In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS
E-Filed: March 14, 2012
No. 11-716V

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	*	PUBLISHED
PEARL S. GUILLIAMS,	*	
	*	Motion to Dismiss for Lack of
	*	Subject Matter Jurisdiction, RCFC
Petitioner,	*	12(b)(1); Motion to Dismiss for
	*	Failure to State a Claim, RCFC
v.	*	12(b)(6); Premature Filing of Petition
	*	before Six-Month Injury
SECRETARY OF THE	*	Requirement Met; Petition Content
DEPARTMENT OF HEALTH	*	Requirements Set Forth Under
AND HUMAN SERVICES	*	§ 11(c) of Vaccine Act; Request to
	*	Stay Proceedings; Curable Nature of
	*	Filing Defect; "One Petition Rule;"
Respondent.	*	Request to Deny Attorneys' Fees
	*	and Costs
* * * * * * * * * * *		

Isaiah Kalinowski, Maglio Christopher & Toale, P.A., Washington, D.C., for petitioner.
Jennifer Reynaud, U.S. Department of Justice, Washington, D.C., for respondent.

RULING GRANTING PETITIONER'S MOTION TO STAY PROCEEDINGS, DEFERRING RULING ON RESPONDENT'S MOTION TO DISMISS, AND DEFERRING RULING ON RESPONDENT'S REQUEST TO DENY ATTORNEYS' FEES AND COSTS[1]

[1] Because this ruling contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this ruling on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). 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 a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b).

Campbell-Smith, Chief Special Master

Pending before the undersigned is respondent's Motion to Dismiss based on petitioner's failure to satisfy the six-month injury requirement as set forth under the Vaccine Act.[2]

Respondent seeks dismissal of this claim, arguing that petitioner has not made a prima facie case for compensation under the Vaccine Act because she was, and is currently, unable to attest to one of the petition content requirements under the Vaccine Act – specifically, that petitioner suffered the residual effects of her vaccine-related injury for more than six months after the administration of the vaccine.[3] Mot. to Dismiss (citing 42 U.S.C. § 11(c)(1)(D)(i)).

Respondent contends that this court lacks jurisdiction to hear petitioner's claim because the six-month injury requirement is a "condition precedent" to the filing of a claim under the Vaccine Program. Reply at 4. Pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims (RCFC), respondent seeks dismissal of this petition. Id. at 4-5. Alternatively, respondent seeks dismissal of petitioner's claim pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted. Id. at 5.

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[2] Also pending before the undersigned are a number of responsive filings, including petitioner's Motion to Stay Proceedings, petitioner's Response to the Motion to Dismiss, and respondent's Reply in support of her Motion to Dismiss.

[3] The petition content requirements under the Vaccine Act are set forth in 42 U.S.C. § 300aa-11(c). The statutory provision establishing the particular petition content requirement at issue provides:

> A petition for compensation under the Program for a vaccine-related injury or death shall contain . . . an affidavit, or supporting documentation, demonstrating that the person who suffered such injury or who died . . .
>
> (i) suffered the residual effects or complications of such illness, disability, injury, or condition for more than six 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 . . .

42 U.S.C. § 300aa-11(c)(1)(D) (emphasis and formatting added).

Acknowledging that the petition in this case was filed prematurely, petitioner's counsel requests a stay, rather than dismissal of, the claim. Status Report, Dec. 5, 2011, at ¶¶ 3-4.

Questioning whether a reasonable basis exists for the premature filing of the petition, respondent also seeks a denial of attorneys' fees and costs in this case. See Mot. to Dismiss at 3; Reply at 7-8.

For the reasons discussed more fully below, the undersigned hereby:

(1) **GRANTS** petitioner's Motion to Stay the Proceedings for **180 days**, or until **April 24, 2012**;

(2) **DEFERS** ruling on respondent's Motion to Dismiss; and

(3) **DEFERS** ruling on respondent's request to deny attorneys' fees and costs.

To put the undersigned's rulings on these motions into proper context, some background discussion may be helpful.

BACKGROUND

I. FACTUAL HISTORY

Petitioner alleges she received a trivalent influenza (flu) vaccine on October 3, 2011. Pet. at ¶ 2. "Shortly after" her receipt of the vaccination, petitioner noticed a "strange, metallic taste in her mouth." Id. at ¶ 3. In the days that followed, petitioner began to suffer progressive back pain, numbness, and tingling across her feet, hands, and face, as well as a decrease in her muscle strength and coordination. Id. at ¶¶ 3-5.

By October 23, 2011, petitioner was "almost entirely helpless," "could do nothing for herself," and was admitted to the University of Alabama Hospital in Birmingham (UAB) for intensive care and supervision. Id. at ¶ 5. On October 24, 2011, approximately three weeks after the administration of the flu vaccine, petitioner was diagnosed with Guillain-Barré syndrome (GBS). Id. at ¶ 6.

II. PROCEDURAL HISTORY

A. The Premature Filing of the Petition

On October 28, 2011, four days after receiving her diagnosis and less than one month after the administration of the vaccine at issue, petitioner filed a petition for compensation under the National Vaccine Injury Compensation Program ("the Program").[4]

In her petition, petitioner alleges that her "vaccine[-]related injuries have lasted more than six months." Pet. at ¶ 10.

