IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

* *		
MARK MORAN,	*	
	*	No. 07-363V
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	
	*	Filed: December 12, 2008
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	attorneys' fees and costs,
	*	jurisdiction, reasonable basis,
	*	good faith,
Respondent.	*	attorney's appearance only for fee
* *		phase of the case.

PUBLISHED DECISION ON ATTORNEYS' FEES AND COSTS[*]

Ron Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA., for petitioner;
Julia McInerny, United States Dep't of Justice, Washington, D.C., for respondent.

An application for an award of attorneys' fees and costs is pending. This request is unusual (arguably, unprecedented) in that the attorney whose fees are being requested, Ron Homer, did not become counsel of record in this matter until after Mr. Moran's case had been dismissed for failure to prosecute. Because Mr. Moran did not file his petition in the time provided by the statute of limitations, there is no authority to award attorneys' fees and costs. Furthermore, even if the petition were timely, an award of attorneys' fees and costs is not

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[*] Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it 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).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa–12(d)(4); Vaccine Rule 18(b).

appropriate because the petition was not supported by a reasonable basis and good faith. Therefore, the application for attorneys' fees and costs is denied.

I. Factual and Procedural History[1]

A. Factual History

Some parts of Mr. Moran's medical history before he received a hepatitis B vaccine are relevant. In September 2003, Mr. Moran began feeling fatigued. He also began having headaches in December 2003. He also developed a fever in March 2004. Exhibit 3 (report of Dr. James Grober, dated Aug. 18, 2004) at 2; exhibit 1 at 10; exhibit 1 at 31 (report of Dr. Kamal Singh, dated Aug. 24, 2004).

Mr. Moran's various medical conditions were so severe that he could not work beginning in March 2004. Exhibit 1 at 32.

Mr. Moran received a dose of the hepatitis B vaccine on April 30, 2004. On June 4, 2004, Mr. Moran received a second dose of the hepatitis B vaccine. Exhibit 13 at 3. Mr. Moran identifies only the second dose of the hepatitis B vaccine as the agent that caused his adverse reaction. Pet. ¶ 1.

The date of June 8, 2004, is the critical date for complying with the statute of limitations. See 42 U.S.C. § 300aa–16(a)(2).

On approximately July 15, 2004, Mr. Moran experienced fever and fatigue. Dr. Newberger stated that the etiology of these symptoms was "unclear." Exhibit 13 at 9 (report of Dr. Todd Newberger, dated July 22, 2004).

Following the July 22, 2004 visit with Dr. Newberger, Mr. Moran saw many other doctors. However, the details of these visits are generally not relevant to determining whether Mr. Moran is entitled to award of his attorneys' fees and costs.

B. Procedural History

On June 8, 2007, Mr. Moran filed a petition pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq. (2006). In the petition, he alleged that he received the hepatitis B vaccination on June 4, 2004. Pet. ¶ 1. He also alleged that "[s]ubsequent to receiving the hepatitis B vaccine, [he] suffered Chronic Arthritis, Fever of Unknown Origin, Eosinophilic syndrome, Postural Orthostatic Tachycardia Syndrome ("POTs"), Brachial Neuritis, and other

[1] The sources for factual information are various medical records that were filed after Mr. Moran's claim was dismissed. As discussed in the text, Mr. Moran did not file any medical records while his claim that he was entitled to compensation was pending.

injuries." Id. ¶ 2. Mr. Moran represented himself when the petition was filed. Mr. Moran did not file any medical records with the petition.

An initial order was filed on June 26, 2007. Despite several attempts by the court to contact the petitioner, no contact was ever made and Mr. Moran never contacted the court in response to any order. Eventually, an order to show cause was issued on September 20, 2007, informing Mr. Moran that his case faced dismissal. When Mr. Moran did not respond to that order, a decision was issued dismissing his case for failure to prosecute. Decision, dated Dec. 5, 2007. After the expiration of the time allowed for the filing of a motion for review, judgment followed on January 10, 2008.

This action appeared to conclude the case. Mr. Moran appeared to be a person who filed a lawsuit and then decided, for whatever reason, not to pursue his claim. This happens from time to time in the Vaccine Program.

Unexpectedly, Mr. Homer submitted an application for an award of attorneys' fees and costs on May 15, 2008. This action was "unexpected" because until Mr. Homer filed this motion, there was no information to suggest that Mr. Homer was involved with Mr. Moran's case in any respect. Mr. Homer's application did not seek an award for any costs (such as the filing fee) paid by Mr. Moran.

