

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-1280V

Filed: December 22, 2006

Published

KELLEY ARMSTRONG, by her mother *
and next friend *
LAURA ARMSTRONG, *

Petitioner, *

v. *

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

Respondent. *

Attorney's fees and costs;
statute of limitations

Sheila A. Bjorklund, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, MN, for
petitioner.

Melonie J. McCall, United States Department of Justice, Washington, DC, for respondent.

DECISION ON ATTORNEY'S FEES AND COSTS'

GOLKIEWICZ, Chief Special Master.

I. Procedural Background

The undersigned intends to post this Decision on the United States Court of Federal Claims's website, in
accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As
provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished
by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that
are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy."
Vaccine Rule 18(b). Otherwise, "the entire" Decision will be available to the public. Id.

On May 28, 2003, petitioner, then acting *pro se*, filed a petition for compensation pursuant to the National Vaccine Injury Compensation Program² on behalf of her minor daughter, Kelley. In the petition, petitioner alleged that the hepatitis B vaccine Kelley received on July 16, 1999 caused Kelley's rheumatoid arthritis. On March 25, 2004, Attorney Sheila A. Bjorklund entered her appearance on behalf of petitioner. On February 15, 2005, respondent filed a motion to dismiss this case for being filed beyond the applicable 36 month statute of limitations as set forth in § 16 (a)(2) of the Act. Petitioner responded to the motion with an expert report filed on December 10, 2004 and a brief filed on April 11, 2005.

On January 27, 2006, the undersigned issued a decision in the above-captioned case dismissing petitioner's petition for lack of jurisdiction as being filed beyond the applicable statute of limitations. Armstrong v. Health and Human Services, No. 03-1280V, 2006 WL 337507 (Fed. Cl. Spec. Mstr. Jan. 27, 2006). Petitioner did not file a motion for review of the undersigned's decision and judgment entered on March 9, 2006.

On July 27, 2006, petitioner filed a "Memorandum and Appendix in Support of Her Petition for Attorney Fees and Costs" [hereinafter "Petition"]. In her petition, petitioner requests attorney's fees and costs be awarded to her in the amount of \$18,126.17. On August 28, 2006, respondent timely filed his response to the Petition.³ Respondent's Opposition to Petitioner's Application for Attorneys' Fees and Costs, filed August 28, 2006 [hereinafter "R. Res."]. On October 6, 2006, petitioner timely filed a reply to respondent's response.⁴ Petitioner's Reply Memorandum in Support of Her Petition for Attorney Fees and Costs, filed October 6, 2006 [hereinafter P. Rep.]. The case is now ripe for Decision.

II. The Parties' Positions

In her Petition, petitioner asserts that

[f]ive months after filing a *pro se* petition on behalf of her minor daughter, Petitioner was required to file expert reports to support her petition or face dismissal. Because of the complexity of the statutory provisions of the Vaccine Act, she was additionally encouraged by this Court to hire legal counsel to assist her in finding an expert and

²The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 *et seq.* (West 1991 & Supp. 2002) (hereinafter "Vaccine Act" or "the Act"). Hereafter, individual section references will be to 42 U.S.C.A. § 300aa of the Act.

³The undersigned orally granted an enlargement of time for two weeks for the respondent to file a response. See R. Res. at 1 n.1.

⁴On September 5, 2006, petitioner requested an enlargement of time until October 6, 2006, in which to file her reply. The request was granted. See Order, filed September 14, 2006.

proceeding with her petition. She so complied, incurring thousands of dollars in expert and attorney fees. Thirty-two months after filing her Program Petition, this Court dismissed the petition on the grounds that it was filed more than 36 months after the onset of the first symptoms of vaccine injury. The Court based its determination on information available to it prior to Petitioner ever hiring an attorney or an expert. Under the plain language of the Act, and its undeniable purpose, Petitioner is entitled to an award for the attorney's fees and costs she unnecessarily incurred.

Petition at 1. Petitioner also points out that to make a prima facie case in the Vaccine Program, a petition must satisfy § 11(c)(1) of the Act. Furthermore, petitioner points out that § 15(e)(1)(B) allows for the award of reasonable attorney's fees and costs "in any proceeding," win or lose, as long as the petition was brought in good faith and there was a reasonable basis for the claim. Petition at 6 (emphasis in original). Petitioner continues that since the Vaccine Act is remedial in nature, the statute must be liberally construed so as to give "broad effect to the remedial purpose behind the statute." Id. at 6-7. Thus, the attorney's fees provision in the Act must be liberally construed.

