

OFFICE OF SPECIAL MASTERS

(Filed: February 10, 2006)

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STEVEN KINZER and TRESA KINZER,)	
legal representatives of a minor child,)	
SAMUEL KINZER,)	
)	
Petitioners,)	
)	
v.)	No. 05-1401V
)	UNPUBLISHED
)	
SECRETARY OF THE DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
-----)	

DECISION¹

_____ On December 30, 2005, petitioners, Steven and Tresa Kinzer, as legal representatives of their minor son, Samuel Kinzer (Samuel), filed a petition pursuant to the National Vaccine Injury Compensation Program² (the Act or the Program). The

_____ ¹Vaccine Rule 18(b) states that all of the decisions of the special masters will be made available to the public unless the decisions contain trade secrets or commercial or financial information that is privileged or confidential, or the decisions contain medical or similar information the disclosure of which clearly would constitute an unwarranted invasion of privacy. When a special master files a decision or substantive order with the Clerk of the Court, each party has 14 days within which to identify and move for the redaction of privileged or confidential information before the document’s public disclosure. If the special master agrees, upon review of the party’s motion, that the identified material falls within the described categories of protected information, the special master shall delete that material from the publicly accessible document.

² 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

petition alleges: “Samuel suffered from an over exposure to thimerosal. [Samuel’s] autism was caused-in-fact by the thimerosal contained in the DPT vaccine, the Haemophilus vaccine, and the Oral Polio Vaccine.” Petition (Pet.) at 2-3.

On January 25, 2006, respondent filed a document styled as “Respondent’s Rule 4(c) Report and Motion to Dismiss” (R. Report). In the motion, respondent requests that the special master dismiss this petition for lack of jurisdiction based on the untimeliness of the filing. R. Report at 1.

On February 6, 2006, the undersigned conducted a telephonic status conference with the parties. During this conference, petitioners’ counsel indicated that he would file, no later than February 8, 2006, a response to respondent’s motion to dismiss. See Order, filed Feb. 7, 2006. On February 7, 2006, petitioners’ counsel telephoned the court and respondent’s counsel to report that he would not file a response. This matter is now ripe for decision.

I. FACTUAL BACKGROUND

Samuel was born on March 13, 1997. Pet. at 1.³ Samuel received DTaP⁴ and haemophilus influenzae type B⁵ vaccines on May 30, 1997, July 27, 1997, September 19, 1997, and March 30, 1998. Petitioner’s Exhibit (P. Ex.) 5. On May 30, 1997, July 27, 1997, and September 19, 1997, Samuel also received polio vaccinations. Id. Samuel received measles, mumps, and rubella (MMR)⁶ immunizations on March 30, 1998, and

citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

³As respondent notes in its Rule 4(c) Report, petitioners have referred in the petition to Samuel’s prenatal, delivery, and pre-vaccination medical records, but they did not file any of these records with the petition. R. Report at 1; see also Pet. at 1.

⁴The DTaP vaccine is “a combination of diphtheria toxoid, tetanus toxoid, and pertussis vaccine; administered intramuscularly for simultaneous immunization against diphtheria, tetanus, and pertussis.” Dorland’s Illustrated Medical Dictionary 1998 (30th ed. 2003).

⁵The haemophilus influenzae type b vaccine protects against infection by the haemophilus influenzae type b bacterium. Dorland’s Illustrated Medical Dictionary, supra note 4, at 1999.

⁶ The MMR vaccine is “a combination of live attenuated measles, mumps, and rubella viruses, administered subcutaneously for simultaneous immunization against measles, mumps, and rubella.” Dorland’s Illustrated Medical Dictionary, supra note 4, at 1999.

October 7, 2002. Id. On March 16, 1997, May 30, 1997, and September 19, 1997, Samuel received hepatitis B⁷ vaccinations, and on March 30, 1998, he received a varicella⁸ immunization. Id.