Respondent's obligation to respond to Mr. Homer's motion was suspended, pending a status conference. Order, dated May 29, 2008.[2] The status conference was held on June 19, 2008. Mr. Homer was ordered to submit a brief addressing certain questions. Order, dated June 19, 2008.

Mr. Homer filed a motion to become counsel of record for Mr. Moran on July 14, 2008. Additional information regarding the relationship between Mr. Homer and Mr. Moran was requested. Mr. Homer eventually filed an affidavit from Mr. Moran. Mr. Moran said that he was aware that Mr. Homer was requesting an award of attorneys' fees for Mr. Homer's firm and an award of costs incurred by Mr. Homer's firm. Mr. Moran also stated that he consented to Mr. Homer's representation of him. Pet'r Resp. to the Court's July 21, 2008 Order, filed Aug. 4, 2008, Tab A (affidavit of Mr. Moran, dated Aug. 1, 2008); see also Pet'r Supp. Resp. at 16. With this information supporting Mr. Homer's motion to become counsel of record,

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[2] Mr. Moran's brief, which was written by Mr. Homer, suggests that this order prevented Mr. Moran and respondent from resolving the issues easily. Pet'r Supp. Resp., filed Aug. 8, 2008, at 10. This argument is speculative because there is no indication that respondent would have agreed to an award of attorneys' fees and costs. The argument is also unpersuasive because Mr. Moran's case presented such unusual issues that the undersigned would have required briefing about his authority to award attorneys' fees and costs even if Mr. Moran and respondent entered into an agreement about the amount of attorneys' fees and costs.

Mr. Homer's motion was granted. Order, dated Aug. 6, 2008. Until this action, Mr. Homer was not Mr. Moran's "counsel of record," as used in Vaccine Rule 14(b).

After Mr. Homer became Mr. Moran's counsel of record, Mr. Homer could file medical records on behalf of Mr. Moran. Mr. Homer, as counsel of record for Mr. Moran, filed a set of 14 medical records on August 12, 2008. (These medical records are the basis for the factual history set forth in section I.A., above.)

On August 8, 2008, Mr. Homer, still acting as Mr. Moran's counsel, filed a substantive response to the June 19, 2008 order ("Pet'r Supp. Resp."). Respondent, in turn, filed a response and opposed the award of attorneys' fees and costs on several grounds. The time for the filing of a reply elapsed without an additional filing from Mr. Moran. Thus, the motion is ready for adjudication.

II. Analysis

The June 19, 2008 order raised three issues that the parties' briefs then addressed. They are: (1) whether this Court possesses jurisdiction to award attorneys' fees and costs, (2) assuming that there is jurisdiction, whether Mr. Moran's petition was supported by a reasonable basis and good faith, and (3) assuming that there is a reasonable basis and good faith, whether Mr. Homer is entitled to an award of attorneys' fees and cost when he did not act as counsel of record while the case was pending. The answers to the first two questions are negative. The third issue is not resolved, but is discussed.

A. Jurisdiction

The law is presently settled that a special master may award attorneys' fees and costs only in cases in which the court possesses jurisdiction. This court lacks jurisdiction (and cannot award attorneys' fees and costs) when the petition is not filed within the time provided by the statute of limitations. Brice v. Sec'y of Health & Human Servs., 358 F.3d 859 (Fed. Cir. 2004). The parties agree about this statement of the law. Pet'r Supp. Resp. at 11; Resp't Resp at 4.[3]

Respondent presents two arguments regarding jurisdiction. First, respondent argues that because Mr. Moran did not file any medical records with his petition and did not file any records while his claim for compensation was pending, this Court lacks jurisdiction to award attorneys' fees and costs. Resp't Resp. at 6. Respondent's second argument assumes that the collection of medical records filed after the case was dismissed may properly be considered. After making this assumption, respondent argues that these records show that Mr. Moran did not file his case

[3] This principle was followed in Kay v. Sec'y of Health & Human Servs., 80 Fed. Cl. 601 (2008). The Federal Circuit affirmed Kay in a decision without opinion. Kay v. Sec'y of Health & Human Servs., No. 2008-5068 (Fed. Cir. Nov. 10, 2008). Mr. Homer's firm represented the petitioner / appellant in Kay.

within the time provided by the statute of limitations. Resp't Resp. at 7. Mr. Moran's brief appears to address only the second argument. See Pet'r Supp. Resp. at 11. (As mentioned previously, Mr. Moran did not file a reply.)