Petitioner continues her argument by asserting that

[p]ractically speaking, this Court could not have made its determination to dismiss the Armstrong petition without having subject matter jurisdiction over the claim. This Court has always had subject matter jurisdiction over Petitioner's petition. It was unable to reach a determination on the merits of her claim, however, because the Court determined its ability to exercise such authority had expired. This does not divest this Court from exercising its discretionary authority to grant the current petition for attorney fees and costs incurred at the Court's urging in a proceeding on the petition.

Id. at 7. Petitioner then asserts that because the undersigned based the decision "largely" on the reliance on statements that petitioner made in her affidavit and facts present in the medical records, information filed as of October 2003, petitioner "unnecessarily expended thousands of dollars to hire legal counsel, to obtain expert review, and to submit an expert opinion." Id. at 8. Petitioner believes that a denial of fees and costs "would be patently unfair and wholly contrary to the undeniable purpose of the Vaccine Act," and that Congress provided a means under § 15(e) such that "even unsuccessful claimants could be compensated for fees and costs incurred on any proceeding on such petition." Id. (emphasis in original).

Petitioner cites to case law she alleges supports her argument that she is entitled to fees and costs. Petitioner does note that there is case law interpreting § 15(e) which has precluded

petitions for fees and costs where the underlying petition was dismissed as “untimely filed.” Id. Petitioner provides citations to cases that she alleges support her position as well as several that are to the contrary. Id. at 9. Petitioner discusses in detail two cases, those being Martin v. Secretary of Health and Human Services, 62 F. 3d 1403 (Fed. Cir. 1995) and Grass Valley Terrace v. United States, 69 Fed. Cl. 341 (2005). According to petitioner, Martin “instructs that every federal Court has the responsibility to determine whether it, as well as any tribunal it is reviewing, has jurisdiction.” Petitioner continues by adding that “[t]he unstated assumption of this edict is that jurisdiction should be determined sooner rather than later to avoid unnecessary delay and unnecessary expense to either party.”

Next, petitioner discusses the applicability of the Grass Valley Terrace decision to petitioner’s case. Petitioner asserts that this case addressed the statute of limitations provision in 28 U.S.C.A. § 2501, which provides for a six year statute of limitations provision for certain claims which come under the jurisdiction of the Court of Federal Claims. The issue before the court was whether the petition filed by homeowners asserting breach of contract against the government was untimely, and thus beyond the court’s jurisdiction. In support of her argument that the untimeliness of a petition does not preclude recovering attorney’s fees and costs, petitioner cites to the court’s holding where Chief Judge Damich, relying on the Federal Circuit’s decision in Bray v. United States, 785 F.2d 989, 992 (Fed. Cir. 1986),⁵ found that “the statute of limitations issue goes to the sufficiency of the claim asserted and, thus, does not affect the court’s subject matter jurisdiction.” Grass Valley Terrace, 69 Fed. Cl. at 347. Thus, petitioner argues that since she “presented a prima facie case for compensation as early as October of 2003” she is entitled to recover fees and costs. Pet. at 12.

Respondent disagrees. Citing to the Federal Circuit’s decisions in Martin, Brice v. Secretary of Health and Human Services, 358 F.3d 865 (Fed. Cir. 2004), and Johns-Manville Corp. v. United States, 893 F.2d 324, 327-28 (Fed. Cir. 1989), respondent asserts that petitioner is not entitled to attorneys’ fees and costs as a matter of law because “[p]etitioner failed to establish jurisdiction in this case.” R. Res. at 5. In response to petitioner’s allegations that the undersigned “ordered” petitioner to file expert reports, respondent points out that during a telephonic conference call held on October 23, 2003, when it was suggested by respondent that the petition was filed “more than forty-five months after Kelley experienced symptoms,” petitioner asserted that although Kelley had experienced an immediate reaction to the vaccine, Kelley had an extended period without symptoms, and that the symptoms of her disease did not appear until the Fall of 2001. Id. at 2. Respondent reports that at that time, the undersigned informed petitioner that if the two occurrences were related, the undersigned would have no

⁵In Bray, 785 F.2d at 992, the Circuit held that the

limitations issue does not affect the fact that the court still has subject matter jurisdiction over the claim, it simply means that the claim must be dismissed because the period during which the government had consented to be sued had “expired.”

jurisdiction and could not award costs associated with an expert report. Respondent continues that the undersigned also noted at that time, that the medical records combined with the petitioner's affidavit suggested that Kelley's symptoms were ongoing from the time that she received the vaccine. Id. At that point, respondent reports that the undersigned "afforded petitioner an opportunity to substantiate her claim with the opinion of a medical expert, as the Act specifically provides that the special master may not determine eligibility for compensation 'based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.'" Id. at 4.