On January 28, 2002, Patricia L. Nash, M.D., a developmental pediatrician, evaluated Samuel because Samuel's parents were concerned about his limited speech and his difficulty relating to others. P. Ex. 8 at 1. Dr. Nash noted that Samuel attended Pickaway County Special Needs preschool and had begun speech therapy after a speech and language evaluation, performed in November 1999, revealed a speech delay. Id.

In recording Samuel's medical history, Dr. Nash noted:

Samuel was the 5 lb. 2 oz. product of a 34 week pregnancy complicated by twin gestation, toxemia, nausea and vomiting, and a urinary tract infection Delivery was induced because of toxemia. He was hospitalized for 7 days. He had hyperbilirubinemia and was treated with phototherapy. Samuel's medical history includes recurrent ear infections, for which he has had pressure equalization tubes placed twice, pneumonia, asthma, bronchitis, and constipation. He has also had his adenoids removed Samuel spoke early, at the age of twelve months. By the time he turned 2 years old he had stopped talking. He made some sounds and only very few words.

P. Ex. 8 at 2 (emphasis added).

Dr. Nash also noted that Dr. Kasten of the Developmental Disabilities Clinic at

⁷ The hepatitis B vaccine is "a noninfectious viral vaccine derived by recombination from hepatitis B surface antigen and cloned in yeast cells; administered intramuscularly for immunization of children and adolescents and of persons at increased risk for infection." Dorland's Illustrated Medical Dictionary, supra note 4, at 1999.

⁸The varicella vaccination is "a preparation of live, attenuated human herpesvirus 3 (varicella-zoster virus) administered subcutaneously for production of immunity to varicella and herpes zoster." Dorland's Illustrated Medical Dictionary, supra note 4, at 2000. Varicella is commonly known as chickenpox. Id. at 2008. Herpes zoster, also called shingles, is "an acute infectious, usually self-limited, disease believed to represent activation of latent human herpesvirus 3 in those who have been rendered partially immune after a previous attack of chickenpox." Id. at 845.

Children’s Hospital had evaluated Samuel on July 3, 2001. P. Ex. 8 at 2.⁹ After ordering a series of laboratory tests, Dr. Kasten “diagnosed Samuel with autism spectrum disorder.” Id. Following her examination of Samuel, Dr. Nash also opined that Samuel suffered from Autism Spectrum Disorder. P. Ex. 8 at 4. Dr. Nash noted that Samuel’s Gillium Autism Rating Scale score “places him in the above average category for having autism.” Id.

David Hammer, Ph.D., a psychologist, examined Samuel on January 28, 2002. P. Ex. 9 at 1. Based on his examination and his review of Samuel’s past records, Dr. Hammer diagnosed Samuel with “Persuasive Developmental Disorder in the form of Autism and associated delays [in] language, social and emotional functioning.” P. Ex. 9 at 2.¹⁰

II. DISCUSSION

____ Respondent argues that, based on the petition and the limited medical records filed, “it is clear that this case was filed well beyond the relevant statutory limitations period.” R. Report at 5. Respondent also argues that equitable tolling does not apply to claims arising under § 16(a)(2) of the Act. Id. Accordingly, respondent contends that this petition should be dismissed. Id. After reviewing the record and the relevant law, the undersigned agrees with respondent that this petition must be dismissed.

In ruling on a motion to dismiss, the court “is generally ‘obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff’s favor.’” Ullman v. United States, 64 Fed. Cl. 557, 564 (2005) (quoting Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995)). As the non-moving party, petitioner bears the burden of establishing jurisdiction by a preponderance of the evidence. See Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (Fed. Cir. 1998). In this case, petitioners’ counsel does not oppose respondent’s motion.

Section 16(a)(2) of the Act requires the filing of a vaccine petition within 36 months after the date of the first symptom or manifestation of onset of the alleged vaccine-injury. 42 U.S.C. § 300aa-16(a)(2). In Goetz v. Secretary of HHS, 45 Fed. Cl. 340 (1999), aff’d, 4 Fed. Appx. 827 (Fed. Cir. 2001) (unpublished opinion), the Court of

⁹Although the records filed in this case do not indicate Dr. Kasten’s first name or area of specialty, these facts are not in dispute.

