

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 04-892V

Filed: September 22, 2009

NOT TO BE PUBLISHED

TINA E. POWERS Individually and as Next
Friend of JONATHAN SCOTT POWERS, a
Minor,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN
SERVICES

Respondent.

Attorney's Fees and Costs;
Statute of Limitations

Michael Gallagher, Houston, TX, for petitioner.

Rebecca J. Trinrud, United States Department of Justice, Washington, DC, for respondent.

ATTORNEY'S FEES AND COSTS DECISION¹

GOLKIEWICZ, Chief Special Master.

On May 21, 2004 petitioner filed a Complaint under the National Childhood Vaccine Injury Act² on behalf of her son Jonathan. On October 29, 2008 the undersigned issued a Decision dismissing the above-captioned matter as untimely filed.³ Petitioner filed an

¹ 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.

²The 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. §§ 300aa-10 et seq. (2006) ("Vaccine Act" or the "Act"). Hereinafter, individual section references will be to 42 U.S.C. § 300aa of the Vaccine Act.

³In relevant part, the Vaccine Act provides:

a vaccine set forth in the Vaccine Injury Table which is administered after [October 1, 1988], if a

Application for Final Fees and Costs (hereinafter Fee Petition) on August 31, 2009.

As discussed briefly with the parties at a status conference conducted on September 14, 2009, the court has no jurisdiction to award attorney's fees and costs when a petition is dismissed as untimely. Petitioner's case was dismissed as petitioner failed to prove her petition "was filed within 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation" of Jonathan's alleged injury as required by the Vaccine Act. Decision filed October 29, 2008 at 2; see also § 16(a)(2). Pursuant to the precedent of the Court of Appeals for 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, 129 S.Ct. 1933 (2009); see also Brice v. Sec'y of HHS, 358 F.3d 865, 869 (Fed. Cir. 2004). Thus, based upon the binding precedent from the Federal Circuit 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 December 5, 2008. Thus, the Fee Petition should have been filed by no later than June 3, 2009. Petitioner's Fee Application was filed on August 31, 2009, and thus was untimely filed.

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

IT IS SO ORDERED.

s/Gary J. Golkiewicz
Gary J. Golkiewicz
Chief Special Master

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

§ 16(a)(2).