Whether medical records filed only after the case has been adjudicated can be the basis to establish jurisdiction for purposes of awarding attorneys' fees and costs is unclear. On the one hand, the Vaccine Act requires that medical records be filed with the petition. 42 U.S.C. § 300aa–11. On the other hand, some jurisdictional infirmities may be cured while the case is pending. Black v. Sec'y of Health & Human Servs., 93 F.3d 781, 790-91 (Fed. Cir. 1996) (discussing the since repealed requirement that a petitioner incur $1,000 in unreimbursed medical expenses before filing a petition). Whether Black can be extended to permit a showing of timeliness after the case has been dismissed for lack of prosecution is far from certain.[4]

It is not necessary to answer this difficult legal question about whether Mr. Moran may rely upon exhibits 1-14, because, even assuming that Mr. Moran could rely upon them, they show that his case was not timely filed. See Salmon Spawning & Recovery Alliance v. United States, 532 F.3d 1338, 1345 n.4 (Fed. Cir. 2008) (noting that jurisdictional issues may be resolved in any sequence).

Mr. Moran's petition claims compensation for the following injuries: chronic arthritis, fever, eosinophilic syndrome, postural orthostatic tachycardia syndrome, brachial neuritis, and other injuries. Pet. ¶ 2. The medical records establish that Mr. Moran had experienced the problems for which he seeks compensation before he received the two doses of the hepatitis B vaccine.

For example, in August 2004, Mr. Moran reported that he was having "increasing aching in feet . . . ankles, just above knees, right low back, fingers and wrist/fingers, feet and ankles swollen" in March 2004. The doctor's assessments included "polyarthralgias." Exhibit 3 at 2.

Doctors also noted concerns about eosinophilia before Mr. Moran received the hepatitis B vaccine on June 4, 2004. (Eosinophilia means that Mr. Moran had an abnormally high number of white blood cells. Dorland's Illustrated Medical Dictionary (30th Ed. 2002) at 624, 1021.) See exhibit 13 at 8 (progress notes from Dr. Newberger, dated March 9, 2004); exhibit 1 at 127 (letter from Dr. Newberger).

For the postural orthostatic tachycardia syndrome, Mr. Moran has not identified any medical record that shows that a doctor attributed this condition to the hepatitis B vaccine. See

[4] It bears emphasis that the medical records were filed after the case was dismissed. Mr. Moran's case differs from cases in which petitioners file their petition without any medical records but then file medical records while the case is pending. In these cases, special masters possess jurisdiction. See Stewart v. Sec'y of Health & Human Servs., No. 02-819V, 2002 WL 319695743 (Fed. Cl. Spec. Mstr. Dec. 30, 2002).

exhibit 1 at 105 (report from Dec. 9, 2004, stating "orthostatic hypotension was not detected" on a tilt table test); exhibit 9 at 2 (report from a neurologist on June 17, 2005, indicating that the "most likely explanation for part" of Mr. Moran's symptoms was POTS); exhibit 12 at 21 (report from a cardiologist on July 1, 2005, indicating Mr. Moran's tilt table test was "negative."). These medical reports, especially the July 1, 2005 report, raise a question about whether Mr. Moran actually suffers from POTS. See Resp't Resp. at 14 n. 14. However, Mr. Moran has not answered this question by filing a reply.

Similarly, the petition's allegation that Mr. Moran suffers from brachial neuritis appears not to be accurate. In February 2005, Mr. Moran had an electromyograph, which measures electrical activity of muscles at rest and during contraction. Dorland's Illustrated Medical Dictionary (30th ed. 2003) at 598. The results of this test were normal. Exhibit 1 at 92. An electromyograph is used to diagnose brachial neuritis. See 42 C.F.R. § 100.3(b)(6).

Mr. Moran has identified no evidence that indicates that the problems experienced before April 2004, such as fever and fatigue, differed in any way from the fever and fatigue described in his July 22, 2004 visit to Dr. Newberger. Again, it is noteworthy that although Mr. Moran enjoyed the opportunity to challenge respondent's argument, Mr. Moran did not file a reply brief. Thus, it appears that Mr. Moran has waived any argument in rebuttal. See Vaccine Rule 8(f).

