OFFICE OF SPECIAL MASTERS

No. 94-1029V

(Filed: January 10, 1997)

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ANN M. JESSEN,	*	
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Petitioner,	*	**TO BE PUBLISHED**
	*	
v.	*	
	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	
* *		

Eugene A. Gaer, New York, New York, for petitioners.

Althea E. Walker, Department of Justice, Washington, D.C., for respondent.

DECISION (ATTORNEYS' FEES)

HASTINGS, Special Master.

In this case under the National Vaccine Injury Compensation Program[(1)] (hereinafter "the Program"), petitioner seeks, pursuant to § 300aa-15(b) and (e), an award for attorneys' fees and costs incurred in attempting to obtain Program compensation in this case. Respondent has opposed the granting of any award, and also challenged the amount claimed should I find an award to be appropriate. I will discuss respondent's various challenges in Sections I through III of this Decision, below.

I

"REASONABLE BASIS" ISSUE

Pursuant to § 300aa-15(b) and (e)(1), the special master may make an award of attorneys' fees and costs even when, as in this case, the petitioner is not found to qualify for a substantive Program award, if the petition was filed in "good faith" and upon a "reasonable basis."

In this case, respondent has argued that I should reject petitioner's request for such an award, on the ground that there did not exist a "reasonable basis" for petitioner's claim for a Program award in this case. After full consideration, however, I conclude not only that the petition was filed in good faith, but also that there existed a reasonable basis for petitioner's claim. As to the latter conclusion, because the respondent has disputed whether a reasonable basis existed, I will elaborate on my conclusion below.[(2)]

A. Background

Under the Program, compensation awards are made to individuals who have suffered injuries thought to be caused by certain vaccines. Generally, if an individual was administered one of the vaccines listed on the "Vaccine Injury Table" found at § 300aa-14(a), such person will be entitled to Program compensation if he can show either that he suffered one of the specific injuries corresponding to that vaccination listed in the Vaccine Injury Table, or that he suffered an injury that was "caused-in-fact" by that vaccination. § 300aa-13(a)(1); § 300aa-11(c)(1)(C); § 300aa-14(a). More specifically, the statute provides in § 300aa-13 (a)(1) that to gain an award, the injured person must demonstrate fulfillment of the requirements listed at § 300aa-11(c)(1). And one of the requirements contained at § 300aa-11(c)(1) is found at subsection (D), which provides the tests as to *how severe* an injury must be in order to qualify for Program compensation. Subsection (D) provides that unless the vaccine recipient died as a result of the vaccine-related injury, it must be shown *both* that the ill effects of the injury lasted longer than six months, *and* that the recipient incurred unreimbursable expenses in excess of $1000 resulting from the injury. § 300aa-11(c)(1)(D)(i).

This "$1000 requirement" of § 300aa-11(c)(1)(D)(i), at first glance, might not appear to be a terribly difficult one to satisfy in the case of a significant injury. But in some Program cases it has caused considerable problems, chiefly due to the fact that the expenses must be "unreimbursable." Persons whose medical expenses were wholly covered by Medicaid, "workers' compensation" programs, or health insurance have sometimes been denied Program awards despite the fact that their injuries otherwise seemed to qualify for Program compensation. See, *e.g.*, *Black v. Secretary of Dept. of HHS*, 93 F. 3d 781 (Fed. Cir. 1996); *Rodriguez v. Secretary of Dept. of HHS*, 34 Fed. Cl. 57 (1995); *Mack v. Secretary of Dept. of HHS*, No. 90-1427V, 1995 WL 507581 (Fed. Cl. Spec. Mstr. Aug. 11, 1995); *Robinson v. Secretary of Dept. of HHS*, No. 93-530V, 1994 WL 879449 (Fed. Cl. Spec. Mstr. Feb. 23, 1994); *Davis v. Secretary of Dept. of HHS*, No. 95-107V, 1995 WL 413933 (Fed. Cl. Spec. Mstr. June 29, 1995); *Hammond v. Secretary of Dept. of HHS*, No. 91-1238V, 1994 WL 59444 (Fed. Cl. Spec. Mstr. Feb. 15, 1994); *Warner v. Secretary of Dept. of HHS*, No. 90-201V, 1992 WL 405286 (Fed. Cl. Spec. Mstr. Dec. 29, 1992).

This is such a case. The petitioner in this case received a rubella vaccination in 1992, and within a few days thereafter began to suffer arthritis in multiple joints, a condition that has been chronic since then. This history seems to fit within a pattern of chronic arthritis after rubella vaccinations that has been shown to likely have been caused by such vaccinations. See *Ahern et al. v. Secretary of Dept. of HHS*, No. 90-1435, 1993 WL 179430 (Fed. Cl. Spec. Mstr. Jan. 11, 1993). Respondent did not dispute that petitioner's history fits the pattern described in *Ahern et al.* (see Respondent's Report filed on February 16, 1995), and my own initial review of the record in this case also seemed to indicate that petitioner's arthritic condition is likely vaccine-caused. However, in my initial review it also appeared questionable whether petitioner could satisfy the "$1000 requirement" of § 300aa-11(c)(1)(D)(i), so I determined that

in this case it made sense to resolve that issue first.

Petitioner advanced two arguments in an attempt to satisfy the $1000 requirement. As her primary argument, she averred that her arthritic condition caused her to miss 38 days of work from her job, which cost her $12,219 in lost earnings. I rejected her arguments with respect to the $1000 requirement in a Decision filed on September 13, 1995. See *Jessen v. Secretary of Dept. of HHS*, No. 94-1029V, 1995 WL 571514 (Fed. Cl. Spec. Mstr. Sept. 13, 1995). As to petitioner's primary theory, I ruled as a matter of law that to lose the opportunity to earn money, while certainly constituting an economic loss to the petitioner, is not to "incur an expense" within the meaning of § 300aa-11(c)(1)(D)(i). Having concluded that petitioner had not shown fulfillment of the $1000 requirement, I thus ruled that she was not entitled to a Program award. Petitioner did not seek review of my decision, and thus judgment against petitioner was entered on October 18, 1995. That judgment was followed by this request for a fees award with respect to that unsuccessful petition.

B. Discussion

Respondent does not dispute that petitioner had at least a reasonable basis for her contention that her arthritic condition was vaccine-caused. She obviously did have a reasonable basis for that claim. Respondent contends, rather, only that petitioner did not have a reasonable basis for her *specific contention that her case met the $1000 requirement*. But even assuming *arguendo* that a petitioner must show a reasonable basis for her contentions as to each and every element of the requirements contained at § 300aa-11(c), I conclude that petitioner has done so in this case. Specifically, I conclude that petitioner's primary theory as to the $1000 requirement was at least a reasonable one, although ultimately I could not accept it as legally correct.

In this regard, the key point is that there seems to be no dispute that petitioner did miss many days of work due to her arthritic condition, and that as a result she did lose the opportunity to earn far more than $1000. It is a question of law, of course, whether that circumstance means that petitioner "incurred an expense" within the statutory meaning, and I ruled against petitioner on that legal question. But was petitioner's argument on that point at least a "reasonable" one? I conclude that it was. The distinction between losing an opportunity to earn money, on one hand, and actually incurring a liability to pay out funds, on the other, is a fairly fine one. And while this fine line is ultimately justified by the statutory language, it is not necessarily obvious at first glance at the statute. A reasonable person's first instinct might be that in either event, the vaccinated individual has suffered an economic loss because of the injury, and thus qualifies under the $1000 requirement. I find that the petitioner's legal argument in this regard was within the range of reason.

Respondent points, however, to the fact that at the time that petitioner filed her petition in this case (on November 23, 1994), two special masters of this court had already issued decisions casting doubt upon petitioner's primary theory here. That is, in *Warner v. Secretary of Dept. of HHS*, No. 92-201V, 1992 WL 405286 (Fed. Cl. Spec. Mstr. Dec. 29, 1992), a special master specifically held that lost earnings cannot fulfill the $1000 requirement. Later, in *Robinson v. Secretary of Dept. of HHS*, No. 93-530V, 1994 WL 879449 (Fed. Cl. Spec. Mstr. Feb. 23, 1994), a special master rejected a claim that a petitioner had fulfilled the $1000 requirement by using up her "sick leave" benefits at her place of employment. Respondent argues that because of the existence of these decisions, it was unreasonable for petitioner to rely upon her "lost wages" argument, with respect to the $1000 issue, in filing her petition here.[(3)]

I cannot agree. First, respondent's characterization of these two decisions as "published" decisions requires explanation. There is, in fact, no *official* reporter of special master decisions under the Program. Selected special master decisions are, however, forwarded to two computer services, where such decisions are made available to subscribers "on-line." It is only in these on-line services in which the

Warner and *Robinson* decisions were "published." The fact that this "publication" system even exists, of course, may not even be known to most practitioners who have filed, or are planning to file, a single Program petition. Nor is this system always readily accessible to "sole practitioner" attorneys who do not regularly subscribe to such expensive on-line legal research services. (Indeed, in this case petitioner's counsel seems to indicate that at the time this petition was filed, counsel was in fact unaware of the *Warner* and *Robinson* decisions--see petitioner's supplemental memorandum filed on November 13, 1996, p. 21.) Accordingly, it is hardly clear that Program counsel, many of whom file only a single Program case, can be "reasonably" expected to be aware of all electronically "published" special master Program decisions.