B. The Undersigned's Initial Order

Uncertain whether the petition reflected a typographical error as to the date of vaccine administration, the undersigned issued an initial order on November 7, 2011. The initial order first, noted that petitioner had filed a petition without any medical records, and second, directed petitioner's counsel to file a status report on or before December 8, 2011, to detail the status of the medical records collection effort. See Order, Nov. 7, 2011.

C. Respondent's Motion to Dismiss

On December 1, 2011, respondent filed a Motion to Dismiss ("Motion to Dismiss"), contending that petitioner has not demonstrated a prima facie case for vaccine compensation under the Act. Mot. to Dismiss at 1. In her filing, respondent focused on the six-month injury requirement under the Act as a prerequisite to filing a vaccine claim. Id. at 2. Respondent also contemplated the legislative intent informing the particular requirement. Id. at 3.

Respondent reiterated that the petition in this case fails to meet a necessary requirement for the filing of a petition under the Act – because "a mere two months have passed since [petitioner's] alleged receipt of the flu vaccine," id. at 2, and "the petition was filed with [the] knowledge that the petition content requirements could not be, and m[ight] never be, met," id. at 3.

Citing to the recently issued opinion by the United States Court of Appeals for the Federal Circuit, Cloer v. Secretary of Health and Human Services, 654 F.3d 1322 (Fed. Cir. 2011), respondent construed petitioner's inability to attest to

[4] The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758, codified as amended, 42 U.S.C. §§ 300aa-10 et seq. (hereinafter "Vaccine Act" or "the Act"). Hereinafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

the satisfaction of the six-month injury requirement as a failure to meet a "condition precedent to filing a petition for compensation." Id. at 2 (citing Cloer, 654 F.3d at 1335). Respondent pointed to the language in Cloer noting that a petitioner must "attest" that she has satisfied, among other things, the six-month injury requirement, in order to file a vaccine petition. Id. (citing Cloer, 654 F.3d at 1335).

Because the "speculation" exhibited by petitioner's counsel's premature filing of the petition in this case – "apparently in anticipation of the possibility of having a viable claim in the future" – is "entirely contrary to Congress' intent 'to limit the availability of the compensation system to those individuals who are seriously injured from taking a vaccine,'" id. at 3 (citing Cloer, 654 F.3d at 1335), respondent requested dismissal of petitioner's claim without prejudice and denial of an award of attorneys' fees and costs, id.

D. Petitioner's Status Report and Request to Stay the Proceedings

A few days after the filing of respondent's Motion to Dismiss, on December 5, 2011, petitioner's counsel filed a status report to inform the court of the status of the medical records collection effort, pursuant to the directive provided in the undersigned's initial order. Status Report, Dec. 5, 2011.

Petitioner's counsel acknowledged that "since petitioner is still a patient at [UAB], medical records pertaining to her care are not yet available for release." Id. at ¶ 2. Counsel also defended the premature filing of the petition, explaining that he filed the petition "out of an abundance of caution, as it seemed that Petitioner's condition was in precipitous decline, and the Petition was filed . . . to preserve all her rights to compensation," as recognized by the Federal Circuit in Zatuchni v. Secretary of Health and Human Services, 516 F.3d 1312 (Fed. Cir. 2008).[5] Id. at ¶ 3.

To cure the petition defect, petitioner's counsel requested a stay, rather than a dismissal of, the vaccine claim.[6] Id. at ¶ 4.

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[5] Zatuchni stands for the proposition that, under the appropriate circumstances, a petitioner's estate may recover both a death benefit and compensation for petitioner's vaccine-related injuries. 516 F.3d 1312.

[6] The undersigned construes the request, included within the status report filed by petitioner's counsel, as a Motion to Stay the Proceedings. See Status Report, Dec. 5, 2011, at ¶ 4.

E. Status Conference with the Parties

To address petitioner's counsel's acknowledgement that he filed the petition prematurely and to discuss the concerns raised in respondent's Motion to Dismiss, the undersigned conducted a telephonic status conference with the parties on December 14, 2011.

Based on the representations of petitioner's counsel regarding the severity of petitioner's medical condition, the undersigned noted that the petition defect appeared likely to be cured in a number of months. Order, Dec. 15, 2011, at 2. The undersigned nonetheless "discouraged the [practice of] early filing of other petitions in contravention of the six-month statutory requirement." Id.

The undersigned observed that should the prematurely filed petition trigger dismissal of the claim, petitioner could potentially be precluded from filing another claim for the same vaccine-related injury based on the statutory "one petition rule."[7] Id. The undersigned directed the parties to complete the briefing on the dismissal motion. Id.

F. Petitioner's Response to the Motion to Dismiss

On December 22, 2011, petitioner's counsel filed a Response to the Motion to Dismiss ("Response"). Counsel defended the premature filing of the petition in this case by explaining that: first, he expected, based on his prior experience with the Program, that enforcement of the petition content requirements would be treated with some degree of flexibility; second, he considered that a strict implementation of the six-month injury requirement necessarily would yield unintended and undesirable consequences; third, he noted that interpreting the six-month injury requirement in isolation, rather than within the context of its broader statutory purpose, was improper; and fourth, he factored the severity of petitioner's medical condition into his decision to file the claim promptly.

