

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 07-0530V

Filed: 4 February 2008

* * * * *
MATT MILLER, next friend of *
JUSTINE MILLER, *
 * * * * *
Petitioner, *
 * * * * *
v. *
 * * * * *
SECRETARY OF HEALTH *
AND HUMAN SERVICES, *
 * * * * *
Respondent. *
* * * * *

PUBLISHED DECISION¹

**ORDER GRANTING MOTION TO DISMISS
PURSUANT TO VACCINE RULE 8(d) AND RCFC 12**

Petitioner filed this Petition on 16 July 2007, alleging a vaccine-related injury (encephalopathy) resulting from an administration of the trivalent influenza vaccine on 23 October 1999. On 20 August 2007, the Court convened a status conference, pursuant to Vaccine Rule 4(a), at which Respondent gave notice that the Petition was filed after the statutorily-set deadline of 1 July 2007. *See* the Court's Order, 21 August 2007. Petitioner responded that the Petition was timely filed, based on his alleged reasonable reliance upon some document he attributed to the creation of Respondent, the Department of Health and Human Services.

The Court ordered the parties to brief the issue following Respondent's written motion to dismiss for failure to file within statutory limitations period (Respondent's Motion). Respondent filed such Motion on 6 September 2007, and Petitioner opted not to respond in opposition to the Motion.

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).

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 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, 236, 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F. 2d 746, 747 (Fed. Cir.1988).

There is a particular subsection of the Vaccine Act which controls the issue raised by Respondent’s Motion:

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, notwithstanding section 300aa–11 (b)(2) of this title, 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.

42 U.S.C. § 300aa-16(b)³

Given the factual history in this case, Petitioner could not have availed himself of the typical statute of limitations, which limit petitions to filing within “36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury” (§ 16(a)(2)), inasmuch as Justine’s condition first manifested as symptomatic in the Spring of 2000, seven years prior to the filing date of the Petition. Therefore, Petitioner needed the extra time granted for filing afforded by § 16(b), set forth *supra*.

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.

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.

Under the limitation set by § 16(b), once the trivalent influenza vaccine was added to the Vaccine Injury Table⁴ on 1 July 2005,⁵ petitions seeking compensation for injuries related to that vaccine (at least those that had occurred within eight years of the vaccine's addition to the Table) had to sue within two years of that addition (i.e., 2 July 2007) or lose their right to pursue the petition due to untimely filing.

Here, Petitioner filed the Petition well after 2 July 2007, on 16 July 2007. On matters such as this, deep contemplation is unnecessary. As the Petition was filed outside of the statutory limitations period, the Petition is untimely. Accordingly, there is no reasonable alternative but to **DISMISS** this Petition. 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.

Richard B. Abell
Special Master

⁴ 42 C.F.R. § 100.3.

⁵ See 70 Fed. Reg. 19,092-01, 2005 WL 828323.