IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

JOANNA H. RYDZEWSKI,	*	No. 99-571V
	*	Special Master Christian J. Moran
Petitioner,	*	
	*	Filed: March 12, 2007
v.	*	**PUBLISHED**
	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	Judgment on the record; allegation sufficient to establish jurisdiction; failure to prove receipt of a covered vaccine; denial of compensation.
	*	
Respondent.	*	
	*	

DECISION DENYING COMPENSATION[*]

On August 4, 1999, Joanna Rydzewski filed a petition seeking compensation pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq. Her petition, which was filed pro se, asserts that she received the hepatitis B vaccine on September 5, 1995, and was injured as a consequence.

On September 1, 2006, respondent filed a motion to dismiss this case for lack of subject matter jurisdiction. Respondent maintains that because Ms. Rydzewski has not proven that she received a vaccine covered by the Act, this Court lacks jurisdiction to entertain the action.

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[*] Pursuant to 42 U.S.C. § 300aa-12(d)(3)(A), this document constitutes a final "decision." Unless a motion for review is filed within 30 days, the Clerk of the Court shall enter judgment in accord with this decision.

Vaccine Rule 18(b) states that 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, petitioner 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.

The issue raised by this motion – whether this Court possesses jurisdiction only when petitioners prove that they received a covered vaccine – has not been addressed directly by any precedential decision and is a question implicating the availability of costs and attorneys' fees. If this Court lacks jurisdiction to entertain the action, the Court lacks the authority to award fees and costs to Ms. Rydzewski and her attorney. Brice v. Sec'y of Health & Human Servs., 358 F.3d 865 (Fed. Cir. 2004). As explained below, Congress did not require proof of a covered vaccine as part of the jurisdictional aspect. Here, respondent has not challenged the facial sufficiency of Ms. Rydzewski's allegation that she received the hepatitis B vaccine. Thus, the motion to dismiss for lack of jurisdiction is DENIED.

Ms. Rydzewski has also requested a decision based upon the record. She admits that she cannot prove her case. Her motion for a decision is GRANTED and her petition for compensation is DENIED for the reasons explained below in parts II.B. and II.C.

I. Facts and Procedural History

On September 5, 1995, Ms. Rydzewski was admitted to the Walter Reed Army Medical Center for a cardiac catheterization scheduled to be performed the following day. Exhibit 1 at 2-3. A cardiac catheterization is the entry of a tubular surgical instrument into the heart to detect abnormalities. Dorland's Illustrated Medical Dictionary (30th Ed. 2003) at 308, 310.

During the cardiac catheterization, Ms. Rydzewski experienced an anaphylactic reaction. Exhibit 1 at 5-7, 11 and 37. Anaphylaxis is a severe reaction to an antigen that sometimes causes death due to cardiac arrest. Dorland's at 73. ("Anaphylaxis" carries a specific definition in the Vaccine Program. 42 C.F.R. § 100.3(b)(1). However, the difference between the meaning of

anaphylaxis as understood in the medical community generally and the specific definition in the regulation, if any, is not relevant to the issue being considered.)

The contemporaneously created medical records indicate that the anaphylaxis was due to the administration of "hexabrix contrast." Exhibit 1 at 7. Hexabrix is an agent that creates contrasts when used during, among other procedures, arteriograms. Exhibit 100 at 15; see also exhibit 1 at 12 (discussing the amount of contrast used during the catherization). Severe reactions have been reported following the use of hexabrix. Exhibit 100 at 9-10.

To address her reaction, staff at Walter Reed administered Solu-Medrol, epinephrine, and benadryl. Exhibit 1 at 5, 10, 12, 14. She did not have any long term consequences from the anaphylaxis. Exhibit 1 at 40. On September 11, 1995, Ms. Rydzewski was discharged in excellent condition. Exhibit 1 at 39-41. Ms. Rydzewksi did not submit any medical records describing her condition after September 1995. (Although not substantiated by any filed medical records, Ms. Rydzewski asserted that by August 1999, the Department of Veterans' Affairs had determined that she was 100 percent disabled. Ms. Rydzewski did not identify the basis of her disability. Exhibit 1 at 26.)