In her reply, petitioner reiterates that there is no provision in the Act that "this discretionary authority of the Special Master or the Court is limited to situations in which petitioner 'proves jurisdiction.'" P. Rep. at 2. Asserting that it is "undisputed that this Court has at all times had subject matter jurisdiction of Petitioner's claim," id. at 3, petitioner posits that the "question that was at issue here was whether or not Petitioner Laura Armstrong met all of the essential elements of a cause of action under the Act, not whether or not this Court had subject matter jurisdiction over her claim." Id. Petitioner continues that the undersigned's ultimate ruling that there was no jurisdiction did not "divest this Court of its jurisdiction to hear the claim in the first place, or to hear collateral issues involving the Petition; here the matter of reimbursement of attorneys' fees and costs." Id. Petitioner asserts that Spruill v. Merit Sys. Prot. Bd., 978 F.2d 679, 687 (Fed. Cir.1992) and Borough of Alpine v. United States, 923 F.2d 170 n.1 (Fed. Cir. 1991) support her position in that they both stand for the proposition that timeliness is not a jurisdictional prerequisite. Petitioner finds respondent's reliance on Johns-Manville to be "misplaced because the case is distinguishable. Petitioner asserts that Johns-Manville "addressed the subject matter jurisdiction of the Claims Court over a civil contract suit, not whether the cases before it were time-barred." Id. at 6 n.1.

III. Discussion

The Federal Circuit has addressed the issue of whether attorney's fees and costs can be awarded under the Vaccine Act if the underlying petition is determined to be untimely filed and thus jurisdictionally barred and has found such petitions for attorney's fees to be barred. Brice v. Secretary of Health and Human Services, 358 F.3d 865, 869 (2004) citing Martin v. Secretary of Health and Human Services, 62 F.3d 1403, 1406 (1995).

As discussed by petitioner in her petition, see Petition at 8-9, in Martin, the Circuit affirmed the Court of Federal Claims decision that since petitioners were jurisdictionally barred from filing a petition under the Vaccine Act, there was no jurisdiction over the petition for awarding attorneys' fees and costs. The facts presented in Martin are as follows. Petitioners filed their petition on June 12, 1990 alleging that their son's paralysis was caused by the oral polio vaccine. The respondent filed a motion to dismiss based on §11(a)(6) because petitioners had previously filed a civil suit for the same injury. The undersigned, as the assigned special master, subsequently granted the motion and dismissed the petition. Petitioners then filed a motion for attorneys' fees and costs, which the undersigned granted finding that there was a

reasonable basis for their claim and that they brought it in good faith. Respondent appealed the special master's decision regarding fees and costs. The Court of Federal Claims vacated the award based on § 11(a) of the Act finding that because the special master had no jurisdiction over the petitioner's petition, there was no jurisdiction over the request for fees and costs. Petitioners appealed to the Federal Circuit arguing that even if § 11(a) limits the jurisdiction of the court, the Act independently provides jurisdiction for an award of attorneys' fees and costs. More specifically, petitioners argued that § 11(a)(6) goes to the merits of the claim, not to the court's jurisdiction to hear the claim. Upholding the denial of fees and costs by the Court of Federal Claims, the Circuit held that:

We recognize that the distinction between facts necessary to establish jurisdiction and those necessary to prove a claim is often a close one, carrying significant legal consequences. But we cannot agree with the suggestion that a particular matter goes to the merits of a claim, and not jurisdiction, whenever a court must resolve legal, or even factual, issues in reaching a decision. Every federal court has the responsibility to determine whether it, as well as any tribunal it is reviewing, has jurisdiction. This proves only that every court has jurisdiction to determine the limits of its jurisdiction in a particular case. It is something else entirely to say . . . that a court has jurisdiction over the merits of a claim whenever a party can raise a nonfrivolous legal or factual allegation that jurisdiction exists.

