In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-795V
Filed: January 23, 2009

TO BE PUBLISHED

JOHN HOOGACKER, a legal representative of a minor child, TRAVIS J. HOOGACKER	*	
Petitioner,	*	Statute of limitations; Untimely Filing
v.	*	Markovich; Setnes; Autism; Mercury and/or Heavy Metal Poisoning.
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Charles Marion Hughes, Jr., Talley, Anthony, et. al, Mandeville, LA for petitioner.

Katherine Carr Esposito, United States Department of Justice, Washington, DC, for respondent.

DECISION[1]

GOLKIEWICZ, Chief Special Master.

I. PROCEDURAL BACKGROUND

On November 13, 2007, petitioner filed a Petition pursuant to the National Vaccine Injury

[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.

Compensation Program[2] ("the Act" or "the Program") alleging that the vaccines given on August 10, 2001 (measles), August 31, 2001 (rubella), and October 24, 2001 (mumps) "caused-in-fact" Travis J. Hoogacker's injury. Petition (Pet.) at 1. Petitioner contends that "Travis suffers from severe mercury poisoning" and that his "developmental delay is the sequela of that brain injury caused by the MMR vaccine." Id. at 2. Respondent filed a Motion to Dismiss pursuant to Rule 21(b) on January 4, 2008, alleging that the petition was filed beyond the relevant statutory limitations period. Petitioner filed petitioner's Response to Motion to Dismiss (hereinafter P Response) on February 20, 2008. Respondent filed respondent's Reply to petitioner's Response (hereinafter R Reply) on April 7, 2008. After considering the parties' arguments in conjunction with the record of this case it is clear to the undersigned that petitioner's of an alleged injury of developmental delays, diagnosed as autism in September 2004, was untimely filed.

However, the undersigned did not immediately dismiss petitioner's claim since petitioner created some confusion in petitioner's Response to respondent's Motion to Dismiss by arguing that "The Petition is not limited to Autism. The primary purpose of the petition is to seek compensation for the diagnosis and treatment of mercury poisoning." P Response at 2 para. 6. The undersigned issued on July 24, 2008 an Order analyzing the statute of limitations issue, concluding that "there is little doubt the onset of symptoms of Travis's alleged injury occurred more than thirty-six months prior to the filing of the Petition on November 13, 2007." Order filed July 24, 2008.[3] Thus, in an effort to give petitioner every opportunity to establish a timely filing the undersigned ordered that if "petitioner intends to pursue a claim for mercury poisoning that is separate and distinct from the claim that the vaccines caused Travis's autism, petitioner **shall file within thirty days, by no later than August 22, 2008**, a response to this Order detailing why petitioner's claim of mercury poisoning should not be dismissed as untimely..." Id. at 7 (emphasis in original). Petitioner filed a Response to this Order, but failed to specifically address all of the issues laid out in the July 24, 2008 Order. P Response to Special Master's Order of July 24, 2008, filed Sept. 10, 2008. This case is now ripe for resolution.

II. FACTUAL BACKGROUND

For purposes of this decision the undersigned will limit the discussion to facts relevant for determining whether petitioner met the relevant statute of limitations period in this case. Travis J. Hoogacker was born on March 27, 2000 in New Orleans, Louisiana. Pet. at 1. Travis was the product of a multiple birth and was delivered, via cesarean section, at 36 weeks. Id. Travis was the second born of twins, weighed 6 lbs. 1 oz. and was 18.25 inches in length. Id.

---

[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] The undersigned notes the instant decision largely reiterates the undersigned's analysis of the parties arguments as presented in the July 24, 2008 Order.

Travis had Apgars of nine and ten at one and five minutes respectively. P Ex 2 at 230. Travis was seen by a pediatrician periodically during the first few years of his life and received routine childhood immunizations. Pet. at 2; P Ex 5 at 2.

