OFFICE OF SPECIAL MASTERS

No. 06-0586V
Filed: April 13, 2007

MARCIA D. GUY, as legal representative of MYIA HOWARD, a minor	)	
Petitioner	)	Motion to Dismiss Petition for Untimeliness; Petitioner's Motion for a Stay of Proceedings
v.	)	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	PUBLISH
Respondent.	)	

ORDER

Further to a telephonic status conference, held for the purpose of addressing the statue of limitations issue presented by petitioner's claim, the undersigned issued an Order on January 31, 2007, directing petitioner to file a status report on or before February 6, 2007, "indicating his position on the case having had the opportunity to further evaluate his position." Order of 1/31/07. The January 31, 2007 Order also directed respondent to file the anticipated motion to dismiss by February 28, 2007, and afforded petitioner until April 2, 2007, to respond to the motion for dismissal. Id. Petitioner failed to file a status report and failed to contact the chambers of the undersigned. Consistent with the January 31, 2007 Order, however, respondent moved for the dismissal of petitioner's claim as untimely. See Respondent's Motion to Dismiss (R's Mot.) at 1.

In the motion to dismiss, respondent asserts that no petition may be filed under the National Vaccine Injury Compensation Program[1] (the Act or the Program) more than

[1] The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. § 300aa-10-§ 300aa-34 (West 1991 & Supp. 2002) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

thirty-six months after the date of the occurrence of the first symptom or manifestation of onset. R's Mot. at 3-4 (citing 42 U.S.C. § 300aa-16(a)(2)). In support of the motion, respondent points to the recent decision of Markovich v. Secretary of Health and Human Services, 477 F.3d 1353 (Fed. Cir. 2007), in which the Court of Appeals for the Federal Circuit held that the "'first symptom or manifestation of onset'" for the purposes of the limitations period, "is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." R's Mot. at 4 (quoting Markovich, 477 F.3d at 1360). Respondent contends that the Federal Circuit's decision in Markovich "reinforce[s]" the appellate court's earlier holding in Brice v. Secretary of Health and Human Services, 240 F.3d 1367 (Fed. Cir. 2001)[2] that "'the statute of limitations [under the Vaccine Act] begins to run upon the first symptom or manifestation of the onset of injury, even if the petitioner reasonably would not have known at the time that the vaccine had caused an injury.'" R's Mot. at 4 (quoting Brice, 240 F.3d at 1373). Respondent further contends that the Federal Circuit's decision in Markovich "expressly reject[s]" the analysis of the Vaccine Act's statute of limitations in autism cases advanced by the Court of Federal Claims in Setnes v. Secretary of Health and Human Services, 57 Fed. Cl. 175 (2003). R's Mot. at 4.

In Setnes, the Court of Federal Claims determined that "[w]here there is no clear start to the injury, such as in cases involving autism, prudence mandates that a court addressing the statute of limitations not hinge its decision on the 'occurrence of the first symptom.'" Setnes, 57 Fed. Cl. at 179. Rather, the Court of Federal Claims urged that

> in a situation such as that before the court, where the symptoms of autism develop "insidiously over time" and the child's behavior cannot readily be connected to an injury or disorder, the court may rely on the child's medical or psychological evaluations for guidance in ascertaining when the "manifestation of onset" occurred.

Id. at 181. The Markovich decision informs that, contrary to "[t]he Setnes construction," a subtle symptom or manifestation of onset of an alleged vaccine-related injury, particularly a symptom that is recognizable to the medical profession at large if not to a parent, is sufficient to trigger the running of the Vaccine Act's statute of limitations. See Markovich, 477 F.3d at 1358.

Petitioner has declined to file a response to respondent's motion. Instead,

---

[2]The United States Supreme Court denied the petition for writ of certiorari. See Brice v. Thompson, 534 U.S. 1040 (2001).

petitioner's counsel faxed, to chambers and to respondent, a letter addressed to the undersigned dated March 22, 2007, stating "I cannot write a response due to a recent change of the law."[3] Petitioner's Motion for Stay of Proceedings (P's Stay Mot.) at 1. Although petitioner's counsel did not refer explicitly in his correspondence to the Federal Circuit's decision in Markovich, which issued on February 20, 2007, the undersigned infers from the timing of petitioner's counsel's letter and his reference to "a recent change of the law" that petitioner's counsel is referring to the Markovich decision. In his letter to the undersigned, petitioner's counsel requested a continuance of this proceeding "in the event of the Supreme Court taking the case in favor of the Plaintiff." Id. Petitioner's counsel concedes that "[i]n the event of the Supreme Court not taking the case, my client's lawsuit will be dismissed." Id.