Martin, 62 F.3d at 1406-07. Thus, pursuant to Martin when a petition is jurisdictionally barred, a petitioner is not entitled to be awarded attorney's fees and costs related to the prosecution of the petition for entitlement.

The Federal Circuit subsequent to Martin addressed the issue of whether attorney's fees and costs can be awarded if the underlying petition was dismissed for lack of jurisdiction in Brice, 358 F.3d 865. In Brice, petitioners filed a petition for compensation for injuries allegedly caused by the measles, mumps, and rubella vaccine that their minor son received on April 30, 1992. The special master dismissed the petition as untimely under § 16 (a)(2). The United States Court of Federal Claims remanded the case to the special master for a factual ruling to determine whether the Brice's late-filing could be excused under the doctrine of equitable tolling. Finding that the untimeliness was not excusable, the special master again dismissed the petition. The Court of Federal Claims affirmed, Brice v. Secretary of Health and Human Services, 55 Fed. Cl. 366, 367 (2003), and the Brices appealed to the Federal Circuit. At that point, the Brices hired an attorney to represent them as the Federal Circuit's rules of practice did not allow a non-attorney to represent their son's interests. The Circuit subsequently affirmed the dismissal of the petition for lack of jurisdiction as the court found that the doctrine of equitable tolling was never available to "save" untimely claims arising under § 16 (a)(2) of the Vaccine Act. Brice v. Secretary of Health and Human Services, 240 F.3d 1367, 1369 (Fed. Cir. 2001) cert. denied, 534 U.S. 1040 (2001).

Subsequently, petitioners filed a petition for attorney's fees and costs, which was denied by the special master. The special master held that she lacked jurisdiction to award attorneys fees and costs because petitioners' entitlement petition was filed beyond the statute of limitations. Brice v. Secretary of Health and Human Services, No. 95-835V, 2002 WL 31051640, at * 2 (Fed. Cl. Spec. Mstr. Aug. 9, 2002). The Petitioner moved for review of the special master's decision to the Court of Federal Claims. Relying on the Circuit's decision in Martin, the Court of Federal Claims affirmed, holding neither the Special Master nor the Court of Federal Claims had jurisdiction to award attorney fees where there was no jurisdiction over the underlying petition. "Where there is no jurisdiction over the petition, as is the case when the statutory deadline has passed, there is no jurisdiction over the award of attorney fees." Brice v. Secretary of Health and Human Services, 55 Fed. Cl. 366, 369 (2003). The Brice's appealed the decision to the Federal Circuit and the Circuit affirmed. Brice v. Secretary of Health and Human Services, 358 F.3d 865, 868 (2004). In the Circuit's decision, 358 F.3d 865, the court rejected petitioner's attempt to create a narrow "Rule of Necessity" exception to Martin on the basis that "fee agreements [between petitioners' and counsel] that contravened 15(e)(3)⁶ would be unenforceable as against public policy,⁷ and held that "a petition for compensation filed under the Vaccine Act that is dismissed for want of jurisdiction is not 'a petition filed under section 300aa-11' as provided in section 15(e)(3)." Id. at 869. Thus, §15(e)(3) does not preclude an attorney from charging a fee for litigating an appeal of a decision of the Court of Federal Claims dismissing a claim for Vaccine Act compensation for want of jurisdiction." Id. Underpinning the court's analysis of recovery of attorney's fees under §15(e) is the tenet that "[t]he jurisdiction of the Court of Federal Claims to award attorneys' fees under the Vaccine Act is not unlimited. The court must have jurisdiction over a petitioner's claim for compensation before it can award attorneys' fees." Id. at 868 (citing Martin, 62 F.3d at 1406.).

Thus, in the undersigned's view, a clear reading of the Circuit's decision in Brice is that when a petition for compensation is time-barred under § 16(a)(2) of the Act, the special master may not award attorney's fees and costs because there was no jurisdiction over the original petition.

Applying the decisions in Martin and Brice, the outcome in this case is clear as the undersigned is bound to follow the Circuit's precedent. Brice and Martin tell us that the Circuit finds the timeliness requirements of § 16(a) to be jurisdictional and that attorney's fees

⁶§ 300aa-15(e)(3) reads: "No attorney may charge any fee for services in connection with a petition filed under section 300aa-11 of this title which is in addition to any amount awarded as compensation by the special master or court under paragraph (1)."