Expounding on the first of his defenses, petitioner's counsel asserted that "[i]t has long been understood within the Vaccine Program, particularly in actual causation cases, that enforcing a strict reading of § 11(c)[, as urged by respondent,] is typically impractical." Resp. at 2. Observing that the Act's requirements regarding the supporting materials to be filed with the petition "customarily [have been] read with a gloss," counsel argued that petitioners have been afforded opportunities, with liberality, to "substantiate the allegations of the petition" after the filing of the petition itself. Id. Furthermore, counsel pointed

[7] The Act provides that only one petition may be filed with regard to each administration of a vaccine, a limitation that is described as the "one petition rule." § 11(b)(2). See also Vaccine Rule 2(a).

out, "it is the exception, not the standard practice, for a petitioner to file a petition [that is] accompanied by all [the] medical records, fact witness affidavits, medical literature, and all necessary expert reports, as would be necessary to comply with the letter of [the statute]." Id. 2-3. Maintaining that it is the court's "stated preference" and indeed, "occasionally even its command," that petitioners refrain from filing with the petition the materials mandated by § 11(c), counsel stated that certain special masters "commonly order" petitioners not to pursue a medical expert opinion report until directed.[8] Id. at 3.

Elaborating on the second of his defenses, petitioner's counsel argued that requiring strict compliance with the petition content requirements necessarily would generate unwarranted consequences. Id. at 3-5. Counsel explained that because the applicable rules in the Program mandate the filing of "the petition, and all that accompanies it as an initial filing" in paper rather than in electronic form, a strict interpretation of the petition content requirements would abolish the practice of electronic filing for vaccine cases. Id. at 3-4. Such a reading would destroy, according to counsel, the practice of electronic filing that "is otherwise favored by the Court," by compelling petitioners to file in paper form most of the "relevant documents in a given case," including "the great bulk of the medical records," at the time of the filing of the petition. Id.

Petitioner's counsel further explained that an inflexible reading of the petition content requirements would invoke the "waiver rule" inappropriately at the moment of the petition's filing, rather than when the vaccine claim is "tendered" to the court for adjudication. Id. at 4. The "waiver rule," as set forth in Vaccine Rule 8, provides that "[a]ny fact or argument not raised specifically in the record before the special master will be considered waived and cannot be raised by either party in proceedings on review of a special master's decision." Vaccine Rule 8(f)(1). Counsel argues that a strict interpretation of the petition content requirements would effectively mandate that a petition "must," rather than "should," contain all the facts and relevant arguments, thus invoking the "waiver rule" at the moment of the petition's filing and precluding the current, allegedly liberal practice of petition amendment. Resp. at 2-4.

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[8] To illustrate his experiences with what he alleged has become the "customary practice" under similar circumstances, petitioner's counsel identified four vaccine cases in which he serves as attorney of record. Resp. at 4 n.2 (citing Kimbell v. Sec'y of Health & Human Servs., No. 10-364; Seibold v. Sec'y of Health & Human Servs., No. 10-866; Hayman v. Sec'y of Health & Human Servs., No. 11-667; Mantlo v. Sec'y of Health & Human Servs., No. 11-673).

Petitioner's counsel noted that in each of the identified cases, respondent did not move for dismissal, despite his filing of petitions that did not "immediately satisfy[] all of the requirements of § 11(c), or § 11(c)(1)(D) in particular." Id.

For these reasons, petitioner's counsel maintains that satisfaction of the six-month injury requirement is required only when the case is presented to the court for decision, not at the time of filing. Id. at 5.

As his third defense, petitioner's counsel attacked respondent's "literal" and "out of context" interpretation of both the statutory text of the six-month injury requirement and the Federal Circuit's use of the phrase "condition precedent" in its opinion in Cloer. Id. at 5-8 (citing Cloer, 654 F.3d at 1335). Arguing that respondent's interpretation of the six-month injury requirement construed the statutory language not in its proper context, but rather, in isolation, counsel contended that adoption of respondent's proposed interpretation would be inconsistent with the manner in which the other petition content requirements have been read. Id. at 4-5. Counsel also challenged respondent's reading of the Federal Circuit's use of the phrase "condition precedent" in its recent Cloer decision to describe the six-month injury requirement.[9] Id. at 6-7. Insisting that the Federal Circuit in Cloer simply clarified that the six-month injury requirement is unrelated "to the rightful opportunity to file a petition," counsel asserted that the six-month injury requirement instead relates to the merits of the claim itself. Id. at 7. Counsel added that sufficient administrative safeguards exist within the structure of the Program to protect against the filing of frivolous claims. Id. at 9. Counsel pointed to the requirements of good faith and reasonable basis – for the recovery of reasonably incurred attorneys' fees and costs – as "potentialit[ies that] prevent[] petitioners from filing early without good reason to do so." Id. See § 15(e)(1).

Offered as a fourth defense, petitioner's counsel averred, without further explanation, that early filing is appropriate when "the injury is so severe as to threaten imminent death." Resp. at 9 (citing Zatuchni, 516 F.3d 1312). Counsel stated that the time of the filing of the petition "could affect a petitioner's rights to compensation were [death] to occur prior to the filing of the petition." Id.

In addition to his offered defenses, petitioner's counsel indicated that "Petitioner's Affidavit has been filed, or presently will be filed," addressing "the matters required by § 11(c)(1) of the Vaccine Act." Id. at 2.

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[9] Petitioner's counsel pointed out that "the Court in Cloer employed a phrase from contracts law[, 'condition precedent,'] that appears nowhere in the Vaccine Act or in any prior Vaccine Act decision." Resp. at 7. In counsel's view, the instant motion for dismissal improperly "rests upon one malapropistic use of a legal term that holds no relevance to the Vaccine Program, [when] divorced from the context and reasoning of the opinion as a whole." Id. at 8.

