

OFFICE OF SPECIAL MASTERS

No. 99-539V

(Filed: March 11, 2005)

(Reissued for Publication April 26, 2005).¹

* * * * *

LAURA BROWN, a minor, by her Parents *
and Natural guardians MYRA BROWN and *
RICHARD BROWN, *

Petitioners, *

v. *

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

* * * * *

To be Published

Clifford Shoemaker, Esq., Vienna, Virginia, for Petitioners,
Julia McInerny, Esq., U.S. Department of Justice, Washington, D.C., for Respondent.

DECISION ON ATTORNEY FEES AND COSTS²

ABELL, Special Master:

BACKGROUND

On 29 July 1999, Petitioners filed an action seeking an award under the National Childhood

¹ This Decision was originally entered by the court on March 11, 2005 as an unpublished decision. This reissuance as a published decision follows in response to Respondent's written request for publication which the Court granted on April 26, 2005. The reissuance of this decision shall not affect the time for filing a motion for review.

² Petitioners are reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Rule 18(b)(2) of the Vaccine Rules of this Court, within fourteen days of this decision, they may object to the public disclosure of any material including "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy."

Vaccine Injury Act of 1986 (Vaccine Act or Act)³ for the alleged vaccine-related injuries of Laura Brown (hereinafter "Laura") caused by the administration of Hepatitis B vaccination(s) (hereinafter "HBV") administered "[o]n or about February 21, 1996 and March 28, 1996." Petition at 1. Their petition was dismissed on 9 January 2004 "for the object of [sic] failure of Petitioners to prosecute their claim." Petitioners filed an Application for Attorney Fees and Costs on 27 August 2004 from which this present case arises.

The petition claims that "[a] fact-specific description of the claimed symptoms and the nature and extent of the injuries caused by the inoculation and the condition of [Laura] at all relevant times will be set forth in further affidavits which, when filed, will be incorporated by reference herein and annexed hereto as Exhibits pursuant to 42 U.S.C. §300aa-14(b) and §300aa-11(c)(2)." Petition at 2. The petition further noted that counsel was in the process of obtaining the requisite records and that the skeletal petition was filed in order to preserve Laura's rights from extinguishing under a 6 August 1999 deadline for Hepatitis B cases. *Id.*

Petitioners' counsel originally grouped this petition along with hundreds of similar cases involving the administration of the Hepatitis B vaccine. For years, joint motions or generalized individual motions were submitted by Petitioners' counsel in these cases.⁴

On 4 March 2003, once it was finally determined that this case would not be part of any omnibus Hepatitis B proceedings, this Court resumed prosecution of the petition and, noting that medical records had yet to be produced, ordered such to be filed post-haste.

After several status conferences and repeated orders to file the requisite records, on 26 September 2003, Petitioners' counsel submitted a status report stating that they could not locate the Petitioners. On 29 September 2003, the Court issued an order giving Petitioners' counsel forty-five days to locate their clients or face an Order to Show Cause for failure to prosecute.⁵

On 19 November 2003 this Court issued an Order stating, "No medical records or fact witness affidavits were filed with the petition and none have been file as of the date of this Order.

³ The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 *et seq.* (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

⁴ On 14 February 2000, Chief Special Master Golkiewicz denied a motion by Petitioners' counsel to include these cases in a master file for discovery purposes stating that "it is premature to file discovery motions until the complete sets of medical records have been filed." Over the next year, Petitioners' counsel filed multiple status reports stating that they were seeking medical records and that such were forthcoming. After these cases were reassigned to the present special master in Spring 2001, Petitioners' counsel requested, and this Court granted, permission to issue subpoenas *duces tecum*. There is no record of any efforts on the part of Petitioners' counsel to compel compliance on a subpoena in this case.

⁵ RCFC Appendix B Rule 21. Dismissal of Petitions. (c) Involuntary Dismissal. For failure of petitioner to prosecute or comply with the Vaccine Rules or any order, the special master or the court may dismiss a petition or any claim therein.

