was "extremely upset" over Quinn's condition when his unit First Sergeant visited with him at the UNC hospital. Res. Ex. A at 40 (Ronald Carlson's written statement). After being informed that Quinn would be blind and deaf as the result of her injuries, Mr. Heath became despondent and was admitted to a local hospital for treatment. *See* Res. Ex. A at 14 (interview of Dennis Styles). His military counseling records reflected that he was having nightmares, insomnia, and was depressed. *Id*. at 17.

that neither parent knew that the other parent was responsible for Quinn's injuries, it does suggest that if one parent injured Quinn, she or he had not communicated that fact to the other parent.

c. Expert Opinion Supporting Vaccine Causation.

Finally, although the record does not indicate precisely when the Heaths consulted Dr. Yazbak,[18] they clearly did so prior to the filing of the petition for compensation in this case, because the billing records submitted with the Fees App. reflected a review of a report from Dr. Yazbak before the petition for compensation was filed. Fees App., Tab 2 at 1 (entry dated Nov. 2, 2007). Given the nature of Dr. Yazbak's reports actually filed in this case, it is likely that his earlier report also supported vaccine causation. In spite of medical records to the contrary, Mr. Heath could have a good faith belief in vaccine causation based on Dr. Yazbak's opinion.

3. Conclusion on Good Faith.

Considering the evidence as a whole, I conclude that Mrs. Heath is more likely than Mr. Heath to have been responsible for Quinn's injuries. It is unlikely that Mr. Heath believes his wife is responsible for injuring their daughter, and Dr. Yazbak's opinions, flawed as they may be, support Mr. Heath's belief that vaccines were responsible for Quinn's condition. Given the presumption of good faith attached to the filing of a petition for compensation (*see Grice v. Sec'y, HHS*, 36 Fed. Cl. 114, 121 (1996)), and the likelihood that Mr. Heath was not himself responsible for Quinn's injuries, I conclude that this petition was filed in good faith. I note, however, that the Federal Circuit has warned that "when the reasonable basis that may have been sufficient to bring the claim ceases to exist, it cannot be said that the claim is maintained in good faith." *Perreira*, 33 F.3d at 1377.

4. Addition of Mrs. Heath as Petitioner.

Respondent also argues that there was no good faith basis for the petition after Mrs. Heath, petitioner's wife and Quinn's natural mother, was added as a petitioner on September 2, 2008. Res. Obj. at 10. Respondent's logic in asserting that the addition of Mrs. Heath as a petitioner resulted in a permanent loss of a good faith basis for this claim escapes me. A Vaccine Act claim brought by parents on behalf of a minor child is brought for the benefit of that minor child. Mrs. Heath's culpability in Quinn's injury

[18] In Pet. Ex. 115, Dr. Yazbak explains that Mr. Heath provided the factual background for his reports, but in the two initial reports (Pet. Exs. 19-20), he comments on Mrs. Heath's accounts, barely mentioning reports from Mr. Heath. *See, e.g.*, Pet Ex. 19 at 1.

would certainly bar a good faith belief in vaccine causation, but Quinn's other (and likely non-culpable) parent filed the Vaccine Act petition and remained a petitioner on Quinn's behalf throughout the suit. Unless the parents acted in concert in causing Quinn's injuries, a petition could be brought and maintained in good faith by one parent with a sincere belief in vaccine causation.

I also find that Mrs. Heath was never a proper petitioner in this case; adding her as a petitioner was a legal nullity. The brief period she purported to be a petitioner has no legal consequence in a determination that this petition was prosecuted in good faith.

Under the Act, the "legal representative" of a person who sustained a vaccine related injury may bring a petition on that person's behalf. § 300aa-11(b)(1)(A). The Act defines a "legal representative" as "a parent or an individual who qualifies as a legal guardian under State law." § 300aa-33(2). While Mrs. Heath is one of Quinn's parents, she lost legal and physical custody of Quinn after North Carolina determined that Quinn was a "neglected and dependent juvenile," requiring removal of her from her parents' care. *See* Pet. Ex. 16 at 128-31. At the time of her addition to this case, Mrs. Heath did not have legal or physical custody of Quinn, and she testified at the hearing that she had chosen not to pursue legal or physical custody further. Tr. at 59-60. Thus, while the biological mother of Quinn, Mrs. Heath is unable to care for or make decisions on behalf of Quinn, responsibilities that make a "parent" the logical legal representative of her child.

I am mindful that in the context of a disabled adult vaccinee, one special master and one judge of the U.S. Court of Federal Claims have interpreted these provisions of the Act to conclude that every parent may represent their child, if disabled, "whether or not they also qualify as such under state law." *Kennedy v. Sec'y, HHS*, __ Fed. Cl. __, 2011 WL 1879626, at *4 (May 16, 2011), *appeal docketed*, No. 2011-5160 (Fed. Cir. June 27, 2011).[19] The special master below concluded that under § 300aa-33(2), "a 'parent' of an injured child *automatically* qualifies as a 'legal representative' who is legally authorized to file a petition under the Vaccine Act," a determination necessary to his conclusion that any parent is a legal representative under § 300aa-11(b)(1)(A) who can represent a disabled vaccinee. *Kennedy*, No. 90-1009V, 2010 WL 4810233, at *5 (Fed. Cl. Spec. Mstr. Oct. 29, 2010) (emphasis original). On review, the judge concurred. While he noted that "one [cannot] be totally sanguine with the prospect of allowing every sort of parent to represent their disabled sons and daughters,