G. Respondent's Reply in Support of Her Motion to Dismiss

On January 13, 2012, respondent's counsel filed a Reply in support of her Motion to Dismiss ("Reply"): first, urging dismissal of petitioner's claim pursuant to RCFC 12(b)(1) and RCFC 12(b)(6);[10] second, questioning whether a reasonable basis and good faith existed for the premature filing of the petition; third, addressing petitioner's counsel's perception that the petition content requirements are not rigorously enforced within the Program; and fourth, discouraging the requested stay of proceedings.

Respondent reiterated her contention that because petitioner cannot attest that she has met the six-month injury requirement, petitioner has not met a "condition precedent to filing a petition for compensation." Reply at 4-5. Respondent urged dismissal of petitioner's claim because absent such attestation, petitioner has not yet invoked the jurisdiction of this court, pursuant to RCFC 12(b)(1). Id.

Alternatively, respondent urged dismissal of petitioner's claim for failure to state a claim upon which relief can be granted, pursuant to RCFC 12(b)(6). Id. at 5. Characterizing the allegation in the petition that petitioner has met the six-month injury requirement as "not merely doubtful[,]" but "impossible," respondent asserted that the factual allegations contained in the petition fail to elevate petitioner's right to relief "above the speculative level." Id. at 5.

Respondent also took particular exception to the inaccurate declaration contained in the petition, stating that petitioner has met the six-month injury requirement. Id. at 4 n.4; see also Pet. at ¶ 10. Respondent argued that "the knowing filing of such an obviously defective petition is profoundly contrary to the Act's requirement that petitions have a reasonable basis and be brought in good faith." Id. at 7-8 (citing § 15(e)(1)). Respondent further observed that to date, and contrary to the representations made by petitioner's counsel in his responsive briefing, see Resp. at 2, petitioner's counsel has not filed an affidavit attesting to the petition content requirements set forth in § 11(c), Reply at 4 n.4.

[10] Vaccine Rule 1 affords to special masters broad authority to employ procedures consistent with the Act and the Vaccine Rules. See Vaccine Rule 1(b). Thus, RCFC 12(b)(1) and RCFC 12(b)(6) may be applied to Program cases "to the extent they are consistent with the Vaccine Rules." Vaccine Rule 1(c).

Addressing to petitioner's counsel's view that the petition content requirements are not rigorously enforced within the Program,[11] respondent asserted that the presentation of sufficient facts within a petition is an entirely distinguishable matter from the submission of evidence in support of the pleaded facts.[12] Id. at 3 n.2. Because petitioner "is currently unable, and m[ight] never be able, to attest" that the six-month injury requirement has been satisfied, id. at 3, respondent urges dismissal of the claim because petitioner has failed to establish the statutorily-required factual basis for a proper petition, id. at 4-5. Respondent posited that determining whether a petition is facially deficient does not require an examination of the supporting evidence for petitioner's claim. Id. at 3 n.2.

Finally, respondent argued that the premature filing of this petition cannot be excused by petitioner's counsel's "fundamental misreading of the Federal Circuit's Zatuchni decision."[13] Id. at 7. Under the circumstances at hand, respondent urged petitioner to simply "voluntarily dismiss her current petition and re-file it later, should she be able to satisfy the petition content requirements."[14] Id. at 7. Respondent represented that she would not object to the re-filing of petitioner's claim, should the present petition defect be cured later. Id. at 6.

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[11] Respondent noted that of the four vaccine cases to which petitioner's counsel adverted to as examples of the Program's "customary practice" of not requiring absolute compliance with the petition content requirements under the Act, see supra n.8, only one of them was filed with a claim of injury lasting less than a period of six months. Reply at 3 n.3. Respondent explained that she declined to move for dismissal of that claim in an effort to avoid harming petitioner based on what appeared to be an "anomal[ous]" error by counsel. Id. But, respondent now intends to challenge what petitioner's counsel has "confirmed" as "his firm's practice" of filing petitions "that contravene the statutory content requirements." Id.

[12] Respondent contends that petitioner's counsel "conflates two entirely distinct issues: (1) whether the alleged facts are facially sufficient; and (2) whether sufficient proof has been offered to support the alleged facts." Reply at 3 n.2 (emphasis in original).

[13] In contrast to the case at hand, respondent observed that the original petition in Zatuchni was well-pleaded and satisfied the petition content requirements. Reply at 7. See Zatuchni, 516 F.3d 1312.

[14] Under the Vaccine Rules, a petitioner may voluntarily dismiss the petition, without an order, by filing either a notice of dismissal before the service of respondent's report or a signed stipulation of dismissal. Vaccine Rule 21(a)(1).

The parties have completed briefing on the issue of whether the premature filing of the petition in this case, in contravention of the six-month injury requirement, militates in favor of a stay or a dismissal. The matter is now ripe for a ruling.

DISCUSSION

I. PETITIONER'S REQUEST TO STAY THE CASE

Petitioner's counsel has filed a cross-motion for relief, requesting a stay of proceedings in order "to allow the record to be developed, up to and including the passage of six months following vaccination." Status Report, Dec. 5, 2011, at ¶ 4. Petitioner's counsel explains that "[b]y that time, [petitioner's] condition may . . . have stabilized" and her records may then be made available. Id.

