In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-0346V

Filed: 18 December 2009

LEONARD R. DAVIS,	*	
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Petitioner,	*	
	*	
v.	*	**PUBLISHED DECISION**
	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	Statutes of Limitation Significant Aggravation Reasonable Basis
Respondent.	*	

Patricia Ann Finn, Esq., Piermont, New York, for Petitioner;
Traci Patton, Esq., U.S. Department of Justice, Washington, District of Columbia, for Respondent.

ORDER GRANTING MOTION TO DISMISS AND DECISION[1]

The Court convened a status conference in the above-captioned case on 8 December 2009, to rule on Respondent's Motion to Dismiss. Following the filing of the Motion were filed: Petitioner's Response in Opposition, Respondent's Reply in Support, Petitioner's Amended Petition, Petitioner's Surreply in Opposition, and Respondent's Surresponsive-Surreply in Support. The Court considers the issue–that of timely filing–to have been given adequate airing on this essentially legal issue. At the status conference, Petitioner offered to file an expert report describing that Petitioner's condition aggravated significantly in the last three years, but the Court declined such offer, inasmuch as it did not affect the central issue, which is legal, not factual.

Although Petitioner amended his Petition to comport more closely to his argument in opposition to Respondent's Motion, the essential facts of the case have not changed. Petitioner received an influenza vaccination on 13 November 2003. Pet. Ex. A at 2. Over the next two days,

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[1] Petitioner is reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b), a petitioner has 14 days from the date of this ruling 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" may be made available to the public per the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

he visited the Emergency Room complaining of chest pain and other symptoms. Pet. Ex. B at 4; Pet. Ex. C at 6. He continued intermittently to visit doctors for several symptoms, all including chest pain and heart trouble, through 2005, and began associating the symptoms with his vaccination as early as February 2005. Pet. Ex. D at 8, F at 13-15, H at 20, I at 23.

After initially pleading these symptoms as vaccine-related, Petitioner amended his Petition to largely ignore such symptoms, and to focus instead on "high mercury levels" as Petitioner's alleged vaccine-related injury. Amended Petition at 1. The Amended Petition strains credulity to the breaking point by dismissing symptoms of nausea, diarrhea, vomiting, headache, fever, sweating and cold skin that followed the vaccination, and ignoring completely by omission the chest pain and heart problems that followed in the months, even years, that followed as inconvenient, choosing instead to list the first symptom as "breathing difficulty" complained of in December 2006. *Id*. at 1-2. However, the lack of pleading of those complete facts does not strip them from the record for purposes of this ruling, inasmuch as the records containing such facts are seen to be incorporated therein by their "accompanying" the Petition. Vaccine Rule 2(c)(2)(A).

The most significant addition contained in the Amended Petition, and the centerpiece of Petitioner's reformed argument, is that in April 2008, Petitioner underwent lab tests to check his metal levels, which indicated "somewhat high levels of mercury, lead, and other metals," which Petitioner was told were "a contributing factor" to unspecified "health issues." Amended Petition at 2. According to the Amended Petition, "It is almost certain that the flu vaccine caused the high mercury levels, as all flu vaccines contain at least some amount of thimerosal," and "[Petitioner's] suffering was caused-in-fact by the flu shot but significantly aggravated by the high levels of mercury."

In reviewing this case, the Undersigned Special Master reminds the parties that he "may decide a case on the basis of written filings without an evidentiary hearing." Vaccine Rule 8(d), first part.[2]

Two particular subsections of the Vaccine Act control the issue of timely filing:

> In the case of ... 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.

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[2] The first part of Vaccine Rule 8(d) reads:

> The special master may decide a case on the basis of written filings without an evidentiary hearing.

The language of the Rule continues as follows:

> In addition, the special master may decide a case on summary judgment, adopting procedures set forth in RCFC 56 modified to the needs of the case.

42 U.S.C. § 300aa-16(a)(2).[3]

> If at any time the Vaccine Injury Table is revised and the effect of such revision is to permit an individual who was not, before such revision, eligible to seek compensation under the Program, or to significantly increase the likelihood of obtaining compensation, such person may ... file a petition for such compensation not later than 2 years after the effective date of the revision, except that no compensation may be provided under the Program with respect to a vaccine-related injury or death covered under the revision of the table if ... the vaccine-related injury occurred more than 8 years before the date of the revision of the table.

§ 16(b).

The essential rule that these statutory provisions set forth can be summated thusly: If a petitioner receives a vaccine that is already on the Vaccine Injury Table,[4] generally the petitioner must file the petition pertaining thereto before 36 months pass from the date of "onset" of the injury alleged, or lose the right to file the petition; however, if the petitioner has received a vaccine that is subsequently added to the Table, the petitioner may file the petition pertaining thereto within two years of that addition, but may only do so if the vaccine at issue was received eight years or less before that addition.