[19] Although I find the instant case distinguishable, and need not and do not reject the reasoning in *Kennedy*, I note that a special master is not bound by her other decisions, decisions of other special masters, or decisions of judges of the U.S. Court of Federal Claims, except in the same case on remand. *Hanlon v. Sec'y, HHS*, 40 Fed. Cl. 625, 630 (1998), *aff'd*, 191 F.3d 1344 (Fed. Cir. 1999).

irrespective of the individual circumstances," he concluded that individual circumstances could not alter the application of these statutory provisions. 2011 WL 1879626, at *5.

The instant case, however, demonstrates when individual circumstances do matter in applying these provisions of the Act. North Carolina has taken affirmative steps to prevent Mrs. Heath from acting as Quinn's parent. Mrs. Heath has no authority to make decisions, legal or otherwise, that affect Quinn. She lacks physical custody of Quinn, and is only permitted supervised visitation. Tr. at 52-53, 60. Under these circumstances, I conclude Mrs. Heath is not a "parent" who qualifies as a "legal representative" under the Act.

Non-custodial parents have sought to represent their children in Program proceedings before. In *Bernhardt v. Sec'y, HHS*, 82 Fed. Cl. 287 (2005), the judge declined to address whether a non-custodial parent could qualify as a parent under § 300aa-33(2), instead looking to state law to conclude that the non-custodial parent would qualify as a guardian under that law and could represent his child in the Program. 82 Fed. Cl. at 291. Even if I look to state law to determine Mrs. Heath's eligibility to represent Quinn's interests, Mrs. Heath still could not be Quinn's legal representative. Under North Carolina law, a guardian performs the "duties relating to the care, custody, and control" of the ward she represents. N.C. GEN. STAT. § 35A-1202 (2011) (defining guardian of the person). In losing physical and legal custody, Mrs. Heath lost the ability to perform all of those duties. Initially, the county department of social services was granted "full responsibility for placement and care of [Quinn]," as well as "the authority to consent to medical, surgical, dental, psychiatric, psychological or other treatment." Pet. Ex. 16 at 129-30. During that time, Quinn's legal interests were represented by a guardian ad litem. *See id.* Once Mr. Heath regained custody, he regained the right to make legal, medical, and other decisions on Quinn's behalf, while physical custody remained with the facility where Quinn resides. *See* Pet. Ex. 16 at 2, 11.

It is difficult to determine from the record precisely why Mrs. Heath was added as a petitioner on September 2, 2008, but it appears to have been at the prompting of the special master then assigned, who was not aware that the state of North Carolina had removed Quinn from her mother's legal custody. *See* Orders filed Feb. 2, 2009 and Mar. 13, 2009; Pet. Ex. 16 (documenting the legal custody proceedings). The records documenting the Heaths' loss of custody, their efforts to regain custody, and Mr. Heath's ultimate success in regaining custody, were not filed into the record until July 9, 2009. *See* Pet. Ex. 16. When Quinn's attorney learned that Mrs. Heath did not have custody, he moved to recaption the case, leaving Mr. Heath as the sole petitioner on Quinn's behalf. Petitioners' Statement Regarding How to Proceed and Motion to Amend Petition, filed Mar. 10, 2009. That motion was promptly granted on March 13, 2009. The roughly six-month period during which Mrs. Heath was listed as a petitioner in this case appears to have resulted from a lack of information before the special

master. There is no evidence that petitioner attempted to deceive the court, and the mistake does not affect my determination on good faith.

B. Reasonable Basis.

Mr. Heath's good faith, by itself, is insufficient for an award of fees in this case. Petitioner must also demonstrate a reasonable basis for this claim. § 300aa-15(e)(1). Respondent maintains that the medical records and police investigations established that Quinn was the victim of abuse. Res. Obj. at 13. Respondent also argues that Dr. Yazbak's contrary medical opinions could not provide petitioner or his attorney with a reasonable basis for filing and pursuing this claim.[20] Res. Obj. at 10. I agree that, standing alone, the medical and police records constitute preponderant evidence of abuse. However, although I find Dr. Yazbak poorly qualified to opine on the medical matters in controversy in this case,[21] inadequately supported by reliable medical and scientific evidence,[22] and reliant in large measure on symptoms not appearing in the