In her petition, Ms. Rydzewski asserts that on September 5, 1995, she received the hepatitis B vaccine. Petition ¶ 2 (second), filed August 4, 1999. Ms. Rydzewski does not identify a specific injury that was allegedly caused by the hepatitis B vaccine.

Before filing exhibits in this case, Ms. Rydzewski made two similar statements that she received the hepatitis B vaccination at Walter Reed Army Medical Center. First, she submitted a Vaccine Adverse Event Registry form to the National Vaccine Information Center on August 2, 1999. Exhibit 1 at 20. She stated that she received an experimental form of the hepatitis B

vaccine that was being given to soldiers. Exhibit 1 at 21. She also maintained that she was in a coma for two days. Exhibit 1 at 23. She also complained that she suffered, among other things, frequent headaches, migraine headaches, memory problems, and a loss of the ability to concentrate. Exhibit 1 at 24. In response to a request for "other comments," Ms. Rydzewski stated that "I don't think anyone even thought about a reaction to the Hep B shot instead they have blamed it all on the cath. procedure. It was easily written off and also because the so called doctors were [sergeants] only." Exhibit 1 at 26.

In addition, Ms. Rydzewski sent a letter to Walter Reed requesting medical records on October 20, 1999. Exhibit 1 at 32. Ms. Rydzewski requested that Walter Reed supply her with information about any medications she received during her hospitalization in September 1995. Ms. Rydzewski wrote that "I was given a shot the night before which I [ ] believe [ ] was a HEP 'B' shot." Id. (emphasis deleted). Although Walter Reed supplied medical records, which Ms. Rydzewski filed as exhibit 1, these records do not indicate that she received the hepatitis B vaccination.

As stated, Ms. Rydzewski filed her petition on August 4, 1999. When she filed her petition, she was acting pro se. She paid the filing fee when she filed her petition. Exhibit 1 at 18. Ms. Rydzewski did not file any medical records with her petition.

The special master to whom this case was originally assigned ordered Ms. Rydzewski to file medical records. Orders, dated September 7, 1999, and January 4, 2000. Ms. Rydzewski did not file any medical records in response.

On January 6, 2000, Clifford Shoemaker filed an appearance on behalf of Ms. Rydzewski. Mr. Shoemaker has acted as her counsel of record since this date.

Between January 2000 and July 2002, Ms. Rydzewski's attorney filed six status reports. These status reports were not specific to Ms. Rydzewski's case. Instead, they generally explained that counsel was attempting to collect medical records and that petitioner's counsel and respondent's counsel were attempting to develop a procedure to allow the numerous cases alleging injury following hepatitis B vaccinations to be resolved easily. Ms. Rydzewski also requested that the special master authorize her attorney to issue subpoenas to assist with the gathering of medical records. A special master granted this motion. Order, dated August 14, 2001.

On April 5, 2006, this case was assigned to the present special master. No action had occurred in the case since July 2002.

On June 22, 2006, Ms. Rydzewski filed two exhibits. She also filed a motion for a judgment on the record. In this motion, Ms. Rydzewski conceded that she could not prove "causation." Pet'r Mot. Ms. Rydzewski also asserted that the special master should find that she established the "filing requirements." Pet'r Proposed Order, submitted June 22, 2006.

On July 6, 2006, respondent filed its response to Ms. Rydzewski's motion for judgment on the record. Respondent stated that Ms. Rydzewski "failed to establish jurisdiction . . . based on [the existing] record." Resp't Resp., filed July 6, 2006, at 2. Following a status conference, respondent filed a motion to dismiss for lack of jurisdiction on September 1, 2006, which developed the jurisdictional arguments.

After the parties filed briefs, Ms. Rydzewski was given an additional opportunity to submit any evidence that supports her assertion that she received the hepatitis B vaccine. Order, dated January 19, 2007. Ms. Rydzewski did not submit additional material by the deadline.

For the reasons set forth below, respondent's motion to dismiss is DENIED. Ms. Rydzewski's motion for a decision on the record is GRANTED. Ms. Rydzewski is not entitled to compensation and her petition is DENIED.