Moreover, as petitioner's counsel has also pointed out, simply because one or more Program special masters have ruled on a legal issue hardly means that to advance an argument contrary to that legal holding is inherently unreasonable. Legal precedent under the Program is only legally binding when established by the United States Court of Appeals for the Federal Circuit (and even then, of course, could be overturned by that same court sitting *in banc* or by the United States Supreme Court). Thus, even a petitioner's counsel aware of a contrary special master's legal holding could reasonably advance a contrary theory, in hopes of persuading another special master *or* a reviewing Court of Federal Claims judge *or* a Federal Circuit panel on appeal to hold to the contrary.

Further, as petitioner's counsel also has pointed out, respondent's position as to "reasonable basis" ignores one very important aspect of the Program statute. That is, persons who, like petitioner, believe that they have been harmed by a vaccination administered after October 1, 1988, are *required* to file a Program petition, and obtain a resolution of their Program claim, before filing a tort suit against either the vaccine administrator or manufacturer. See § 300aa--11(a)(2). It seems to me that, faced with that requirement, a person in petitioner's situation, with an apparently meritorious claim of a vaccine-related injury, has *no choice* but to file a Program claim and advance the best argument that she can concerning the $1000 requirement, even if her argument on that $1000 issue is of questionable merit. Only when her argument concerning the $1000 issue has been advanced and rejected in the Program proceeding is she legally free to pursue a tort claim. Thus, respondent's argument here, that a Program petitioner's argument concerning the $1000 issue must qualify under a very strict and high standard as to "reasonable basis," would yield a result inherently unfair to Program petitioners and their counsel. Such persons would be *required* by law to go through a Program proceeding, and then denied the cost of the legal fees incurred in that proceeding by an extremely strict interpretation of the "reasonable basis" requirement.[(4)]

This brings me, then, to the final consideration worthy of discussion here. That is, respondent's argument here implies that the special masters of this court should set a very strict, very high standard as to the "reasonable basis" requirement for obtaining a fees award in Program proceedings. But for the special masters to do so would, in my view, be an inappropriate interpretation of the statutory scheme, and would be quite counterproductive with respect to the Congressional goals behind enactment of the Program.

As has been oft-observed, the dual goals behind the Program were to provide assistance to vaccine-injured persons and to reduce the burden of civil tort actions upon vaccine manufacturers, vaccine administrators, and the courts of general jurisdiction. [CITE TO COME] And clearly, the provision for attorneys' fees awards to Program petitioners, extending such awards to unsuccessful petitioners so long as their claims were brought in good faith and upon a reasonable basis, was one important part of advancing those goals. The provision for fees' awards even to unsuccesful claimants was obviously designed to make it easier for would-be petitioners to obtain the assistance of attorneys in filing their Program claims. [See, *e.g*. CITE] This provision, obviously was important in attracting into the Program would-be petitioners whose vaccinations were administered *prior* to October 1, 1988 (the "effective date" of the Program), who were left the *option* of maintaining vaccine-related tort actions in other courts and bypassing the Program entirely. Certainly, Congress could not have intended that the "reasonable basis"

standard be interpreted in a very strict, tight-fisted manner, for such an interpretation in the initial Program cases would likely have influenced potential petitioners with pre-effective date injuries to avoid the Program and look only to tort actions for redress.[(5)]

But the provision for fees awards is also important as to vaccine-injured persons vaccinated *after* October 1, 1988, who are *required* by the statute to file Program claims and obtain Program decisions before filing tort suits. First, if the special masters were to set too high a standard as to the reasonable basis issue, and to often fees deny awards on that basis, it surely would discourage some attorneys from even taking cases involving vaccine injuries in the first place, for it would face such counsel with the prospect of working through a Program proceeding and then possibly receiving no compensation whatever for that work.[(6)] Second, even in situations in which a petitioner *could* find an attorney willing to accept a Program case, such counsel could be influenced not to *actively and agressively pursue* the Program case, for fear of losing the case and then being denied compensation for the Program work under the strict standard of "reasonable basis" scrutiny. Counsel might be influenced to do as little work as possible in the Program proceeding, simply waiting for a denial so that a tort suit would be filed. Such a result would, of course, be contrary to the Program goal of keeping cases *out* of the tort system.

In short, in my view the special masters have over the past several years generally set an appropriate standard on the "reasonable basis" question. In situations where truly there existed no logical basis for the claim, applications for attorneys' fees and costs have appropriately been denied. But in cases where the claim was within a fairly broad range of "reasonableness," awards have been made. Even in these circumstances, some *pro se* petitioners have expressed great frustration at their inability to find counsel willing to assist them in Program cases. But this serious problem would only get *worse* if, as respondent seems to suggest, the special masters were now to set a higher and stricter standard as to "reasonable basis." Accordingly, I do not find it appropriate to follow that suggestion.

Thus, for all the reasons set forth above, I find that the petitioner's Program claim in this case was filed not only in good faith, but also with a reasonable basis for the claim.

II

"JURISDICTIONAL" CHALLENGE

Next, respondent's chief argument in this case is that an award for attorneys' fees and costs in this case is barred for another reason. Respondent notes that in this case, petitioner's claim was *not* rejected on the ground that her arthritic condition was not vaccine-caused. Rather, she was unable to satisfy the requirement of § 300aa-11(c)(1)(D)(i) that she incurred in excess of $1000 in unreimbursed expenses due to that condition. Respondent argues that this failure to satisfy this "$1000 requirement" left petitioner "unable to demonstrate that this court has jurisdiction over this matter." (Respondent's response filed on March 12, 1996, p. 2.) "Without jurisdiction over the petition," respondent argues, "the court has no jurisdiction to award attorney's fees and costs." (*Id.*) After considerable efforts upon my part, respondent was finally prompted to explain this argument, in at least some detail, in her "Supplemental Response" (hereinafter "Supp. Resp.") filed on October 4, 1996. Petitioner filed a response on November 13, 1996.[(7)]

After careful consideration of respondent's argument, however, I must reject it. I conclude that I *do* have jurisdiction to grant an award for fees and costs in this case, for the reasons set forth below.

A. Introduction

As noted above, pursuant to § 300aa-15(e)(1), in a case, like this one, in which the petitioner fails to establish entitlement to a Program award, a special master may nevertheless award an amount for attorneys' fees and costs incurred by the petitioner. But such an award is not automatic. As discussed above, such a "fees award" is appropriate only if the petition was filed in good faith and had at least a reasonable basis in fact. In addition, in *Martin v. Secretary of Dept. of HHS*, 62 F. 3d 1403 (Fed. Cir. 1995), the United States Court of Appeals for the Federal Circuit ruled that when this court lacks jurisdiction over the petitioner's underlying claim, no fees award may be made. Specifically, in *Martin*, the court of appeals ruled that if a petition is dismissed pursuant to any of subsections (5), (6), or (7) of § 300aa-11(a), such dismissal should be considered to be for *lack of jurisdiction*, and no fees award is appropriate.

The *Martin* court, however, beyond ruling that dismissals under those three specific subsections of § 300aa-11(a) are "jurisdictional," did not offer any *explicit* guidance as to the appropriateness of fees awards in situations where petitioners have failed to obtain a Program award for *other* reasons. (Although the *Martin* court did leave a *suggestion* that, as will be discussed in detail below, in my view offers strong reason to believe that respondent's argument in this case is wrong.) Accordingly, in such situations, a special master of this Court must look beyond *Martin* in order to decide whether a petitioner's failure to gain a Program awarded resulted from a "jurisdictional" rather than a non-jurisdictional defect. This is such a case.

In this case, as explained above, the petitioner alleged that her chronic arthritic condition was caused by a rubella vaccination, but it turned out to be unnecessary to resolve that "causation" question, because petitioner proved to be unable to show that she satisfied another requirement for obtaining a Program award. That is, pursuant to § 300aa-11(c)(1)(D)(i), it must be demonstrated that the person with the putatively vaccine-related injury "incurred unreimbursable expenses due in whole or in part to * * * [the vaccine-related injury] in an amount greater than $1000 * * *." In this case, petitioner was unable to make that showing. Thus, on this application for an attorneys' fees award, the issue before me now is whether a petitioner's failure to satisfy the "$1000 requirement" of § 300aa-11(c)(1)(D)(i) constitutes a "jurisdictional" defect in petitioner's case, barring her from a fees award.

