In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-1663V

Filed: 6 April 2010

* * * * * * * * * * * * * * * * * * *		
PAULETTE ROZIER, Parent of MESHA ROZIER, a Minor,	*	
Petitioner,	*	
v.	*	**PUBLISHED DECISION**
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	Statute of Limitations; § 16(a)(2); Objective Test; Autism as a Vaccine-Related Injury
Respondent.	*	
* * * * * * * * * * * * * * * * * * *		

Walter Samuel Holland, Esq., The Ferraro Law Firm, Miami, Florida, for Petitioner;
Voris Edward Johnson, Esq., Department of Justice, Washington, District of Columbia, for Respondent.

PUBLISHED DECISION AND ORDER GRANTING MOTION TO DISMISS PURSUANT TO VACCINE RULE 8(d) AND RCFC 12[1]

On 8 July 2003, Petitioner filed a "short form autism petition" for compensation under the National Childhood Vaccine Injury Act of 1986 ("Vaccine Act" or "Act"),[2] alleging that her daughter Mesha suffered from a disorder listed among the autism spectrum of disorders, but without any specific factual allegations, only incorporating by reference the "Master Autism Petition" form. Putatively then, Petitioner claimed compensation for an autism spectrum disorder she alleged was

---

[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).

[2] 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.

related to the MMR vaccine or any vaccine containing thimerosal that was administered to Mesha. Eventually, the Court ordered Petitioners, on 15 January 2008, to file the relevant medical records pertaining to this Petition, with which Petitioners complied on 14 April 2008.

Thereafter, on 4 June 2008, Respondent filed a Motion to Dismiss for lack of timely filing (the Motion), inasmuch as Respondent's position, based on a reading of the medical records, was that the Petition was filed outside of the statutory limitations period of § 16(a)(2). Petitioner filed her responsive memorandum of opposition (the Response) on 13 August 2008. The matter was then reassigned to the Undersigned's chambers on 3 October 2008. At a status conference before the Undersigned, Petitioner was ordered to file an affidavit regarding Mesha's development and onset of symptoms, of which one was then filed on 6 April 2009. Thereafter, Respondent filed a Reply to Petitioner's filings (the Reply) on 28 April 2009, and Petitioner was granted opportunity to file a Surreply, though none was filed. No further filings were desired by the parties nor ordered by the Court, and the Court must now rule on the motion based on the materials filed.

FACTUAL RECORD

Petitioner's daughter Mesha received vaccinations from her date of birth on 29 November 1997 through 29 January 2003. Petitioner's Exhibit (Pet. Ex.) 1 at 1; Pet. Ex. 2 at 1. She was formally diagnosed with autism on 21 November 2000. Pet. Ex. 14 at 6.

Respondent, in the Motion to Dismiss, honed in on a medical record from an audiological evaluation conducted when Mesha was seven and a half years old, in which her mother, Petitioner, recounted in a history that Mesha's regression began when she was 18 months old, six years prior. Pet. Ex. 5 at 125. Petitioner did not point to evidence in the medical records to indicate otherwise. In fact, in Petitioner's Affidavit, Petitioner recollected:

> Mesha continued to develop normally and spoke her first words at around six to eight months of age. At around a year and a half she was able to use two word phrases. However, at around eighteen to twenty months I noticed her progress had slowed and she seemed not [to] use some of the words that she had been using in the past. At the time, Mesha had recently moved from one day care center to another and I thought the move may have had something to do with her change. I was not overly concerned since Mesha was developing normally in all other respects and I assumed she would soon begin progressing with her speech again....
>
> ...I took Mesha to [the Children's Diagnostic and Treatment Center] sometime in October of 2000 and they ruled out any hearing problems but advised me that Mesha appeared to have some developmental delays....
>
> ...Unfortunately, the various physicians and therapists who ultimately treated Mesha confirmed that she suffered from autism.

Affidavit of Petitioner, filed 6 April 2009. 18-20 months from Mesha's birth date of 29 November 1997 calculates to the period of 29 May-29 July 1999.

On 21 November 2000, Mesha was formally diagnosed with autism. Pet. Ex. 14 at 6.

DISCUSSION

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.[3]

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.
>
> 42 U.S.C. § 300aa-16(a)(2).

> 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.

---

[3] 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.

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

In this case, the relevant statute of limitation is 16(a)(2). 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." Petitioners would have had three years from onset of injury symptoms to file, which means any onset of injury having occurred prior to 8 July 2000 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 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 Petitioners.

Respondent's motion and briefs in support argue that Mesha's decline into eventual developmental delay began in late May 1999 or shortly thereafter. If these symptoms, occurring with they did, constitute onset of Petitioner's injury, then Respondent prevails on their motion to dismiss. The law in the Program is particularly clear on this point: regardless of how family members or even treating physicians viewed onset symptoms contemporaneously, the determinant is whether those symptoms would be viewed as onset symptoms or manifestation if viewed contemporaneously through the lens of generally accepted medicine. *Markovich v. Sec'y of HHS*, 477 F.3d 1353, (Fed. Cir. 2007), *cert. denied sub nom., Markovich v. Leavitt*, 75 USLW 3638, 76 USLW 3020 (Oct. 1, 2007).

