

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

VALERIE SCHMIDT,	*	No. 11-401V
	*	Special Master Christian J. Moran
Petitioner,	*	
	*	
v.	*	Filed: March 30, 2012
	*	
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES,	*	
	*	Attorneys' fees, reasonable basis,
	*	vaccine not covered
Respondent.	*	
	*	

Carol L. Gallagher, Gallagher & Gallagher, Somers Point, NJ, for petitioner;
Ann Donohue Martin, United States Dep't of Justice, Washington, DC, for
respondent.

PUBLISHED DECISION DENYING ATTORNEYS' FEES¹

Valerie Schmidt filed a petition seeking compensation under the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act"). 42 U.S.C. § 300aa-1 to 34. Ms. Schmidt alleged that she received the Pneumovax vaccine on October 12, 2010, and was injured as a consequence. Pet. at 1. Ms. Schmidt was denied compensation because the type of vaccine was not listed in the Vaccine Injury Table. Decision, filed Nov. 21, 2011, 2011 WL 6148590.

¹ The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

Ms. Schmidt seeks an award for her attorneys' fees and costs pursuant to 42 U.S.C. § 300aa—15(e).² Ms. Schmidt has not presented any argument that the Office of Special Master has subject matter jurisdiction to award attorneys' fees in which the petition did not concern a vaccine listed on the Vaccine Injury Table. A petitioner must establish subject matter jurisdiction before a special master may award attorneys' fees. See Brice v. Sec'y of Health & Human Servs., 240 F.3d 1367, 1370 (Fed. Cir. 2001), overruled in part by Cloer v. Sec'y of Health & Human Servs., 654 F.3d 1322, 1340 (Fed. Cir. 2011) (en banc). Ms. Schmidt also has not attempted to demonstrate that her petition, although unsuccessful, was supported by good faith and reasonable basis as required by 42 U.S.C. § 300aa—15(e).

Whether there is subject matter jurisdiction to entertain Ms. Schmidt's claim is a question not easily answered. It is not necessary to attempt to resolve this challenging question because even if subject matter jurisdiction were assumed, Ms. Schmidt could not be awarded attorneys' fees and costs. Cf. Minesen Co. v. McHugh, No. 2010-1453, 2012 WL 678150, at *5 (Fed. Cir. March 2, 2012) (noting that federal courts may defer statutory (but not constitutional) questions of subject matter jurisdiction); Decker & Co. v. West, 76 F.3d 1573, 1580 (Fed. Cir. 1996) (affirming the merits of the Board of Contract Appeals without deciding contested jurisdictional issue).

Ms. Schmidt is not eligible for an award of attorneys' fees and costs because she has not established that she had a reasonable basis for her petition. Although special masters have tended to construe "reasonable basis" liberally to promote payment to petitioners' attorneys, special masters have required that petitioner receive a vaccine listed on the Vaccine Injury Table at a minimum. Rydzewski v. Sec'y of Health & Human Servs., No. 99-571V, 2008 WL 382930 (Fed. Cl. Spec. Mstr. Jan. 29, 2008); Van Houter v. Sec'y of Health & Human Servs., No. 90-1444V, 1992 WL 266301 (Cl. Ct. Spec. Mstr. Sept. 21, 1992); Dover v. Sec'y of Health & Human Servs., No. 99-2299V, 1992 WL 42924 (Cl. Ct. Spec. Mstr. Feb. 14, 1992).

The Vaccine Act specifies that the petitioner "received a vaccine set forth in the Vaccine Injury Table." 42 U.S.C. § 300aa—11(c)(1)(a). At least three cases

² Originally, Ms. Schmidt requested a total of \$19,140.00. Ms. Schmidt reduced the amount claim by eliminating some fees claimed by her attorney. The amended request, filed on February 27, 2012, totals \$14,325.00.

have found that the pneumovax vaccine is not listed on the Vaccine Injury Table. See 2011 WL 6148590, at *1 n.2. Basic diligence would have informed Ms. Schmidt that she could not receive compensation on a claim based on pneumovax through the Vaccine Program. Thus, the petition should not have been filed. See Di Roma v. Sec'y of Health & Human Servs., No. 90-3277V, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993) (discussing need for investigation before filing a petition).³

Ms. Schmidt's request for attorneys' fees and costs is DENIED. The Clerk's Office is instructed to enter judgment in accord with this decision unless a motion for review is filed.

IT IS SO ORDERED.

s/Christian Moran
Christian Moran
Special Master

³ In a reply supporting her request for attorneys' fees and costs, Ms. Schmidt mentions that she also received the influenza vaccine. Pet'r Reply, filed Feb. 27, 2012, at 1. Ms. Schmidt's petition, however, sought compensation for injuries "caused in fact by the pneumococcal vaccine." Pet. ¶ 23. Similarly, in response to the Secretary's motion to dismiss her case, Ms. Schmidt continued to press a claim based on the pneumococcal vaccine and did not reference the influenza vaccine. Thus, as Ms. Schmidt has pled her case, her receipt of the influenza vaccine is not relevant.