In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 02-1085V

Filed: January 16, 2009

TO BE PUBLISHED

SCOTT AND LAURA BONO, parents of JACKSON BONO, a minor,	*	Autism; Statute of Limitations; Markovich; Dismissal; Vaccine Injury; Heavy Metal Poisoning.
Petitioner,	*	
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Jean Martin, Wilmington, NC, for petitioners.

Linda Renzi, United States Department of Justice, Washington, DC, for respondent.

DECISION[1]

GOLKIEWICZ, Chief Special Master.

On August 29, 2002 petitioners, Scott and Laura Bono filed a Short-Form Autism Petition (hereinafter Petition) for Vaccine Compensation under the National Childhood Vaccine

[1] Because this decision contains a reasoned explanation for the undersigned's action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). 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.

Injury Act[2] (hereinafter "Vaccine Act" or the "Act") pursuant to Autism General Order #1 on behalf of their son Jackson which adopted the Master Autism Petition for Vaccine Compensation. Short-Form Autism Petition for Vaccine Compensation (hereinafter Pet) at 1.[3] In order to establish that the petition was timely filed[4] and to complete the petition by filing the statutorily required medical records, §11(c)(2), on January 15, 2008 the court ordered petitioners to file all medical records "from the period of the vaccinee's birth through either, whichever date is later, (1) the date of petition filing, or (2) the date of the vaccinee's initial diagnosis of autism, autism spectrum disorder, a speech or language delay related to an autism diagnosis, or any similar neurological disorder related to an autism diagnosis." Order filed January 15, 2008. On April 14, 2008 petitioners filed the required medical records. On May 29, 2008, respondent filed a Motion to Dismiss (hereinafter Respondent's Motion) alleging the Petition was filed outside the statutorily prescribed limitations period. Respondent's Motion to Dismiss (hereinafter R Mot.) at 1. Petitioners filed a Response contesting Respondent's Motion Dismiss (hereinafter Petitioners' Response). Petitioners' Response to Respondent's Motion to Dismiss filed June 16, 2008 (hereinafter P Resp.). Respondent filed a Reply to Petitioners' Response (hereinafter Respondent's Reply) on September 19, 2008. Respondent's Reply to Petitioners' Response to Respondent's Motion to Dismiss filed September 19, 2008 (hereinafter R Reply). The issue of whether petitioners' claim was timely filed is now ripe for resolution.

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[2] The National Vaccine Injury Compensation Program comprises 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 et seq. (West 1991 & Supp. 2002) ("Vaccine Act" or the "Act"). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

[3] By electing to file a Short-Form Autism Petition for Vaccine Compensation petitioners alleged that

> [a]s a direct result of one or more vaccinations covered under the National Vaccine Injury Compensation Program, the vaccinee in question has developed a neurodevelopmental disorder, consisting of an Autism Spectrum Disorder or a similar disorder. This disorder was caused by a measles-mumps-rubella (MMR) vaccination; by the "thimerosal" ingredient in certain Diphtheria-Tetanus-Pertussis (DTP), Diphtheria-Tetanus-acellular Pertussis (DTaP), Hepatitis B, and Hemophilus Influenza Type B (HIB) vaccinations; or by some combination of the two.

Autism General Order # 1 filed July 3, 2002, Exhibit A, Master Autism Petition for Vaccine Compensation at 2.

[4] In relevant part, the Vaccine Act provides:

> a vaccine set forth in the Vaccine Injury Table which is administered after [October 1, 1988], if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the **expiration of 36 months** after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury . . . .

§ 16(a)(2) (emphasis added).

Facts

The facts presented in this matter are uncontested, and therefore the undersigned will only briefly describe Jackson's relevant medical history. See P Resp. at 2.

Jackson was born on March 25, 1989 and received a number of vaccinations between June 1, 1989 and August 9, 1990. Petitioners' Exhibit 1(hereinafter P Ex.) at 2, 4 . Respondent and petitioner agree the first symptom of Jackson's later diagnosed injuries was on October 20, 1990 when presumably either Laura or Scott Bono wrote in a record referencing "18 MOS" and the date "10/20/90" that "[t]his is when I told Doc my concerns. Had 7-20 words but not talking now." P Ex. 3 at 5. The undersigned also notes the term "Pervasive Developmental Disorder," written in Jackson's records from Virginia Family Practice Associates, as one of several items listed under the heading "Major Problems" with "Date Onset" as "??10/20/90" and "Date Recorded" as "10/20/90." Id. at 2. Jackson was diagnosed with "partial autistic syndrome" on April 13, 1993. P Ex. 4 at 31.

