

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: August 29, 2007)

DO NOT PUBLISH

DIANE ROSE,)
as guardian ad litem of her grandchild,)
CHELSEA ROSE,)
)
Petitioner,)
)
v.)
)
SECRETARY OF)
HEALTH AND HUMAN SERVICES,)
)
Respondent.)

No. 07-0575V
Statute of Limitations;
Dismissal

DECISION¹

Petitioner, Diane Rose (Ms. Rose), as guardian ad litem of her grandchild, Chelsea Rose (Chelsea), seeks compensation under the National Vaccine Injury Compensation Program (Program).² Ms. Rose filed her Program petition on **July 31, 2007**. She alleges that Chelsea suffers “Ramsey [sic] Hunt Syndrome.” Petition (Pet.) ¶ 12. Ramsay Hunt Syndrome is “herpes zoster involving the facial and auditory nerves associated with ipsilateral facial paralysis, usually transitory, and herpetic vesicles of the external ear or tympanic membrane, which also may or may not be associated with tinnitus, vertigo, and hearing disorders.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1830 (30th ed. 2003). Ms. Rose relates Chelsea’s Ramsay Hunt Syndrome to a varicella vaccine that Chelsea received on March 25, 2002. See Pet. ¶¶ 5, 12-13; see also

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.

Petitioner's exhibit (Pet. ex.) at 34. Chelsea's medical records reflect that Chelsea experienced her initial episode of Ramsay Hunt Syndrome in **May 2003**. *See, e.g.*, Pet. ex. at 162; *see also* Pet. ex. at 169 (5/3/07: "Chelsea presents with a history of recurrent Bell's palsy *for the past 4 years.*") (emphasis added).

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). Therefore, the special master must construe "strictly and narrowly" Program provisions. *Markovich*, 477 F.3d at 1360. 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. In *Markovich*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) accorded different meanings to the word "symptom" and to the phrase "manifestation of onset." *See Markovich*, 477 F.3d at 1357. According to the Federal Circuit, "either a 'symptom' or a 'manifestation of onset' can trigger the running of the statute, whichever is first." *Markovich*, 477 F.3d at 1357. And, according to the Federal Circuit, "'the first symptom of manifestation of onset,' for the purposes of § 300aa-16(a)(2), is the first event objectively recognizable as a sign of" a petitioner's alleged vaccine-related injury "by the medical profession at large." *Markovich*, 477 F.3d at 1360. Thus, the Federal Circuit confirmed that "Congress intended the limitations period to commence to run prior to the time a petitioner has actual knowledge that the vaccine recipient suffered from an injury that could result in a viable cause of action under the Vaccine Act." *Markovich*, 477 F.3d at 1358.

The special master convened an informal, yet substantive, early status conference on August 28, 2007. He discussed thoroughly the application of § 300aa-16(a)(2) and of *Markovich* to the case. He expressed that § 300aa-16(a)(2) and *Markovich* are clear. Therefore, he stated that he did not contemplate briefing on the application of § 300aa-16(a)(2) and of *Markovich* to the case. *See, e.g., Johns-Manville v. U.S.*, 893 F.2d 324, 326 (Fed. Cir. 1989), citing *The Mayor v. Cooper*, 73 U.S. (6 Wall.), 247, 250-51 (1868) (When a jurisdictional defect is apparent, the special master has "no power to do anything but to strike the case from the docket.").

Based upon Chelsea's medical records, the special master finds as a matter of fact that Chelsea suffered certainly by May 2003 manifestations of her current condition. *See* Pet. ex. at 51 (initial diagnosis of Bell's Palsy during an examination on May 12, 2003); *see also* Pet. ex. at 92 (December 20, 2004 referral letter noting that first episode of "recurrent Bell's Palsy" occurred in May 2003). Ms. Rose commenced her Program claim on July 31, 2007. *See* Pet. The special master notes that May 2003 is between 14 months and 15 months *before* the 36 months preceding July 31, 2007. Therefore, the special master rules as a matter of law that Ms. Rose filed her Program petition beyond the statute of limitations contained in § 300aa-16(a)(2).

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 contained in § 300aa-16(a)(2).

The clerk of court shall send Ms. Rose's copy of this decision to Ms. Rose by overnight express delivery.

John F. Edwards
Special Master