This precise legal issue has been addressed in an actual case holding on only one previous occasion, as far as I am able to tell. In that case, a special master of this Court specifically ruled, in the context of an application for an attorneys' fees award, that this "$1000 requirement" is *not* jurisdictional in nature, so that a fees award could still be made. *Long v. Secretary of Dept. of HHS*, No. 91-326V, 1995 WL 774600 (Fed. Cl. Spec. Mstr. Dec. 21, 1995).

The issue has also been addressed, however, in *dictum* in three other published opinions. In *Smith v. Secretary of HHS*, No. 91-57V, 1992 WL 210999 (Cl. Ct. Spec. Mstr. Aug. 13, 1992), again in the context of an attorneys' fees application, a special master ruled, as in *Long*, that the "$1000 requirement" is not a jurisdictional requirement. However, in *Smith*, the special master nevertheless declined to make a fees award, on the ground that the underlying claim for Program compensation had no reasonable basis in fact; thus the special master's opinion on the jurisdictional issue may be viewed as constituting *dictum*. In the two other cases in which the question of whether the $1000 requirement is jurisdictional was mentioned, these references also clearly constituted *dicta*, because, in each case, the issue to be decided was simply whether the $1000 requirement *had been satisfied* in that particular case. Whether the requirement was a "jurisdictional" one or not was not relevant in either case to the resolution of the issue immediately at bar. Thus, in *Olascoaga v. Secretary of Dept. of HHS*, No. 93-616V, 1994 WL 100687 (Fed. Cl. Spec. Mstr. March 14, 1994), a special master indicated the view that the $1000 requirement, along with all of the "petition content requirements" of § 300aa-11(c), are *not* jurisdictional. In *Black v.*

Secretary of Dept. of HHS, 33 Fed. Cl. 546, 550 (Fed. Cl. 1995), aff'd, 93 F. 3d. 781 (Fed. Cir. 1996), however, Judge Yock of this court indicated disagreement with that observation in *Olascoaga*, opining that instead all the requirements of § 300aa-11(c) "are indeed jurisdictional."

After my own study of the issue, while the correct answer is not free from doubt, I side with the viewpoint expressed in the former three opinions, that the $1000 requirement is *not* a jurisdictional requirement, for reasons to be set forth below.

B. The Statute's Own Jurisdictional Language

It seems appropriate to begin analysis of this issue by reference to that section of the governing statute that specifically deals with the issue of this Court's jurisdiction over Program proceedings. Section 300aa-12(a) provides that--

[t]he United States Court of Federal Claims and the United States Court of Federal Claims special masters shall, in accordance with this section, have jurisdiction over proceedings to determine if a petitioner under section 300aa-11 of this title is entitled to compensation under the Program and the amount of such compensation.

This section, then, at first glance yields only the bare information that the Court of Federal Claims and its special masters may resolve Program cases. As to the task here, however, of determining *which* Program requirements are "jurisdictional" and which are not, this section by itself would seem to be of no help.

In theory, however, one might try to closely scrutinize the language of § 300aa-12(a) in order to more precisely define this jurisdictional grant. One might start with the fact that in the portion of § 300aa-12(a) quoted above, the Court of Federal Claims is granted jurisdiction to determine whether a "petitioner under section 300aa-11" is entitled to compensation. Thus, one might then look to § 300aa-11 for a definition of the term "petitioner." Nowhere in § 300aa-11 does there appear a "definition" of the word petitioner as such,[(8)] but in § 300aa-11(b)(1)(A), under the heading "Petitioners," it is stated that--

any person who has sustained a vaccine-related injury * * * may, if the person meets the requirements of subsection (c)(1) of this section, file a petition for compensation under the Program.

Thus, perhaps a "petitioner," as mentioned in § 300aa-12(a), is one who "may * * * file a petition" under § 300aa-11(b)(1)(A). In turn, under § 300aa-11(b)(1)(A), one who "may file a petition" is one who "has sustained a vaccine-related injury * * * [and] meets the requirements of [§ 300aa-11(c)(1)]."

A glance at § 300aa-11(c)(1), however, makes it clear that this sort of attempt to pursue the statutory language literally to an answer to the problem here will be fruitless. That is, § 300aa-11(c)(1) contains basically *all* of the *substantive requirements for obtaining a Program award*, including demonstrating factually the existence of a vaccine-related injury, etc. Therefore, any attempt to follow the literal language from § 300aa-12(a) through § 300aa-11 would yield an absurd conclusion that this court has "jurisdiction" only over those petitioners who have *completely meritorious claims*.

Because it is entirely impossible, then, to follow the literal statutory language to a reasonable outcome on this point, I must look instead to general principles of subject matter jurisdiction for the resolution of the question at hand.

C. General principles of subject matter jurisdiction

As one court recently observed, "[j]urisdiction is a term that is one of the most slippery in the legal lexicon." *Spruill v. Merit Systems Protection Bd.*, 978 F. 2d 679, 686 (Fed. Cir. 1992). In this instance, the issue at hand concerns *subject matter jurisdiction*, meaning essentially the power of the Court to hear and decide a Program case. See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 538 (1994) ("[j]urisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other"); *Stokes v. Federal Aviation Admin.*, 761 F. 2d 682, 685 (Fed. Cir. 1985) ("[j]urisdiction means the right or power of a tribunal to act").

A review of the case law dealing with subject matter jurisdiction shows that the statutory interpretation problems that have been encountered in Program cases, in attempts to distinguish jurisdictional from non-jurisdictional Program requirements, are not unique to Program cases. To the contrary, the Supreme Court has observed that it "frequently happens where jurisdiction depends on subject matter [that] the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249 (U.S. 1951). Similarly, the Federal Circuit recently observed that "[s]ometimes the question of subject matter jurisdiction gets confused with the question of entitlement to relief, that is, whether a cause of action has been stated in the complaint, or later proved." *Spruill, supra*, 978 F. 2d at 686. The *Spruill* court added that this confusion arises particularly in suits against the federal government. In such cases, said the *Spruill* court, it is sometimes erroneously contended or held that "[f]ailure to prove a claim means that the claimant did not come within the scope of the authorized waiver of sovereign immunity, and thus the forum must have lacked jurisdiction to hear the cause." Id. at 688.

To avoid such confusion, it is instructive to review the teachings of a number of Supreme Court cases that have discussed this general topic. In general, these decisions admonish the lower courts in many contexts *not* to dismiss a case for *want of jurisdiction*, when in fact the deficiency is merely a *failure to prove the claim*. The thrust of these decisions is that when a plaintiff makes a claim under a federal statute, the court determines its jurisdiction based upon the *allegations* pleaded in the complaint. The court looks to see whether the complaint's allegations raise a non-frivolous claim *arguably arising under the terms of the federal statute* in question. For example, the court looks to see whether the factual allegations of the complaint, *if proven to be true*, would describe a claim fitting within the statute in question. If the complaint's allegations do appear to raise a non-frivolous claim *arguably* falling within the class of claims described in the statute, then the court does have *jurisdiction* over the case, and thus has authority to determine whether in fact the plaintiff can *prove* the allegations made in the complaint. If the plaintiff eventually fails to prove the facts alleged, or it is determined as a matter of law that the alleged facts do not state a cause of action under the statute, then the case is dismissed for *failure to prove the case*, rather than for lack of jurisdiction.

1. The Supreme Court opinions

A number of early Supreme Court opinions stated rather succinctly the general principles for determining jurisdiction discussed above. For example, in *Lamar v. United States.*, 240 U.S. 60 (1916), the Supreme Court explicitly *rejected* the theory that--

when the controversy concerns a subject limited by Federal law, such as bankruptcy * * *, copyright * * *, patents * * *, or admiralty * * *, the jurisdiction so far coalesces with the merits that a case not within the law is not within the jurisdiction of the court.

Id. at 64 (citations omitted). Similarly, in *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271, 273-74 (1923), the same court stated that--

when a suit is brought in a federal court and the very matter of the controversy is federal it cannot be dismissed for want of jurisdiction "however wanting in merit" may be the averments intended to establish a federal right.

The Court in *Hart* added that if the complaint in a suit "makes a claim that *if* well founded is within the jurisdiction of the Court, it is within the jurisdiction whether well founded or not." 262 U.S. at 273 (emphasis added).

To the same effect, in *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913), the Supreme Court stated that "when the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim." The Court went on to explain that if the claim on its face is wholly frivolous, it might be dismissed for lack of jurisdiction,

"[b]ut if the plaintiff really makes a substantial claim under an act of Congress, there is jurisdiction whether the claim ultimately be held good or bad." *Id.*

Later Supreme Court opinions explained these principles more fully. In *Bell v. Hood*, 327 U.S. 678 (1946), the Supreme Court explained that:

Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the constitution and laws of the United States. * * * [w]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit. * * * The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.

