

OFFICE OF SPECIAL MASTERS

Filed: August 9, 2002

JOSEPH TILGHMAN BRICE, *
LAURAJEAN COUNCILL BRICE, and *
JOSEPH OSLER BRICE, *

Petitioners, *

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

No. 95-835V
PUBLISHED

Peter H. Meyers, Washington, DC, for petitioners.
Mark W. Rogers, Washington, DC, for respondent.

DECISION ON ATTORNEYS' FEES AND COSTS

MILLMAN, Special Master

This case has a long history. For five years, pro se petitioners went twice to the undersigned (who dismissed their petition for failure to file within the statute of limitations), twice to a judge on the United States Court of Federal Claims (who initially remanded and then affirmed the dismissal), and ultimately to the United States Circuit Court of Appeals for the Federal Circuit. In their appeal to the Federal Circuit, they retained Professor Peter H. Meyers and his students at the Vaccine Injury Clinic at the George

Washington University School of Law. The Federal Circuit affirmed the dismissal. Brice v. Secretary of HHS, 240 F.3d 1367 (Fed. Cir.), cert. denied sub nom. Brice v. Thompson, 122 S. Ct. 614 (2001).

Professor Meyers filed an Application for Attorneys' Fees and Costs requesting fees and costs reflecting fees for his and his students' work on the appeal before the Federal Circuit and filing of a petition for certiorari before the United States Supreme Court and costs since the filing of the petition. Respondent filed Respondent's Opposition to Petitioners' Application for Attorney's [sic] Fees and Costs, objecting to any award on the ground that the undersigned had no subject matter jurisdiction in this case due to the running of the statute of limitations.

DISCUSSION

The Federal Circuit in Brice, supra, stated, at 1370:

[A] "statute of limitations is a condition on the waiver of sovereign immunity by the United States," and courts should be "careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended." *Stone Container Corp. v. United States*, 229 F.3d 1345, 1352 (Fed. Cir. 2000) (quoting *Block v. North Dakota*, 461 U.S. 273, 287 ... (1983) (internal quotation omitted)).

When Congress waives sovereign immunity, as it did in the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10, et seq., it grants jurisdiction to a deliberative body, i.e., the special masters, the judges of the United States Court of Federal Claims, the judges of the Federal Circuit, and ultimately the Justices of the United States Supreme Court, to hear cases arising under the statute. But the statute has certain requirements that petitioners must fulfill in order to file a valid petition.

Section 300aa-16(a)(2) states, for post-Act cases, that "no petition may be filed...after the expiration of 36 months after the date of the ...first symptom...of such injury...." Petitioners in the instant

action violated this requirement by filing their petition more than 36 months after the onset of their son's alleged injury. The Vaccine Act states they cannot file this petition.

In order to award attorneys' fees and costs, the undersigned must determine if petitioners satisfy the requirements of § 300aa-15(e)(1) which states that in cases in which petitioners do not prevail, such as this case, "the special master...may award...reasonable attorneys' fees and other costs...if the special master...determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." Even if there were good faith and a reasonable basis for the claim, the award of fees and costs is still discretionary.

But, petitioners herein do not satisfy either prong of the requirements of § 300aa-15(e)(1) because they cannot have had either good faith or a reasonable basis for the claim underlying their petition when they filed their petition after the statute of limitations had run. Petitioners in their Application argue "necessity" and good faith as grounds for an award of fees and costs, based on the arguments that the Federal Circuit required their son to have an attorney represent him in order to pursue his appeal ("necessity") and that they honestly believed they had a good legal argument (equitable tolling) why they should be permitted to file a late petition.

The cases which they cite to support their necessity argument are inapposite since they deal with situations in which judges may have a conflict of interest in presiding over a trial.¹ That the Federal Circuit required petitioners' son to have legal counsel to represent him in an appeal before it (see letter attached at tab 7 to Petitioners' Application) does not mean that the undersigned of necessity must compensate that

¹ United States v. Will, 449 U.S. 200, 213-16 (1980); Williams v. US, 240 F.3d 1019, 1025-26 (Fed. Cir. 2001); and Bolin v. Story, 225 F.3d 1234, 1238-39 (11th Cir. 2000).

counsel. There is no such necessity doctrine as applied to the award of fees of costs. Pro bono counsel participate in legal proceedings without compensation. Where a petition is filed in the Vaccine Program after the statute of limitations has run, petitioners' attorney becomes pro bono counsel.