⁷ Counsel argued that an attorney would be unable receive compensation in cases where a petition was dismissed for being time barred and as §15(e)(3) prevents an attorney from charging a fee for petitions filed under section § 11. Brice v. Secretary of Health and Human Services, 358 F.3d 865, 868 (2004).

and costs are not recoverable when the underlying petition for compensation is found to be jurisdictionally barred. Thus, a petition found to be jurisdictionally barred pursuant to § 16 (a)(2) of the Act does not allow an award of attorney's fees and costs to that petitioner as there is no jurisdiction to consider the fees and costs request. Accordingly, Petitioner's Petition for Fees and Costs is denied.

When counsel agreed to take this case in March of 2004, counsel should have been aware that Federal Circuit precedent could potentially preclude compensation for attorney's fees and costs when there is a lack of jurisdiction of the original petition. Brice, 358 F.3d at 869; Martin, 62 F.3d 1403.⁸ The facts of the case *sub judice* fit squarely into the Martin and Brice framework as the undersigned discussed above. The undersigned found in the January 27, 2006 ruling on entitlement that petitioner's claim was filed more than 36 months from the "first symptom or manifestation of onset" of Kelley's injury. Thus, the undersigned was "constrained to grant respondent's motion and dismiss the petition as untimely" under § 16 (a)(2). Armstrong 2006 WL 337507 at *12. The cases cited by petitioner in her briefs, which petitioner asserts stand for the proposition that "[d]ismissal on statute of limitations grounds is more accurately stated as failure to prove the necessary elements of a cause of for which relief could be granted," are not persuasive. First, as discussed above, Martin and Brice dictate a different result. In addition, the cases cited by petitioner fall into one or more of the following categories. These cases are either not Vaccine Act cases, not binding on the undersigned as they are from the Court of Federal Claims, factually dissimilar from the case *sub judice*, or pre-date the Circuit's decision in Brice. See Petition at 1; P. Rep. at 3-4. The same fate lies with petitioner's argument that costs for "any proceeding" on a petition should be recovered is unavailing as well. As the Circuit stated in Brice in interpreting § 15(e) of the Act, "a petition for compensation filed under the Vaccine Act that is dismissed for want of jurisdiction is not 'a petition filed under section 300aa-11.'"⁹ Thus, unfortunately, for the reasons discussed above, the undersigned must deny petitioner's request for attorney's fees and costs.¹⁰

⁸However it should be noted that the United States Supreme Court has recently stated "we have clarified that time prescriptions, however emphatic, 'are not properly typed jurisdictional.'" Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1245 (2006) citing Scarborough v. Principi, 541 U.S. 401, 414 (2004). The Court elaborated "[i]f the Legislature clearly states that threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1245 (2006).

⁹Petitioners, however, "are free to conclude fee agreements with attorneys willing to represent at any stage of the prosecution of their claim." Brice, 358 F.3d at 869.

¹⁰In making this ruling, the undersigned agrees with respondent's assessment of the status
(continued...)

III. Conclusion

Based upon the undersigned's interpretation of Federal Circuit case law, petitioner's petition requesting attorney's fees and costs is *denied*. Because petitioner's petition for compensation was filed beyond the applicable statute of limitations, the undersigned never had jurisdiction over the original petition and thus has no jurisdiction to consider the attorney's fees and costs application.

IT IS SO ORDERED.

s/ Gary J. Golkiewicz
Gary J. Golkiewicz
Chief Special Master

¹⁰(...continued)

conference held on October 2, 2003, according to the undersigned's staff attorney's contemporaneous notes of that status conference. Upon petitioner's representation to the undersigned that the early joint pain was from Kelley's gymnastics, and that the onset of Kelley's disease was not until late 2001, the undersigned informed petitioner that onset was a medical issue and she would need an expert to opine as to when onset of Kelley's disease occurred. At that time, the undersigned informed petitioner of the issues surrounding the recoupment of expenses and attorney's fees, and advised that to keep expenses to a minimum, petitioner should discuss this issue orally with Kelley's treating physicians. "Requiring" the petitioner to file an expert report was done in order to keep petitioner's claim alive; without the report, the undersigned would have had to dismiss the petition for being untimely based on the record as it stood, as petitioner had not made a prima facie case that the petition was filed timely. It is unfortunate that petitioner needed an expert to establish jurisdiction and incurred fees and costs in that process – fees and costs that cannot be reimbursed through the Vaccine Program upon finding no jurisdiction.