Jurisdiction, therefore, is not defeated, as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. *For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.* Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. [Citations omitted.] The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

327 U.S. at 681-683 (emphasis added).

A similar discussion was set forth a few years later in *Montana-Dakota Utilities Co.*, *supra*, where the Supreme Court stated as follows:

Petitioner asserted a cause of action under the Power Act [a federal statute]. To determine whether the claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that it has no merit, as well as to decide that it has. In the words of Mr. Justice Holmes, "* * * if

the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad." *The Fair v. Kohler Die & Specialty Co.* [cited above]. * * * We think there was power in the District Court to decide whether the claims so grounded constitute a cause of action maintainable in federal court and, if so, whether it is sustained on the facts. We think a direction [by the Court of Appeals] to dismiss for want of jurisdiction was error and that it should not stand as a precedent.

341 U.S. at 249. Similarly, the Supreme Court in *Hagans v. Lavine, supra,* observed that "[o]nce a federal court has ascertained that a plaintiff's jurisdiction-conferring claims are not insubstantial on their face, * * * no further consideration of the merits of the claim[s] is relevant to a determination of the court's jurisdiction of the subject matter." 415 U.S. at 542, n.10. See also, to the same effect, *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Baker v. Carr*, 369 U.S. 186, 199 (1962).

2. Similar Federal Circuit and Court of Claims precedent

The analysis of this line of Supreme Court opinions has been reflected in certain opinions of the United States Court of Appeals for the Federal Circuit and its predecessor, the United States Court of Claims. For example, in *Spruill, supra*, the Federal Circuit addressed the question of the jurisdiction of the Merit Systems Protection Board. The Court held:

When a nonfrivolous claim for relief has been asserted before the Board, and the outcome is determined by whether the facts support that claim, a decision by the Board that they do not is a *failure to prove the claim, not a lack of jurisdiction* in the Board.

978 F. 2d at 689 (emphasis added). The Court added the following explanation:

To the extent a successful claim against the government requires compliance with all statutory elements of the claim, failure of proof of an element of the cause of action means the petitioner is not entitled to the relief he seeks. To conclude in such a case that the petitioner loses because the forum is "without jurisdiction" is to obscure the nature of the defect. It would be more accurate to conclude that the petitioner has failed to prove the necessary elements of a cause for which relief could be granted. The forum had jurisdiction to hear the matter in the first instance--that is, subject-matter jurisdiction existed--as long as the petitioner asserted nonfrivolous claims.

Id. at 687-688.

Similarly, in *Ralston Steel Corp. v. United States*, 340 F. 2d 663 (Ct. Cl. 1969), cert. denied 381 U.S. 950 (1965), the Court of Claims rejected the federal government's argument that that court had no jurisdiction over the action in question. The court stated:

[The government's] contention wrongly equates the issue of jurisdiction with the merits. * * * If the plaintiff asserts that his claim "arises under" or its "founded" on federal legislation * * *, "to determine whether that claim is well founded," the court "must take jurisdiction, whether its ultimate resolution is to be in the affirmative or negative." * * * It is "well settled that the failure to state a proper cause of action * * * calls for a judgment on the merits and not a judgment for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." * * *

These same principals have applied, and still apply, to this court [i.e., the Court of Claims] within the ambit of its limited jurisdiction. In general, a claimant who says he is entitled to money from the United States because a statute * * * grants him that right, in terms or by implication, can properly come to the Court of Claims, at least if his claim is not frivolous, but arguable. Where an Act of Congress * * * arguably confers such rights upon the claimant, the court will assume jurisdiction and decide the claim on the merits, even though the defendant may ultimately prevail.

Id. at 667-668, citations omitted.

A similar analysis was adopted in the case of *Do-Well Machine Shop, Inc. v. United States*, 870 F. 2d 637, 639-40 (Fed. Cir. 1989). There, the issue was whether a successful defense raised by the government, against a claim for money due under a contract, went to the jurisdiction of the forum, or was a question of failure to state a claim for which relief could be granted. The Federal Circuit held that it was *not* a matter of jurisdiction, saying:

The distinction between lack of jurisdiction and failure to state a claim upon which relief can be granted, is an important one: "[T]he court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy. Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover * * *." *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L. Ed. 939 (1946).

3. Application here

Applying to this case the principles set forth in the above-cited Supreme Court cases, plus the *Spruill, Ralston,* and *Do-Well* opinions, the result seems clear. The petitioner in this case filed a claim against the government under the federal statute that set up the Program. The claim certainly was of the type covered by that statute--i.e., it asserted an injury caused by one of the vaccinations covered by the statute. The claim also certainly was not "frivolous," as discussed above in Section I of this Decision. Under the teachings of the cases cited above, therefore, as a special master of this court I clearly had *jurisdiction* to entertain the claim and consider whether petitioners could establish all the elements of the claim. The claim ultimately proved to be unsuccessful, on account of the petitioner's failure to prove a single element of the claim, i.e., that she incurred more than $1000 in unreimbursable expenses due to her allegedly vaccine-related arthritic condition. Under the teachings of the cases cited above, however, this plainly should *not* be viewed as a dismissal for *want of jurisdiction*, but rather as a dismissal for *failure to prove the claim*--that is, failure to prove one of the substantive requirements for a Program award. Therefore, an award of attorneys' fees should *not* be barred.

In reaching this conclusion, I note that I do recognize that not all of the decisions of the Federal Circuit have taken the same approach as that set forth in the *Spruill, Ralston,* and *Do-Well* opinions discussed above. A chief example is *Cruz v. Department of Navy*, 934 F. 2d 1240 (Fed. Cir. 1991) (*in banc*), another case involving, like *Spruill*, the question of the jurisdiction of the Merit Systems Protection Board. In the *Cruz* opinion, there is language to the effect that a failure by the claimant in that case to prove an important substantive element of his claim, i.e., that his termination from his government job was involuntary, means that the Board never had jurisdiction to hear the case in the first instance: "Here the Board never had jurisdiction * * *. * * * Cruz' resignation was found to be voluntary, * * * [so therefore the Board] did not acquire jurisdiction [over his claim]." *Id*. at 1247. (See also the cases to the same effect as *Cruz*, cited at *Spruill, supra*, 978 F. 2d at 688-699, footnotes 11 and 12.) It has been suggested that because *Cruz* was an *in banc* decision of the Federal Circuit, it constitutes authority in this court (i.e, the Court of Federal Claims, a court bound by Federal Circuit precedent) superior to *Spruill* and to those Federal Circuit and Court of Claims decisions similar to *Spruill*. See *Maniere v. United*

States, 31 Fed. Cl. 410, 415 (1994). It might, thus, be argued that the reasoning of *Cruz* should be applied to this case, and that the $1000 requirement should therefore be held to be a jurisdictional requirement. I would reject such a suggestion, however, for two reasons.

First, to the extent that *Cruz* is considered to be inconsistent with *Spruill*, *Ralston*, and *Do-Well*, it is true that the *in banc* status of *Cruz* would indeed seem to mean that *Cruz* was the superior authority, *if* those four decisions constituted the whole universe of precedent. However, this ignores the entire line of *Supreme Court* authority discussed above. It would appear to me that I am bound to follow the higher authority of those Supreme Court opinions, which in my view are consistent with the reasoning of *Spruill, Ralston*, and *Do-Well,* rather than that of *Cruz*.

Second, even were *Cruz* considered to be the *sole* applicable precedent, I still would not find that application of its reasoning to this case would mandate the result sought by respondent here. I note that the requirement held to be "jurisdictional" in *Cruz* was quite different than the requirement here in question. That is, in actions brought before the Merit Systems Protection Board (MSPB), as in *Cruz*, it is in effect the very fact that a federal employee was subjected to one of several types of agency actions (including an involuntary termination) *specifically-enumerated in the applicable statute* that gives rise to a claim before the MSPB. (See, e.g., Cruz, 934 F. 2d at 1243.) That is, the *only* business of the MSPB is to hear cases involving *those specifically enumerated agency actions*. (If an employee has a grievance with respect to any *other* type of action by his employing agency, not involving one of the actions specified in the statute, he may have some type of cause of action or remedy, but it is plainly *not* with the MSPB.) Therefore, it is not too surprising that demonstrating the very fact that an involuntary termination (or one of the other specified actions) has occurred has been termed a "jurisdictional" requirement for invoking the authority of the MSPB.[(9)] In contrast, with respect to the Program, while the $1000 requirement is a requirement that must be satisfied by *some* claimants, certainly the fact of suffering $1000 in expenses is *not* the essential, primary characteristic distinguishing a Program claim from other types of claims, analogous to the way in which suffering an involuntary termination or other specifically-enumerated agency action is the distinguishing characteristic of MSPB actions. (Indeed, some Program clients--*i.e.*, those who *died* from a vaccine administration--need *not* satisfy the $1000 requirement at all.) Therefore, even the precedent of *Cruz* would not justify holding the Program's $1000 requirement to be a jurisdictional one.