II. Analysis

A. Whether Proof That Petitioner Received A Covered Vaccine Is An Element Of Jurisdiction Or An Element For The Merits

Jurisdiction is a "threshold" issue that must be addressed first. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter ... is 'inflexible and without exception.'") (quoting Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884)). This principle restricts how the Office of Special Master adjudicates petitions seeking compensation through the Vaccine Program. O'Connell v. Sec'y of Health & Human Servs., 63 Fed. Cl. 49, 57 n. 7 (2004). Consequently, it is necessary to resolve the jurisdictional issue even though Ms. Rydzewski's motion for judgment on the record admits that she cannot prove her case. Id.; see also Barnett v. Brown, 83 F.3d 1380, 1383 (Fed. Cir. 1996) (stating "any statutory tribunal must ensure that it has jurisdiction over each case before adjudicating the merits") (emphasis in original); but see Nippon Steel Corp. v. United States, 219 F.3d 1348, 1353 (Fed. Cir. 2001) (refraining from determining whether Court of International Trade possessed jurisdiction in which the jurisdictional question was complex and inexplicably intertwined with the merits question).

The extent of this Court's jurisdiction is a question of law. Aull v. Sec'y of Health & Human Servs., 462 F.3d 1338, 1342 (Fed. Cir. 2006). As a matter of law, the parties may not change the boundaries of a tribunal's jurisdiction. United Pacific Ins. Co. v. Roche, 380 F.3d

1352, 1356-57 (Fed. Cir. 2004); Dunklebarger v. Merit Systems Protection Bd., 130 F.3d 1476, 1480 (Fed. Cir. 1997) ("[N]o actions of the parties can confer subject-matter jurisdiction on a tribunal and the principles of estoppel do not apply to vest subject-matter jurisdiction where Congress has not done so."). Thus, although Ms. Rydzewski concedes that "proof of vaccination is a jurisdictional requirement," Pet'r Opp'n, filed Nov. 16, 2006, at 2, an independent determination is required. Hines v. Sec'y of Health & Human Servs., 940 F.2d 1518, 1522 (Fed. Cir. 1991).

Determining whether this Court possesses jurisdiction to entertain Ms. Rydzewski's petition entails an analysis of whether jurisdiction depends upon proof that a petitioner received a covered vaccine, or whether an allegation of receiving a covered vaccine is sufficient to establish jurisdiction. For the reasons that follow, an allegation that a petitioner received a covered vaccine suffices to meet the jurisdictional standard. Therefore, respondent's argument is not correct and the motion to dismiss is denied.

Respondent's primary argument is that the Vaccine Act restricts the people who can file a petition for compensation. Respondent argues that anyone outside of the dictates of the Vaccine Act may not file a petition and any petition that was filed improperly fails to invoke the jurisdiction of the Court. Resp't Mot. to Dismiss, filed Sep. 1, 2006, at 2-3. According to respondent, the interaction between 42 U.S.C. § 300aa-11(b)(1)(A) and § 300aa-11(c)(1)[2] sets the jurisdictional boundaries. The first section provides, in pertinent part, that "any person who has sustained a vaccine-related injury . . . may, if the person meets the requirements of subsection

[2] Hereinafter, for ease of reference, all "section" references to the Vaccine Injury Compensation Act will be to the pertinent subdivision of 42 U.S.C. § 300aa (2006 ed.).

(c)(1) of this section, file a petition for compensation under the Program." § 11(b)(1)(A). In turn, subsection (c)(1) requires that the petitioner has "received a vaccine set forth in the Vaccine Injury Table." § 11(c)(1)(A).[3] Thus, according to respondent's interpretation, a person who did

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[3] Because section 11(c)(1) is discussed extensively, pertinent parts of this section are reproduced below:

A petition for compensation under the Program for a vaccine-related injury or death shall contain--

(1) except as provided in paragraph (3), an affidavit, and supporting documentation, demonstrating that the person who suffered such injury or who died–

