In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-1734V

Filed: 25 June 2009

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THEODORE and APRIL SCHROEDERS, Parents of DANIEL SCHROEDERS, a minor,	*	
Petitioners,	*	
v.	*	**PUBLISHED**
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* * * * * * * * * * * * * * * * * * *		

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

Petitioner filed this Petition on 18 July 2003, without any specific factual allegations, only incorporating by reference the "Master Autism Petition" form. Putatively then, Petitioners were claiming compensation for an autism spectrum disorder they were alleging was related to the MMR vaccine or any vaccine containing thimerosal that was administered to Daniel. Eventually, the Court ordered Petitioners, on 15 February 2008, to file the relevant medical records pertaining to this Petition, with which Petitioners complied on 14 May 2008. Included with those medical records was Daniel's vaccination record, which referenced a series of administrations of the DtaP/DTP, Polio, Haemophilus Influenza B, MMR, Hepatitis B, and Varicella vaccines between 5 November 1996 and 26 August 1999. *See* Petitioners' Exhibit (Pet. Ex.) 2.

On 24 June 2008, Respondent filed a Motion to Dismiss for untimely filing. On 3 October 2008, this case was transferred to the Undersigned's Chambers. In due course, the Court ordered

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[1] Petitioners are 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).

Petitioners to file detailed affidavits to fill in the gaps in the medical records to tie onset to a specific date range. On 15 June 2009, Petitioners filed a series of twenty unsigned, unsworn journal entries composed sporadically between 20 January 1997 and 4 September 1999. The entries paint a bittersweet monograph of an apparently very loving family struggling with the particular demands of a special needs child; however, in that format it was less useful to the Court as evidence tying onset to a specific time period or specific date. Therefore, the Court is left to resolve the issue based upon the filed medical records extant.

Daniel was born 29 August 1996. Treating neurologist Melvin Grossman, M.D. recorded on 22 November 1999 that Daniel "stopped speaking [at] about 2 years of age" (1998-99), and clinical psychologist Virginia Shields diagnosed him with autistic disorder on 10 July 1999. Pet. Ex. 4 at 1; Pet. Ex. 6 at 1.

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.

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

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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.

[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.

> 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 this case, the general, 36-month rule applies, inasmuch as all of the vaccines administered to Daniel, as enumerated by the Vaccination Record, were added to the Table prior to the administrations of those vaccines to him. See 42 C.F.R. § 100.3(c). The issue then becomes 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." § 16(a)(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). 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 Petitioner.

Based on the Petition's filing date of 18 July 2003, onset would have had to have occurred on or after 18 July 2000 for the claim to be timely filed. However, a full, formal diagnosis of autism, which certainly postdated onset, was rendered just under a year prior to that date. If loss of speech is used as an indicium of onset, the evidence available situates that occurrence even earlier, sometime in 1998 or 1999. On matters such as this, deep contemplation is unnecessary. As the Petition was filed outside of the statutory limitations period, the Petition is untimely.

In their opposition to Respondent's motion to dismiss, Petitioners 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." Petitioners' Opposition brief at 7-8, citing *Markovich v. Secretary of HHS*, 477 F.3d 1353, 1360 (Fed. Cir.2007) (holding that "'the first

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

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. Secretary 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,"[5] Petitioners themselves have alleged that Daniel'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.

Accordingly, there is no reasonable alternative but to **DISMISS** this Petition.[6] 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

[5] 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. Secretary of HHS*, 418 F.3d 1274 (Fed. Cir. 2005) (regarding medical literature) and *Knudsen v. Secretary of HHS*, 35 F.3d 543 (Fed. Cir. 1994) (regarding statistical evidence), respectively.

[6] 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. Secretary 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).