One other point also merits a brief discussion in this portion of the opinion. That is, I note that in my view it matters not whether in a particular case, a petitioner's attempt to satisfy the $1000 requirement fails upon a factual ruling or a legal ruling by the special master.[(10)] In either case the failure is a failure on the merits, not a failure of jurisdiction, under the precedent of the cases discussed at pp. ____. Note that in a number of those cited cases, the plaintiff's claim ultimately appeared not to be meritorious *as a matter of law*, rather than because of a finding of fact, yet the Supreme Court, Federal Circuit, or Court of Claims in each case explained that the failure to establish the claim was *not* a failure of jurisdiction, but rather a "failure to state a cause of action." See, *e.g.*, *Lamar v. United States, supra*; *The Fair V. Kohler Die, supra*; *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Montana-Dakota Utilities Co., supra*; *Do-Well Machine Shop, supra*; *Ralston Steel Corp., supra*. And see especially *Bell v. Hood*, where the Supreme Court explained as follows:

Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

327 U.S. at ___. This statement demonstrates clearly that a failure to satisfy a statutory requirement as to

a matter of law, as well as to a matter of fact, generally calls for dismissal of the claim "on the merits," *not* for lack of jurisdiction.

Thus, whether a Program petitioner fails to satisfy the $1000 requirement for *either* factual or legal reasons, his failure should not be viewed as an indication that the court lacked *jurisdiction* over the petition.

D. Other Considerations

In addition to the general teachings concerning subject matter jurisdiction discussed in the preceding section of this Decision, there exist several other reasons for reaching my conclusion here, which I will discuss in turn below.

1. The Martin opinion

As noted above, in *Martin*, the Federal Circuit ruled that when a Program petition is dismissed pursuant to subsections (5), (6), or (7) of § 300aa-11(a), such dismissal should be viewed as for lack of jurisdiction, and no attorneys' fees award is appropriate in such case. As also noted, that *Martin* opinion did not purport to *expressly* specify what, if any, other provisions of the Program statute might be "jurisdictional" in nature. But a close reading of the *Martin* opinion does yield some instruction *by implication*, which is relevant here.

The *Martin* court's key discussion of its rationale, in concluding that subsections (5), (6), and (7) of § 300aa-11(a) are jurisdictional, was as follows:

[T]he statute expressly states that a person who meets its terms "may not file" a petition for vaccine compensation. 42 U.S.C. § 300aa-11(a)(6). This language ***distinguishes this subsection's requirements*** (as well as those of the parallel provisions of section 300aa-11(a)(5) and section 300aa-11(a)(7)) ***from other elements of a claim for compensation under the Vaccine Act***. Indeed, section 300aa-13, entitled "Determination of eligibility and compensation," requires that "[c]ompensation shall be awarded under the Program to a petitioner if the special master or court finds on the record as a whole--(A) that the petitioner has demonstrated by a preponderance of the evidence the matters required in the petition by section 300aa-11(c)(1) of this title." *Id.* § 300aa-13(a)(1) (1988 & Supp. V 1993). ***While Congress made the requirements of subjection (c)(1) part of a petitioner's prima facie case, it made subsection 11(a)(6) a bar to filing a petition in the first place***. Reading these provisions in the context of section 300aa-12, we are left with the inescapable impression that Congress intended section 300aa-11(a)(6) to limit the court's jurisdiction.

62 F. 3d at 1406, emphasis added. The *Martin* court, thus, found crucial the fact that subsections (5), (6), and (7) of § 300aa-11(a) were constructed with the "may not file" language. And, of course, the statutory provision here in question, containing the $1000 requirement, is *not* constructed with such "may not file" language. But even more importantly, in the sentences emphasized above, the *Martin* court *specifically contrasted* the three subsections of § 300aa-11(a) there at issue with the affirmative requirements of § 300aa-11(c)(1). These sentences, in my view, indicate strongly that the *Martin* panel viewed *all* of the requirements of § 300aa-11(c)(1), which the court described as "part of petitioner's prima facie case," as substantive, *non-jurisdictional* requirements. And, of course, the $1000 requirement here at issue is one of those "prima facie" requirements of § 300aa-11(c)(1).

Accordingly, even if I were to analyze the issue in this case based solely upon the precedent of *Martin*, I would clearly reach the same result.

2. Placement of the "$1000 requirement" within § 300aa-11(c)(1)(D)(i)

Another strong reason to rule in petitioner's favor on this issue comes from a close examination of the precise placement of the $1000 requirement *within* the provisions of § 300aa-11(c)(1). That is, the $1000 requirement is only one part of § 300aa-11(c)(1)(D), the entire text of which I will set forth below. Under § 300aa-11(c)(1), it must be shown that the person who suffered the allegedly vaccine-related injury--

(D)(i) suffered the residual effects or complications of such illness, disability, injury, or condition for more than 6 months after the administration of the vaccine and incurred unreimbursable expenses due in whole or in part to such illness, disability, injury, or condition in an amount greater than $1,000, or (ii) died from the administration of the vaccine * * *.

It is clear, then, that subsection (D) of § 300aa-11(c)(1) provides the test for determining whether the vaccine-related injury is *severe enough* to qualify the vaccine recipient for a Program award. Subsection (ii) provides, not surprisingly, that if the vaccine recipient died as a result of the vaccine-related injury, the severity test is satisfied. Subsection (i), on the other hand, provides the test for vaccine recipients who have not died from their vaccine-related injury. The subsection specifies that the recipient's injury must satisfy *both* of two requirements--(1) that the ill effects of the injury must have lasted more than six months, and (2) that the injury must have cost the vaccine recipient or his legal representatives more than $1000 in unreimbursable expenses.

The $1000 requirement, then, is simply one of two complementary requirements for proving the severity of the vaccine-related injury. Both of these requirements are contained in the same sentence of the same statutory subsection. Yet respondent here argues that one of the two requirements (the $1000 requirement) is a jurisdictional requirement, while the other (the six months requirement) is not. (See, e.g., "Response" filed on Sept. 3, 1996, p. 2.) Respondent simply does not make a persuasive case as to why this would be so. To the contrary, in my view, the fact that the $1000 requirement is simply one of the two tests for the severity of a vaccine-related injury is further strong indication that this is *not* a jurisdictional requirement.

3. Incongruous results of respondent's theory

Another problem with respondent's theory that the $1000 requirement should be considered jurisdictional is that, as aptly pointed out in the decision in *Long*, *supra*, it would lead to results that seem inconsistent with the spirit of the statutory provision authorizing attorneys' fees awards in Program cases even for petitioners who fail to gain substantive compensation for their injury. As explained above in part I of this Decision, it seems appropriate that the statutory provisions relating to Program attorneys' fees awards should be interpreted in ways that will foster the Congressional goal of giving persons who have suffered injuries that may be vaccine-related a good chance to obtain competent counsel to help them pursue Program actions. But respondent's theory would, of course, deny attorneys' fees awards to individuals who otherwise have strong proof of a compensable injury, but who fail to successfully prove the $1000 requirement, even when such petitioners had at least reasonable arguments concerning that $1000 issue. There have been a number of petitioners each year in Program cases who fall within such a set of circumstances, who would thus be denied fees awards under respondent's position. And this result in such cases would, undoubtedly, deter some counsel from assisting would-be petitioners with Program claims, and influence other counsel to only "go through the motions" of pursuing "post-effective date" Program claims, with the intent of leaving the Program to pursue tort actions once the time limit expired. Thus, the fact that respondent's interpretation would produce a result that would tend to *add* to Program petitioners' difficulties in obtaining counsel perhaps is further indication that respondent's interpretation is mistaken.

Moreover, as the *Long* case illustrates, if respondent's theory here is pushed to its logical conclusion, it

could also potentially cause results which are *clearly and absolutely* contrary to the general intent of the Program fees award provision. That is, while in general only a handful of petitioners each year are formally rejected from Program awards explicitly for failure to satisfy the *$1000 requirement*, a much larger number are rejected because they failed to prove that their injuries *were causally or temporally related to their vaccinations*, as required under the statute. Such a case was *Long*. In *Long*, after rejecting the petitioner's claim that his injury had been shown to be vaccine-related, the special master added a footnote saying that "[b]ecause I find that [the vaccine recipient] did not suffer a vaccine-related injury, logically I cannot find that he incurred more than $1000 in vaccine-related expenses." *Long, supra*, 1995 WL 774600 at 1. The respondent, citing that footnote, thereupon argued, as she does here, that because of the failure to prove $1000 in vaccine-related expenses, the special master was without jurisdiction to make any attorneys' fees award at all.