Some of the illnesses alleged in the petition began before Mr. Moran received the first dose of the hepatitis B vaccine. Thus, the hepatitis B vaccine did not cause them. Whitecotton v. Shalala, 514 U.S. 268, 274 (1995) (stating "[t]here cannot be two first symptoms or onsets of the same injury."). For these illnesses, the first manifestation occurred more than 36 months before Mr. Moran filed his petition. Consequently, the statute of limitations bars this action. See 42 U.S.C. § 300aa–16(a)(2).[5]

For other illnesses, Mr. Moran has not identified any evidence to support the petition's assertion that he actually suffers from the disease. These allegations are tantamount to a frivolous assertion over which there is no jurisdiction. See Moden v. United States, 404 F.3d 1335, 1341 (Fed. Cir. 2005) (holding that the Court of Federal Claims possesses jurisdiction to entertain non-frivolous allegations).

B. Reasonable Basis and Good Faith

Typically, the determination that the statute of limitations is a jurisdictional bar to the award of attorneys' fees and costs would close the decision. However, because Kay might be

[5] Arguably, Mr. Moran could have asserted that the hepatitis B vaccine "significantly aggravated" his underlying disease. See 42 U.S.C. § 300aa–11(c)(1)(C)(ii)(I). However, Mr. Moran did not assert this theory at any time, including while Mr. Homer represented him. Therefore, this alternative theory will not be considered.

reconsidered by the Federal Circuit en banc, that court may reconsider its holding in Brice. Thus, to avoid a potential remand in Mr. Moran's case, an additional issue is resolved as well.

In the Vaccine Program, when petitioners fail to establish that they are entitled to compensation, special masters enjoy discretion to award petitioners reasonable attorneys' fees and costs. When compensation is not awarded,

> the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition 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).

Section 15(e)(1) permits, but does not mandate, an award of attorneys' fees and costs when an unsuccessful petitioner fulfills two requirements: specifically, that the petition was brought in good faith and that there was a reasonable basis for the claim. Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) ("If the petition for compensation is denied, the special master 'may' award reasonable fees and costs if the petition was brought in good faith and upon a reasonable basis; the statute clearly gives [a special master] discretion over whether to make such an award.") (citation omitted).

Consistent with the deference given to special masters to award attorneys' fees and costs, the Federal Circuit reviews decisions awarding or denying attorneys' fees to petitioners in the Vaccine Program under an abuse of discretion standard. Perreira v. Sec'y of Health & Human Servs., 33 F.3d 1375, 1377 (Fed. Cir. 1994).

In response to the June 19, 2008 order, Mr. Moran argued why his petition was supported by a reasonable basis and why he acted in good faith by filing the petition. Pet'r Supp. Resp. at 12-13.

Respondent argues that the petition lacked a reasonable basis. Resp't Resp. at 12-15. Respondent also questions whether Mr. Moran acted in good faith in filing his petition. Resp't Resp. at 13 n.13.

1. Reasonable Basis

Whether a reasonable basis supports a petition depends on the totality of the circumstances. Rydzewski v. Sec'y of Health & Human Servs., No. 99-564V, 2008 WL 382930 * 3 (Fed. Cl. Spec. Mstr. Jan. 29, 2008). Mr. Moran, as the party seeking the award of attorneys' fees and costs, bears the burden of showing that he is entitled to such an award.

Mr. Moran offers two facts to support his claim that a reasonable basis supports his petition. First, Mr. Moran observes that his petition claimed that he suffered from postural orthostatic tachycardia syndrome (POTS) and that at least one petitioner has established that the hepatitis B vaccine caused him to suffer POTS. Second, one treating doctor "noted an association between the onset of [Mr. Moran's] symptoms and the hep B vaccine." Pet'r Supp. Resp. at 12. Neither argument is persuasive.

First, the argument about POTS is not based in fact. Although Mr. Moran's brief, which was written by Mr. Homer, is accurate because Mr. Moran's petition, which was filed by Mr. Moran pro se, claims that Mr. Moran suffers from POTS, evidence to substantiate his assertion is not clear cut. A preponderance of the evidence seems to indicate that Mr. Moran did not suffer from POTS. See exhibit 1 at 105; exhibit 9 at 2; exhibit 12 at 21. Respondent specifically argued that "there is no evidence that [Mr. Moran] suffered from [POTS]." Resp't Resp. at 14 n.14. If there were evidence that Mr. Moran did suffer from POTS, then it was incumbent on Mr. Moran to identify that evidence. However, he did not. See Vaccine Rule 8(f).

Mr. Moran's assertion regarding his suffering from POTS is not supported by any medical record. A mistake about basic factual information cannot be the basis for finding that a reasonable basis supported the filing of the petition. Rydzewski, 2008 WL 282930 * 5-6.