Petitioners' counsel has now informed the Court that after extensive effort, she is unable to locate her clients. Since the Court cannot assess the merits of Petitioners' claim, Petitioners shall have until close-of-business 18 December 2003 to SHOW CAUSE FOR WHY THIS CASE SHOULD NOT BE DISMISSED FOR FAILURE TO PROSECUTE."

The petition was dismissed on 9 January 2004 for failure to prosecute. That decision noted, "In almost four and a half years, Petitioners have failed to put forth evidence of any kind by which this Court can duly adjudicate their claim. Accordingly, this case is DISMISSED WITH PREJUDICE."

Judgment was entered on 11 February 2004; and on 27 February 2004 Petitioners elected to file a civil action. On 27 August 2004, six months from the date of election, Petitioners filed a motion for attorney fees and costs.

In defense of the application for fees and costs, on 18 November 2004 Petitioners' counsel filed copies of e-mail correspondence between Petitioners and the firm which constituted the basis for the petition. In short, the firm was contacted by Petitioners via e-mail on 26 July 1999. Upon being informed of the upcoming deadline, Petitioners supplied pertinent information to counsel and requested that counsel file a petition on behalf of their daughter. Using information gleaned from the e-mail correspondence, Petitioners' counsel filed a petition on 29 July 1999. On 5 August 1999, counsel received a signed retainer agreement and a check in the amount of \$120.00 to cover the petition filing fee. Petitioners were never heard from again.

ANALYSIS⁶

In general, the Act allows for the recovery of reasonable attorney fees and costs. § 15(e). However, such an award is not automatic. When compensation is denied, as it was in this case, reasonable attorney fees and costs *may* be awarded provided the special master finds that the petition was (1) brought in good faith and (2) there was a reasonable basis for the claim. § 15(e)(1).

Apart from the aforementioned e-mail correspondence, no other record or evidence has been filed in this case. No record of the vaccination(s) in question were ever filed. No medical records have been filed whatsoever. No analysis either by a medical expert or by a treating physician has been filed. Based on the dearth of evidentiary filings, no record has been presented under which a special master could find that the petitioner was even injured. § 13 (a)(1); *see also Schneider v. Secretary of HHS*, No. 90-160V, (Fed. Cl. Spec. Mstr. Sept. 3, 2004) (reissued for publication Feb. 1, 2005).

The Court generally accepts skeletal petitions (those filed *sans* records). *See Stewart v.*

⁶ In addition to the issue discussed herein, Respondent also raised the question of whether Petitioner has proved that the petition was filed in a timely manner. *See Brice v. Secretary of HHS*, 358 F.3d 865 (Fed. Cir. 2004) (holding that a petitioner may not recover fees and costs if a petition is not filed in a timely manner). As the application is denied on separate grounds, the timeliness issue is not reached.

Secretary of HHS, No. 02-819V, 2002 WL 319695743, at *4 (Fed. Cl. Spec. Mstr. Dec. 30, 2002); *see also Robles v. Secretary of HHS*, 155 F.3d 566, 1998 WL 228174 (Fed. Cir. 1998) (unpublished disposition). Yet, while such a filing is adequate to stop the running of the statute of limitations, it does not by itself establish a “reasonable basis” within the meaning of the statute.

The Court recognizes that a reasonable basis could be proved in any number of ways including via a single medical record or a medical record plus a narrative from the petitioner. In fact, the special masters have historically been quite generous in finding a reasonable basis for petitions; very few cases have been denied fees and costs based upon the reasonability standard. In the present case, however, the Court cannot conclude that Petitioners had a reasonable basis for bringing the claim.

CONCLUSION

Due to the complex nature of the Vaccine Act’s statutory scheme, this Court encourages petitioners to seek legal representation. Moreover, the Court has no desire to discourage attorneys, particularly veteran attorneys, from participating in the Vaccine Program. However, for the aforementioned reasons, Petitioner’s application for attorney fees and costs regrettably must be denied.

IT IS SO ORDERED.

Richard B. Abell
Special Master