As the special master pointed out in *Long (id.* at 3-4), if the respondent's interpretation of the statute as argued in *Long* were correct, then virtually *no* petitioner who failed to obtain substantive Program compensation would *ever* get an attorneys' fees award. That is because if the petitioner fails to show a vaccine-related injury, then he cannot show fulfilment of the $1000 requirement, because he cannot show that $1000 in expenses resulted from a *vaccine-related* injury.

To be sure, respondent's current position on this point is not completely clear. Perhaps respondent has backed off from the extreme position that she apparently took in the *Long* case. Perhaps respondent now means to suggest that, to bring his petition within the court's *jurisdiction*, a petitioner need demonstrate only the expenditure of $1000 in relation to the injury that is *claimed* to be vaccine-related. But even if that is the case, then new problems and anomalies would arise from the adoption of respondent's position. For example, in a great many Program cases a petition is dismissed for failure to prove a vaccine-related injury, without the $1000 requirement *ever having been even addressed* by the special master. For nearly eight years, in such cases the awarding of fees has been routine, without discussion of whether the $1000 requirement had been fulfilled. Does respondent now suggest that in order to award attorneys' fees, the special master will now have to resolve the $1000 issue in each such case? This is an important point, because in many Program cases there can be very difficult factual and/or legal issues surrounding the $1000 requirement.

Adoption of respondent's theory, therefore, would force the parties in many cases to address and resolve, in the context of the fees application, very difficult and time-consuming issues concerning the $1000 requirement, which issues otherwise would be only moot points not requiring resolution. In my view, the fact that respondent's statutory interpretation would result in such a wasteful process is simply further indication that respondent's interpretation is a flawed one.

E. Respondent's arguments

In the foregoing subsections of this Decision, I have set forth my basic reasoning in rejecting respondent's argument that the $1000 requirement is jurisdictional. In this final subsection, I will address several arguments raised by respondent with which I have not yet specifically or fully dealt.

1. The Court of Federal Claims opinion in Black

As previously noted, as support for her position in this case, respondent relies almost exclusively upon the statement of the Court of Federal Claims judge in *Black, supra*, 33 Fed. Cl. at 550. But, as previously noted, this particular portion of that *Black* opinion constituted *dictum* only. Moreover, it is also worthy of note that even respondent herself in essence cannot agree with the *reasoning* set forth in that *Black*

opinion. That is, in that opinion the judge indicated the view that *all* of the requirements of § 300aa-11(c) "are indeed jurisdictional." Id. Respondent, however, in her briefs in this case, indicates the view that *most* of the requirements of § 300aa-11(c)(1) are *not* jurisdictional. (See "Response" filed on Sept. 3, 1996, p. 2.) It is unclear, therefore, why respondent finds that *Black* opinion to be persuasive authority as to the issue here, when respondent actually *disagrees* with the reasoning process by which the judge in *Black* arrived at the result stated therein.

To be sure, with reference to the Court of Federal Claims' opinion in *Black*, of course I treat all such opinions of the judges of this Court, even though they may not constitute *binding* precedent, with great deference and respect, looking to such opinions for guidance. In situations such as this one, however, where I find the contrary authority to be more persuasive, I simply must respectfully disagree, and adopt a contrary interpretation on this difficult legal issue.

2. The Federal Circuit opinion in Black

The decision of the Court of Federal Claims in *Black* was affirmed by the Federal Circuit. *Black v. Secretary of Dept. of HHS*, 93 F. 3d 781 (Fed. Cir. 1996). But this affirmance did not, of course, encompass the *dictum* statement by the Court of Federal Claims judge concerning whether the $1000 requirement is a jurisdictional one. Rather, the issue before each court (*i.e.*, first the Court of Federal Claims and then the Federal Circuit) in *Black* was simply whether the petitioner in that case had demonstrated compliance with the $1000 requirement. Each court concluded that the petitioner had been unsuccessful in that regard. That was all that was necessary to resolve the case. And while the Court of Federal Claims offered the additional *dictum* as to whether the $1000 requirement is a jurisdictional one, the Federal Circuit, which did not need to address the issue, simply did not do so.

Respondent, however, in this case points to certain language in the Federal Circuit's *Black* opinion, and argues that such language at least *implies* that the $1000 requirement is a jurisdictional one. (See Supp. Resp. at pp. 11-12.) I cannot agree.

Respondent first relies upon the Federal Circuit's statement that rejected the argument of the Program petitioner in that case that the $1000 requirement "is simply a matter of proof at trial." (See 93 F. 3d at 787.) Respondent fails, however, to quote the rest of that very sentence of the *Black* opinion, in which the Federal Circuit indicated that the argument that it was rejecting in that sentence was the petitioner's argument that the petitioner could show that the $1000 in expenses were *incurred at any time up until the date of trial*. The court, of course, rejected that argument, holding instead that the $1000 must be incurred by the expiration of the statutory period for filing the Program petition. The Federal Circuit, however, was *not* rejecting or addressing any argument as to *jurisdiction*.

Also, respondent points to the fact that the Federal Circuit in *Black* once referred to the $1000 requirement as a "threshold criterion for seeking entry into the compensation program." (Id.) But this argument simply reads far too much into the Federal Circuit's off-hand use of the word "threshold" as an adjective in the quoted phrase. Use of the term "threshold" hardly equates to the term "jurisdictional." Instead, the use of the adjective "threshold" would seem simply to refer to the fact that in many cases, such as this very case here, it may make sense to resolve the $1000 issue at the *outset* of the case, *before* deciding the potentially more difficult or time-consuming "causation" issue.

Finally, respondent relies upon the remark of the Federal Circuit in *Black* that "a defect in the plaintiff's case, even a jurisdictional defect, can be cured by a supplemental pleading." 93 F. 3d at 790. But this reference clearly does not indicate the Federal Circuit's view that the $1000 issue in *Black* was necessarily a "jurisdictional" one. Rather, by the addition of the phrase "even a jurisdictional defect," the Court of Appeals simply emphasized the very broad nature of the supplemental pleading as a remedy.

In short, the Federal Circuit in *Black* was called upon simply to rule upon whether each of the petitioners in question had in fact complied with the $1000 requirement. The court had no reason to decide whether that requirement is a jurisdictional one. And the court did not purport to do so.

3. Analogy to 28 U.S.C. § 1332(a)

Next, respondent presents an argument (Supp. Resp. at 13-15) based upon an analogy to the minimum jurisdictional amount provision of 28 U.S.C. § 1332. That statutory section provides the so-called "diversity jurisdiction" of the federal district courts--i.e., the jurisdiction over actions that do *not* involve federal law but *do* involve a suit by a citizen of one state against that of another. Section 1332(a) provides that the federal district courts will have jurisdiction over such suits only "where the matter in controversy exceeds the sum or value of $50,000."

At first glance, there appears to be the possibility of some merit in this argument of the respondent. That is, by their express terms, both the federal diversity jurisdiction statute and the $1000 requirement of the Program require a showing of a certain level of economic harm. This similarity, though, is not dispositive. Respondent has advanced no theory under which it is reasonable to conclude that economic thresholds, by their very nature, must always fulfill the function of a jurisdictional hurdle. Rather, one must consult the *context* in which the requirement is found to determine its function. As noted above, respondent specifically acknowledges that most of the elements of § 300aa-11(c)(1), in the midst of which the $1000 requirement is situated, are non-jurisdictional in nature. Therefore, it seems clear that there is nothing about an element's placement in § 11(c)(1) that makes it jurisdictional. Thus, the only other possibility for finding the $1000 requirement to be jurisdictional is some clue in the language establishing the element.

Title 28 U.S.C. § 1332(a) provides, *inter alia*, that "[t]he district courts *shall have original jurisdiction* of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs * * *" (emphasis added). On the other hand, the relevant language of the Program statute provides as follows:

A petition for compensation under the Program for a vaccine-related injury or death shall contain--

(1) supporting documentation, demonstrating that the person who suffered such injury * * *

(D)(i) suffered the residual effects or complications of such illness, disability, injury, or condition for more than 6 months after the administration of the vaccine and incurred unreimbursable expenses due in whole or in part to such illness, disability, injury, or condition in an amount greater than $1000, or (ii) died from the administration of the vaccine * * *.

Section 11(c). Thus, while the federal diversity provision unequivocally *designates* the $50,000 requirement as jurisdictional *by its very terms*, the Program statute, by contrast, merely makes the $1000 requirement another element of proof, remaining utterly silent as to whether or not it is jurisdictional. In fact, as fully explained above, the context in this Program situation militates *against* finding the $1000 requirement to be jurisdictional, for it rests in the same sentence requiring the petitioner to demonstrate that the vaccine-related injury had effects lasting longer than six months, a requirement that respondent admits to be non-jurisdictional.