Second, the treating doctor's statement is not evidence that the hepatitis B vaccine caused his symptoms. After reviewing Mr. Moran's medical history indicating that Mr. Moran had health problems from September 2003 until March 2004, Dr. Singh recounts that Mr. Moran had elevated liver function tests and a fever when "he started a series of Hep B vaccinations at this time." Exhibit 14 at 1. This statement is not persuasive evidence of a reasonable basis that the hepatitis B vaccine caused any illness for two reasons. First, a statement that the hepatitis B vaccine occurred around the same time as the appearance of some abnormal medical results is not a statement that the hepatitis B vaccine caused the abnormality. Second, Dr. Singh's statement refers to the hepatitis B vaccination in April 2004, not June 2004. Even if Dr. Singh had said that the April 2004 vaccination caused a problem, there would not necessarily be a reasonable basis for a belief that the June 2004 vaccination caused an adverse reaction. Distinguishing between the April 2004 vaccination and the June 2004 vaccination is necessary because the statute of limitations bars compensation for injuries that were manifest before June 8, 2004.

The two reasons for finding reasonable basis offered by Mr. Moran are not persuasive. Consequently, Mr. Moran has not met his burden of establishing that a reasonable basis supports his petition. Thus, he is not entitled to an award of attorneys' fees and costs.

2. Good Faith

Although the finding that Mr. Moran's petition lacked a reasonable basis precludes an award of attorneys' fees, additional discussion about Mr. Moran's good faith is warranted

because this presents the rare case in which good faith cannot be found. The lack of good faith reinforces the conclusion that an award of attorneys' fees and costs is not appropriate.

"The 'good faith' requirement is subjective." Di Roma v. Sec'y of Health & Human Servs., No. 90-3277V, 1993 WL 496981 * 1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993). Good faith means that the "petitioner honestly believed that he had suffered a vaccine-related injury." Turner v. Sec'y of Health & Human Servs., No. 99-544V, 2007 WL 4410030 *5 (Fed. Cl. Spec. Mstr. Nov. 30, 2007). "Petitioners are entitled to a presumption of good faith." Grice v. Sec'y of Health & Human Servs., 36 Fed. Cl. 114, 121 (1996).

Here, a preponderance of the evidence establishes that Mr. Moran did not act in good faith in bringing his petition. The following facts are relevant to determining Mr. Moran's subjective state of mind when he filed his petition.

The first relevant fact is the history of Mr. Moran's interaction with Mr. Homer's law firm. Mr. Moran consulted Mr. Homer's law firm in August 2005. Application for Fees and Costs ("App'n"), filed May 15, 2008, Tab A, at 1; Pet'r Supp. Resp. at 1. The fourth and fifth entries, which were made by an unnamed paralegal, indicate that the law firm was concerned about the statute of limitations. App'n, Tab A, at 1. The law firm, presumably, determined that the statute of limitations was not a problem in August 2005, because the law firm undertook the process of obtaining Mr. Moran's medical records. According to the law firm's time records, this process concluded by October 2006. Id. at 9.

Approximately four months later, Mr. Homer conferred with Mr. Moran. Id. at 10 (entry for Feb. 13, 2007). Two months later, on May 8, 2007, Mr. Homer informed Mr. Moran that "based upon [the law firm's] analysis of his case, the firm would not be able to secure the services of an expert witness who would testify that the hep B vaccine he received was the reason for his medical conditions. In these circumstances, [Mr. Moran] was advised, [the law firm] would not be able to represent him the Vaccine Program." Pet'r Supp. Resp. at 2. Because Mr. Homer communicated the law firm's evaluation of Mr. Moran's case to him, this fact may be considered when evaluating Mr. Moran's state of mind in filing his petition. See Broadcom Corp. v. Qualcomm Inc., 543 F.3d 683, 699 (Fed. Cir. 2008) (holding that trial court properly instructed jury that a legal opinion may be considered in determining a patent infringer's state of mind).

Mr. Moran, nevertheless, believed that the hepatitis B vaccine caused him an injury, and requested assistance in pursuing his claim. Mr. Homer provided certain documents and "reminded" Mr. Moran "that the statute of limitations in the Program expired three years after the onset of symptoms from a vaccine and that, to be safe, he should file his claim on or before June 4, 2007, three years after his hep B vaccine." Pet'r Supp. Resp. at 3.[6]

[6] The medical records actually show that Mr. Moran received a dose of the hepatitis B vaccine on April 30, 2004. Exhibit 13 at 3. Why Mr. Homer referenced the date of the second

Mr. Moran filed his petition on June 8, 2007. Mr. Moran represented himself. No evidence suggests that Mr. Homer's law firm communicated with or assisted Mr. Moran from June 2007 until after May 2008, when Mr. Homer filed his application for attorneys' fees and costs.