Respondent argues against staying petitioner's claim to allow the factual petition defects to be cured. Reply at 6-7. Although respondent recognizes that special masters previously have allowed, under "limited circumstances," a petitioner to cure a defectively filed petition, by affording petitioner the opportunity to file a supplemental pleading pursuant to RCFC 15(d), id. (citing to Black v. Sec'y of Health & Human Servs., 93 F.3d 781, 789-90 (Fed. Cir. 1996)) (holding that "under the appropriate circumstances," even a jurisdictional defect can be cured by a supplemental pleading detailing post-filing events, thereby remedying the original petition defect), respondent asserts that this "extreme remedy" is not appropriate for this case. Id. at 7. Respondent reasons that because petitioner cannot attest to the factual basis of six-month injury requirement, she has "no cognizable claim." Id. at 6. Respondent adds that "petitioner can simply voluntarily dismiss her current petition and re-file it later, should she be able to satisfy the petition content requirements." Id. at 7.

Several factors militate in favor of granting the request to stay this proceeding. These factors are more fully discussed below.

A. The Curable Nature of the Defect

The petition content requirements set forth in § 11(c) of the Act serve to ensure that certain conditions have been satisfied by the date of the filing of the petition, before the claim may further proceed under the Program.

Where, as in this case, one of the conditions for the filing of a petition has not been established at the time of the filing of the petition, the nature of the identified defect may be considered in determining how to proceed. Once a petitioner's inability to satisfy the petition content requirements is conclusively established – because the petition defect cannot be cured – the petition must be

dismissed. Here, dismissal of petitioner's claim will be required should the evidence offered to support petitioner's claim make clear that petitioner's injury has not lasted for more than six months.

Special masters generally have permitted a petitioner to develop the record in a case up until the point that it becomes decidedly apparent that a petitioner has not, and cannot, demonstrate that the alleged vaccine-related injury has persisted for more than six months. Compare, e.g., Warfle v. Sec'y of Health & Human Servs., No. 5-1399, 2007 WL 760508, at *2 (Fed. Cl. Spec. Mstr. Feb. 22, 2007) (allowing a claim to survive a motion to dismiss because evidence from previously undisclosed affidavits corroborated petitioner's contention that her child's alleged vaccine-related injuries lasted more than six months), with, e.g., Stavridis v. Sec'y of Health & Human Servs., No. 7-261, 2009 WL 3837479, at *4 (Fed. Cl. Spec. Mstr. Oct. 29, 2009) (dismissing a claim for failing to meet the six-month injury requirement because of petitioner's repeated refusals to produce an expert opinion that would support a finding that petitioner's vaccine-related injuries lasted more than six months).

The realization that a petition has failed to satisfy the six-month injury requirement may also occur after a hearing has been conducted to evaluate whether a causal relationship exists between a petitioner's earlier alleged vaccine-related injury and her subsequent medical conditions. See, e.g., Boley v. Sec'y of Health & Human Servs., 86 Fed. Cl. 294, 303 (2009) (affirming dismissal of a claim for failing to meet the six-month injury requirement based on a special master's factual finding that petitioner's vaccine-related injuries were not related to subsequent medical conditions); Song v. Sec'y of Health & Human Servs., 31 Fed. Cl. 61, 66 (1994), aff'd, 41 F.3d 1520 (Fed. Cir. 1994) (same). See also Jordan v. Sec'y of Health & Human Servs., 38 Fed. Cl. 148, 151-54 (1993) (affirming dismissal of a claim for failing to meet the six-month injury requirement after petitioners effectively conceded, in their motion for review, such a failure).

The defect in this case is not decidedly incurable. In fact, as the undersigned observed during the status conference with the parties, the severity of petitioner's alleged vaccine-related injury suggests that petitioner may very likely be able to show, in a few months, that her injury has lasted longer than six months. See Order, Dec. 15, 2011, at 2.

B. The Use of Curative Supplemental Pleadings

In Black v. Secretary of Health and Human Services, the Federal Circuit squarely considered, among other things, "whether the inadequacy [in a petition] can be cured and, if so, when the curative measures must be taken." 93 F.3d at 791. The petition content requirement at issue in Black – the requirement that a

petitioner has incurred at least $1,000 in pre-petition, unreimbursable expenses as a result of alleged vaccine-related injuries – has since been repealed.[15] See § 11(c)(1)(D)(i) (Supp. IV 1987). But, the Federal Circuit's decision in Black provides important guidance here.

The Federal Circuit in Black focused on whether the petitioners, in each of the three cases consolidated on appeal, filed their supplemental pleadings within the statute of limitations. Because "Congress has in effect determined that if the $1000 threshold is not reached within the limitations period, a would-be Vaccine Act petitioner cannot file a timely and qualifying petition," Black, 93 F.3d at 791, the appellate court inferentially reasoned that any deficiency in a petition pertaining to the incurred expenses requirement could be cured by allegations

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[15] Although the incurred expenses requirement was eventually repealed in 1998, the Act, as originally written, set forth an injury and an incurred expenses requirement within the same statutory provision. See § 11(c)(1)(D) (Supp. IV 1986) (allowing a petitioner to proceed with a Program claim if petitioner either: (1) satisfied the injury requirement; (2) satisfied the incurred expenses requirement; or (3) died as a result of the administration of the vaccine). In 1987, Congress shortened the requisite duration of the alleged injury from one year to six months for the injury requirement and also amended the provision to require petitioners to meet both the injury requirement and the incurred expenses requirement, and not simply one or the other. See § 11(c)(1)(D)(i) (Supp. V 1987).