[20] Doctor Yazbak's reports were not a model for other experts to emulate. They are poorly organized, rambling, and address issues other than vaccine causation. The initial report included several pages of information related to DTP, a vaccine that Quinn did not receive, and information pertaining to reactions to DTaP (a component of the Pediarix vaccine that she did receive), but to ones occurring within seven days following vaccination. Pet. Ex. 19 at 20-21. Quinn collapsed more than eight days after her vaccination. Doctor Yazbak criticized virtually every health care provider who treated Quinn prior to or after her collapse. *See* Pet. Exs. 19 at 1-2; 20 at 16-17, 25-34, 50-51. In the second part of his initial report, Dr. Yazbak summarized Mrs. Heath's health during pregnancy and appears to attribute Quinn's problems to a number of "risk factors" present prenatally. *See* Pet. Ex. 20 at 10. Although the report mentions vaccinations at several points, it represents a "shotgun" approach to Quinn's case, variously asserting that Quinn's injuries may have resulted from vitamin C, D, or K deficiency, her mother's smoking during pregnancy, iatrogenic injury during her transport and hospitalization, liver disease, enzyme defects, and connective tissue disorders, among others. *See* Pet. Ex. 20 at 42-49. It appears that petitioner's counsel had concerns about using Dr. Yazbak as a witness in this case. Although a report from Dr. Yazbak was available at the time the law firm accepted this case (*see* Fees App., Tab 2 at 1 (entry dated 11/2/07 reflecting review of "Dr. Yazbak report")), several billing entries involve efforts to find a different expert to opine in this case. *See, e.g.*, Fees App., Tab 2 at 2, 6-7, 10, 18 (entries dated 2/11/08, 10/17/08, 10/22/08, 11/14/08, 1/28/09, 6/16/09, 7/7/09). One entry also reflected research into previous opinions involving Dr. Yazbak as a witness. *See* Fees App, Tab 2 at 12 (entry dated 3/3/2009).

[21] Doctor Yazbak is a board-certified pediatrician (*Curriculum Vitae* ["CV"] of Dr. Yazbak, Pet. Ex. 18), and has testified on behalf of Vaccine Act petitioners in other cases (*e.g.*, *Dixon v. Sec'y, HHS*, 61 Fed. Cl. 1 (2004)). However, his CV does not reflect expertise in evaluating neurological injuries, and it lists few peer reviewed publications, none of which involved clinical research. His CV reflects several diverse areas of research focus, including autism, vaccine injury, shaken baby syndrome, and sudden infant death syndrome. As Dr. Block noted in his reports (Res. Exs. B at 3; L at 2), although the CV lists numerous "publications," only one is peer reviewed. Most of Dr. Yazbak's publications are "internet publications," rather than articles appearing in mainstream medical journals.

[22] Many pages of Dr. Yazbak's initial report (Pet. Ex. 19) are printouts of data culled from the Vaccine Adverse Event Reporting System ["VAERS"]. VAERS data is inadequate to demonstrate a causal

contemporaneous medical records,[23] I nevertheless conclude that petitioner and his attorney reasonably relied upon his opinions in filing and maintaining this petition up to the point at which I rejected the factual basis for Dr. Yazbak's opinions. Although his opinion that Quinn's condition should not be attributed to abuse represents a minority medical opinion, a competent attorney could reasonably rely on it to file a petition for compensation and to maintain the petition, at least until the factual underpinnings of the opinion proffered were removed. I thus reject respondent's contention that Dr. Yazbak's opinions were so insufficient as to make the filing and maintaining of this petition unreasonable. I also reject any contention that Dr. Yazbak's opinions were insufficient to constitute a reasonable basis to maintain the claim, up to the point where the factual bases for his opinion were rejected. I recognize that this is a close question, given Dr. Yazbak's qualifications, the nature of the opinions proffered, and the reliance on VAERS data for his causal conclusions.

1. Circumstances Surrounding Filing.

Although the petition was filed a little less than two weeks before the expiration of the Vaccine Act's three year statute of limitations (*see* § 300aa-16(a)(2)), without any supporting medical records,[24] the billing records from the law firm handling petitioner's case indicate that the firm was in receipt of at least some documentation regarding the

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relationship between vaccines and injuries. *See Parsley v. Sec'y, HHS*, No. 08-781V, 2011 WL 2463539, at *11 n.41 (Fed. Cl. Spec. Mstr. May 27, 2011) (citing *Donica v. Sec'y, HHS*, No. 08-625V, 2010 WL 3735707, at *11 (Fed. Cl. Spec. Mstr. Aug. 31, 2010) (citing *Analla v. Sec'y, HHS*, 70 Fed. Cl. 552, 558 (2006))). Expert opinions based primarily or substantially on VAERS data are unlikely to be considered reliable evidence. Much of the remainder of Dr. Yazbak's initial opinion (Pet. Ex. 20) challenged the existence of "shaken baby syndrome." An analysis of the strengths and weaknesses of his opinion is unnecessary to resolve the issues in this fees application. Suffice it to say that shaking as a mechanism for producing the injuries seen in Quinn has adherents and detractors, with most mainstream medical practitioners subscribing to opinions that differ from those expressed by Dr. Yazbak. *See Huffman v. Sec'y, HHS*, No. 7-81V, 2011 WL 995958, at *13-24 (Fed. Cl. Spec. Mstr. Feb. 28, 2011).

[23] His initial report (Pet. Ex. 19), dated September 17, 2009, began with a two page recitation of information received from Mr. and Mrs. Heath, and some information obtained from Quinn's medical records. Buried within an amalgamation of VAERS data on page 19 is a report of certain symptoms Quinn purportedly displayed seven days after the vaccinations alleged to be causal. On page 25 is a recital of symptoms Quinn purportedly displayed on the day before and day of her collapse, most of which are not reflected in the histories given to health care providers. Doctor Yazbak also relied on symptoms that the Heaths did not include in their testimony, specifically prolonged high-pitched crying and projectile vomiting. *See* Pet. Ex. 19 at 25; Fact Ruling at 13 n.28.