Respondent filed a response to petitioner's counsel's correspondence, characterizing petitioner's request for continuance as a motion for suspension of proceedings pursuant to 42 U.S.C. § 300aa-12(d)(3)(C), and "recommend[ing]" the denial of petitioner's request. Respondent's Response to Motion for Suspension (R's Resp.) at 1. Respondent asserts that "[b]y petitioner's own admission, her claim must be dismissed under Markovich." Id. at 3. Noting that petitioner's request for a continuance is premised on her "hop[e] for a change in the law governing her claim," id. at 2, and arguing that petitioner "has given no grounds upon which the special master can conclude that the requested suspension [for more than thirty days] is reasonable and necessary," respondent urges the undersigned to deny petitioner's request and dismiss her claim, id. at 2.

Before addressing the pending motions of the parties, specifically, respondent's motion to dismiss and petitioner's motion for stay of proceedings, the undersigned first reviews the record in this case.

I. The Filed Record

On August 14, 2006, petitioner Marcia Guy, as legal representative of the minor Myia Howard (Myia), filed a claim pursuant to the Vaccine Act alleging that her daughter Myia suffered autism as a result of the multiple vaccinations she received between November 14, 1998, and January 10, 2003. Petition (Pet.) ¶ 1. Petitioner states in her petition that Myia was born on November 12, 1998, and on August 19, 2003, nearly five years after Myia's birth, Myia "was diagnosed with autism." See id. Although petitioner did not file medical records with the petition, she did attach her affidavit as Exhibit 1.

[3]By Order dated April 10, 2007, the undersigned directed the Clerk of the Court to file the faxed correspondence as a motion for stay of proceedings. Order of 4/10/07.

See Pet., Ex. 1. Petitioner stated in her affidavit that Myia's "speech and social skills began to seem to be less than normal" when Myia was about two and one half years old. Id. ¶ 4 (emphasis added). Petitioner further stated that "as time [went] on and Myia received additional vaccinations, she [fell] further behind in her social skills and speech development." Id. ¶ 5.

On January 9, 2007, petitioner filed medical records. Petitioner's Notice of Filing of 1/9/07. The filed records included: (1) Myia's birth certificate, (2) petitioner's delivery records, (3) an affidavit stating that petitioner is awaiting receipt of Myia's birth records, (4) Myia's vaccine administration records; (5) Myia's pediatric records from birth until age 5; (6) Myia's updated pediatric records; (7) Myia's occupational therapy records for the period between July 2003 and April 2004; (8) Myia's occupational therapy records for the period between May 2004 and June 2005; (9) Myia's speech therapy records for the period between July 2003 and May 2004; and (10) Myia's speech therapy records for the period between August 2004 and August 2005. Id.

Although petitioner states in her affidavit that she first noticed Myia's delayed speech development and "less than normal" social skills in May 2001, when Myia, who was born in November 1998, was two and one-half years old, see Pet., Ex. 1¶4, a patient history taken from Myia's parents by Dr. Joseph Pasternak, a neurologist, on August 19, 2003, during an evaluation of Myia for autistic spectrum disorder reveals that Myia's "[p]arents first became concerned when she was 3-½ years old . . . [and] was not speaking well," Petitioner's Notice of Filing of 1/9/07, Ex. V at 15. During Dr. Pasternak's evaluation, he noted that the concern of Myia's parents prompted their consultation with Dr. Molly Jacobs, Myia's pediatrician, who in turn recommended an evaluation with a speech therapist and subsequently referred Myia to Dr. Pasternak himself for evaluation. See Petitioner's Notice of Filing of 1/9/07, Ex. V at 15, 23.

The filed speech therapy records in this case indicate that Myia had a speech language evaluation as early as July 16, 2003, with a speech pathologist. See Petitioner's Notice of Filing of 1/9/07, Ex. IX at 1. During that July 2003 examination, the speech pathologist noted that Myia exhibited expressive and receptive language delay. Id. Additionally, the speech pathologist noted Myia's "fleeting eye contact," and recommended speech and language services to address Myia's "communication needs." Id.

