

OFFICE OF SPECIAL MASTERS

(No. 95-835V)

(Filed March 12, 1998)

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JOSEPH TILGHMAN BRICE, \*  
LAURAJEAN COUNCILL BRICE, and \*  
JOSEPH OSLER BRICE, \*  
\*  
Petitioners, \*  
\* Publish  
v. \*  
\*  
SECRETARY OF THE DEPARTMENT OF \*  
HEALTH AND HUMAN SERVICES, \*  
\*  
Respondent. \*  
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LauraJean Councill Brice and Joseph Osler Brice, Pasadena, MD (pro se), for petitioners.

Mark W. Rogers, Washington, DC, for respondent.

**SECOND DECISION ON REMAND**

**MILLMAN, Special Master**

The Honorable Roger B. Andewelt, in an Order filed February 13, 1998, directed the undersigned to make any appropriate subsidiary factual findings to support a holding whether, assuming petitioners reasonably could not have known about their son's injuries until March 30, 1995, they acted with due diligence from that time until they filed their petition on December 19, 1995.<sup>(1)</sup> Presumably, if they filed their petition with due diligence eight and one-half months after their conversation with Dr. Vining,

equitable tolling of the statute of limitations would apply.

## DISCUSSION

Assuming equitable tolling would apply to this case, petitioners still must "bring suit within a reasonable time after [they] ha[ve] obtained, or by due diligence could have obtained, the necessary information." Cada v. Baxter Healthcare Corp., 920 F.2d 446, 453 (7th Cir. 1990). "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984).

In Bailiss v. Secretary, HHS, 37 Fed. Cl. 64 (1996), petitioners in a vaccine case failed to elect in a timely fashion to reject the judgment denying their claim. Petitioners attempted to file an election 180 days after judgment was entered, instead of the statutorily required 90 days. The Honorable Moody R. Tidwell held that equitable tolling did not apply since petitioners' counsel's secretary's failure to file the election due to her maternity leave and miscommunication to a temporary replacement did not amount to the "extraordinary circumstances" worthy of equitable relief.

Judge Tidwell held, inter alia, that counsel in the Bailiss case had not acted with due diligence since all he had to do was ask the temporary secretary if she had filed the election notice. Had he asked, he would have learned that she had not. Judge Tidwell stated that petitioners' counsel should have checked. Id.

## SUBSIDIARY FACTUAL FINDINGS

1. Dr. Eileen Vining, a neurologist, at Johns Hopkins Hospital, told petitioners on March 30, 1995 that they should file a claim under the Vaccine Program. Tr. at 41-42.
2. The three-year statute of limitations expired five weeks later.
3. On June 19, 1995, petitioners made their first request for their son's medical records two-and-one-half months after their visit with Dr. Vining. Tr. at 66.
4. Petitioners obtained the University of Maryland discharge record listing MMR reaction in September-October 1995, six or seven months after their visit with Dr. Vining. Tr. at 61.
5. Petitioners filed their petition on December 19, 1995, eight and one-half months after their visit with Dr. Vining.

Assuming, as per Judge Andewelt's Order, that equitable tolling applies in this case, petitioners failed to exercise due diligence in filing their petition. The standard is what a reasonable person would do. Spohn v. Secretary, HHS, 1996 WL 532610, \*9 n.16 (Fed. Cl. Spec. Mstr. 1996), aff'd, No. 97-5045 (Fed. Cir. 1997) (Table)(parents failed to review medical records in their possession to determine correct date of vaccination).

The visit with Dr. Vining was an unmistakable direction to seek legal redress. There were still five weeks remaining for petitioners to file a petition in a timely fashion, ample time within which to do so. Yet, petitioners waited eight and one-half months after their visit with Dr. Vining to assert their legal rights. They did not even pursue obtaining their medical records until two and one-half months after visiting Dr. Vining. Moreover, they did not obtain the University of Maryland discharge summary which stated, inter alia, MMR reaction until September or October, six or seven months after the visit to Dr. Vining. There is no diligence in this case, much less due diligence.

## CONCLUSION

Equitable tolling is inapplicable in this case both for failure of extraordinary circumstances to warrant applying it and for failure of petitioners to exercise due diligence. The petition should be dismissed with prejudice for lack of jurisdiction.

DATED: \_\_\_\_\_

Laura D. Millman

Special Master

1. This court initially dismissed the petition on March 27, 1996 for filing past the three-year statute of limitations. Petitioners appealed and Judge Andewelt initially remanded on September 6, 1996 for this court to determine if the doctrine of equitable tolling applied. This court, in a Decision on Remand, filed November 26, 1996, concluded that equitable tolling did not apply.