The vaccines at issue in this case were received on August 10, August 31, and October 24 of 2001. Pet. at 1; P Ex 5 at 2. According to the Petition, Travis began to "show signs of developmental delays, as well as repetitive behaviors" a few months after the vaccinations at issue. Pet. at 1. Petitioner alleges that this behavior was "caused in-fact" by the vaccinations, and "more particularly, the mercury used to preserve those vaccinations." Id. Petitioner alleges that prior to his immunizations, Travis showed no signs of problem behavior and appeared to meet all milestones at the typical rate until he reached eighteen months of age. Id. (Travis reached eighteen months of age on September 27, 2001.). The first medical record that indicates developmental problems is a speech and language evaluation performed on May 16, 2002. P Ex. 7 at 1-2. This evaluation was conducted "due to parental concerns regarding speech and language development." Id. Under the Impressions, it is noted that "Travis J. Hoogacker presents with speech and language skills that are severely delayed. All areas of communication seem to be affected." P Ex 7 at 1-2. Travis met the criteria for diagnosis of Pervasive Developmental Disorder (hereinafter PDD) which includes five diagnoses, including Autism and Asperger's Disorder in September 2004. P Ex 10 at 5; Pet. at 2. On August 27, 2007, Dr. Kashi Rai indicated that Travis tested positive for "extremely high levels of heavy metal poisoning." Pet. at 2 (petitioner says incorrectly "heavy mercury poisoning"); compare P Ex 9 at 1 (tested positive for "extremely high levels of heavy metal poisoning," does not specifically state tested positive for heavy mercury poisoning).

III. 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 intend." 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,'" Id. 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. 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." Id. 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 statute of 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. Id. 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 petitioner would recognize "only with the benefit of hindsight, after a doctor makes a definitive diagnosis of the injury," Id. 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." Id. at 1360 (citing Goetz v. Sec'y of HHS, 45 Fed. Cl. 340, 342 (1999)). See also Cloer v. Sec'y of HHS, No. 05-1002V, -- Fed. Cl. -- , 2008 WL 5248401, at *9 (2008) (Block, J.) (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 v. Sec'y of HHS, No. 01-617V, slip. op. at 9 (Fed. Cl. 2008) (Baskir, J.) ("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 at 1360.

IV. PARTIES' ARGUMENTS

Respondent filed a Motion to Dismiss on January 4, 2008. Respondent, citing the Federal

Circuit's controlling authority in Markovich, notes that his review of the records discloses that the filing of this Petition on November 13, 2007, was out of time by over two years. R Motion to Dismiss at 4. Specifically, the Petition and petitioner's affidavit allege that Travis exhibited developmental delays which were caused by his immunizations within "a few months after the vaccinations" or about when Travis reached eighteen months. Pet. at 1; P Ex 6 at 2 (Travis reached eighteen months of age on September 27, 2001). Since the last vaccine was received on October 24, 2001, by petitioner's own statements the latest the Petition could legally be filed would be a few months after October 24, 2004.[4] The Petition was filed on November 13, 2007. Petitioner encounters similar problems with the medical records. Speech and language problems were noted on May 16, 2002. P Ex 7 at 1-2. Thus, based upon this record, the Petition could be filed no later than May 16, 2005. Also, Travis was diagnosed with autism on September 7, 2004. Thus, the Petition was filed more than three years from not only the first symptom or manifestation of onset, but also from the date of diagnosis of autism. Respondent argues essentially that based upon either petitioner's allegations or the contemporaneous medical records, petitioner's claim filed on November 13, 2007 was beyond the three-year period prescribed by the Act as interpreted by the Federal Circuit in Markovich. R Motion to Dismiss at 3-4.[5]

Petitioner rejoins with four primary arguments in petitioner's Response to Motion to Dismiss. P Response at 2. Petitioner's first argument relies on Setnes ex. rel. Setnes v. U.S., 57 Fed.Cl. 175 (2003) (Futey, J.) stating that when addressing the statute of limitations the court "not hinge its decision on the "occurrence of the first symptom.'" Id.; P Response at 2-3. The "inability of members of the medical profession to easily and consistently link perceived symptoms of autism to immunization within a reasonable time reflects poorly upon the lack of foresight of Congress" with regards to the thirty-six month statutory limitations period. Id.; 42 U.S.C. § 300aa-16(a)(2). Petitioner acknowledges that the legal analysis underpinning Setnes has been called into question, but posits that "the principles concerning autism established in Setnes have not been overturned and should still be considered good law." P Response at 2 n.1.

Petitioner's second argument is that the right of due process, under the 5th and 14th Amendments of the Constitution of the United States of America, supersedes the limitations period established under the Vaccine Act. P Response at 3. Petitioner argues that the thirty-six month statute of limitations as set forth in §16(a)(2) is "unconstitutional because it illegally deprives persons such as petitioner of a property right without affording them an opportunity to

[4]Given the decision in this case, it is unnecessary to determine the exact date by which petitioner needed to file.