(A) received a vaccine set forth in the Vaccine Injury Table . . . ,

(B)(i) if such person received a vaccine set forth in the Vaccine Injury Table--

(I) received the vaccine in the United States or in its trust territories,

* * *

(C)(i) sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table in association with the vaccine referred to in subparagraph (A) or died from the administration of such vaccine, and the first symptom or manifestation of the onset or of the significant aggravation of any such illness, disability, injury, or condition or the death occurred within the time period after vaccine administration set forth in the Vaccine Injury Table, or

(ii)(I) sustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by a vaccine referred to in subparagraph (A), or

(II) sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine referred to in subparagraph (A),

(D)(i) suffered the residual effects or complications of such illness, disability, injury, or condition for more than 6 months after the administration of the vaccine, or (ii) died from the administration of the vaccine, or (iii) suffered such illness, disability, injury, or condition from the vaccine which resulted in inpatient hospitalization and surgical intervention, and

(E) has not previously collected an award or settlement of a civil action for damages for such vaccine-related injury or death.

Section 13(c).

not receive a vaccine set forth in the vaccine injury table may not file a petition for compensation.

While respondent's argument has some superficial appeal, a closer examination reveals that it must be rejected. The flaw in respondent's argument is insightfully identified in Jessen v. Sec'y of Health and Human Servs., No. 94-1029V, 1997 WL 48940 *8 (Fed. Cl. Spec. Mstr. Jan. 17, 1997). Simply put, respondent's approach would limit the jurisdiction of this Court to only successful petitioners. Petitioners entitled to compensation are petitioners that establish that they have suffered a "vaccine-related injury," and that their injury was caused by the vaccine. § 11(b)(1)(A), 11(c)(1)(C). This Court's jurisdiction to adjudicate petitions in the Vaccine Program cannot be limited to only successful petitions because the Vaccine Act authorizes an award of attorney's fees to unsuccessful petitions as well. § 15(e); see also Steel Co., 523 U.S. at 89 (subject matter jurisdiction is the court's power to adjudicate the case).

In its reply brief, while arguing that Jessen was decided wrongly, respondent attempts to address the reasoning in it. Respondent contends that the requirement that petitioner establish that the vaccine caused the injury (found in § 11(c)(1)(C)) is an element of both jurisdiction and the merits. In this regard, respondent differentiates between subparagraph (C) and subparagraph (A). Therefore, respondent suggests that for subparagraph (C) alone, whether the claim is "'frivolous' . . . may be a useful guide" in determining jurisdiction. Resp't Reply, filed Jan. 5, 2007, at 7.

Respondent's argument is not persuasive. Although the premise of the argument is that subparagraph (A) differs from subparagraph (C) in the sense that subparagraph (A) is jurisdictional (but not part of the merits) and subparagraph (C) is both jurisdictional and part of

the merits, respondent offers no reason for treating the two subparagraphs differently. Nothing in the text of the statute indicates that one subparagraph is jurisdictional and the other is not. Respondent also does not address the other subparagraphs within section 11(c)(1). For example, subparagraph (D) requires that the adverse consequences of the vaccination be significant — either lasting for more than six months, or causing a death, or requiring hospitalization and surgical intervention. Subparagraph (D) seems to be as much as an issue of the merits of the petition as subparagraph (C). Yet, respondent argues that only subparagraph (C) should be evaluated by whether the petition contains non-frivolous allegations.

The text of section 11(c)(1) does not indicate that any one of the five subparagraphs should be treated differently from the rest with regard to jurisdiction. Without a definite statement from Congress that a certain element is jurisdictional, a court's finding a jurisdictional element may be in error. See Arbaugh v. Y&H Corp., ___ U.S. ___, 126 S.Ct. 1235, 1245 (2006).