Therefore, if there is nothing inherent in an economic barrier that would inexorably classify it as jurisdictional, and there is no language in the Program statute denominating the $1000 requirement as jurisdictional, and there is nothing about the statute that would contextually require this element to

function jurisdictionally, and the requirement is even paired in the same sentence with another requirement that is admittedly non-jurisdictional, then the *only* similarity between the $1000 requirement and 28 U.S.C. § 1332(a) is that they both constitute economic hurdles that plaintiffs must overcome. Respondent's analogy fails for a dearth of points of commonality, and a surplus of dissimilarities.

4. "Two groups" argument

In addition, respondent presents an argument (Supp. Resp. at 15-17) in which respondent asks the court to divide all the required elements for a successful Program petition into two groups--(1) those that are ascertainable *without* a determination whether the injury was vaccine-related, and (2) those that can be ascertained only *after* a determination that the injury was vaccine-related. Respondent asserts that the former are properly classified as jurisdictional. Applied to the instant question, respondent argues that the existence of $1000 in unreimbursable expenses can be established without reference to the ultimate connection between vaccine and injury, and is therefore a jurisdictional issue.

This argument, however, also must be rejected. First, respondent never explains why it is necessary or logical to go through the effort of setting up these two groups and attempting to determine into which group each Program requirement fits. Let us assume, for the sake of argument, that as to some Program requirements, it is possible to determine whether they have been fulfilled without determining whether a vaccine-related injury has been suffered. Why should those requirements therefore be considered jurisdictional? Respondent does not tell us. To the contrary, from the teachings of the cases set forth at pp. ___, above, it would seem that the presumption as to *any* federal statutory requirement should be that such requirement is merely an element of proof necessary to prove a claim, rather than a jurisdictional requirement, *unless* something particular in the statute itself indicates Congress' intent that the requirement be jurisdictional. In this case, as discussed above, nothing in the statutory language indicates that the $1000 requirement was intended to be a jurisdictional one, or to be treated any differently than the other statutory requirements set forth in § 300aa--11(c)(1).[(11)]

Accordingly, respondent simply fails to make a persuasive case for its premise that any Program requirement that can be ascertained without a ruling concerning the vaccine-relatedness of the injury should thereby be considered jurisdictional.

Second, even if respondent were somehow able to make a case for setting up these two categories of Program requirements, and determining the one category to be jurisdictional, it is still not at all clear that the $1000 requirement would necessarily fall within the category of requirements that are ascertainable without a determination whether the petitioner's injury was vaccine-caused. In this regard, it is true, of course, that in some cases the $1000 issue can be resolved *against* a petitioner by that petitioner's failure to document $1000 in unreimbursable expenses attributable during the relevant time period to the person in question. However, proof of the requisite amount of such expenses is not necessarily a *sufficient* condition for fulfilling the requirement embodied in § 11(c)(1)(D)(i). The actual language mandates a showing of "unreimbursable expenses *due in whole or in part to such illness, disability, injury, or condition* in an amount greater than $1000" (emphasis added). And in that clause, the word "such" would seem to refer to an illness, disability, injury, or condition, that has been *shown to have been "vaccine-related*" pursuant to § 300aa-11(c)(1)(C). And if that is indeed the meaning of the word "such," then it would not be enough that there exist $1000 in unreimbursable expenses incurred on behalf of the injured person; such expenses would also need to have been caused by a *vaccine-related* injury. Therefore, while it is possible to dispositively determine that a petitioner has *failed* this element by a failure to demonstrate $1000 in unreimbursable expenses attributable to an injury, regardless of whether the injury was caused by a vaccine, one arguably cannot *affirm* its fulfillment *until* the injury has been shown to be the result of a vaccine. Only then can it be said that the expenses were due, in whole or in part, to a *vaccine-related* injury. Thus, when we closely examine the full measure of the $1000 requirement, we find that

respondent's own "two groups" argument would arguably *exclude* that requirement from the group of requirements that could be considered jurisdictional, for even when a petitioner clearly has over $1000 in unreimbursable expenses, a determination on the merits that the injury is vaccine-related would be essential before it can be said whether the $1000 requirement element has been *fulfilled*. Only in those cases in which a petitioner has less than $1000 in unreimbursable expenses of any kind could this element be resolved prior to ruling on the merits of the case.

Moreover, looking at this argument of respondent from another perspective, yet another basic flaw can be seen. That is, if this argument is to be considered correct as to the $1000 requirement, then it would also seem to classify the above-described "six months requirement" as jurisdictional as well. That is, as with the $1000 requirement, resolution of this six months element *can* be had in the negative without reference to whether the injury was vaccine-related. Yet respondent insists that the $1000 requirement is jurisdictional, while the "six months requirement" is not.

In short, this "two groups" argument of respondent is not persuasive, and must be rejected.

5. Case citations

Finally, I note that at pp. 6-8 of her supplemental response, respondent cites a list of cases in which, she asserts, a number of different requirements contained in the statutory provisions defining the Program have been held to be "jurisdictional" in nature. Respondent seems to imply that it would therefore be unremarkable to find that the $1000 requirement is also jurisdictional in nature. But respondent's laundry list of citations does not offer significant support for her contention in this case.

First, some of the cited cases[(12)] relate to the statutory provisions encompassed at subsections (5), (6), and (7) of § 300aa-11(a), which, of course, have definitively been held to be jurisdictional by the Federal Circuit in *Martin*, *supra*. I have already discussed above why the fact that these peculiar statutory provisions are viewed as jurisdictional does not indicate that the $1000 requirement is also jurisdictional.

Second, a number of respondent's other citations refer to cases in which a dismissal for violation of the *statute of limitations* for filing a Program petition has been stated to be a jurisdictional dismissal.[(13)] But a dismissal for late filing of an action is obviously a matter very different from a dismissal for failure to establish one element of the substantive requirements for proving the case, and thus the fact that a dismissal under one of the limitations provisions may be jurisdictional is quite unhelpful in determining whether the $1000 requirement is jurisdictional.

Third, respondent asserts (Supp. Resp. at 7-8) that another requirement contained in § 300aa-11(c)(1), the requirement of § 300aa-11(c)(1)(E) that the petitioner demonstrate that he has never previously received a legal award due to the injury, has been held to be jurisdictional. Respondent cites the cases of *Head v. Secretary of Dept. of HHS*, 26 Cl. Ct. 546 (1992), aff'd, 996 F. 2d 318 (Fed. Cir. 1993); and *Massing v. Secretary of Dept. of HHS*, 19 Cl. Ct. 511, aff'd, 926 F. 2d 1133 (Fed. Cir. 1991). But respondent is incorrect again, because in neither of those two cases was § 300aa-11(c)(1)(E) held to be jurisdictional. In *Head*, the special master, rather, held that the petitioner's failure to satisfy § 300aa-11(c)(1)(E) was an "evidentiary" ground for denying the petitioner's claim, while it was the related problem under § 300aa-11(a)(7) that was the "jurisdictional" bar. The Claims Court judge affirmed, based upon the special master's "evidentiary" ruling pursuant to § 300aa-11(c)(1)(E). In *Massing*, on the other hand, a Claims Court judge denied a Program petition pursuant to § 300aa-11(c)(1)(E), but again the judge *never* referred to that as a dismissal on "jurisdictional" grounds. Moreover, in also denying a request for attorneys' fees in that case, the judge indicated that the reason for that denial was that the petition had not been filed in "good faith;" there was no mention of any lack of jurisdiction over the petition. 19 Cl. Ct. at 515.

Thus, respondent is simply wrong in asserting that the requirement of § 300aa-11(c)(1)(E) has been found to be jurisdictional. (And even if § 300aa-11(c)(1)(E) were held to be jurisdictional, respondent does not explain why it would therefore follow that the "$1000 requirement" is also jurisdictional.)

Finally, respondent asserts (Supp. Resp. at 7) that the requirement of § 300aa-11(c)(1)(A), that the injured person be shown to have received one of the vaccinations listed in the statute, has been held to be jurisdictional, citing *Dalton v. Secretary of Dept. of HHS*, No. 90-2785V, 1991 WL 146245 (Cl. Ct. Spec. Mstr. July 18, 1991). While this assertion requires a bit more discussion, again respondent's analysis fails to offer support to her contention here, that the $1000 requirement of §300aa-11(c)(1)(D)(i) should be deemed jurisdictional.

To begin with, an examination of the opinion in *Dalton* shows that the respondent has misrepresented the holding of yet another case. In *Dalton*, the special master *never* said that he was dismissing the petition *for lack of jurisdiction*. Rather, he simply noted that the petition must be dismissed "for failure to demonstrate that the petitioner received a vaccine set forth in the [statute] * * *." (1991 WL 146245 at p. 2.)