[24] The only evidence filed in this case between the filing of the petition and September 30, 2008, was the affidavits of petitioner and Mrs. Heath. Neither provides much in the way of substantive information regarding causation, with both affiants identically averring that Quinn's injuries were the result of her February 15, 2005 vaccinations. *See* Pet. Exs. 2 at 2; 3 at 2.

case over three months prior to the filing of the petition. The earliest billing entry is dated 10/30/2007, for 0.6 hours to "analyze[] facts of Heath vaccine case." The next entry is similar, dated 10/31/2007, for 1.6 hours, to "review facts" and "analyze materials." Fees App., Tab 2 at 1. The billing records also reflect that the law firm had, at the time the petition was filed, a report from Dr. Yazbak.[25] Fees App, Tab 2 at 1. It thus appears that the law firm exercised due diligence in filing and pursuing a case in which the statute of limitations was close to expiring.

The record does not reflect, however, precisely what records the law firm had available for review. The billing records filed with the Fees App. indicate that the first medical records were not requested for more than a month after the claim was filed (Fees App., Tab 2 at 2), and the next six months of billing records document efforts to obtain and file most of the exhibits pertaining to Quinn's medical treatment (Fees App., Tab 2 at 2-5).[26] However, whatever documents the firm had were sufficient to raise the issue of nonaccidental trauma, as the billing records reflect an attorney's review of "shaken baby syndrome papers," presumably ones provided by Dr. Yazbak along with his report. Fees App., Tab 2 at 1.

Respondent filed her report pursuant to Vaccine Rule 4 on January 23, 2009.[27] Based on Quinn's medical records, respondent recommended against compensation and requested that this case be dismissed because all of the evidence pointed to nonaccidental trauma as the cause of Quinn's injuries. The only contrary evidence, the affidavits of petitioner and his wife, may have evinced a good faith belief by one of them in vaccine causation of Quinn's injuries, but those affidavits, standing alone, did not provide a reasonable basis for their claim.

In his response to the motion to dismiss, petitioner requested the opportunity to file additional evidence[28] and an expert report to demonstrate vaccine causation of

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[25] It does not appear that this particular report was ever filed, based on the dates appearing on the subsequently filed reports by Dr. Yazbak. *See* Pet. Exs. 19, 20, 21, 87, 115.

[26] I do not fault the law firm for independently obtaining medical records. Copies provided by petitioners themselves may be missing important data, such as laboratory test reports and nursing notes, and frequently do not include more recent treatment records.

[27] Because the medical records were not promptly filed, the deadline for the Vaccine Rule 4 report was suspended, and the report was not filed until nearly a year after the filing of the petition. The Rule 4 report included a motion to dismiss based on the medical records, which contained the opinions of Quinn's treating physicians that her devastating injuries were the result of nonaccidental trauma. No treating physician, much less any other medical record, attributed Quinn's injuries to a vaccine.

[28] When finally filed, the additional records from police, social services, and a state court were largely unhelpful to petitioner.

Quinn's injuries. Petitioners' Statement Regarding How to Proceed and Motion to Amend Petition, filed March 10, 2009. The expert report attributing Quinn's injuries to her vaccinations was finally filed on September 28, 2009. *See* Pet. Exs. 19, 20. Supplemental expert reports by Dr. Yazbak were filed on November 6, 2009 (Pet. Ex. 21); April 9, 2010 (Pet. Ex. 87); and October 6, 2010 (Pet. Ex. 115).

Only Dr. Yazbak's reports linked Quinn's vaccinations to her devastating neurological injuries.[29] Because those reports relied on evidence outside the evidentiary record in the form of statements from or interviews of petitioner and his wife, a hearing ensued to determine what symptoms Quinn displayed after her February 15, 2005 vaccinations, to establish a timeline of events leading up to her collapse, and to resolve other factual conflicts.

I issued my Fact Ruling on September 1, 2010. The ruling reflected that Quinn did not display most of the symptoms upon which Dr. Yazbak relied. I found the contemporaneous medical records and statements made by the Heaths closer in time to the events in question to be more reliable and thus entitled to greater weight than their hearing testimony. In summary, I rejected most of Mr. and Mrs. Heath's accounts of Quinn's behavior and symptoms, removing the factual underpinnings for Dr. Yazbak's opinions on vaccine causation. Thereafter, I offered the parties the opportunity to submit supplemental filings on the issue of whether petitioner had a reasonable basis to bring this case. Order, filed Sept. 20, 2010.

On October 4, 2010, and October 6, 2010, petitioner filed a supplemental expert report and supporting materials, most of which addressed the effects of adjuvants in vaccines. On October 4, 2010, respondent filed a sur-reply to petitioner's application for interim fees, a supplemental expert report, and additional evidence.[30] Petitioner's counsel responded to the Fact Ruling and respondent's renewed motion to dismiss by conceding that he could not find expert support for his causation theory under the facts I found. *See* Petitioner['s] Response to Respondent's Motion to Dismiss, filed Nov. 3, 2010, at 3.