To support its argument that elements listed in section 11(c)(1)(A) are special elements going to jurisdiction, respondent relies upon Black v. Sec'y of Health & Human Servs., 93 F.3d 781 (Fed. Cir. 1996). Resp't Mot. at 10; Resp't Reply at 4-5. In Black, the Federal Circuit addressed how and when petitioners could fulfill the Vaccine Act's section 11(c) requirement that they have incurred $1,000 in unreimbursed medical expenses. (Congress eliminated this requirement in 1998. Pub. L. No. 105-277, § 1502, 112 Stat. 2681, 2681-741 (1988); Lowry v. Sec'y of Health & Human Servs., 189 F.3d 1378 (Fed. Cir. 1999)). In this context, the Federal Circuit stated that "there is no merit to Black's alternative argument that the $1,000 requirement is simply a matter of proof at trial . . . . The statute makes clear that the $1,000 in expenses is a

threshold criterion for seeking entry into the compensation program." Black, 93 F.3d at 787. Respondent equates "threshold criterion" with "jurisdiction," and argues that because the $1,000 requirement was jurisdictional, other items found in section 11(c), such as the requirement to have received a covered vaccine, are also jurisdictional.

Respondent's reliance on Black is wrong for two overlapping reasons. First, it is not entirely clear that a "threshold criterion" is the same as a jurisdictional element. Second, Black did not actually hold that the elements of section 11(c)(1)(A) are jurisdictional. Thus, respondent's argument based upon Black is rejected.[4]

Characterizing one part of a plaintiff's or petitioner's case as a "threshold" is not necessarily the same as indicating that it is an element of jurisdiction. This principle is demonstrated in the recent Supreme Court decision in Arbaugh. Arbaugh addressed a requirement in Title VII that only employers employing 15 or more people were prohibited from discriminating in employment. Arbaugh, 126 S.Ct. 1235 (2006); 42 U.S.C. § 2000e(b). The trial court considered this aspect to be a jurisdictional element. However, the Supreme Court held that "the numerical threshold does not circumscribe federal-court subject-matter jurisdiction." Arbaugh, 126 S.Ct. at 1238 (emphasis added). This recent pronouncement by the Supreme Court demonstrates that not all "threshold" requirements are jurisdictional. Moreover, the Supreme Court has also instructed that courts should be careful in analyzing earlier cases discussing "jurisdiction" because many cases lack any detailed analysis in their conclusions regarding

[4] Black and the present case also involve different issues. Black addresses whether the petitioner's allegations were legally sufficient, not whether those allegations were proven. In contrast, here, Ms. Rydzewski has made an allegation that she received a covered vaccine. Facially, this allegation meets the statute. The ensuing question is whether Ms. Rydzewski also must prove her allegation as part of her burden to establish this Court's jurisdiction.

jurisdiction. Steel Co., 523 U.S. at 91 (discussing "drive-by" jurisdictional rulings); see also Kontrick v. Ryan, 540 U.S. 443, 454 (2004) (observing that courts, including the Supreme Court, have been "less than meticulous" in their use of the term "jurisdiction").

A close reading of Black shows that respondent places too much weight on passing phrases such as "threshold criterion." Although Black used that term in describing the $1,000 requirement, Black does not hold that elements of section 11(c)(1)(A) are jurisdictional.

The holding in Black is comprised of the outcomes in three separate cases with different underlying facts. The differences in the factual scenarios led to different outcomes, despite a single uniform holding by the Court. In each of the three underlying cases, the special masters dismissed the petitions because the petitioners did not allege that they incurred $1,000 in unreimbursed expenses before filing their petitions. The three appellants challenged the dismissal of their lawsuits on a variety of grounds.[5]

The Federal Circuit determined that the decisive question is whether the petitioner incurred $1,000 in unreimbursed expenses before the expiration of the statute of limitations, rather than before the filing of a petition. Black, 93 F.3d at 791-92. The amount of unreimbursed expenses is a "threshold" item in the sense that it must be incurred before the expiration of the statute of limitations. Events during the lawsuit that occur after the expiration of the statute of limitations do not affect a petitioner's ability to make the necessary allegation. Appellant Black admitted that he did not incur $1,000 in unreimbursed expenses before the

[5] An analysis of Appellant Black's claim and Appellant May's claim follows. It is unnecessary to discuss Appellant Rodriguez's claim because the parents were never able to establish more than $1,000 in unreimbursable expenses, before or after the expiration of the statute of limitations. Black, 93 F.3d at 785, 786.

expiration of the statute of limitations. Accordingly, he could not recover compensation pursuant to the Vaccine Act. Id. at 787. The special master, therefore, correctly dismissed his petition. Id. at 792.

