

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Simmons v. Secretary of Health & Human Services

875 F.3d 632 (Fed. Cir. 2017) · No. 2017-1405 · Decided November 7, 2017

SUMMARY

The Federal Circuit affirmed the Court of Federal Claims’ denial of attorneys’ fees and costs in a Vaccine Act case. The court held that an impending statute-of-limitations deadline cannot establish an objective reasonable basis for the merits of a vaccine-injury claim, distinct from the subjective good-faith requirement.

CASE DETAILS

COURT	United States Court of Appeals for the Federal Circuit
WRITING FOR THE COURT	Prost, Chief Judge; Lourie, Circuit Judge; Taranto, Circuit Judge
JURISDICTION	Federal
DECIDED	November 7, 2017
DOCKET	2017-1405
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the Court of Federal Claims' reversal of a special master's award of attorneys' fees and costs under the Vaccine Act.
STANDARD OF REVIEW	The Federal Circuit reviews a special master's Vaccine Act decision for arbitrariness, capriciousness, abuse of discretion, or failure to accord with law. Application of the correct legal standard is reviewed de novo.
PRECEDENTIAL VALUE	Published Federal Circuit opinion; binding precedent within the Federal Circuit.
PARTIES	Henry Simmons v. Secretary of Health and Human Services

TOPICS

- health law
- administrative law
- appellate procedure
- remedies
- standard of review

PRACTICE AREAS

- Vaccine Act litigation
- health law
- administrative law
- appellate procedure
- attorneys' fees

QUESTIONS PRESENTED

1. Whether an impending Vaccine Act statute-of-limitations deadline can establish an objective reasonable basis for the merits of an otherwise unsupported claim for purposes of awarding attorneys' fees and costs under 42 U.S.C. § 300aa-15(e)(1).
2. Whether the special master abused her discretion by treating counsel's impending ethical or limitations concerns as sufficient to establish a reasonable basis for the claim.

HOLDINGS

1. An impending Vaccine Act statute-of-limitations deadline does not establish a reasonable factual basis for the merits of the claim. The reasonable-basis inquiry is objective and concerns the claim for which the petition was brought, independent of counsel's conduct.
2. A special master's Vaccine Act fee decision is reviewed for arbitrariness, capriciousness, abuse of discretion, or failure to accord with law, and application of the wrong legal standard is reviewed de novo.

KEY QUOTATIONS

“Whether there is a looming statute of limitations deadline, however, has no bearing on whether there is a reasonable factual basis “for the claim” raised in the petition.” (at 635)

“We conclude that counsel may not use this impending statute of limitations deadline to establish a reasonable basis for Mr. Simmons’s claim.” (at 637)

FACTUAL BACKGROUND

Simmons told counsel that he developed Guillain-Barre Syndrome after receiving a flu vaccination on October 26, 2010, and provided a vaccination record. After a lengthy period during which counsel could not contact him, Simmons recontacted counsel shortly before the limitations period might expire, and counsel filed a Vaccine Act petition without medical records or other evidence that he had been diagnosed with Guillain-Barre Syndrome. Simmons again became unreachable, and the special master dismissed the petition for failure to prosecute.

PROCEDURAL HISTORY

Simmons filed a Vaccine Act petition alleging Guillain-Barre Syndrome caused by a flu vaccination, but the petition contained no medical records or other supporting evidence. The special master dismissed the petition for failure to prosecute and awarded attorneys' fees and costs after finding good faith and a reasonable basis. The Court of Federal Claims reversed the fee award, and Simmons appealed to the Federal Circuit.

DISPOSITION

affirmed

CASES CITED

- Simmons v. Secretary of HHS, 128 Fed. Cl. 579 (2016)

- Chuisano v. United States, 116 Fed. Cl. 276, 289 (2014)
- Rodriguez v. Secretary of HHS, 632 F.3d 1381, 1383-84 (Fed. Cir. 2011)
- Avera v. Secretary of HHS, 515 F.3d 1343, 1347 (Fed. Cir. 2008)
- Hendler v. United States, 952 F.2d 1364, 1380 (Fed. Cir. 1991)
- Markovich v. Secretary of HHS, 477 F.3d 1353, 1356 (Fed. Cir. 2007)
- Cloer v. Secretary of HHS, 654 F.3d 1322, 1325, 1344 (Fed. Cir. 2011) (en banc)
- Cloer v. Secretary of HHS, 675 F.3d 1358, 1360, 1362, 1364 (Fed. Cir. 2012) (en banc)

OPINION

PROST, J.

United States Court of Appeals for the Federal Circuit _____ HENRY SIMMONS, Petitioner-Appellant v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent-Appellee _____ 2017-1405 _____ Appeal from the United States Court of Federal Claims in No. 1:13-vv-00825-NBF, Senior Judge Nancy B. Firestone. _____ Decided: November 7, 2017 _____ JOSEPH PEPPER, Conway Homer, PC, Boston, MA, argued for petitioner-appellant.