Dr. Pasternak diagnosed Myia with autism on August 19, 2003, stating:

> Myia most likely has autistic spectrum disorder. She has considerable echolalic speech and perseverative behavior. Occupational therapy and

> speech therapy are important at this time . . . . I suggested that she be evaluated by a developmental psychologist. I think that considerable behavioral intervention is needed at this time . . . .

Petitioner's Notice of Filing of 1/9/07, Ex. V at 16. On August 14, 2006, nearly three years after Myia's autism diagnosis, petitioner filed a petition under the Vaccine Act alleging that Myia's condition was a vaccine-related injury.

II. The Applicable Law and Analysis

The Vaccine Act prohibits the filing of a petition for compensation for an alleged vaccine-related injury "after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset . . . of such injury." 42 U.S.C. § 300aa-16(a)(2). As recently articulated by the Federal Circuit in the Markovich decision, for purposes of the Vaccine Act's limitations period, the "'first symptom or manifestation of onset' . . . is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." Markovich, 477 F.3d at 1360. In this case, for petitioner's claim to be timely, the first sign of an alleged vaccine-related injury, objectively recognizable by the medical profession at large, must have occurred within thirty-six months of the filing date of the petition on August 14, 2006. Preponderant evidence that Myia's injury was objectively recognizable before August 14, 2003, will require the undersigned to find that petitioner's claim is untimely under the Vaccine Act.

In this case, the first "objectively recognizable" indication of Myia's autistic condition to both her pediatrician and her parents, was her delayed speech development and social skills. Based on the record evidence, Myia's parents became concerned about Myia's apparent impairment either in May 2001 or in May 2002. The record indicates that Myia's parents drew their concern about Myia's delayed development to the attention of Myia's pediatrician who, in turn, referred Myia for a speech evaluation and then for an autism evaluation. The record also indicates that a speech evaluation occurred as early as July 2003, nearly one month beyond the thirty-six month period of time afforded for the filing of a Vaccine Act claim. The record in this case supports a finding that the symptoms of Myia's condition that ultimately led to her diagnosis of autism were apparent to Myia's parents and her physicians prior to August 2003. Accordingly, petitioner's Vaccine Act claim is time-barred.

III. The Parties' Pending Motions

Because petitioner's Vaccine Act claim is time-barred, dismissal of petitioner's claim is appropriate as respondent has urged in its motion to dismiss and as petitioner's

counsel has acknowledged in his motion for stay of proceedings. While conceding that petitioner's claim must fail absent a review of the Markovich decision on petition for writ of certiorari, petitioner's counsel "request[s] that the Court enter a continuance." P's Stay Mot. at 1. Petitioner's counsel does not specify the length of time for which he seeks the continuance. Rather, he adverts to "the event of the Supreme Court taking the case in favor of Petitioner." Id. The undersigned construes petitioner's request as a motion for stay of proceedings until the period for filing a petition for writ of certiorari has expired.

The Vaccine Act addresses requests for suspension of proceedings on a petition. The Act requires a special master to "suspend the proceedings [on a petition] one time for 30 days on the motion of either party." 42 U.S.C. § 300aa-12(d)(3)(C) ("In conducting a proceeding on a petition a special master shall suspend the proceedings one time for 30 days on the motion of either party.") (emphasis added). The Act further provides that "[a]fter a motion for suspension is granted, further motions for suspension by either party may be granted by the special master, if the special master determines the suspension is reasonable and necessary, for an aggregate period not to exceed 150 days." Id. In Widdoss v. Secretary of Health and Human Services, 989 F.2d 1170 (Fed. Cir. 1993), the Federal Circuit addressed periods of suspended proceedings under the Vaccine Act, stating:

> [T]he legislative history demonstrates that periods of suspension serve only to enlarge the legally available time period in which to render a decision on a petition. Such extensions are authorized if the special master determines that "further time is necessary for . . . action on the petition to proceed."

Id. at 1175 (quoting H. R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 516 (1986), reprinted in 1989 U.S.C.C.A.N. at 3119) (emphasis added). Here, because petitioner's pending motion for stay of proceedings is the first request, by either party, for a suspension of the proceedings in this case, the Vaccine Act compels the granting of a thirty-day stay of proceedings. See 42 U.S.C. § 300aa-12(d)(3)(C).

Whether a thirty-day continuance will suspend this proceeding until the period for filing a petition for writ of certiorari has expired requires an examination of the timing rules for filing a petition for writ of certiorari. Title 28, United States Code, Section 2101(c) addresses the timing for filing a petition for a writ of certiorari to the United States Supreme Court. The statute provides, in pertinent part:

> . . . [A]ny writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or

> decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C.A. § 2101(c). Rule 13.1 of the United States Supreme Court addresses the timing for filing a petition for a writ of certiorari as follows:

> Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.