In contrast, Appellant May filed a supplemental petition in which she alleged that she incurred $1,000 in unreimbursed expenses before the expiration of the statute of limitations. Thus, the special master erred in dismissing Appellant May's petition and the Federal Circuit remanded her petition for further consideration. Id. at 784, 791-92.

The different outcomes for Appellant Black and Appellant May depended, in part, upon an observation that "defects in a plaintiff's case – even jurisdictional defects – can be cured while the case is pending." Black, 93 F.3d at 790. Thus, the Federal Circuit appears not to have been called upon to determine whether the $1,000 requirement was jurisdictional. The outcome for Black and May would have been the same regardless of whether the Federal Circuit considered the $1,000 requirement to be jurisdictional. Thus, even assuming that the Federal Circuit equated "threshold criterion" with jurisdiction — an assumption that may not be warranted for the reasons explained above — a conclusion that the $1,000 requirement was an aspect of jurisdiction is unwarranted. See National Cable Television Ass'n, Inc. v. American Cinema Editors, Inc., 937 F.2d 1572, 1581 (Fed. Cir. 1991) ("When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issues arises"); Smith v. Orr, 855 F.2d 1544, 1550 (Fed. Cir. 1988) ("[I]t is well established that a general expression in an opinion, which expression is not essential to the disposition of the case, does not control a judgment in a subsequent proceeding.")

In contrast to Black, the Federal Circuit did analyze jurisdiction pursuant to the Vaccine Act explicitly in Martin v. Sec'y of Health & Human Servs., 62 F.3d 1403 (Fed. Cir. 1995).[6] In Martin, the Federal Circuit addressed section 11(a)(6), which generally states that a person who has previously filed a lawsuit seeking compensation for the same injuries "may not file" a petition for compensation in the Vaccine Program. The Federal Circuit held that section 11(a)(6) is jurisdictional because Congress intended to limit this Court's jurisdiction. Martin, 62 F.3d at 1406.

The reasoning in Martin undercuts respondent's argument in the present case that section 11(c)(1)(A) is jurisdictional. Martin held that the phrase "may not file" indicates a jurisdictional element. However, this phrase is not used in section 11(c)(1)(A). If Congress had intended that section 11(c)(1)(A) be a jurisdictional requirement, Congress would have used the same words in that section as it did in section 11(a)(6). See Steen v. United States, 468 F.3d 1357, 1362 (Fed. Cir. 2006) (stating that Congress's inclusion or exclusion of certain words is presumed intentional); Butler v. Soc. Sec. Admin., 331 F.3d 1368, 1372 (Fed. Cir. 2002) (stating nearly identical statutes are interpreted to have the same meaning). Conversely, the different words in section 11(c)(1)(A) and section 11(a)(6) indicate different meanings. Burlington N. & Santa Fe Ry. Co. v. White, ___ U.S. ___, 126 S.Ct. 2405, 2407 (2006).

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[6] The fact that Black omits any discussion of Martin further reinforces the conclusion that Black was not answering a question about jurisdiction. If Black had intended to define jurisdictional limits, Black presumably would have addressed Martin, which was decided almost exactly one year earlier. To the extent that Martin and Black speak inconsistently regarding jurisdiction, Martin controls because it is the earlier decision. Texas American Oil Corp. v. United States Dep't of Energy, 44 F.3d 1557, 1561 (Fed. Cir. 1995); Newell Cos., Inc. v. Kenney Manufacturing Co., 864 F.2d 757, 765 (Fed. Cir. 1988).