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[29] Those reports were countered by the expert opinion of Dr. Robert Block, filed as Res. Ex. B. In contrast to Dr. Yazbak's reports, Dr. Block's opinion focused on the medical records rather than statements from Quinn's parents. His supplemental report was filed as Res. Ex. L.

[30] Respondent's evidentiary filings (a supplemental report by Dr. Block, and articles in support) appear to be responsive to Dr. Yazbak's April 9, 2010 report (Pet. Ex. 87).

2. Discussion of Reasonable Basis.

Whether there exists a reasonable basis to file and maintain a claim under the Vaccine Act is evaluated using an objective standard. *Perreira* establishes that a reasonable basis to pursue a petition may initially exist, but that it can be lost as the result of case developments. 33 F.3d at 1377. Thus, I first evaluate the reasonable basis to file this case, and then the reasonable basis to pursue it at two points in its development.

a. Reasonable Basis to File.

As Special Master Moran noted in *Hamrick*, "[s]etting a relatively low standard for [finding] a reasonable basis in filing a petition (as opposed to prosecuting a petition) is supported by public policy and cases interpreting roughly analogous rules from civil litigation." 2007 WL 4793152, at *5. Applying a lenient standard is particularly appropriate when the impending expiration of the statute of limitations prevents an adequate investigation of the basis for the claim. *Id.*

I hold that petitioner had a reasonable basis for filing this case. Petitioner apparently engaged counsel roughly three months before the statute of limitations on his claim would have run (*see* § 300aa-16(a)(2)) and shortly after he regained legal custody of Quinn (*see* Pet. Ex. 16 at 1-2, 10-12). The billing records reveal that in this short period before filing, petitioner's counsel had before him some records and a report by Dr. Yazbak that likely attributed Quinn's injuries to vaccination rather than trauma. *See* Fees App., Tab 2 at 1. In light of the lenient standard for reasonable basis applied to Program cases, this is a sufficient basis for filing the petition.

b. Reasonable Basis for Maintaining the Petition.

Whether there existed a reasonable basis for maintaining this petition is a more difficult issue, and the answer depends on the point in time examined. A reasonable basis to continue must be something more than "unsupported speculation." *Perreira*, 33 F.3d at 1377. If petitioner's causation theory is not premised on facts supported by the record, or is not grounded in reputable medical evidence, his espousal of that theory is insufficient to maintain a reasonable basis. *See Perreira*, 27 Fed. Cl. at 33-34; *Stevens v. Sec'y, HHS*, 1992 WL 159520, at *4 (Cl. Ct. Spec. Mstr. June 9, 1992). Once a case is filed, and the statute of limitations is no longer an issue, petitioner's statutory obligation to substantiate his theory with medical records or medical opinion (*see* § 300aa-13(a)(1)) should also provide the minimal evidence necessary to supply a reasonable basis to continue.

The primary question is how to evaluate a reasonable basis when petitioner's expert relies on contested facts. The most appropriate test to be applied would appear to be one similar to that applied in a summary judgment context. *Chronister v. Sec'y, HHS*, No. 89-41V, 1990 WL 293438, at *1 (Cl. Ct. Spec. Mstr. Dec. 4, 1990). That is, for purposes of evaluating a reasonable basis in the absence of a judicial determination of the facts upon which an expert relies, the court must accept the facts in the light most favorable to the party asserting those facts. Once the court determines the facts of the case, then the expert's opinion can be evaluated to determine whether it continues to provide a reasonable basis for the claim. Of course, some "expert" opinions so clearly lack a reasonable basis to support a claim that they can be rejected on their face, such as when an expert is unqualified to opine or offers an opinion that does not meet the test set forth in *Althen v. Sec'y, HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005). *See, e.g.*, *Veryzer v. Sec'y, HHS*, No. 06-522V, 2010 WL 2507791, at *22-25 (Fed. Cl. Spec. Mstr. June 15, 2010) (order granting motion to exclude an expert witness who refused to explain how his causation theory worked, describing that information as proprietary, and leaving the court with no basis to verify that the vaccine received could cause the petitioner's condition).[31]

Doctor Yazbak's opinion falls, albeit slightly, on the side of supporting a reasonable basis for this claim. Dr. Yazbak relies on VAERS reports of vaccine reactions that are similar to the reaction that the Heaths purportedly relayed to him. He also relies on medical literature that is unpersuasive, but ostensibly supportive of his theories. This is sufficient to support a reasonable basis, at least until the factual basis for his vaccine causation case was removed by my factual findings.

(1) Reasonable Basis after September 2008.

Respondent contends that petitioner no longer had a reasonable basis to maintain the petition after the filing of evidence establishing the medical diagnosis of nonaccidental trauma. Res. Obj. at 13. She maintains that Dr. Yazbak's expert reports, the first two of which were filed on September 28, 2009, did not constitute a reasonable basis for continuing to pursue the petition because they were not based on a correct factual predicate that was clearly established in the medical records. Res. Obj. at 10-14.

As indicated above, I have concluded otherwise. A difference between the medical history as set forth in the records and the medical history as relayed by petitioner is not unusual. This is particularly true if the difference in the factual descriptions can be accounted for by an absence of a factual account in the record.

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[31] This interim ruling was affirmed on review, though the ultimate dismissal of the case was vacated and the matter was remanded for further proceedings. *Veryzer v. Sec'y, HHS*, 98 Fed. Cl. 214 (2011).