Jackson was also later diagnosed as suffering from Childhood Idiopathic Language Deterioration ("CHILD") and Landau-Keffner Syndrome. P Ex. 5 at 16; P Ex. 7 at 50-53.

Issue

The sole issue presented at this stage in the proceedings is whether petitioners' Short-Form Petition for Vaccine Compensation was filed within "36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury." §16(a)(2). For the reasons set forth below the undersigned answers the question in the negative and thus must dismiss this petition as untimely filed.

Legal Standard

Pursuant to the Vaccine Act petitioners may be compensated for injuries caused by certain vaccines. See generally §§ 10 - 34. However, to be eligible for any compensation, the Vaccine Act provides statutory deadlines for filing program petitions at § 16. In relevant part, the Vaccine Act provides:

> a vaccine set forth in the Vaccine Injury Table which is administered after [October 1, 1988], if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may be filed for compensation under the Program for such injury after the **expiration of 36 months** after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury . . . .

§16(a)(2) (emphasis added). The Vaccine Act is a waiver of the United States' sovereign immunity and accordingly "must be strictly and narrowly construed." Markovich v. Sec'y of

HHS, 477 F.3d 1353, 1360 (Fed. Cir. 2007). The Federal Circuit has instructed "courts should be careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended." Id. (citing Brice v. Sec'y of HHS, 240 F.3d 1367, 1370 (Fed. Cir. 2001)). The Circuit's decision in Markovich directly addressed the question of "what standard should be applied in determining the date of 'the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury,'" Markovich, 477 F.3d at 1356, by holding "'the first symptom or manifestation of onset,' for purposes of §300aa-16(a)(2), is the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large." Id. at 1360.[5] Accordingly, petitioners have 36 months from the first recognizable sign of their alleged vaccine injury to file their claim.

The Circuit explained in Markovich that "the terms of the Vaccine Act demonstrate 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 (citing Brice v. Sec'y of HHS, 36 Fed. Cl. 474, 477 (1996) (Andewelt, J) aff'd on other grounds, 240 F.3d 1367 (Fed. Cir. 2001)). The Circuit elaborated that by choosing to start "the running of the limitations period on the date the first symptom or manifestation of the onset occurs, Congress chose to start the running of the statute before many petitioners would be able to identify, with reasonable certainty, the nature of the injury." Id. at 1358 (citing Brice, 36 Fed. Cl. at 477). The Court noted that the Act has "consistently been interpreted" to include "subtle symptoms or manifestations of onset" as triggers of the Act's statute of limitations. Id. The Court stressed that the words "symptom" and "manifestation of onset" are in the disjunctive as used in the Act and that the words have different meanings. Markovich, 477 F.3d at 1357. Thus, **symptom** "may be indicative of a variety of conditions or ailments, and it may be difficult for lay persons to appreciate the medical significance of a symptom with regard to a particular injury," whereas a **manifestation of onset** "is more self-evident of an injury and may include significant symptoms that clearly evidence an injury." Id. Accordingly, the Court found that the Act's statutory standard of first symptom or manifestation of onset could include subtle symptoms that a

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[5] Although not directly stated, the Markovich decision appears to have found that Setnes v. Sec'y of HHS, 57 Fed. Cl. 175 (2003) (Futey, J.) was incorrectly decided 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. The Setnes court stated that because the symptoms of autism develop "insidiously over time" and the child's behavior cannot readily be connected to an injury or disorder, the court's inquiry into the onset of the autistic condition is not limited to a determination of when the first symptom or manifestation of the condition occurred, but rather is informed by the child's subsequent medical or psychological evaluations of when the "manifestation of onset" occurred. Id. at 181. The Federal Circuit found a "significant problem with the rationale of Setnes" in that Setnes "effectively" required evidence of a "symptom *and* manifestation" whereas the Act requires either a symptom or manifestation of onset, whichever occurs first, to trigger the statute of limitations. Markovich, 477 F.3d at 1358; Cloer v. Sec'y of HHS,-- Fed. Cl.--, 2008 WL 5248401 at *7 (2008) (Block, J.) ("[T]he validity of Setnes was made doubtful by the Federal Circuit in Markovich."); see also Lemire v. Sec'y of HHS, No. 01-617V, slip. op. at 3 (Fed. Cl. 2008) (Baskir, J.) (In Markovich, "[t]he Federal Circuit criticized the rational in Setnes and rejected its subjective standard as to the trigger date of the limitations period.").