¹⁰None of the records to which Dr. Hammer refers and upon which he appears to have relied in his evaluation of Samuel has been filed with the petition in this case.

Federal Claims discussed the requirements of § 16(a)(2):

[I]t is clear that Congress intended the cause of action in a Vaccine Injury Table case to accrue upon occurrence of the first symptom of an injury, not upon the first identification of a link between the injury and the vaccination. Thus, the statute of limitations commences to run “upon the first symptom or manifestation of the onset of the injury and [is] not to be delayed until the time the petitioner has actual knowledge that the vaccine recipient suffered an injury compensable under the Vaccine Act.”

Id. at 341 (citing Brice v. Secretary of HHS, 36 Fed. Cl. 474, 478 (1996), aff’d 240 F.3d 1367, 1373 (Fed. Cir. 2001)); see also Childs v. Secretary of HHS, 33 Fed. Cl. 556, 557 n.2 (1995) (agreeing “with the holding of Melendez v. Secretary of HHS, No. 94-103V (Cl. Ct. Jan. 6, 1995), that lack of knowledge of a connection between the injury and the vaccination is not grounds for tolling”).

According to petitioners, Samuel’s development slowed between 12 and 24 months of age, and “[b]y the time Samuel turned 2 years old [on March 13, 1999,] he had stopped communicating verbally.” Pet. at 2. According to the medical records filed in this case, Dr. Kasten diagnosed Samuel with “autism spectrum disorder” on July 3, 2001. P. Ex. 8 at 2. On January 28, 2002, Samuel again received autism diagnoses from Drs. Nash and Hammer. P. Ex. 8 at 4; P. Ex. 9 at 1.

“A diagnosis of [an injury] meets the statutory definition of ‘manifestation of onset’ [because] [t]he diagnosis constitute[s] a recognition by a doctor of [the injured party’s] medical condition.” Reed v. Secretary of HHS, 2005 WL 3729271, at *4 (Fed. Cl. Dec. 30, 2005). At the time of diagnosis, petitioner is “on notice that a responsible person within the medical community [has] identified a present condition.” Id. Based on the diagnosis of Samuel’s autism disorder by medical providers on July 3, 2001, and January 28, 2002, petitioners’ claim does not meet the timeliness requirement of the Act. Because this petition was not filed until December 28, 2005, almost a year after the allowable 36 month period following a later date of manifested onset of Samuel’s autism spectrum disorder, petitioners’ claim is time-barred.

“Timely filing is a pre-condition to suit.” Reed, 2005 WL 3729271, at *3 (Fed. Cl. Dec. 30, 2005). When a petition is filed outside of the Act’s statute of limitations period, the special master may not exercise jurisdiction. Johns-Manville Corp. v. United States, 893 F.2d 324, 327 (Fed. Cir. 1989) (“[W]here the court has no jurisdiction, it has no power to do anything but strike the case from its docket.”). And, the United States Court of Appeals for the Federal Circuit has held that equitable tolling is not available for

claims arising under § 16(a)(2). See Brice v. Secretary of HHS, 240 F.3d 1367, 1374 (Fed. Cir. 2001). The Federal Circuit also noted that a “‘statute of limitations is a condition on the waiver of sovereign immunity by the United States,’ and courts should be ‘careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended.’” Id. at 1370 (citations omitted). Because petitioners’ untimely filing creates a jurisdictional bar to further proceedings, the undersigned must dismiss this petition.

III. CONCLUSION

Because petitioners filed this action after the expiration of the limitations period imposed by § 16(a)(2) of the Vaccine Act, the undersigned must dismiss this petition for lack of jurisdiction. Respondent’s motion to dismiss is **GRANTED**. The Clerk of the Court shall enter judgment accordingly.

IT IS SO ORDERED.

Patricia E. Campbell-Smith
Special Master