

Injury Act of 1986 ("Vaccine Act" or "Act")³ on behalf of her son Conor for alleged vaccine-related injuries associated with the administration of Hepatitis B vaccination(s). She acquired counsel shortly thereafter. This petition was dismissed on 11 February 2004. Petitioner filed an Application for Attorney Fees and Costs on 17 December 2004 from which this present case arises.

Petitioner's counsel originally moved to include this case in a master file along with hundreds of other vaccine petitions involving the administration of the Hepatitis B vaccine. On 14 February 2000, Chief Special Master Golkiewicz denied that motion stating that "it is premature to file discovery motions until the complete sets of medical records have been filed." Over the next year, Petitioner filed five status reports stating that she was seeking medical records and that such were forthcoming.

On 5 April 2001, the above captioned matter was reassigned to the present special master. At Petitioner's request, this Court granted her permission to issue subpoenas *duces tecum*.⁴ On 4 March 2003, once it was finally determined that this case would not be a part of any omnibus Hepatitis B proceedings, this Court resumed prosecution of the petition and, noting that medical records had yet to be produced, ordered such to be filed post-haste. In April 2003, the Court set a deadline for the records to be filed. That 20 June 2003 deadline was later extended through 26 November 2003. On 14 November 2003, Petitioner filed some records; however, those records pertained to an entirely different case⁵ and were withdrawn.

On 13 January 2004, noting that no records had been filed in support of the petition since its inception in 1999, this Court ordered Petitioner to show cause for why this case should not be dismissed for a failure to prosecute.⁶ Petitioner did not respond. On 11 February 2004, the Court dismissed the petition stating:

In the almost four and a half years that this case has been on this Court's docket, not a single medical record, fact witness affidavit, or other record of any kind has been filed. Without such records, the Court cannot review the merits of Petitioners' claim

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

⁴ There is no record of any efforts on the part of Petitioner's counsel to compel compliance on a subpoena.

⁵ Those records related to *Turpin v. Secretary of HHS*, No. 99-535V, which was concurrently filed on 29 July 1999 on behalf of the Petitioner, Laura Turpin, for alleged vaccine-related injuries relating to the administration of the Hepatitis B vaccine. That case is presently a part of the current Hepatitis B omnibus proceedings.

⁶ RCFC Appendix B Rule 21. Dismissal of Petitions. (c) Involuntary Dismissal. For failure of petitioner to prosecute or comply with the Vaccine Rules or any order, the special master or the court may dismiss a petition or any claim therein.

ANALYSIS⁷

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

On 26 January 2005, Petitioner submitted an affidavit in support of attorney fees and costs. This filing represents the first documentation provided to this Court since the petition was originally filed some five and a half years ago. In that affidavit, the mother claims that, “Shortly after Conor received his Hepatitis B shot he developed a skin rash. From all indications we believed that the shot caused the rash. We were told that Conor did not make any anti-bodies to the vaccine, which also led us to believe the shot caused his reaction.”⁸

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

In her affidavit, Petitioner notes that the petition was filed “shortly before the statutory deadline and therefore did not have any records ready at that time.” The Court generally accepts skeletal petitions (those filed *sans* records). *See Stewart v. Secretary of HHS*, No. 02-819V, 2002 WL 319695743, at *4 (Fed. Cl. Spec. Mstr. Dec. 30, 2002); *see also Robles v. Secretary of HHS*, 155 F.3d 566, 1998 WL 228174 (Fed. Cir. 1998) (unpublished disposition). Yet, while such a filing is adequate to stop the running of the statute of limitations, it does not by itself establish a “reasonable basis” within the meaning of the statute.

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

⁷ In addition to the issue discussed herein, Respondent also raised the question of whether Petitioner has proved that the petition was filed in a timely manner. *See Brice v. Secretary of HHS*, 358 F.3d 865 (Fed. Cir. 2004) (holding that a petitioner may not recover fees and costs if a petition is not filed in a timely manner). As the application is denied on separate grounds, the timeliness issue is not reached.

⁸ The affidavit does not indicate what parties constitute the first person plural “we.” Neither does the affidavit indicate whose opinion was relied upon regarding Conor’s alleged inability to produce anti-bodies.

CONCLUSION

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

IT IS SO ORDERED.

Richard B. Abell
Special Master