In 2003, trivalent influenza was not a Table Vaccine; that is, it had not then been added to the Vaccine Injury Table by statute or regulation. The Table was revised to include the flu vaccine on 1 July 2005. See 42 C.F.R. § 100.3(c). Following § 16(b), Petitioner would have had until 2 July 2007 to file the Petition, since that is two years after the addition and Petitioner's vaccination and symptoms occurred within eight years prior to the addition. Petitioner's filing date of 28 May 2009 precludes timely filing under that rubric. Following 16(a)(2), the question is whether the Petition was filed before 36 months had expired "from the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury." Petitioner would have had three years from onset of injury symptoms to file, which means any onset of injury having occurred prior to 28 May 2006 would render the Petition untimely under that provision.

In ruling on a motion to dismiss based on the Petition and accompanying exhibits (*see* Vaccine Rule 2(e)(1)), brought pursuant to Vaccine Rule 8(d) and RCFC 12 (as with FRCP 12), the deciding court "must accept as true the allegations in the [petition] and must construe such facts in the light most favorable to the nonmoving party." *Nelson Const. Co. v. United States*, 79 Fed. Cl. 81 (2007), citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F. 2d 746, 747 (Fed. Cir.1988). Therefore, in ruling on this Motion without the taking of

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[3] The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 *et seq*. (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

[4] 42 C.F.R. § 100.3(a), hereinafter referred to as "the Table."

evidence, the Court will view the date of onset for this Petition as the latest possible date, so as to construe the facts alleged therein in the light most favorable to Petitioner.

From the facts in the medical records filed with the Petition, and as conceded by the initial Petition, it appears that the actual injurious condition from which Petitioner suffered, and may continue to suffer, are the pain symptoms, of which he has been complaining of to medical personnel since 2003, almost immediately following vaccination. Or, as his doctor summarized in 2005, "Mr. Davis states that his current problems of episodic palpitations, sweats, chest pain and extreme fatigue started at least 16 months ago, following a flu shot." Pet. Ex. I at 23. This would seem to clearly bar the Petition under either statute of limitations in the Vaccine Act. Even if his injury was actually the overabundant presence of heavy metals, such injury, if those heavy metals were deposited into his system by the vaccine, began at the time of vaccination in 2003.

Petitioner argued, beginning in his first Response in Opposition, that Petitioner's real injury was mercury or other heavy metal toxicity, and that, since his heavy metal levels were not tested until 2008, the injury did not "manifest," i.e., had no onset, until 2008, well within three years of the 2009 filing. Furthermore, Petitioner argued for timeliness based on the fact that Petitioner's condition worsened noticeably, or, as Petitioner styled it, "significantly aggravated" in 2008. Even though, Petitioner alleges and argues, Petitioner was injured by the vaccine at the time he was injected with thimerosal, that injury became "significantly aggravated" in 2008. When this argument was challenged by Respondent, Petitioner defended the proposition, arguing that the Act allows the filing of a petition "within three years of the manifestation of symptoms related to the vaccine, or significant aggravation," inclusive of "not only original injuries but also the aggravation of them." Petitioner's Surreply.

Respondent argued in rebuttal that mercurial toxicity is (at best) a cause of injury, not an injury itself, as that term is used in the Act. By way of example, many hundreds of petitioners have alleged in the Omnibus Autism Proceeding that mercurial toxicity introduced by vaccines in the form of thimerosal was the mechanism for what they allege to be a vaccine-related injury: autism. That is to say, biological toxicity is a mechanism–an intermediate cause–of a symptomatic condition, and that condition would then be the injury a petitioner might allege to be vaccine-related. *See Bono v. Sec'y of HHS*, No. 02-1085V, 2009 WL 321264, *5 (Fed. Cl. Spec. Mstr. Jan. 16, 2009) ("[T]he statute of limitations begins to run from the first symptom of an alleged injury, not a cause [thereof]"). Respondent also pointed out that the metals level testing Petitioner underwent in 2008 was more akin to a date of diagnosis than it was actual onset, which presumably occurred earlier.

Respondent also pointed out the statutory definition of significant aggravation: "The term 'significant aggravation' means any change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health." § 33(4). To Respondent's good credit, she referenced the restatement of "significant aggravation" under the Act given in *Holtzman v. Sec'y of HHS*, No. 07-0414V, 2008 WL 4489619 (Fed. Cl. Spec. Mstr. Sep. 22, 2008): "Petitioners may alternatively plead, prove, and argue either (1) that the vaccine caused a new injury, medically separate and distinct from a condition that preexisted the vaccine, or (2) that the vaccine caused a significant aggravation of the preexisting condition that

worsened it substantially; provided that the onset of the new injury or significant aggravation occurred within the applicable statute of limitations." Respondent honed in on the definitional misunderstanding implicit in Petitioner's argument regarding significant aggravation: there was no preexisting injury, neither pled nor proven, which was exacerbated by the vaccine. Petitioner's argument is merely that the vaccine caused, *ab initio*, an injury (whether cardiac problems or metal toxicity), and that later, in 2008, that injury worsened significantly. In fine, by the terms of Petitioner's own argument, the vaccine did not "aggravate" in any transitive meaning of that word; it is merely that the same condition(s) worsened from their initial state at some time following the vaccination. If the same injury(ies) remain the issue, then it is only the initial onset thereof that is relevant for statute of limitations purposes.