Within the Program, the injury requirement and the incurred expenses requirement have been discussed together. See, e.g., Davis v. Sec'y of Health & Human Servs., No. 95-107, 1995 WL 413933, at *2 (Fed. Cl. 1995) (citing H.R. Rep. No. 100-391(I), at 699 (1987), reprinted in 1987 U.S.C.C.A.N. 2313-1, 2313-73) (explaining that Congress intended to limit Program claims to cases "in which a person incurs unreimbursable medical expenses of more than $1,000 and suffers ongoing disabilities for at least six months"). In Black v. Secretary of Health and Human Services, 33 Fed. Cl. 546, 551-52, aff'd, 93 F.3d 781 (Fed. Cir. 1996), the Court of Federal Claims observed that "[j]ust as a petitioner must wait six months past the date of vaccination in order to tell if he or she [satisfied the six-month injury requirement], so a petitioner must also wait until an adequate amount of unreimbursable expenses – an amount greater than $1000 – have been incurred[,]" and also noted that one "who suffers an injury for four months and then recovers, or who expends only $500 in unreimbursable expenses is obviously not eligible for the Program." The Court of Federal Claims further stated that although Congress' use of these two requirements "to measure the severity of a victim's medical and financial hardship" is "rough and inexact," the requirements "still [have] some logic to [them] and [are] not wholly without reason." Id. at 552.

made in a supplemental pleading, provided that the supportive supplemental pleadings were filed within the applicable statute of limitations, id. at 790.

In Black, one of the named petitioners filed supplemental affidavits to substantiate his claim that he had, in fact, incurred more than $1,000 in unreimbursable, vaccine-related expenses. 93 F.3d at 784. However, the additional expenses detailed in petitioner's supplemental pleadings were incurred after the applicable statute of limitations had run. Id. at 792. When it became apparent that petitioner had expended only $814.15 in unreimbursable expenses prior to the filing of the original petition,[16] the Federal Circuit affirmed the dismissal of Black's petition, reasoning that petitioner "failed to show that he could have filed a petition within the limitations period that would have validly alleged unreimbursed expenses of more than $1000." Id. The Federal Circuit in Black found that the "time-specific" nature of the incurred expenses requirement did not "bar[] a special master from accepting a supplemental pleading" to cure a petition deemed defective at the time of filing because "it was filed before the $1000 expense threshold was reached." Black, 93 F.3d at 790.

It follows, then, that allowing the petition defect to be cured in this case would be consistent with the reasoning articulated by the Federal Circuit in Black. See, e.g., id. at 791 (observing that, notwithstanding Congress' contemplation that "the opportunity to seek compensation would [not] remain open for whatever period of time is necessary for the petitioner to reach the $1000 expense threshold," there is "no indication that Congress intended that compensation would be barred simply because the petition was filed too early in the limitations period or because a technical defect in the petition was not noticed and corrected at the time of the filing"). The six-month injury requirement commands a petitioner to demonstrate that the residual effects of the alleged vaccine-related injury have lasted more than six months. Applying the logic of the Federal Circuit

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[16] Satisfaction of the incurred expenses requirement, before the requirement was repealed, demanded a two-part showing: first, the $1,000 in vaccine-related expenses had to be unreimbursable and second, the expenses had to be incurred prior to the filing of the petition. See Black, 93 F.3d at 790 (affirming that the $1,000 expenses requirement is "time-specific" and mandating that the expenses must be incurred before the petition is filed); Hammond v. Sec'y of Health & Human Servs., No. 91-1238, 1994 WL 59444, at *1 (Fed. Cl. Spec. Mstr. Feb. 15, 1994), aff'd by unpublished order (Fed. Cl. July 12, 1994) (holding that qualifying unreimbursable expenses must have been incurred prior to the filing of the petition in order to be included in the $1,000 calculation). See also Black, 93 F.3d at 786 (observing that the Act distinguishes between "actual unreimbursable expenses" that "have been" incurred, as referenced as the incurred expenses requirement in § 11(c)(1)(D)(i), and "reasonable projected unreimbursable expenses" that "will be" incurred, as referenced in § 15(a)(1)(A), later in the Act).

in Black counsels in favor of affording petitioner an opportunity to cure the defect occasioned by the premature filing of the petition, by staying the claim until the six-month period has elapsed and then allowing petitioner to file supplemental pleadings.

C. Giving Consideration to the "One Petition Rule" in Determining How to Proceed

The potential applicability of the "one petition rule" also counsels in favor of granting a stay, rather than urging the voluntary dismissal of the case, as respondent's counsel requests. Set forth in § 11(b)(2) of the Act, the "one petition rule" restricts a petitioner to the filing of only one claim for each administration of a vaccine. See also Vaccine Rule 2(a).

Application of this rule, following a dismissal of this claim, would prevent petitioner from filing another petition for the same vaccine-related injury.[17] Although respondent's counsel has indicated that she will refrain from objecting to the subsequent re-filing of the petition in the event that the six-month injury requirement is satisfied, Reply at 6, whether counsel can circumvent the "one petition rule" by agreement with opposing counsel is not clear.

Section 12(d)(3)(C) of the Vaccine Act and Vaccine Rule 9 permit a special master to stay proceedings on a petition for up to 180 days for good cause. Pursuant to this authority and further to the guidance in Black, the undersigned **GRANTS** petitioner's request for a stay of proceedings, to afford petitioner's claim an opportunity to ripen and to enable further development of the case.