See Murphy v. Sec'y, HHS, 23 Cl. Ct. 726, 733 (1991), *aff'd*, 968 F.2d 1226 (Fed. Cir. 1992). Doctor Yazbak's reliance on the parental accounts of Quinn's behavior following her vaccinations was reasonable at the time he wrote his reports. This is sufficient to sustain a reasonable basis for the case until I rejected those accounts.

Up until the issuance of my Fact Ruling on September 1, 2010, petitioner had a reasonable basis to pursue this case premised on his accounts of the facts surrounding Quinn's injuries and Dr. Yazbak's causation theory relying on those facts. Petitioner, his counsel, and his expert are not bound to accept the accounts in the medical records as the sum total of the symptoms Quinn experienced prior to her cardiopulmonary collapse. Factual disputes are common in Vaccine Act cases, and although the law favors contemporary records over later accounts (*see Murphy*, 23 Cl. Ct. at 733), clear, cogent, and convincing testimony may persuade a fact finder that the records are incomplete or inaccurate. *Stevens v. Sec'y, HHS*, No. 90-221V, 1990 WL 608693, at *3 (Fed. Cl. Spec. Mstr. Dec. 21, 1990). Doctor Yazbak's theory was sufficient to demonstrate a reasonable basis until the facts on which it relied were found to not exist. I did not find clear, cogent, or convincing testimony by petitioner or his wife sufficient to counter the contemporaneous accounts in the medical records, and thus issued findings in accord with the medical records and the accounts of the Heaths immediately after Quinn's hospitalization.

(2) Reasonable Basis after September 2010.

After the factual underpinnings for Dr. Yazbak's opinion were removed by my Fact Ruling on September 1, 2010, his filed reports no longer provided a reasonable basis to proceed. Only those actions that were reasonably calculated to ascertain whether his vaccine causation opinion could be sustained under the facts as found, and those actions reasonably necessary to conclude the litigation, are compensable.

Based on my review of the fees and costs incurred after September 1, 2010, certain actions are not compensable. Filing Dr. Yazbak's final report, dated July 29, 2010 (Pet. Ex. 115), but not filed until October 6, 2010, is one of them. Fees App., Tab 2 at 32 (9/7, 9/8, 9/10, 9/27, 9/29, 9/30, 10/1, 10/4 entries). This appears to be part of petitioner's response to my September 20, 2010 order. In that order I gave the parties the opportunity to submit supplemental filings supporting their positions on whether there was a reasonable basis for this case. Given the posture of this case at that point, and Dr. Yazbak's earlier reliance on evidence of a vaccine reaction that I rejected, it was not a reasonable exercise of billing judgment to file this report and the references therein.[32]

[32] While the report does not discuss the facts on which Dr. Yazbak previously relied, or the facts as found in the Fact Ruling, it does contain speculation regarding Quinn's vitamin C levels at the time of her

C. Petitioner May Receive an Award of Attorney Fees and Costs.

Because I have determined that petitioner brought and prosecuted this case in good faith, and maintained a reasonable basis throughout the proceedings, I may exercise my discretion to award him attorney fees and costs. I do so here, but I award less that petitioner requests based on my determination of the fees and costs that were "reasonable" to incur in this matter. *See* § 300aa-15(e)(1).

II. Other Disputes Concerning Fees and Costs.

While continuing to assert her objections to any award of fees and costs in this case, respondent further objects to (1) the hourly rate that petitioner requests for one of his attorneys, (2) certain expenditures of hours, and (3) some costs.

This court applies the lodestar method to any request for attorney fees and costs. *See Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) ("[T]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984))); *see also Avera v. Sec'y, HHS*, 515 F.3d 1343, 1347-48 (Fed. Cir. 2008); *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993). The standards for calculating attorney fees set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), "are generally applicable in all cases in which Congress has authorized an award of fees." *Hensley*, 461 U.S. at 433 n.7.

A. Hourly Rate Dispute.[33]

Petitioner requests an hourly rate for Mr. Chris Webb, an associate in the law firm representing petitioner, of $225.00 per hour. Petitioner's rationale for this rate is that Mr. Webb is experienced in Vaccine Act cases, that these cases constitute complex civil litigation such that an hourly rate exceeding Mr. Webb's local billing rate of $195.00 per hour is warranted, and that Mr. Webb's experience as a law clerk to a federal magistrate judge places a premium on his services. Pet. Reply at 8-11. Petitioner also argues that the $200.00 hourly rate awarded by another special master to an associate in a Boston law firm specializing in Vaccine Act cases is evidence of a forum rate. He offered to compromise on Mr. Webb's hourly rate at that amount. Pet. Reply at 11-12.

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collapse. As there is no evidence of her vitamin C levels at that time, this speculation is irrelevant. Pet. Ex. 115 at 6.

[33] Respondent does not object to the hourly rates charged by the other attorneys and by the paralegals that worked on this case. *See* Res. Obj. at 19-20. Based on my experience in the Program, I find those rates reasonable.