petitioner would recognize "only with the benefit of hindsight, after a doctor makes a definitive diagnosis of the injury," Markovich, 477 F.3d at 1358 (citing Brice, 36 Fed. Cl. at 477), and would be "recognizable to the medical profession at large but not necessarily to the parent." Markovich, 477 F.3d at 1360 (citing Goetz v. Sec'y of HHS, 45 Fed. Cl. 340, 342 (1999)); see also Cloer 2008 WL 5248401 at *9 (explaining Markovich holds "the limitations period begins to run at the first occurrence of a symptom even though an exact diagnosis may be impossible until some future date when more symptoms or medical data are forthcoming."); Lemire, slip. op. at 6 ("Congress chose to start the running of the statute before many petitioners would be able to identify, with reasonable certainty, the nature of the injury."). Thus, the Circuit in interpreting the Act's statute of limitations, rejected applying a "subjective standard that focuses on the parent's view" of the timing of onset in favor of an "objective standard that focuses on the recognized standards of the medical profession at large." Markovich 477 F.3d at 1360.

Discussion

Petitioners do not dispute respondent's contention that the first symptom of Jackson's alleged injuries occurred in 1990. Nor do petitioners dispute that Jackson was diagnosed with partial autistic syndrome in 1993. Thus, it would be appear axiomatic that petitioners' claim filed in 2002 falls outside of the Vaccine's Act's statute of limitations which requires a petition be filed within "36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury." §16(a)(2). Nonetheless, petitioners' contend the Petition in the instant case was timely filed, alleging reliance on the Circuit's opinion in Markovich. P Resp at 3. Petitioners' allege that "[i]n fact, there has been an incorrect application and misinterpretation of the exact holding in Markovich." Id. at 6.

Petitioners argue that the holding in Markovich stating that the first symptom or manifestation of onset under §16(a)(2) 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, instructs that the "medical profession at large must recognize this condition, disorder, or disease as having the potential to be a 'vaccine related injury.'" P Resp at 6 (emphasis in the original). Thus, petitioners contend that since "[n]either autism or autism spectrum disorder is recognized by the medical community at large as being a vaccine injury," Id. at 7, the statute of limitations has not even commenced running in the instant case. Id. at 9 ("Until such time as the medical profession at large recognizes autism as being a potential vaccine-related injury, then the statute of limitations has yet to run."). As petitioners contend, their "argument is simply that the full holding of Markovich must be given consideration and the Respondent and this Court have previously misinterpreted the Federal Circuit's ruling in [Markovich]." Id. For a number of reasons, the undersigned disagrees.

Petitioners' counsel presented the identical argument in a case before my colleague, Arnold v. Sec'y of HHS, No. 02-1084V, 2008 WL 4054354 (Fed. Cl. Spec. Mstr. Aug. 19. 2008). As my colleague explained, petitioners' counsel's argument is erroneous for several reasons.

First, the statute itself does not refer to the medical profession. Courts should not add qualifications to a statute of limitations. "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." Holmberg v. Armbrecht, 327 U.S. 392, 395 (1945). "Our duty is limited to interpreting the statute as it was enacted, not as it arguably should have been enacted." Beck ex rel. Beck v. Sec'y of Health & Human Servs., 924 F.2d 1029, 1034 (Fed. Cir. 1991).

The second reason relates to the first. Notwithstanding the Arnold's arguments, Markovich did not change the process for determining when a claim to seek compensation pursuant to the National Vaccine Injury Compensation Program accrues. Consistent with Brice v. Sec'y of Health & Human Servs., 240 F.3d 1367, 1373 (Fed. Cir. 2001), and Weddell v. Sec'y of Health & Human Servs., 100 F.3d 929, 931 (Fed. Cir. 1996), Markovich states "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 Arnolds argue that "the full holding of Markovich must be given consideration." Pet'r Br. at 9; accord id at 5-6. This proposition is not controversial. Decisions of the Federal Circuit are binding upon Special Masters. 42 U.S.C. § 300aa–12(f).