Sup. Ct. R. 13.1. The Supreme Court Rules make clear that "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice)." Sup. Ct. R. 13.3. The Supreme Court Rules permit a Justice, for good cause, to "extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days." Sup. Ct. R. 13.5. However, an application to extend the time to file a petition for a writ of certiorari is disfavored. Id.; see also Penry v. Texas, 515 U.S. 1304, 1305 (1995) (stating that although that Supreme Court Rules permit a Justice to "extend the time to file for up to 60 days 'for good cause shown,' [o]ur Rules specify, however, that '[a]n application to extend the time to file a petition for a writ of certiorari is not favored'") (internal citations omitted).

Recently, in Limtiaco v. Camacho, 127 S. Ct. 1413 (2007), the Supreme Court stated that "[o]nly 'a genuinely final judgment' will trigger § 2101(c)'s 90-day period for filing a petition for certiorari in this Court." Id. at 1417 (quoting Hibbs v. Winn, 542 U.S. 88, 98 (2004)). In Hibbs, the Supreme Court stated that, for purposes of evaluating the timeliness of a writ for certiorari, consideration of the finality of an appellate court's "judgment" is critical. 542 U.S. at 98. The Supreme Court explained that the finality of an appellate court's judgment is called into question if: (1) an appeals court receives a timely petition for rehearing; (2) an appeals court appropriately decides to entertain an untimely rehearing petition; or (3) an appeals court, on its own initiative, directs the parties to address whether rehearing should be ordered in a case. See id. at 98 (citations omitted). The Supreme Court further explained that if the finality of the appellate court's judgment is uncertain because, as in each of three described circumstances, there is a question of "whether the court will modify the judgment and alter the parties' rights[,] . . . [then] there is no 'judgment' to be reviewed." id. (citations and internal quotations omitted). Conversely stated, in the absence of appellate court action that would raise a

question of whether that court would modify its judgment, the ninety-day time limit for applying for a writ of certiorari is undisturbed.

The Federal Circuit issued the Markovich decision on February 20, 2007. See Markovich, 477 F.3d 1353. As the Practice Notes following Rule 35 of the Federal Rules of Appellate procedure indicate, "[f]iling a petition for a panel rehearing or for rehearing en banc [before the Federal Circuit] is not a prerequisite to filing a petition for a writ of certiorari in the Supreme Court." Fed. R. App. P. 35, Practice Note. And, as informed by the United States Code and the Supreme Court's Rules, the undersigned calculates that, absent a timely filed petition for rehearing, a petition for writ of certiorari to review the Markovich decision must be filed by May 21, 2007. See 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. To date, no petition for rehearing of the Markovich decision has been filed.

For petitioner's request for a continuance of this proceeding to be effective until the period for filing a petition for writ of certiorari has expired, it is the view of the undersigned that a suspension of proceedings until May 21, 2007, a period of time greater than the thirty-day suspension granted as a matter of right upon a party's request under the Act, is necessary and not unreasonable under these circumstances. See 42 U.S.C. § 300aa-12(d)(3)(C). Informed by the legislative history of the Vaccine Act, the Federal Circuit in Widdoss recognized that an extension of a period of suspension of proceedings under the Vaccine Act is authorized "if the special master determines that 'further time is necessary for ... action on the petition to proceed'" Widdoss, 989 F.2d at 1175 (quoting H. R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 516 (1986), reprinted in 1989 U.S.C.C.A.N. at 3119). As petitioner's counsel has observed in his letter requesting a continuance, in light of the Federal Circuit's recent decision in Markovich, petitioner's case must be dismissed unless on a petition for writ of certiorari to the Supreme Court, the law is reversed, an action that would petitioner to proceed with her claim. In this circumstance, affording petitioner this modest period of a suspension of the proceedings to learn whether a petition for writ of certiorari will be filed is not unreasonable.

IV. Conclusion

For the foregoing reasons, the undersigned **GRANTS** petitioner's request for a continuance until May 21, 2007. The undersigned **DEFERS** issuing its ruling on respondent's motion to dismiss until that time. Absent a timely filing of petition for writ of certiorari, the undersigned will dismiss petitioner's Program claim.

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Special Master