

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 07-610V

Filed: April 9, 2009

TONYA DIXON, Parent of JARVIS  
WHEATON, a Minor,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN  
SERVICES

Respondent.

Attorney's Fees and Costs:  
Statute of Limitations

### ATTORNEY'S FEES AND COSTS DECISION<sup>1</sup>

**GOLKIEWICZ, Chief Special Master.**

On August 16, 2007 petitioner filed a Short-Form Autism Petition (hereinafter Petition) for Vaccine Compensation under the National Childhood Vaccine Injury Act<sup>2</sup> pursuant to Autism General Order #1 on behalf of her son Jarvis which adopted the Master Autism Petition for Vaccine Compensation. On April 4, 2008 the undersigned issued a Decision dismissing the above-captioned matter as untimely filed.<sup>3</sup> Petitioner filed a Petition for Reimbursement of Attorneys' Fees and Costs (hereinafter Fee Petition) on November 25, 2008. On December 9, 2008 respondent filed an Opposition to the Fee Petition (hereinafter Opposition) on the "grounds

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<sup>1</sup> Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). 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 trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" decision will be available to the public. Id.

<sup>2</sup>The National Vaccine Injury Compensation Program (hereinafter Program) comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. §§ 300aa-10 et seq. (2006) ("Vaccine Act" or the "Act"). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

<sup>3</sup>In relevant part, the Vaccine Act provides:

a vaccine set forth in the Vaccine Injury Table which is administered after [October 1, 1988], if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the **expiration of 36 months** after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury . . . .

the Court lacked jurisdiction over the underlying petition for vaccination compensation and, therefore, it does not have authority to award attorneys' fees and costs to petitioner. Opposition at 1.

On January 9, 2009 the undersigned issued an Order to Show Cause in this matter stating the following:

The undersigned agrees with respondent's discussion of the state of the law and how it relates to this case. Therefore, petitioner shall file a Reply to respondent's Opposition by no later than February 9, 2009 explaining why her petition for attorneys' fees and costs is legally permissible. Failure to file will result in a decision denying the request for fees and costs for lack of jurisdiction.

Order to Show Cause filed January 9, 2009. Petitioner failed to file a response to the undersigned's Order to Show Cause. The undersigned notes, failure to follow court Orders, can result in dismissal of a petitioner's claim. Tsekouras v. Sec'y of HHS, 26 Cl. Ct. 439 (1992), 991 F.2d 810 (Fed. Cir. 1993) aff'd per curiam without opin.; Sapharas v. Sec'y of HHS, 35 Fed. Cl. 503 (1996). In addition to petitioner's failure to file a response to the undersigned's Order to Show Cause, the undersigned denies petitioner's Fee Application for the following reasons.

Petitioner's case was dismissed as petitioner failed to file her petition within 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation" of Jarvis' alleged injury. Decision filed April 4, 2008 at 2; see also § 16(a)(2). Under the precedent of the Federal Circuit a petitioner may not recover attorney's fees and costs if the underlying Program petition was filed beyond the statute of limitations. Kay v. Sec'y of HHS, 80 Fed. Cl. 601, 605 (2008) ("[I]n Order to recover attorneys' fees and costs, petitioner must assert a claim within the express provisions of the Vaccine act by filing her petition within the statutory time period that Congress established.") aff'd per curiam, 298 Fed. Appx. 985 (Fed. Cir. 2008); cert. denied, - S.Ct. -, 2009 WL 901544 (2009); see also Brice v. Sec'y of HHS, 358 F.3d 865, 869 (Fed. Cir. 2004). Thus, the undersigned is legally obligated to deny the Fee Petition in this matter.

Additionally, the undersigned notes that the Fee Petition itself is untimely. Pursuant to Vaccine Rule 13, "any request for attorneys' fees and costs pursuant to 42 U.S.C. § 300aa-15(e) shall be filed no later than 180 days after the entry of judgment . . . ." Judgment in this matter was entered on May 8, 2008. Thus, the Fee Petition should have been filed by no later than November 4, 2008.

For the foregoing reasons, the petitioner's Fee Petition is denied. The Clerk shall enter judgment accordingly.

**IT IS SO ORDERED.**

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Gary J. Golkiewicz  
Chief Special Master