The Arnolds, however, err in their view of what the "holding" of Markovich is. In determining what is the "holding" of Markovich, the actions of the court are more important than the words in the decision. Ingram v. Comm'r of Social Sec. Admin., 496 F.3d 1253, 1265 (11th Cir. 2007). In contrast to a holding, dicta are "statements made by a court that are unnecessary to the decision in the case, and therefore[,] not precedential (although [they] may be considered persuasive)." National American Ins. Co. v. United States, 498 F.3d 1301, 1306 (Fed. Cir. 2007) (quotation marks deleted and brackets in original). According to the United States Supreme Court, "the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979).

Arnold, 2008 WL 4054354 at * 2.

As Special Master Moran discussed in the Arnold decision, in Markovich it appears undisputed that Ashlyn Markovich suffered from seizure disorders caused by certain vaccinations. Arnold, 2008 WL 4054354 at *3 citing Markovich, 477 F.3d at 1356. See also Wilkerson v. Sec'y of HHS, No. 05-232V, 2008 WL 4636329 at *10 (Fed. Cl. Spec. Mstr. Set. 30, 2008). The issue of whether Ashlyn's injuries were "vaccine related" or not was not before

the Circuit in Markovich. Thus, for the Circuit's purposes in Markovich, the injuries claimed by petitioners in that case were considered "vaccine related" without further analysis by the court as the parties conceded this point. Arnold, 2008 WL 4054354 at *3 . Accordingly, as Special Master Moran explained the term "vaccine" in the phrase "vaccine injury," from the Markovich holding "the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large," Markovich, 477 F.3d at 1360, is thus considered "dictum," and therefore not part of the Markovich holding, nor binding authority. Arnold, 2008 WL 4054354 at *3.[6]

The above analysis of Markovich, as my colleague pointed out, is consistent with the Circuit's decision in Brice. As the Circuit repeated in Markovich, the Brice court in its rejection of the application of equitable tolling to claims arising under the Vaccine Act stated under § 16(a)(2) "the statute of limitations here begins to run upon the first symptom or manifestation of the injury, even if the petitioner reasonably would not have known at that time that the vaccine had caused an injury." Brice, 240 F.3rd at 1373; Markovich 477 F.3d at 1358. Markovich does not distinguish Brice, nor does Markovich "require that the medical community accept an injury as being caused by a vaccine before the statute of limitations begins to run." Arnold at *3. The undersigned agrees completely with my colleague's analysis of this issue.

The undersigned also notes that Judge Block addressed recently a similar argument in the Cloer case, where petitioners argued the statute of limitations should not begin to toll until such time as "it was known that the vaccine caused the complained-of specific injury." Cloer 2008 WL 5248401 at *9. Judge Block rejected this argument explaining "all of this is contrary to Markovich, which held that the limitations period begins to run at the first occurrence of a symptom even though an exact diagnosis may be impossible until some future date when more symptoms or medical data are forthcoming. Logical or not, unfair or not, this is what Congress intended." Id. (internal citations omitted). Petitioners in this case have not advanced a single new argument that calls into question the reasoning of these prior opinions.

There is also a very practical reason to reject petitioners' arguments. As respondent correctly explains, petitioner is attempting to escape the statute of limitations standard set in Markovich by claiming that the medical community does not recognize autism as a vaccine-related injury, while at the same time having filed a vaccine-related claim for autism. R. Reply at 5; see §11(c). The Federal Circuit rejected an analogous effort by the Markovich's to utilize the symptom of eye blinking as support for causation while arguing that the same eye blinking did not start the running of the statute of limitations. Markovich, 477 F.3d at 1359. As the Federal Circuit found, petitioners cannot utilize the same medical information in contradictory ways to meet different Vaccine Act provisions.

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[6] Further, read in context, it is perfectly reasonable to read the Circuit's use of the phrase "vaccine injury" as referencing nothing more than the obvious - the injury a petitioner alleges as a vaccine-related injury. See Wachol v. Sec'y of HHS, No. 07-93V, 2008 WL 2275564 at *2 (Fed. Cl. Spec. Mstr. May 14, 2008); see also §11(c) (lists the required contents of a "petition for compensation under the Program for a vaccine-related injury or death"). That is in fact what occurred in this case as petitioners filed a Petition alleging a vaccine-related claim of autism.