Petitioners argue that, even if onset did objectively occur at 18-20 months of age (a year or more before 8 July 2000), the Petition should not be ruled untimely due to other reasons. Interestingly, as Respondent pointed out in the Reply, Petitioner did not dispute that Mesha's speech and language loss was the first symptom or manifestation of onset of Mesha's injury. Instead, Petitioners' briefs are rife with policy arguments about the plurality of purposes (or "concerns") that underlie the Vaccine Act, and arguments that basically read the statute as a "notice" type statute of limitation, a reading that has been repeatedly rejected by the Federal Circuit. *See Markovich*, *supra*, and *Brice v. Sec'y of HHS*, 240 F.3d 1367 (Fed. Cir. 2001), *cert. denied sub nom. Brice v. Thompson*, 122 S. Ct. 614 (2001).[5] Petitioner attempts to say that Congress could not have meant what it forthrightly stated in the plain wording of the Act, because a mythically-scried purpose would contravene such a result.

[5] Petitioner spent considerable energy discussing *Setnes v. Sec'y of HHS*, 57 Fed. Cl. 175 (2003), but must be reminded that such decision is not binding as mandatory authority on the Court here; however, *Markovich* and *Brice* certainly are so binding. *See Vessels v. Sec'y of HHS*, 65 Fed. Cl. 563, 569 (2005); *Hanlon v. Sec'y of HHS*, 40 Fed. Cl. 625, 630 (1998).

Such arguments are unavailing. More effort might have been expended describing why the symptoms noted in the record were or were not clearly identifiable symptoms or manifestation of autism instead of pondering Congressional Intent, or–perish the thought–Congressional Purpose, that dubious, ephemeral chimera.

Factually, Petitioner argues that, inasmuch as no doctor observed and recorded Mesha's loss of language skills, that means that the "medical profession at large" did not recognize the onset of symptoms. Petitioner argues that her actual notice of Mesha's symptoms from 18 to 20 months are irrelevant to calculating onset.

Petitioner's arguments on this point are hopelessly mired in the paradigm of a subjective standard. From a purely legal point of view, it is truly immaterial who saw or did not see symptoms that constitute an onset. Obviously, individual recollections and accounts are helpful for discovering what occurred at a given time, as a pragmatic matter of developing the factual record. Nevertheless, these are not used for the purpose of determining what the person believed concerning the facts they witnessed; it is for the purpose of determining what happened and when–specifically, which symptoms manifested and when they first appeared.

Later, Petitioner argued that "because autism is not yet recognized by the medical profession at large as a vaccine injury, the triggering of the statute of limitations ... has yet to occur: the 'first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." Petitioner's Opposition brief at 7-8, citing *Markovich v. Sec'y of HHS*, 477 F.3d 1353, 1360 (Fed. Cir.2007) (holding that "'the first symptom or manifestation of onset,' for the purposes of § 300aa-16(a)(2), is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large."). Petitioners' argument alights upon one of the most obtuse and bedeviling portions in the Federal Circuit's *Markovich* opinion, and raises an imaginative argument on that semantic foundation. However, even if Petitioners' argument had not been squarely dispelled by Judge Hodges of the Court of Federal Claims in *Wilkerson v. Sec'y of HHS*, __ Fed. Cl. __, 2009 WL 1583527 (Apr. 03, 2009), the absolute authority in Program cases, the Vaccine Act itself, controls the outcome of the case through a plain reading of its statutory language, noted above. *See, e.g., Markovich*, 477 F.3d at 1357 ("We begin our analysis with the language of the Vaccine Act...").

Irrespective of any attempt at divination to assess the opinion of "the medical profession at large,"[6] Petitioner herself has stated that Mesha's autism spectrum disorder was vaccine-related. That is the injury for which they claim entitlement to compensation, and the Petition was filed "after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset ... of such injury." 16(a)(2). As such, the Petition is decisively time-barred.

---

[6] Whether such legendary consensus opinion is to be derived through examination of extant medical literature or by direct statistical survey (i.e., epidemiologic statistical analysis), any evidentiary burden the Court might assign to a petitioner to prove the medical community's unified opinion would run afoul of the Federal Circuit's established precedent in *Althen v. Sec'y of HHS*, 418 F.3d 1274 (Fed. Cir. 2005) (regarding medical literature) and *Knudsen v. Sec'y of HHS*, 35 F.3d 543 (Fed. Cir. 1994) (regarding statistical evidence), respectively.

CONCLUSION

Accordingly, there is no reasonable alternative but to **DISMISS** this Petition.[7] 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

[7] The Court reminds Petitioner of Respondent's position that a lack of timely filing is a jurisdictional defect, and takes the opportunity to restate the clear decisional law that attorneys' fees may only be recovered where the Court held jurisdiction over the underlying petition. *See Brice v. Sec'y of HHS*, 358 F.3d 865, 869 (Fed. Cir. 2004). Also, recovery of attorneys' fees and costs in cases that do not prevail on entitlement is contingent upon a factual showing that the petition was filed upon a reasonable basis with good faith. § 15(e)(1).