Respondent contends that $170.00-178.00 per hour is appropriate for Mr. Webb. Res. Obj. at 16. She cites the Altman-Weil Small Law Firm Economic Survey as support for such a rate. *Id.*

The reasonable hourly rate is "the prevailing market rate," which is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 896 n.11. Petitioners have the burden to demonstrate that the hourly rate requested is reasonable. *See Blum*, 465 U.S. at 895 n.11 ("[T]he burden is on the fee applicant to produce satisfactory evidence–in addition to the attorney's own affidavits–that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.").

The appropriate hourly rate for counsel in Vaccine Act litigation is the forum rate, unless the so-called "*Davis* exception" applies. *Avera*, 515 F.3d at 1349 (citing *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA*, 169 F.3d 755 (D.C. Cir. 1999)); *see also Rodriguez v. Sec'y, HHS*, 632 F.3d 1381, 1384 (Fed. Cir. 2011) (affirming a determination of the forum rate in Vaccine Act cases). The *Davis* exception applies when the bulk of the work in a case is performed outside the forum (Washington, DC, in Vaccine Act cases), and there is a very significant difference in rates favoring the forum. *Avera*, 515 F.3d at 1349. There is no bright line rule for what constitutes a difference significant enough to trigger the *Davis* exception; such a determination is within the special master's discretion. *Hall v. Sec'y, HHS*, 640 F.3d 1351, 1356 (Fed. Cir. 2011). In addition to the evidence in the record, a special master may use her experience in the Vaccine Program to determine an hourly rate. *Id.* at 1357; *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993).

Based on my experience in Vaccine Act litigation, I conclude that the rate awarded to a young associate by Special Master Moran in *Ramsey v. Sec'y, HHS*, No. 07-21V, 2009 WL 3423038, at *3 (Fed. Cl. Spec. Mstr. Oct. 7, 2009), constitutes a reasonable forum rate for attorneys of Mr. Webb's experience.[34] The associate in *Ramsey* graduated from law school in the same year as Mr. Webb and was working with experienced Program attorneys. The $5.00 difference between Mr. Webb's local billing rate of $195.00 per hour and the presumptive forum rate of $200.00 per hour is

[34] In a market as small and geographically diverse as that for Vaccine Act litigation, a rate received by other Program counsel, regardless of the attorney's geographic location, is some evidence of the forum rate. *See Rodriguez v. Sec'y, HHS*, No. 06-559V, 2009 WL 2568468, at *14 (Fed. Cl. Spec. Mstr. July 27, 2009) (rates awarded to or negotiated on behalf of other Program attorneys are evidence of "what a willing buyer would pay a willing seller"), *aff'd*, 91 Fed. Cl. 453 (2010), *aff'd*, 632 F.3d 1381 (Fed. Cir. 2011).

not significant. I conclude that Mr. Webb's services in this case should be compensated at the rate of $200.00 per hour.

B. Reasonable Attorney and Paralegal Hours.

Petitioner requests compensation for 95.4 hours for his attorney of record, Mr. McLaren, 31.8 hours for another member of Mr. McLaren's firm (Mr. Cochran), and 148.1 hours for Mr. Webb. Petitioner likewise requests compensation for 107.8 hours for the services of various firm paralegal specialists. Fees App., Tab 2 at 37 (table summarizing hours claimed).

Respondent argues that the hours claimed are excessive, particularly (1) the hours spent by two attorneys to review medical records, (2) the hours spent by the three attorneys and several paralegals to obtain expert assistance and review and comment on Dr. Yazbak's reports (totaling more than 93 hours by respondent's calculations), and (3) the hours spent by an attorney in conducting legal research and obtaining various military and civilian records pertaining to this case. Res. Obj. at 21-22. Respondent urges me to use my discretion in making a percentage deduction in the hours claimed. *Id.*

In determining the number of hours reasonably expended, a court must exclude 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." *Hensley,* 461 U.S. at 434. Special masters may use their experience in Vaccine Act cases to determine whether the hours expended are reasonable. *Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 483 (1991) (noting special masters have broad discretion in calculating fees and costs awards), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993). A special master is not required to engage in a line-by-line analysis of the hours billed. *Wasson*, 24 Cl. Ct. at 483.

I disagree with respondent that most of the hours she cites were unreasonably expended. I do find that a tendency to bill more than 0.1 hours to read and note routine filings, such as a notice of appearance by respondent's counsel, is unreasonable and will not be compensated. *See, e.g.*, Fees App., Tab 2 at 2 (3/05/2008 entry). I also find some inefficiency and duplication of effort in counsel's obtaining, reading, and summarizing medical and police records throughout the case. Further, time billed to read and review a rules change not directly applicable to actions being taken in this case is not compensable. Fees App., Tab 2 at 32 (9/13/2010 entry). Reading and analyzing a recent Federal Circuit opinion not directly applicable to the issues in this case is likewise not compensable. Fees. App., Tab 2 at 32 (9/14/2010 entry). These result in some small deductions from the attorney and paralegal hours claimed.

C. Costs.[35]

Respondent's primary challenge to petitioner's request for costs concerns the $8,000.00 billed by Dr. Yazbak at a rate of $200.00 per hour for 40 hours of work. She requests that I deny the request in total, because "there is no indication from Dr. Yazbak's invoice that he billed for time for this case prior to September 30, 2008." Res. Obj. at 22. Notwithstanding this and other objections to the award of any fees and costs, respondent does not object to the hourly rate claimed,[36] but due to the nature of Dr. Yazbak's invoice, respondent contends that she "cannot evaluate whether the number of hours sought for his services is reasonable under the circumstances." Res. Obj. at 23.