The second fact relevant to Mr. Moran's belief is his conduct after he filed his petition. Simply put, Mr. Moran failed to take any action in support of his petition. Numerous calls to schedule an initial status conference were not returned. Orders to file documents were ignored. Mr. Moran's failure to prosecute his case caused the dismissal of his case approximately six months after it was filed. (Mr. Moran also did not respond to the undersigned's efforts to have him participate in the attorneys' fees portion of the case.)

The two facts – the law firm's communication that it could not represent him because an expert would not support his claim and Mr. Moran's failure to prosecute the case – combine to raise an inference that Mr. Moran did not act in good faith in filing his petition. Certainly, Mr. Moran was not required to accept the advice of his law firm that his case could not be supported. An attorney's declining a case does not require automatically a finding that a petitioner lacked good faith in filing the petition. But, if Mr. Moran were convinced that his law firm's advice were wrong, meaning that Mr. Moran believed that the hepatitis B vaccine caused him harm, then Mr. Moran should have acted upon his belief by pursuing the lawsuit that he filed. Mr. Moran did not. His actions (or more precisely, his repeated failures to act) are far more consistent with a belief that the lawsuit is unlikely to succeed.

Because the case was dismissed so quickly, Mr. Moran did not experience any of the troubles that could discourage pro se litigants from continuing the litigation. For example, sometimes pro se litigants have difficulty complying with filing requirements (number of copies, certificate of service, etc.). But, Mr. Moran did not have this problem because he did not file any documents after the petition. Obtaining medical records can be another challenge for pro se litigants. Yet, according to Mr. Homer, Mr. Homer sent Mr. Moran the medical records that Mr. Homer's law firm had collected.

This information preponderates in favor of finding that Mr. Moran lacked good faith when bringing his petition. If this determination were the exclusive reason for denying attorneys' fees and costs, then additional information (such as testimony from Mr. Moran by an affidavit or at a hearing) might have been requested. However, because the lack of good faith is actually the third independent basis for denying the attorneys' fees and costs (following the lack of jurisdiction and the lack of reasonable basis) further exploration of Mr. Moran's good faith (or lack thereof) would not change the outcome of whether Mr. Homer is entitled to an award of attorneys' fees and costs.

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hepatitis B vaccine, which was June 4, 2004 (id.), and not the first dose of the vaccine is not clear. This information is not relevant in determining Mr. Moran's state of mind in filing of his petition.

C. Mr. Moran's Pro Se Representation

The last issue discussed by the parties is assuming that Mr. Moran's petition was timely filed and assuming that a reasonable basis and good faith support Mr. Moran's petition, whether Mr. Homer would be entitled to receive an award of attorneys' fees and costs for activities he performed before the petition was filed. The arguably important fact is that Mr. Moran represented himself throughout the entitlement phase of the case. Mr. Homer did not represent the petitioner while the case was pending. As discussed in section II.A., this Court does not possess jurisdiction because the case was not filed timely. As discussed in section II.B, reasonable basis and good faith do not support the petition. Thus, neither predicate assumption exists. Therefore, resolving this issue is not necessary. Nevertheless, this question warrants some comments.

When Congress created the Vaccine Program, the National Childhood Vaccine Injury Act of 1986 contained at least two provisions that distinguish this Program from compensation systems based in traditional tort law. First, Congress required petitioners to present the evidence supporting their case (medical records and opinions) with their petition. 42 U.S.C. § 300aa–11(c). Second, Congress also authorized special masters to use their discretion in awarding attorneys' fees and costs to unsuccessful petitioners when their petition was supported by a reasonable basis and based in good faith. 42 U.S.C. § 300aa–15(e). An award of attorneys' fees and costs to parties that do not prevail is extremely rare. See Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983).

Along with the other sections of this act, these two provisions should be construed in light of the entire Act. See Ishida v. United States, 59 F.3d 1224, 1230 (Fed. Cir. 1995) (citing Massachusetts v. Morash, 490 U.S. 107, 114-15 (1989).