Also represented by RONALD C. HOMER. VORIS EDWARD JOHNSON, JR., Vaccine/Torts Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by CHAD A. READLER, C. SALVATORE D’ALESSIO, CATHARINE E. REEVES. 2 SIMMONS v. HHS JENNIFER ANNE MAGLIO, Maglio Christopher & Toale PA Law Firm, Sarasota, FL, for amici curiae Vaccine Injured Petitioners Bar Association, The George Washington University Law School Vaccine Injury Litigation Clinic. _____ Before PROST, Chief Judge, LOURIE and TARANTO, Circuit Judges.

PROST, Chief Judge. Appellant Henry Simmons appeals the decision of the Court of Federal Claims (“Claims Court”), *Simmons v. Sec’y of HHS*, 128 Fed. Cl. 579 (2016) (“Claims Court Decision”), denying attorneys’ fees and costs for his vaccine case.

Because the Claims Court properly concluded that there was no reasonable basis for Mr. Simmons’s claim, we affirm. I Mr. Simmons first contacted counsel in August 2011, claiming that he developed Guillain-Barre Syndrome (“GBS”) as a result of his October 26, 2010 flu vaccination. He provided his vaccination record to counsel and counsel agreed to represent him.

After the August conversation, counsel was unable to contact Mr. Simmons despite making several attempts. In light of Mr. Simmons’s failure to respond, counsel sent Mr. Simmons a letter in March 2013 notifying him that their attorney-client relationship had been terminated.

The termination letter was returned as undeliverable. Then, on October 17, 2013, nearly two years after his previous communication and shortly before the three-year statute of limitations on his Vaccine Act claim might have expired, Mr. Simmons contacted counsel's firm and expressed that he would like to move forward with his petition. Counsel spoke with Mr. Simmons one additional time on October 21, 2013.

The next day, on October 22, 2013, counsel filed Mr. Simmons's petition for compensation. The petition did not include any medical records or other supporting evidence showing that Mr. Simmons had been diagnosed with GBS.

In January 2014, the special master ordered counsel to produce Mr. Simmons's medical records. Counsel informed the special master that counsel had once again lost all contact with Mr. Simmons and that despite making numerous attempts, they were unable to acquire his medical records.

The special master dismissed the case for failure to prosecute. After the special master dismissed Mr. Simmons's petition, counsel filed two fee petitions seeking a total of \$8,267.89 in fees and costs. The special master found that Mr. Simmons's petition had been filed in good faith and there was a reasonable basis for the claim.

In particular, the special master noted that because there was no direct evidence of bad faith, counsel had satisfied the good faith requirement. Further, the special master found that counsel had satisfied the reasonable basis requirement because Mr. Simmons "provided Counsel with a vaccination receipt"; "after consulting with Petitioner, Counsel judged the claim potentially meritorious"; and "[w]hile that alone may not have provided a reasonable basis for filing a claim, Petitioner then disappeared for almost two years and reemerged less than ten days before the statute of limitations expired" at which point "[t]o not file a petition... would be tantamount to an ethical violation." *Simmons v. Sec'y of HHS*, 2016 WL 2621070, at *3 (Fed. Cl. Apr. 14, 2016) ("Special Master's Decision").

On this basis, the special master awarded the attorneys' fees. *Id.* The government appealed the special master's decision to the Claims Court. On review, the court reversed the special master's decision, concluding that the special master erred in finding that counsel had a reasonable basis for Mr. Simmons's claim.

Claims Court Decision, 128 Fed. Cl. at 583. In particular, the Claims Court noted 4 *SIMMONS v. HHS* that "[c]ounsel failed to produce any evidence, either at the time the petition was filed or in the five months before the special master dismissed the case for failure to prosecute, to support the claim that petitioner suffered from GBS caused by his flu vaccine." *Id.* Further, the Claims Court held that "[t]he fact that the statute of limitations was about to expire did not excuse counsel's obligation to show he had some basis for the claim beyond his conversation with the petitioner." *Id.* at 584.

On appeal to this court, Mr. Simmons's counsel argues that the special master did not abuse her discretion in awarding attorneys' fees and that we should affirm her award. The government, on the other hand, argues that the special master's rationale improperly conflated the subjective good faith analysis with the objective reasonable-basis inquiry.

We have jurisdiction under 42 U.S.C. § 300aa–12(f). Because we agree with the government that the special master conducted an improper reasonable-basis inquiry, we affirm the Claims Court's decision. II A Under the Vaccine Act, an unsuccessful petitioner may be awarded attorneys' fees "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) (emphasis added).

As the Claims Court has previously noted, "good faith and reasonable basis" are "two distinct facets." *Chuisano v. United States*, 116 Fed. Cl. 276, 289 (2014). And "only 'good faith' is subjective; 'reasonable basis' is objective." *Id.* In cases brought under the Vaccine Act, we review a decision of the special master to determine if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Rodriguez v. Sec'y of HHS*, 632 SIMMONS v. HHS 5 F.3d 1381, 1383–84 (Fed.