I agree that Dr. Yazbak's invoice is inadequate to support an award of $8,000.00 for his work on this case. Expert's bills, like those filed by attorneys, should reflect the tasks performed, the dates they were performed, and the hours involved in performing them. *See Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 484 (1991), *aff'd per curiam*, 988 F.2d 131 (Fed. Cir. 1993). Because many experts in Vaccine Act cases appear repeatedly and sometimes offer opinions that are "cut and paste" versions of previous opinions with regard to the science supporting vaccine causation, the Program may pay for the same work (and writing) over and over again. Bills that document with specificity the tasks performed allow the parties and the court to ascertain whether the fees requested are warranted. Counsel have an obligation to monitor expert fees and costs (*Simon v. Sec'y, HHS*, No. 05-941V, 2008 WL 623833, at *2 (Fed. Cl. Spec. Mstr. Feb. 21, 2008); *see also Perreira*, 33 F.3d 1375), and cannot adequately perform their obligation to do so without more specificity than this bill provides.

Fortunately for Dr. Yazbak, his work product is available to evaluate the effort expended. That work product reflects a fair degree of wheel-spinning. "Research" conducted in the VAERS database is unlikely to produce reliable evidence of vaccine causation. I will not compensate such research. Additionally, Dr. Yazbak's rambling supplemental reports were accompanied or followed by the filing of a considerable amount of literature irrelevant to this case, unsupportive of his opinions on causation, or lacking scientific rigor. For example, Pet. Ex. 87, a 13-page supplemental report of Dr. Yazbak, was accompanied by Pet. Exs. 88-112. Those exhibits included an article from the Chicago Tribune Magazine on shaken baby syndrome (Pet. Ex. 88), a tribute to Mr.

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[35] In compliance with General Order 9, petitioner filed a statement averring he incurred no costs in this litigation and all costs were incurred by counsel on his behalf. Fees App., Tab 3.

[36] Respondent notes that she does not object to this rate "in this case only." Res. Obj. at 23 (emphasis original).

Jack Emerson published in a medical journal (Pet. Ex. 90),[37] an appellate decision from 1976 citing Dr. Yazbak's testimony (Pet. Ex. 91), an article on the 1964 rubella epidemic (Pet. Ex. 92), an article on Brown University medical school (Pet. Ex. 93), an article on autism spectrum disorder (Pet. Ex. 94), several news reports regarding criminal charges stemming from shaken baby syndrome (Pet. Exs. 102-04,110),[38] an article on the *Bruesewitz* case[39] (Pet. Ex. 109), and two articles (Pet. Exs. 111-12) on vitamin D deficiency cited to explain Quinn's arm fracture (*see* Pet. Ex. 87 at 13).[40]

Based on the quality of the reports filed, the supporting documents, and the lack of detail in Dr. Yazbak's invoice, I conclude that $4,000.00 is more than adequate to compensate his work relevant to this case. In future cases involving Dr. Yazbak as an expert witness, I am unlikely to award any compensation if detailed invoices are not submitted, and I am unlikely to compensate any additional VAERS research purporting to demonstrate vaccine causation.

III. Resolution of Disputes Regarding Fees and Costs.

A. Fees.

Using the $200.00 per hour rate for Mr. Webb, making small deductions for the billing issues mentioned in Section II.B., above, and deducting for hours expended on matters not reasonably necessary to determine if petitioner could present a case for vaccine causation after the Fact Ruling or to otherwise close out this case, I conclude that a deduction of $4,800.00 in the total fees claimed is appropriate.

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[37] This particular article was apparently filed in order to establish that the first iron lung was used at the Chapin Hospital in Rhode Island, where Dr. Yazbak once worked. *See* Pet. Ex. 87 at 3.

[38] Given the different burdens of proof in criminal cases and civil cases, it is both logically and legally supportable to have a parent acquitted in a criminal trial of abusing his child, but to have his claim of vaccine causation rejected on the basis that it was more likely than not that the child was the victim of abuse. A criminal conviction requires proof beyond a reasonable doubt. Therefore, a jury might believe it is more likely than not that the parent abused the child, but not find proof beyond a reasonable doubt.

[39] *See Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011). The issues raised in *Bruesewitz* have no bearing on Dr. Yazbak's causation theory.

[40] There is no evidence in the record that Quinn had a vitamin D deficiency.

B. Costs.

The total deduction for costs includes $4,000.00 deducted from Dr. Yazbak's expert fee and $643.60 in travel expenses erroneously billed to this case, for a total of $4,643.60.

IV. Conclusion.

Accordingly, I hereby award $81,145.04[41] in the form of a check payable jointly to petitioner, Grant Heath, and petitioner's counsel, Black McLaren Jones Ryland & Griffee, P.C., for petitioner's attorney fees and costs.

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.[42]

IT IS SO ORDERED.

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

[41] This amount is intended to cover all legal expenses incurred in this matter. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. *See generally Beck v. Sec'y, HHS*, 924 F.2d 1029 (Fed. Cir.1991).

[42] Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. *See* Vaccine Rule 11(a).