Petitioners present no refinement to the arguments previously presented in Arnold and Cloer. Petitioners' arguments amount to nothing more than a creative attempt to circumvent the clear standard espoused in Markovich. For the reasons previously expressed by my colleague in Arnold and Judge Block in Cloer, the undersigned likewise rejects petitioners' arguments that 16(a)(2) does not begin tolling until the medical community recognizes the complained of injury as a "vaccine injury."

Lastly, petitioners contend, in the alternative, that Jackson has a "diagnosis of heavy metal poisoning" alleging there are "toxic mercury levels in Jackson...due to the Thimerosal contained in the vaccinations he received." P Resp at 12 citing P Ex 11 at 1. Petitioners thus argue that §16(a)(2) should not begin tolling until the "'first symptom or manifestation of onset' of mercury toxicity was seen in Jackson . . . in October of 2000 when mercury was found in his system by pulling it out through chelation. Id., citing P Ex. 10 at 21.[7]

The undersigned notes as an initial matter that petitioners failed to develop this "alternative argument" in any meaningful sense. Nor does the undersigned find the argument persuasive. It appears to the undersigned that petitioners added this argument with little thought and even less idea of its meaning or impact on the statute of limitations issue. First, "heavy metal poisoning" would appear to be an alleged **cause** of an injury, for example "heavy metal poisoning" is akin to "over vaccination" which in turn may cause an injury such as seizures. The undersigned fails to see "heavy metal poisoning" as an injury itself. Since the statute of limitations begins to run from the first symptom of an alleged injury, not a cause, heavy metal poisoning has no relevance to the statute of limitations issue. Again, the undersigned is uncertain what petitioners are arguing since petitioners made no effort to develop this argument in any meaningful way.

Second and more importantly, the date petitioners discovered "mercury toxicity" in Jackson's system through chelation, is tantamount to a date of diagnosis, as opposed to "the first symptom or manifestation of onset" of an injury. Although petitioners concede that "a *diagnosis* is not required for the statute of limitations to commence," P Resp. at 10, petitioners appear to be arguing to the contrary by alleging the statute of limitations should not commence until October of 2000. October of 2000 is simply the date chelation was performed on Jackson resulting in mercury being found in his system, which is tantamount to a date of diagnosis, not the date of the first symptom or manifestation of the onset of an injury. Petitioners cited to no genuine symptoms of the alleged "injury" of heavy metal poisoning. Petitioners alleged in this case that Jackson suffered the injury of autism or a similar disorder from his vaccinations. Pet. at 1. Whether or not Jackson's autism or similar disorders was caused by the heavy metal

[7] The undersigned notes, Jackson's medical records evidence that in addition to "some mercury" being pulled out through chelation, "they are pulling a lot of lead out of his system." P Ex. 11 at 1-2. Jackson's father apparently indicated to the medical care provider that the family used to have a yard with a fuel line running behind it and Jackson from 0-5 would "eat dirt in the backyard at that time." Id. at 2. Thus were this argument to survive Respondent's Motion there exists a significant issue of where Jackson's alleged diagnosis of "heavy metal poisoning" is due to the mercury or the lead found in his system. Id. at 3.

poisoning does not change the date of the first symptom of Jackson's diagnosed injuries of pervasive developmental delay, partial autistic syndrome, and childhood language deterioration, which occurred as early as 1990, as petitioners' have conceded. P Resp. at 2. This date is clearly beyond the allowable 36 months for filing. The undersigned, views this argument, as nothing more than another effort to circumvent the statute without any support in the facts and medical records of the instant matter, or case law. Accordingly, the undersigned rejects petitioners alternative contention that the statute of limitations should not begin to toll in this matter until October of 2000 when mercury was discovered in Jackson's system.

In conclusion, the parties agree the first symptoms of Jackson's injuries were exhibited in 1990, however a petition was not filed in this matter until 2002, more than "36 months after the date of the occurrence of the first symptom or manifestation of onset" of Jackson's injuries. Therefore the petition in this matter **must be dismissed**. Petitioners' claim is denied. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/Gary J. Golkiewicz
Gary J. Golkiewicz
Chief Special Master