Moreover, petitioners' purported good faith in reliance on the doctrine of equitable tolling, which subsequently the Federal Circuit ruled inapplicable to this Program, does not eliminate the daunting obstacle to their good faith argument that the undersigned has no authority to award them fees and costs when she has no subject matter jurisdiction in this case. The Vaccine Act specifically states that "no petition may be filed for compensation" after the statute of limitations runs. Section 300aa-16(a)(2). Petitioners filed in violation of the statutory rules. Good faith does not cure the jurisdictional defect here. The cases which petitioners cite in support of their good faith argument do not deal with jurisdictional defects.²

The Federal Circuit has previously ruled on this question in Martin v. Secretary of HHS, 62 F.3d 1403 (Fed. Cir. 1995), in which it affirmed the denial of attorneys' fees and costs in a dismissed vaccine case, stating that the Vaccine Act did not create an independent grant of jurisdiction for the awarding of fees in vaccine cases. 62 F.3d at 1405. The Martins were barred from filing a petition because they had a pending civil action, in violation of § 300aa-11(a)(6) which specifically barred their filing a petition. As in this case in which the statute also bars the filing of a petition once the statute of limitations has run, the

² Frymire v. Ampex Corp., 61 F.3d 757, 767-69 (10th Cir. 1995)(former employees sued employer under particular statute, alleging employer failed to give them proper notice of firing; court held inter alia that employer's liability would be mitigated for acting in good faith); Ingham v. US, 167 F.3d 1240, 1245-46 (9th Cir. 1999)(in tax refund suit that plaintiff lost, US was not liable for alleged disclosure of tax return information because it acted in good faith); and Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp., 41 F.3d 182, 188 (4th Cir. 1994)(in antitrust suit, court held inter alia that evidence supported the decision that supplier established affirmative defense of good faith effort to meet competition).

special master in Martin did not have jurisdiction over their petition and, hence, could not award attorneys' fees and costs. The Federal Circuit stated, at 1407:

Because the special master had no jurisdiction over the petition, there was no jurisdiction over the request for attorneys' fees and costs.

The only way out of petitioners' predicament is for the undersigned to hold that their failure to file a petition within the statute of limitations is not jurisdictional but merely a failure to state a claim upon which relief may be granted. Petitioners suggest in their Application that their failure to file a timely petition is analogous to the former requirement of \$1,000 of unreimbursable expenses³ which the Federal Circuit held not to be jurisdictional and said could be cured through subsequent filings until the expiration of the statute of limitations. Black v. Secretary of HHS, 93 F.3d 781, 790-91 (Fed. Cir. 1996). But the language of Black is obviously inapplicable here since petitioners herein have no way to cure their filing after the statute of limitations has run. The hallmark of a failure to state a claim upon which relief may be granted, i.e., the possibility of curing the defect, is absent here.

Of interest in Black is that there were two petitioners' appeals consolidated for appellate review. The other petitioner's name was May. The Federal Circuit permitted May to continue with her case because she had incurred expenses sufficient to satisfy the former \$1,000 requirement before the expiration of the statute of limitations, but it did not permit Black to continue with his case because he did not incur sufficient unreimbursable expenses to satisfy the \$1,000 requirement until after the statute of limitations had

³ Previously, section 300aa-11(c)(1)(D)(i) required petitioner to submit documentation demonstrating that the injured person "incurred unreimbursable expenses...in an amount greater than \$1,000." This provision was stricken from the Act by the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, sec. 1502, 112 Stat. 2681, 2741 (1998).

run. The Federal Circuit affirmed the dismissal of Black’s petition, saying, “it would be improper to permit a supplemental pleading [of additional expenses] to do what a timely filed petition could not have done [i.e., satisfy the \$1,000 requirement].” *Id.* at 792.

The Federal Circuit has previously held in many cases in general that a time-barred complaint must be dismissed for lack of jurisdiction. See, e.g., Bowen v. US, 292 F.3d 1383 (Fed. Cir. 2002); Caguas Central Federal Savings Bank v. US, 215 F.3d 1304 (Fed. Cir. 2000), cert. denied, 531 U.S. 1070 (2001); Brown Park Estates-Fairfield Development Co. v. US, 127 F.3d 1449 (Fed. Cir. 1997); and Hopland Band of Pomo Indians v. US, 855 F.2d 1573, 1582 (Fed. Cir. 1988).

The undersigned has no basis in the law to award attorneys’ fees and costs in this case.

CONCLUSION

Petitioners’ Application for Attorneys’ Fees and Costs is denied for lack of subject matter jurisdiction. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

DATED: _____

Laura D. Millman
Special Master