In short, Congress did not indicate that jurisdiction is established only when a petitioner proves receipt of a covered vaccine. Rather, a petitioner establishes the jurisdiction of the Court of Federal Claims by making allegations that he or she received a vaccine covered by the Program. See Fisher v. United States, 402 F.3d 1167, 1175 (Fed. Cir. 2005) (en banc) (holding jurisdiction to entertain a claim for damages pursuant to a money-mandating statute is established by a "well-pleaded complaint"); Charette v. United States, 33 Fed. Cl. 488 (1995) (affirming dismissal of petition implicating a vaccine not listed in the vaccine injury table). If a petitioner who makes an allegation that he (or she) received a covered vaccine fails to prove this allegation, that petitioner would lose the case on the merits. See Moden v. United States, 404 F.3d 1335, 1341 (Fed. Cir. 2005) (holding that dismissal of case seeking compensation for an unconstitutional taking for lack of jurisdiction was improper but also holding that judgment in favor of the defendant was correct).

Here, Ms. Rydzewski has alleged that she received the hepatitis B vaccine. Pet. ¶ 2 (second). Respondent has not challenged the facial sufficiency of Ms. Rydzewski's allegation. Thus, respondent's motion to dismiss is DENIED. Because this Court possesses jurisdiction to entertain Ms. Rydzewski's petition, the case must be adjudicated on the merits.

On the merits, Ms. Rydzewski filed a motion for judgment on the record. This motion is addressed in the following two sections.

B. Whether A Judgment On The Record Is Appropriate

Ms. Rydzewski has requested a ruling based upon the record in this case. In this motion,

Ms. Rydzewski concedes that she cannot prove that the hepatitis B vaccine caused her injury, which remains unspecified. Pet'r Mot., filed June 22, 2006.[7]

The records are sufficiently developed that a decision may be made as to whether Ms. Rydzewski is entitled to a Program award. See 42 U.S. C. § 300aa-12(d)(3)(B)(v); Vaccine Rule 8(b). Thus, Ms. Rydzewski's motion for judgment on the record is GRANTED.

C. Whether Petitioner Is Entitled To Compensation

Ms. Rydzewski concedes that she is not entitled to compensation because she has not established that the hepatitis B vaccine caused her injury. Pet'r Mot. While this concession is undoubtedly true and, by itself, justifies a judgment in favor of respondent, Ms. Rydzewski glosses over a more significant problem in her case — she has not established that she received a vaccine covered by the Program.

To support her allegation that she received the hepatitis B vaccination, Ms. Rydzewski has not proffered any persuasive evidence. Usually, records created contemporaneously to the event being memorialized are the most probative. Cucuras v. Sec'y of Health & Human Servs.,

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[7] Ms. Rydzewski has not sought to withdraw her case voluntarily. Presumably, Ms. Rydzewski has not taken this step, which would appear to be a more simpler way for a petitioner to concede a case, to preserve her right to file a lawsuit in an appropriate state court.

Before a lawsuit regarding an injury caused by a vaccine administrator or manufacturer may be filed in state court, a petitioner must obtain a "judgment" from this Court. § 21(a). "Judgments" follow "decisions" by special masters. § 12(d) and § 12(e). "Decisions" of special masters, in turn, include "findings of fact and conclusions of law." § 12(d)(3)(A). Ms. Rydzewski's pending motion will eventually produce a judgment.

In contrast, a voluntary withdrawal of an action causes the Court not to issue a "judgment." Robinson v. Sec'y of Health & Human Servs., No. 04-041V, 2004 WL 2677197 (Fed. Cl. Spec. Mstr. Nov. 3, 2004); Hamilton v. v. Sec'y of Health & Human Servs., No. 02-838V, 2003 WL 23218074 (Fed. Cl. Spec. Mstr. Nov. 26, 2003).

Thus, a voluntarily withdrawal prevents Ms. Rydzewski from maintaining a lawsuit against a vaccine administer or manufacturer. To obtain the necessary judgment, Ms. Rydzewski must follow the procedure she has taken.

993 F.2d 1525, 1528 (Fed. Cir. 1993). For Ms. Rydzewski, the contemporaneous records kept by Walter Reed do not show that she was given the hepatitis B vaccination. The absence of information about an event in a record that would otherwise contain that information supports a finding that the event did not happen. FED. R. EVID. 803(7).