The case is **STAYED** for 180 days from the date of petitioner's diagnosis of GBS, or **until April 24, 2012**.

On or before Friday, April 24, 2012, petitioner's counsel shall file an amended petition, together with any supporting evidence, indicating whether petitioner's alleged vaccine-related injuries have lasted more than six months.

II. RESPONDENT'S MOTION TO DISMISS

Respondent seeks dismissal of this claim pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction and RCFC 12(b)(6) for failure to state a claim.

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[17] The "one petition rule" is intended to prevent a petitioner from circumventing the limitation on payments for pain and suffering by filing multiple petitions for the same vaccine-related injury. See H.R. Rep. No. 99-908, at 14-15 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6355-56.

A. Dismissal Pursuant to RCFC 12(b)(1)

Respondent argues that this claim should be dismissed under RCFC 12(b)(1) because the court lacks jurisdiction to hear the claim. Reply at 4. Respondent contends that because "petitioner is unable to attest truthfully to [the] condition precedent [of the six-month injury requirement]," the subject matter jurisdiction of the court has not yet attached to the claim. Id.

Petitioner's counsel retorts that respondent's reliance on the phrase "condition precedent" is flawed. Resp. at 7. Instead, petitioner's counsel avers that the six-month injury requirement is "unrelated to the rightful opportunity to file a petition." Id.

The parties' dispute reflects a disagreement regarding whether the six-month injury requirement is a jurisdictional one. The undersigned need not decide this issue here, but does note the divergence in the vaccine case law regarding whether the petition content requirements under § 11(c) are jurisdictional.[18]

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[18] Within the Program, special masters have found that the petition content requirements set forth in § 11(c) are not jurisdictional, but merely prima facie elements of a claim. See, e.g., Olascoaga v. Sec'y of Health & Human Servs., No. 93-616, 1994 WL 100687, at *1 (Fed. Cl. Spec. Mstr. Mar. 14, 1994); Smith v. Sec'y of Health & Human Servs., No. 91-57, 1992 WL 210999, at *1 (Cl. Ct. Spec. Mstr. Aug. 13, 1992); Beale v. Sec'y of Health & Human Servs., No. 90-1457, 1992 WL 217493, at *2 n.2 (Cl. Ct. Spec. Mstr. Apr. 26, 1992). See also Warfle, 2007 WL 760508, at *2 ("[T]he Court could never dismiss a case with prejudice for failing to meet the statutory elements, because it would be without power to rule as soon as one such element was found to be lacking, were such deficiencies truly 'jurisdictional matter[s]' . . . .").

But, the special master in Black construed the petition content requirements as "essentially the gatekeeper to Program funds." No. 90-3195, 1995 WL 39354, at *2 (Fed. Cl. Spec. Mstr. Jan. 25, 1995), aff'd, 33 Fed. Cl. 546, aff'd, 93 F.3d 781 (Fed. Cir. 1996). The Court of Federal Claims subsequently affirmed the dismissal decision, stating that "the requirements of subsection 11(c) are indeed jurisdictional and that a potential petitioner must do something more than merely submit a petition and an affidavit parroting the words of the statute." Black, 33 Fed. Cl. at 550. The Federal Circuit agreed that the dismissal of the claim was proper because the "statute makes clear that [the petition content requirement of] $1000 in [incurred] expenses is a threshold criterion for seeking entry into the compensation program . . . ." Black, 93 F.3d at 787.

B. Dismissal Pursuant to RCFC 12(b)(6)

Respondent argues dismissal of this claim under RCFC 12(b)(6) for failure to state a claim. Reply at 5. Characterizing petitioner's allegation that she has satisfied the six-month injury requirement as "impossible," respondent contends that the factual allegations contained in the petition do not raise a right of relief "above the speculative level." Id.

Petitioner's counsel defends against dismissal, asserting that the petition content requirements are customarily treated with some degree of latitude within the Program, Resp. at 2-3, and that strictly interpreting these requirements would result in unintended and unwanted consequences, id. at 3-4.

These two contentions merit a brief discussion.

First, while it is true that there is a measure of flexibility afforded within Program proceedings, see, e.g., Vaccine Rule 3(b)(2) (describing proceedings under the Program as "flexible" and "expeditious") and Vaccine Rule 7(a) (explaining that "informal and cooperative exchange of information is the ordinary and preferred practice"), such flexibility relates to the timing for, and the manner of, the submission of supporting evidence. The degree of flexibility afforded in Program cases turns on case-specific considerations. But, at no time does flexibility within the Program obviate the need for petitioner to meet the statutory requirements or to submit supporting evidence.[19]

The circumstances in which flexibility is either required or encouraged vary. The Act directs that the Vaccine Rules shall, among other things, "include flexible and informal standards of admissibility of evidence." § 12(d)(2). And, special masters have determined that not every claim brought under the Program

[19] Petitioner's counsel points to language in the case of Zeller v. Secretary of Health & Human Services, No. 6-120, 2007 WL 1828081, at *2 (Fed. Cl. Spec. Mstr. Jun. 8, 2007). There, the court stated, "this Court strives to accommodate petitioners by providing adequate time to complete these filings during the early pendency of the action, a period frequently lasting several months." Resp. at 3 n.1. But the Zeller court also made clear that "[t]his accommodation should never be confused with laxity under the mandate of the Vaccine Statute and the Vaccine Rules." Zeller, 2007 WL 1828081, at *2.

demands the filing of an expert report during the early stages of a proceeding.[20] Moreover, in cases in which the parties are exploring informal resolution, a special master will often defer the filing of expert reports to avoid incurring such costs, until made necessary by failed settlement efforts. Furthermore, in some cases, a petitioner may be unable to file all of the required medical records with the petition because she requires the aid of a subpoena.[21]

Although flexibility in managing proceedings within the Program is authorized and appropriate, such flexibility does not, and cannot, extend to relaxing petitioner's burden to meet the petition content requirements and to adduce adequate evidence to support a claim for Program compensation.