Indeed, it simply appears that no published opinion of any kind has ever addressed the issue of whether the requirement of § 300aa-11(c)(1)(A), that the claimant have received a vaccination listed in the statute, is a "jurisdictional" one. Based upon the general teachings of the cases discussed at pp. __ above, I would be inclined to say that such requirement is not jurisdictional, but is rather simply one of the elements that must be proved in order to gain an award. The same result would also seem to flow from the Federal Circuit's *Martin* opinion, which, as discussed above, strongly implied that *all* the requirements of § 300aa-11(c)(1) are not jurisdictional. But in any event, there is certainly no need to resolve this issue in this case, since even if the requirement of § 300aa-11(c)(1)(A) were held to be jurisdictional, I would not view such result as impacting the issue here. Clearly, the fact of receiving a statutorily-listed vaccination is the most primary, basic requirement characterizing a claim potentially compensable under the Program. It could be analogized to the situation in *Cruz, supra*, where the basic fact of having been involuntarily terminated was stated to have been a jurisdictional requirement for bringing a claim within the jurisdiction of the Merit System Protection Board. Thus, while it is conceivable that the basic requirement of § 300aa-11(c)(1)(A) might be held to be a jurisdictional requirement, that would be no reason to hold that the $1000 requirement, a very different, decidedly *secondary* requirement for an award, should also be considered jurisdictional.

F. Conclusion

For all the reasons set forth above, I conclude that the "$1000 requirement" of § 300aa-11(c)(1)(D)(i) is *not* a jurisdictional requirement. Therefore, I conclude that an award for fees and costs is appropriate in this case.

III

AMOUNT OF AWARD

Respondent also urges that if an award is granted, the amount requested by petitioner be reduced because petitioner's counsel allegedly billed at his attorney rate ($165 per hour) for tasks that could have been performed by paralegals or secretaries. Petitioner's counsel has replied to this argument at pp. 6-8 of petitioner's "Reply" filed on March 29, 1996.

For the most part, I found petitioner's reply on this point to be persuasive. As to most of the entries enumerated at pp. 3-4 of respondent's "Response" filed on March 12, 1996, my examination shows that petitioner's counsel on each of the dates in question either billed only a few minutes for the task in question (*e.g.*, June 30, 1993--.3 hours), or clearly did perform a very important attorney-level task *along* with drafting a letter or request (*e.g.*,on July 19, 1993, counsel reviewed medical literature as well as drafting a cover letter, billing 1.8 hours). Scrutinizing these entries in light of my experience as a litigator, I generally find no objectionable charges.

There is one exception, however. Petitioner's counsel has failed to persuade me that it was appropriate to bill the 2.8 hours claimed for November 22, 1994. I will allow only .3 hours for this date, subtracting 2.5 hours from the claim.

IV

SUMMARY AND CONCLUSION

The following amounts are allowed for petitioner's attorneys' fees and costs:

Attorneys' fees (54.7 -2.5=) 52.2 hours x $165/hour = $ 8,613.00

Petitioner's costs (filing fee): 120.00

Total $ 8,733.00

Accordingly, my decision is that petitioner is entitled to an award for fees and costs in the total amount of $8,733.00, pursuant to 42 U.S.C. § 300aa-15(b) and (e)(1).

_____

George L. Hastings, Jr.

Special Master

1. The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 et seq (1994 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (1994 ed.).

2. In this case, after petitioner filed her request for fees and costs on February 5, 1996, respondent filed her "Response" to that request on March 12, 1996. In that Response, the respondent *did not* dispute that the petition was filed in good faith and upon a reasonable basis. Only after I required respondent to further brief a separate issue (the "jurisdictional" issue to be discussed at length, *infra*) did respondent raise (in her "Supplemental Response" filed on October 4, 1996) this argument as to "reasonable basis." Petitioner is correct, of course, in arguing that respondent has raised this issue belatedly. For example, if I had granted a fees' award earlier, before respondent raised this issue, this would be an issue that respondent would be barred from raising on appeal. (See Rules of the United States Court of Federal Claims, Appendix J, Rule 8(f).) However, it is also true that under the statute it is the duty of the special master to award attorneys' fees only after making affirmative findings as to "reasonable basis" and "good faith." I make findings as to those requirements with respect to *every* request for a fees award, whether

such issues are raised by respondent or not. (Although in some cases, where the fulfillment of those requirements seems clear, I do not explain in written fashion the *reasoning* behind such findings.) In this case, since respondent has raised the issue of "reasonable basis," even though belatedly, I find it appropriate to set forth my reasoning behind that conclusion in this case.

3. Respondent also has urged me to "see also" the case of *Edgar v. Secretary of Dept. of HHS*, 26 Cl. Ct. 286, 294-296 (1992). *Edgar*, however, did not concern the $1000 requirement at all, but rather the issue of whether a vaccine recipient who was in fact determined to have an injury compensable under the Program could be *compensated under § 300aa-15(a)(1)(B)* for amounts that the recipients' *parents* allegedly lost in wages while attending the sick child. The court denied compensation for this claimed item of damages, without explanation. In my view, it is absurd for respondent to suggest that because of the published decision in *Edgar*, it was therefore unreasonable for petitioner to claim that *her own* lost wages failed to qualify under a *different section* of the statute, *i.e.*, the $1000 requirement of § 300aa-11 (c)(1)(D)(i).

4. Note that in a tort suit, no "$1000 requirement" would exist. Therefore, a petitioner could have a very meritorious tort claim even though she might have only a weak claim as to the strict Program requirement of $1000 in *unreimbursable* expenses.

5. Indeed, even as of the date of this Decision, the cases of many petitioners vaccinated prior to October 1, 1988, remain before this court. Those petitioners continue to maintain the option of withdrawing their Program claim, prior to obtaining a decision, and filing or returning to a civil tort action. Obviously, for the special masters to adopt an overly strict standard for "reasonable basis" might influence counsel for some such petitioners, fearing that they might never be paid for efforts in the Program, to abandon their Program claims short of decision.

6. Note that in Program cases, if this court denies an attorneys' fees award, counsel are *forbidden* from soliciting or accepting any fee from the petitioner. The attorney simply gets nothing, not only for his or her own work, but also for any costs that the attorney might have expended. See *Beck v. Secretary of Dept. of HHS*, 924 F. 2d 1029 (Fed. Ct. 1991). This could be a frightening prospect to an attorney deciding whether to assist a purportedly vaccine-injured person, because costs in such cases, especially expert witness costs, can be very high.

7. The considerable delay between the initial fees request and this decision resulted chiefly from the respondent's request that I stay consideration of this fees application pending the ruling by the United States Court of Appeals for Federal Circuit's in the *Black* case, which is to be discussed in detail later in this opinion. When that ruling was issued on August 22, 1996, however, it did *not* in fact address the issue here, concerning whether the "$1000 requirement" is a "jurisdictional" matter. At that point, the briefing process in this case was resumed.

8. Nor is the term "petitioner" defined in § 300aa-33, the "definitions" section of the statute.

9. Of course, merely having been involuntarily terminated by itself would not entitle a person to relief from the MSPB. The claimant, to obtain relief, must also show that such termination was *wrongful*.

10. In this case, the petitioner had two theories of proof concerning the "$1000 requirement." Petitioner's theory concerning the "lost earnings" was essentially rejected on a legal ground, without even any question as to whether in fact petitioner lost $1000 in potential earnings because of her arthritic condition. Petitioner's alternative theory involving the vacation expense, on the other hand, was essentially rejected on a factual ground, in that in my view petitioner failed to show as a matter of fact that the vacation expenses were reasonably necessitated by the arthritic condition.

11. This is in contrast to the requirements of subsections (5), (6), and (7) of § 300aa-11(a). As noted above, the *Martin* court found that the statutory "may not file a petition" language contained in those subsections *affirmatively indicated* Congress' intent that those requirements be considered jurisdictional.

12. See *Martin, supra*; *Brown v. Secretary of Dept. of HHS*, 34 Fed. Cl. 663 (1995), aff'd 86 F. 3d 1179 (Fed. Cir. 1996).

13. *Jessup v. Secretary of Dept. of HHS*, 26 Cl. Ct. 350 (1992); *Smith v. Secretary of Dept. of HHS*, 26 Cl. Ct. 116, 119, aff'd, 983 F. 2d 1088 (Fed. Cir. 1992); *Brown v. Secretary of Dept. of HHS*, 36 Fed. Cl. 435 (1996); *Riggs v. Secretary of Dept. of HHS*, No. 95-552V, 1996 WL 36282 (Fed. Cl. Spec. Mstr. Jan. 16, 1996).