Thus, a reasonable inference from Congress's enactment of both provisions is that Congress intended to link the two provisions. Special masters could award attorneys' fees and costs to those unsuccessful petitioners who presented a reasonable (albeit unsuccessful) claim, but that this award was contingent upon petitioners filing medical records with their petition. If so, Congress would seem to expect that some attorneys would investigate potential cases (that is, incur the expense of obtaining medical records), yet not file cases that lacked a reasonable basis. From this perspective, Congress expected petitioners' attorneys to filter reasonable cases (a group that includes winning cases and some losing cases) from unreasonable cases. Congress did not authorize an award of attorneys' fees and costs for cases that lacked a reasonable basis.

More than a few cases in the Vaccine Program do not follow this model. Petitioners often file a case without medical records and then obtain the medical records while the case is pending. In effect, the process of obtaining medical records is "on-the-clock." If petitioners realize that they cannot prevail on their case because they cannot obtain an expert to support their

claim, petitioners generally seek a ruling on the record.[7] In these situations, petitioners are usually awarded their attorneys' fees and costs. See, e.g., Hamrick v. Sec'y of Health & Human Servs., No. 99-683V, 2007 WL 4793152 (Fed. Cl. Spec. Mstr. Jan. 9, 2008).

The actions of Mr. Homer's firm in this case comply with the system as (ideally) envisioned by Congress. The firm explored whether Mr. Moran had a reasonable chance of establishing that the hepatitis B vaccine caused him an adverse reaction by gathering medical records before filing a petition. When the law firm determined that it "would not be able to secure the services of an expert witness who would testify that the hep B vaccine he received was the reason for his medical conditions," Pet'r Supp. Resp. at 2; the law firm declined to file a petition on his behalf. The firm should be applauded for not wasting judicial resources by adding a non-meritorious case to the docket.

On the other hand, the consequence of the (ideal) system created by Congress is that sometimes attorneys devote some resources (time and money), but are not compensated for their efforts. Attorneys receive no compensation when a petition is not filed. Mr. Moran agrees with this point. Pet'r Supp. Resp. at 13-14 n. 17 Thus, arguably, by complying with the spirit of the rules, Mr. Homer's firm is worse off than if he had violated the spirit (if not the letter) of the rules by filing a petition on Mr. Moran's behalf, then collecting medical records, and then determining whether the case had some reasonable basis. See Lamar v. Sec'y of Health & Human Servs., No. 99-583V, 2008 WL 3845165 *4 n. 13 (Fed. Cl. Spec. Mstr. July 30, 2008) (using three hypothetical examples to explain how attorneys can "game the system").

In this case, Mr. Homer's application for attorneys' fees and costs can be viewed as a method to increase the compensation to attorneys who investigate and filter cases before filing them. This increase would, in a sense, address the relative imbalance vis-a-vis attorneys that collect medical records after filing a petition. Of course, another way to address the relative imbalance between these two groups of attorneys is for special masters to deny all attorneys' fees and costs in cases that lack a reasonable basis regardless of when the medical records were obtained.

Another factor to consider is the potential payers of attorneys' fees and costs. When a petitioner receives an award of attorneys' fees, the attorney may not charge the petitioner an additional fee. Beck v. Sec'y of Health & Human Servs., 924 F.2d 1029, 1035 (Fed. Cir. 1991); 42 U.S.C. § 300aa–15(e)(3). When the Court lacks jurisdiction to award attorneys' fees, the attorney may receive reasonable compensation from the petitioner through an agreement. Brice, 358 F.3d at 869. Thus, there are some situations in which only the Vaccine Injury Trust Fund

[7] To preserve their right to file an action in state court, petitioners must obtain a ruling on the record. A withdrawal of the petition does not preserve the petitioners' right to file an action in state court. See Currie v. Sec'y of Health & Human Servs., No. 02-838V, 2003 WL 23218074 (Fed. Cl. Spec. Mstr. Nov. 26, 2003) (Currie is sometimes cited as Hamilton.)

pays attorneys' fees but the petitioner / client may not. There are also some situations in which the petitioner / client may pay attorneys' fees but the Vaccine Injury Trust Fund may not.[8]

Against this backdrop, respondent argues that Mr. Moran's status as a pro se petitioner precludes an award of attorneys' fees and costs to Mr. Homer. This argument is based on the proposition that Mr. Moran, himself, is not entitled to an award of attorneys' fees because Mr. Moran is not an attorney. This proposition is well-settled. Kay v. Ehrler, 499 U.S. 432 (1991). Respondent recognizes that the application for attorneys' fees does not request an award for the time that Mr. Moran spent on this case. Nevertheless, respondent argues that Mr. Moran cannot receive an award of attorneys' fees that can be used to pay Mr. Homer. Resp't Resp. at 15-16.