Cir. 2011) (citing *Avera v. Sec'y of HHS*, 515 F.3d 1343, 1347 (Fed. Cir. 2008)). "An abuse of discretion may be found when (1) the court's decision is clearly unreasonable, arbitrary, or fanciful; (2) the decision is based on an erroneous conclusion of the law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence upon which the court rationally could have based its decision." *Hendler v. United States*, 952 F.2d 1364, 1380 (Fed.

Cir. 1991). "'Not in accordance with the law' refers to the application of the wrong legal standard, and the application of the law is reviewed de novo." *Rodriguez*, 632 F.3d at 1384 (citing *Markovich v. Sec'y of HHS*, 477 F.3d 1353, 1356 (Fed. Cir. 2007)). B In her attorneys' fees decision, the special master concluded that Mr. Simmons could receive attorneys' fees because the "Petitioner had a reasonable basis for submitting his petition." Special Master's Decision, 2016 WL 2621070, at *3.

In particular, she noted that while the evidence of Mr. Simmons's claim "alone may not have provided a reasonable basis for filing a claim," the fact that "Petitioner then disappeared for almost two years and reemerged less than ten days before the statute of limitations expired" factored heavily into her analysis. *Id.* According to the special master, counsel had a reasonable basis for filing Mr. Simmons's petition because "[t]o not file a petition at that point... would be tantamount to an ethical violation." *Id.* The government argues that this analysis is improper because "by considering [the] attorney's conduct as part of the reasonable basis assessment, [the special master] folded the subjective good faith provision into the reasonable basis requirement, and

effectively either rendered the ‘good faith’ language [in § 300aa–15(e)(1)] superfluous, or the ‘reasonable basis’ language meaningless.” 6 SIMMONS v. HHS Appellee Br.

28. According to the government, “a looming statute of limitations may excuse an attorney’s ethical duty to investigate a claim prior to filing a Vaccine Act petition, but that does not create a reasonable basis for the claim in the petition.” *Id.* at 37.

We agree with the government’s argument. The Vaccine Act provides that there must be a “reasonable basis for the claim for which the petition was brought” before the special master may exercise her discretion in awarding attorneys’ fees. 42 U.S.C. § 300aa–15(e)(1) (emphasis added). Whether there is a looming statute of limitations deadline, however, has no bearing on whether there is a reasonable factual basis “for the claim” raised in the petition.

That is an objective inquiry unrelated to counsel’s conduct. Although an impending statute of limitations deadline may relate to whether “the petition was brought in good faith” by counsel, the deadline does not provide a reasonable basis for the merits of the petitioner’s claim. *Id.* Mr. Simmons’s counsel argues that the government’s position is inconsistent with our decisions in *Cloer v. Secretary of HHS*, 654 F.3d 1322, 1325 (Fed.

Cir. 2011) (en banc) (“*Cloer I*”) and *Cloer v. Secretary of HHS*, 675 F.3d 1358, 1362 (Fed. Cir. 2012) (en banc) (“*Cloer II*”). Reply Br. 8–9. In *Cloer I*, we addressed Dr. Cloer’s petition for compensation under the Vaccine Act and in *Cloer II*, we addressed her motion for attorneys’ fees.

We held in *Cloer I* that the Vaccine Act’s statute of limitations is not jurisdictional and that some claims brought under the Vaccine Act are subject to equitable tolling. 654 F.3d at 1344. In *Cloer II*, we held that because the statute of limitations is not jurisdictional, a petitioner may receive attorneys’ fees even for an untimely petition so long as “the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.” 675 F.3d at 1360.

In this context, we explained that this “statute of limitations issue,” i.e., *SIMMONS v. HHS* 7 whether a petitioner can receive attorneys’ fees despite filing a petition after the statute of limitations has expired, may be encompassed within the reasonable basis inquiry, along with “the underlying merits of the claim.” *Id.* at 1362.

We therefore held that “[a] petitioner who asserts an unsuccessful but nonfrivolous limitations claim should be eligible for a determination of whether reasonable attorneys’ fees and costs... should be awarded.” *Id.* at 1364. Unlike in *Cloer II*, the issue here is not whether counsel had a reasonable basis for Mr. Simmons’s claim despite the expiration of the statute of limitations.

Instead, the issue here is whether counsel may establish a reasonable basis for the merits of Mr. Simmons’s claim based on the fact that there was an impending statute of limitations deadline.

We conclude that counsel may not use this impending statute of limitations deadline to establish a reasonable basis for Mr. Simmons's claim.

Because the special master only found that there was a reasonable basis for Mr. Simmons's claim because of the impending statute of limitations deadline, we conclude that she abused her discretion by misapplying the law. Accordingly, we affirm the Claims Court's decision.
AFFIRMED