C. Evaluating Respondent's Motion to Dismiss

In light of the stay granted in this case, the undersigned hereby **DEFERS** ruling on respondent's Motion to Dismiss pursuant to RCFC 12(b)(1) and RCFC 12(b)(6), until the stay of proceedings is lifted on **April 24, 2012**.

At that time, pursuant to the directive set forth earlier in this ruling, petitioner's counsel will inform the court regarding the status of the six-month injury requirement. See supra Part I.C (directing petitioner's counsel to file an amended petition, together with any supporting evidence, indicating whether petitioner's alleged vaccine-related injuries have lasted more than six months). Once the status of the six-month injury requirement has been conclusively established, the undersigned will consider again, as appropriate, respondent's Motion to Dismiss.

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[20] An expert opinion may not be required for claims that present a well-established history of recovery under the Program or that are listed on the Vaccine Injury Table. See Vaccine Injury Table, § 14, as amended by 42 C.F.R. § 100.3. See also Vaccine Rule 2(c)(2)(B) (requiring the filing of affidavits and expert opinions in support of any claim that does not rely on medical records alone, but is based instead on observations or testimony); The Office of Special Masters, Guidelines for Practice Under the National Vaccine Injury Compensation Program 6 (rev. ed. 2004) (indicating that most, but not all, cases require the filing of expert reports because petitioners often rely upon the diagnosis of an expert medical witness as part of their proof).

[21] The record in such cases may be developed only by compelling the collection of medical records from treatment facilities, pursuant to the special master's authority to approve the issuance of subpoenas under the Vaccine Rules. Vaccine Rule 7(c).

III. RESPONDENT'S REQUEST TO DENY ATTORNEYS' FEES AND COSTS

By petitioner's counsel own admission, the petition was filed a mere four days after petitioner's diagnosis, and less than one month after the administration of the vaccine at issue. Accompanying the petition was a boilerplate declaration that petitioner's alleged vaccine-related injuries had lasted more than six months. See Pet. at ¶ 10. The filed petition is thus defective because it was filed before the six-month injury requirement could be established.

In response to the motion to dismiss, petitioner's counsel asserts that "Petitioner's Affidavit has been filed, or presently will be filed, stating the matters required by § 11(c)(1) of the Vaccine Act." Resp. at 2. But to date, no such affidavit has been received by the court.

A. Respondent's Request to Deny Attorneys' Fees and Costs

Respondent argues that there was no reasonable basis for the filing of this claim "with [the] knowledge that the petition content requirements could not be, and m[ight] never be, met." Mot. to Dismiss at 3. Thus, respondent urges dismissal of the claim and the denial of counsel's fees and costs. Respondent maintains that petitioner's counsel's "fundamental misreading of the Federal Circuit's Zatuchni decision" cannot excuse the premature filing of the petition.[22] Reply at 7.

Petitioner's counsel does not address directly the proposed denial of attorneys' fees and costs in his briefing. Instead, he asserts that the "good faith" and "reasonable basis" requirements serve as safeguards against abusive filings within the Program. Resp. at 9. Counsel acknowledges that "[w]here there is no reasonable basis and good faith in the petition's filing, it lies within the Court's authority to deny compensation accordingly." Id. However, counsel contends that the severity of his client's injury, which at the time of the filing of the petition, threatened imminent death, provided a reasonable basis for filing the claim prematurely. Id.

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[22] Whether damages for a vaccine-related injury – as well as the statutorily-defined damages for a vaccine-related death – are available under the Program to compensate the estate of a vaccinee who suffered a vaccine-related injury, less than six months before dying, is an unanswered question. In Zatuchni, the case to which petitioner's counsel adverts, the estate of Ms. Zatuchni received compensation for both her vaccine-related injury and vaccine-related death. 516 F.3d 1312, 1319-20 (Fed. Cir. 2008). In that case, however, Ms. Zatuchni had suffered the effects of her vaccine-related injury for more than six months and her claim for the alleged injury was pending at the time of her death. Id. at 1314-15.

B. Evaluating Respondent's Request to Deny Attorneys' Fees and Costs

Because no application for attorneys' fees and costs is pending, the undersigned **DEFERS** ruling on respondent's request to deny attorneys' fees and costs, as well as **DEFERS** assessing whether petitioner's counsel's course of proceeding has been reasonable.

CONCLUSION

For the reasons detailed above, petitioner's Motion to Stay the Proceedings is **GRANTED**. This case is **STAYED** until **April 24, 2012**.

On or before Friday, April 24, 2012, petitioner's counsel shall file an amended petition, together with any supporting evidence, indicating whether petitioner's alleged vaccine-related injuries have lasted more than six months.

The undersigned also **DEFERS** ruling on respondent's Motion to Dismiss and **DEFERS** ruling on respondent's request to deny attorneys' fees and costs in this case.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Chief Special Master