Ms. Rydzewski argues that her own statements combined with the flexible evidentiary standards in vaccine program cases are sufficient to allow a finding that she received the hepatitis B vaccine. Indeed, the thrust of Ms. Rydzewski's opposition to the motion to dismiss is that her statements need to be considered. Pet'r Opp'n at 2 (stating the issue is "what qualifies as proof of vaccination") (emphasis in original). There is no doubt that Ms. Rydzewski's statements are entitled to be examined in the sense that they have not been rejected or stricken from the record. See § 13(a) (requiring a decision to be made on the "record as a whole") and § 13(c) (defining the term "record").

Upon review, Ms. Rydzewski's statements do not demonstrate that she received the hepatitis B vaccine. Ms. Rydzewski's own statements to Walter Reed (exhibit 1 at 32) and to the National Vaccine Information Center (exhibit 1 at 20-21) are conclusory statements. These statements do not explain the basis for Ms. Rydzewski's assertion that she received the hepatitis B vaccine. She does not provide any information about the person or people who allegedly told her that she received the hepatitis B vaccine. And, although she alludes to an Army-wide program of vaccinating people, she has not submitted any material that documents such a program.

Ms. Rydzewski contends that the records from Walter Reed are "incomplete." Pet'r Opp'n at 1. However, she could have issued a subpoena to cure any deficiencies. Order, dated

August 14, 2001. The only evidence that Ms. Rydzewski received the hepatitis B vaccine comes from her. Her conclusory statements do not qualify as material on which a genuine dispute may be based. See Cedars-Sinai Med. Ctr. v. Watkins, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993) (affirming district court's dismissal of lawsuit because affidavits did not support allegation of jurisdiction). Furthermore, not only is Ms. Rydzewski's assertion entirely conclusory and unsupported by the evidence, it is also contradicted by the contemporaneous records from Walter Reed.

After weighing all the evidence, the Court finds as a fact that Ms. Rydzewski did not receive the hepatitis B vaccine. Ms. Rydzewski's assertion that she received the hepatitis B vaccine borders the line – if not actually crosses the line – marking frivolous petitions. See Stephens v. Tech Intern., Inc., 393 F.3d 1269, 1273-74 (Fed. Cir. 2004) (a frivolous petition is baseless); Abbs v. Principi, 237 F.3d 1342, 1345 (Fed. Cir. 2001) (stating an appeal is "frivolous when filed" when issues are "beyond the reasonable contemplation of fair-minded people").

To resolve the pending motions, finding that Ms. Rydzewski did not meet her burden of proving by preponderant evidence that she received a covered vaccine warrants a judgment in favor of respondent. §§ 11(c)(1)(A); 13(a). Consequently, there is no need to decide whether Ms. Rydzewski had a reasonable basis for filing her petition pro se or whether Ms. Rydzewski's attorney acted with a reasonable basis in prosecuting this action after filing his appearance remains undecided. These issues, however, may arise if Ms. Rydzewski files a request for an award of attorneys' fees and costs pursuant to section 15(e).[8]

[8] A failure to prove the receipt of a covered vaccine has constituted the basis for denying attorneys' fees and costs. Brown v. Sec'y of Health & Human Servs., No. 99-539V, 2005 WL 1026713 (Fed. Cl. Spec. Mstr. Mar. 11, 2005) (finding that a petition alleging an illness due to

III. Conclusion

The respondent's motion to dismiss for lack of jurisdiction is DENIED. Ms. Rydzewski's motion for a decision on the record is GRANTED and her petition for compensation is DENIED. Unless a motion for review is filed within 30 days, the Clerk of the Court shall enter judgment in accord with this decision.

IT IS SO ORDERED.

S/ Christian J. Moran

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Christian J. Moran
Special Master

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the hepatitis B vaccination lacked a reasonable basis when, among other things, medical records to document the vaccination were not filed); Di Roma v. Sec'y of Health & Human Servs., No. 90-3277, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993); McCabe v. Sec'y of Health & Human Servs., No. 91-1540V, 1993 WL 135860 (Fed. Cl. Spec. Mstr. Apr. 15, 1993) (stating "it is . . . reasonable to put on [petitioners] the risk of not being compensated for attorneys' fees and costs if they file a petition without the necessary supporting documentation and are later unable to produce such documentation.").