Respondent's argument is not persuasive to establish a bright-line test indicating that people who appear pro se cannot obtain an award of attorneys' fees to compensate them for work performed by an attorney. For example, the agreement between Mr. Moran and Mr. Homer's firm may provide that Mr. Moran agrees to pay Mr. Homer's law firm for work performed at a specific hourly rate only if a court finds that it lacks jurisdiction to award attorneys' fees. (The conditional nature of this agreement would appear to comply with Brice.) Thus, any award of attorneys' fees would eliminate Mr. Moran's contingent liability to Mr. Homer's law firm. Therefore, in theory, Mr. Moran would benefit if Mr. Homer received compensation through an award in this case.[9]

At the end of the day, Mr. Moran's case cannot be the basis for compensating Mr. Homer's firm for the work it performed.[10] As discussed in section II.A., Mr. Moran has not

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[8] Mr. Moran states "in the event a petition is untimely filed, or if a case does not have a reasonable basis, 42 U.S.C. § 300aa–15(e)(3) would not prohibit an attorney from collecting a fee directly from the client." Pet'r Supp. Resp. at 13 (citing Brice, 358 F.3d at 869, footnote omitted without notation, emphasis added).

The Federal Circuit has not addressed how a finding that a petition lacks a reasonable basis affects an attorneys' right to be paid from a petitioner / client. Brice addressed a situation in which a petition was not filed within the statute of limitations, creating a jurisdictional bar to an award of attorneys' fees. Brice does not address the reasonable basis requirement. Thus, the portion of Mr. Moran's brief that is underlined in the quote above is not accurate.

[9] These comments are consistent with the result reached in an unpublished decision by another special master, Dempsey v. Sec'y of Health & Human Servs., No. 05-283V (Fed. Cl. Spec. Mstr. April 19, 2007). Because Dempsey is not published, it does not affect the conclusions reached in this case.

[10] The application for attorneys' fees includes a request for time to prepare a petition for Mr. Moran. People in Mr. Homer's firm, including Kevin Conway, drafted a petition after Mr. Homer informed Mr. Moran that his law firm did not represent Mr. Moran. App'n, Tab A, at 10-11.

established, by a preponderance of the evidence, that he filed his case within the time provided by the statute of limitations. This finding bars the award of attorneys' fees and costs. Brice, 358 F.3d 859.

III. Conclusion

The application for an award of attorneys' fees and costs, filed on May 15, 2008, is DENIED. The Clerk's Office is ordered to enter judgment in accord with this decision unless a motion for review is filed.

IT IS SO ORDERED.

S/ Christian J. Moran
Christian J. Moran
Special Master

The practice by which an attorney drafts a document for a person who is appearing in court pro se is known as ghostwriting. Ghostwriting could implicate the attorneys' ethics. See Duran v. Carris, 238 F.3d 1268, 1271-73 (10th Cir. 2001) (discussing ghostwriting and citing cases); Mass. Bar Ass'n, Ethics Opinion 98-1.

In this case, the conduct of Mr. Conway and Mr. Homer in drafting a petition appears to comply with their ethical duties established by Massachusetts for two reasons. First, due to the informal nature of the Vaccine Program, petitioners are already afforded a great deal of latitude in presenting their cases. Therefore, Mr. Homer's and Mr. Conway's undisclosed assistance did not advantage Mr. Moran unduly. Second, the assistance of Mr. Conway and Mr. Homer was limited to drafting a petition. Although the better course of conduct may have been to refer a former client to the web site of the Court of Federal Claims, which includes a sample petition for use in the Vaccine Program, an isolated instance of an attorney assisting a former client seems not to violate the attorneys' ethical obligations. Mass. Bar Ass'n, Ethics Opinion 98-1 provides:

> An attorney may provide limited background advice and counseling to pro se litigants. However, providing more extensive services, such as drafting ("ghostwriting") litigation documents, especially pleadings, would usually be misleading to the court and other parties and therefore would be prohibited.

The assistance provided by Mr. Conway and Mr. Homer seems more in accord with "limited background advice," which Massachusetts has not prohibited.

Of course, a finding that Mr. Conway and Mr. Homer appear to have complied with their ethical duties does not necessarily mean that they are entitled to award of attorneys' fees for drafting a petition for someone they did not represent. As explained in the text, Mr. Homer's firm is not entitled to an award of attorneys' fees generally. Thus, there is no reason to resolve the more specific issue of compensating an attorney for time spent on behalf of someone who is not the attorney's client.