Respondent summed up her argument in her surresponsive surreply. As this summary addresses the main issue in the case, and articulately dispels the curious reading of the Act suggested by Petitioner, the Court cites it here in approval:

> [P]etitioner's allegation of "high mercury levels" is not an injury or condition that could possibly be compensated under the Vaccine Program, and the alleged findings of heightened mercury levels in 2008 do not render this claim timely. ... Petitioner [in the amended petition] claims that an episode of shortness of breath that he suffered on December 22, 2006, resulting in a visit to the Oneida Healthcare Center, "may have stemmed from previous health problems," but the "onset was in December 2006." Surreply at 2-3. As an initial matter, the medical records belie petitioner's assertion – the December 22, 2006, shortness of breath episode was diagnosed as "acute exacerbation of asthma." Pet. Ex. J at 30.1 Secondly, even if the shortness of breath was not, as the treating physician found, an exacerbation of asthma, if those symptoms, as petitioner alleges, "may have stemmed from previous health problems," those previous health problems are the "injury," and the shortness of breath is simply a symptom of that injury. The statute of limitations runs from the first symptom or manifestation of onset of the injury – the statute does not begin to run anew with every additional symptom of an underlying injury or condition. 42 U.S.C. § 300aa-16(a)(2); see also *Shalala v. Whitecotton*, 514 U.S. 268, 274 (1995) (finding that "[t]here cannot be two first symptoms or onsets of the same injury"). ... Based on the medical records, ... the initial onset of petitioner's health problems began in 2003.
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> [P]etitioner utterly fails to understand the provision of the Act which provides that a petitioner may seek compensation for the significant aggravation of a *preexisting* injury. As previously stated by respondent, the Act defines significant aggravation as "any change for the worse in a *preexisting condition* which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health." Petitioner may not file a claim for a significant aggravation of an injury or condition he believes was caused by the vaccination in question, as an injury alleged to have been caused by the vaccination in question is not an injury or condition that existed *prior* to receipt of the vaccination.

Respondent's Surresponsive Surreply at 3-4 (some citations omitted, emphases in original).

Petitioner has made two basic allegations, neither of which avoid the import of the statute of limitations. As originally pled, Petitioner's symptomatic condition, which he believed to be vaccine-related as it was repeatedly told in the medical histories, began almost immediately after the vaccination in 2003. Under either the two year rule with eight year look-back window, or the typical three year rule, such facts render the claim well outside the statutory limit, without even coming close to being timely. However, if the presence of heavy metals, in the form (at least originally) of thimerosal is the injury Petitioner wishes now to focus upon, then the introduction of such material into Petitioner's system was accomplished at the time of the vaccine's administration, and the claim is still untimely. Furthermore, as addressed by Respondent's arguments *supra*, a plain reading of the Act's term "significant aggravation" stifles Petitioner's argument about a subsequent worsening after an initial introduction of heightened levels and/or symptoms. Indeed, if the mere quantitative level of mercury in Petitioner's metabolism can be counted an injury, it baffles logic how that condition could worsen five years following the introduction of the mercury, without another injection to introduce more mercury. Mercury atoms do not reproduce.

In any event, the Court **RULES** that the Petition may not proceed further because it is patently untimely, and shall be **DISMISSED WITH PREJUDICE**.

The Petition, in either iteration, is untimely on its face. If Petitioner could not ascertain that reality before seeking counsel, it was certainly beholden upon any member of the bar to realize that fact after a moment's glance. The Court has before it no direct evidence that the Petition was filed without subjective good faith; however, from an objective perspective, there is no reasonable basis for this claim. Therefore, the Court also **RULES** that **no** attorneys' fees or costs expended in the prosecution of this Petition are to be reimbursed by the Program. Lastly, the Court **ORDERS** Petitioner's Counsel to **serve** a true, complete copy of this "Order Granting Motion to Dismiss and Decision" **upon Petitioner himself**, and to **file** promptly a notice of compliance with this Order.

Therefore, in the absence of the filing of a motion for review, filed pursuant to Vaccine Rule 23 within 30 days of this date, **the clerk shall forthwith enter judgment** in accordance herewith.

IT IS SO ORDERED.

s/ Richard B. Abell
Richard B. Abell
Special Master