

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: May 23, 2007)

DO NOT PUBLISH

TERRY ALLEN JONES,)	
)	
Petitioner,)	
)	
v.)	No. 07-0313V
)	Statute of Limitations; Dismissal
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

DECISION¹

Petitioner, Terry Allen Jones (Mr. Jones), seeks compensation under the National Vaccine Injury Compensation Program (Program).² Mr. Jones filed a petition on **May 21, 2007**. Mr. Jones appears *pro se*.

Mr. Jones proffered some medical records with his petition. *See* Petitioner’s exhibit (Pet. ex.) 1. The records reflect that Mr. Jones received a “T[etanus]d[iphtheria] booster” vaccination on **June 2, 2003**. Pet. ex. 1 at 3; *see also* Pet. ex. 1 at 1. Mr. Jones insists that he “suffered an *immediate* reaction (*within 12 hours*)” to the June 2, 2003 vaccination. Petition (Pet.) at 1 (emphasis added). According to Mr. Jones, he experienced “fever, stomach pains, irritation of his mouth and sinuses, allergies to smoke and other chemicals, burning and sensation of warmth on his skin, and later tetanus symptoms that would cause him excruciating jaw pain months and years later.” *Id.*

¹ As provided by Vaccine Rule 18(b), each party has 14 days 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” will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

The United States is sovereign, and no one may sue the United States without the sovereign's waiver of immunity. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The Program represents a waiver of sovereign immunity. *See, e.g., Markovich v. Secretary of HHS*, 477 F.3d 1353, 1360 (Fed. Cir. 2007), citing *Brice v. Secretary of HHS*, 240 F.3d 1367, 1370 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1040 (2001). Therefore, the special master must construe "strictly and narrowly" Program provisions. *Markovich*, 477 F.3d at 1360.

A statute of limitations is a jurisdictional condition to the waiver of sovereign immunity. *United States v. Mottaz*, 476 U.S. 834, 841 (1986). The statutory limitations period governing Mr. Jones's petition is contained in § 300aa-16(a)(2). Under § 300aa-16(a)(2), a petitioner seeking compensation related to an injury associated with a vaccine administered after October 1, 1988, may not file a petition "after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset" of the injury.

Mr. Jones claims that he sustained a vaccine-related injury in early June 2003. *See* Pet. at 1. Based upon Mr. Jones's allegations in his petition, the statute of limitations lapsed in early June 2006. *See* § 300aa-16(a)(2). Mr. Jones did not file a Program petition until May 21, 2007. Thus, on its face, Mr. Jones's petition is barred by § 300aa-16(a)(2).

Mr. Jones recognizes apparently his dilemma. He "requests that the timely filing statute be waived given the severity, extent, and duration of his injuries and the fact that the state has in fact acted to delay and deny his claims and to obstruct justice in his cases." Pet. ¶ 26. The special master understands Mr. Jones to assert the application of the doctrine of equitable tolling.

The doctrine of equitable tolling "permits a court to forgive a late filing where compelling circumstances indicate that such a result would be equitable." *Lombardo v. Secretary of HHS*, 34 Fed. Cl. 21, 25 (1995). In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), the Supreme Court announced that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." The Court cautioned that "the principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect." *Id.* at 96. Rather, in noting that "[f]ederal courts have typically extended equitable relief only sparingly," *id.*, the Court identified just two "situations" in which the Court has "allowed" equitable tolling: "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period or where the complainant has been induced or tricked by his adversary's misconduct into allowing the deadline to pass." *Id.* (citations omitted). However, the United States Court of Appeals for the Federal Circuit has held as a matter of law that equitable tolling is not available for claims arising under § 300aa-16(a)(2). *See Brice*, 240 F.3d at 1370-1375. The special master is bound by the Federal Circuit's decision.

The special master possesses no authority to waive the limitation period in § 300aa-16(a)(2). Indeed, the special master "has no power to do anything but strike the case from [the] docket." *See Johns-Manville Corporation v. U.S.*, 893 F.2d 324, 327 (Fed. Cir. 1989) (citation omitted).

Therefore, in the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition as barred by the statute of limitations.

The clerk of court shall send Mr. Jones's copy of this decision to Mr. Jones by overnight express delivery, signature required.

John F. Edwards
Special Master