[5]Respondent also notes that pursuant to Federal Circuit precedent, equitable tolling is not available to remedy a late filing under 16(a)(2) of the Vaccine Act. Brice v. HHS, 240 F.3d 1367 (Fed. Cir. 2001), cert. denied sub nom., Brice v. Thompson, 534 U.S. 1040 (2001). Petitioner did not make an argument for equitable tolling.

seek redress of wrongs done to them." Id. Petitioner continues, arguing that the limitations period is unconstitutional "in light of the difficulty in diagnosis as referenced in Setnes..." Id. Thus, petitioner suggests that it is the special master's duty to examine the constitutionality of the Vaccine Act. Id. at 4.

Thirdly, petitioner notes that the Petition is not limited to autism, but the "primary purpose" of the Petition is to "seek compensation for the diagnosis and treatment of mercury poisoning." Id. at 2. Petitioner was given an opportunity to further explain petitioner's statement regarding mercury poisoning, see July 24, 2008 Order, and in petitioner's Response states that "[p]etitioner has been unable to obtain additional information regarding the heavy metal poisoning and symptoms suffered." P Response to Special Master's Order of July 24, 2008, filed Sept. 10, 2008.

Lastly, petitioner states that he does not rescind his right to seek compensation from the manufacturer of the vaccines, and states that if the instant petition is dismissed, petitioner seeks to have it dismissed with prejudice to preserve this right. P Response at 4; see Robinson v. Sec'y of HHS, No. 04-0041V, 2004 WL 2677197 (Fed. Cl. Spec. Mstr. Nov 3, 2004). Respondent, in addressing petitioner's last argument, asserts that subsequent litigation regarding petitioner's claim does not involve this forum. R Reply at 7. Respondent adds that under §11(a)(2)(a) and § 21 of the Vaccine Act, the right of petitioner to bring a civil action after pursuing a petition under the Vaccine Act is expressly reserved. Id.; see §11(a)(2)(a), § 21. The undersigned finds no need to address this argument further.

Respondent stated in respondent's Reply that the only issue before the special master is whether the filing of the Petition meets the jurisdictional requirements of §16(a)(2). Id. at 2. Respondent argues that the Petition does not meeting the requirements and therefore must be dismissed. Id. Respondent also replied to petitioner's arguments that it is the special master's duty to examine the constitutionality of the limitations period and that the limitations period is unconstitutional. In addressing petitioner's constitutional arguments respondent contends that the Special Master lacks authority to hear and decide those constitutional issues. R Reply at 2. Respondent further contends that the Special Master's authority is subject to Congressional grant, and that the only authority granted by Congress is to decide whether a Petition is entitled to compensation. Id. (citing §12(d)(3)(A)). However, even assuming that the Special Master possessed the authority to hear the constitutional challenges, respondent stresses that the "eligibility of the Vaccine Act must be analyzed under the "rational basis" standard. Id. at 4-7 (citing Black v. Sec'y of HHS, 93 F.3d 781 (Fed. Cir. 1996)). Applying a rational basis analysis, the Federal Circuit and the Court of Federal Claims have found that the Act's provisions are constitutional. Black; see also Leuz v. Sec'y of HHS, 63 Fed. Cl. 602 (2005). Thus, in respondent's view the only issue for the Special Master to resolve is whether the Petition was timely filed.

V. DISCUSSION

Based on the information provided to date, in the undersigned's view there is little doubt that the onset of symptoms of Travis's alleged injury occurred more than thirty-six months prior to the filing of the Petition on November 13, 2007. See Pet. at 1 ("A few months after vaccinations, Travis began to show signs of developmental delays, as well as displays of repetitive behavior....[Travis] appeared to be meeting all milestones at a typical rate, up until he reached eighteen months of age."); P Ex 10 at 5 (Travis was diagnosed with Autism Disorder in September 2004); P Ex 6 at 2 (Travis's father reported that a few months after vaccinations administered in 2001 Travis began suffering from developmental delays); P Ex 7 at 1-2 (Travis presented with speech and language skills that were severely delayed on May 16, 2002 evaluation.) The Federal Circuit's decision in Markovich makes clear that the Act's statute of limitations begins running from the first objectively recognizable sign of the alleged vaccine injury. This sign may be "subtle" and only recognizable "with the benefit of hindsight, after a doctor makes a definitive diagnosis of the injury," and might be "recognizable to the medical profession at large but not necessarily to the parent." Markovich at 1358. In this case, by any measure - the parent, medical records recording the first apparent symptoms of speech and development problems or even diagnosis - this Petition was filed untimely.

The first symptom of onset of Travis's alleged injury appears as early as September 27, 2001 (Travis reached the age of eighteen months) by petitioner's account or May 16, 2002 (where medical records indicate Travis had speech and language delay). Even if the undersigned did not rely on petitioner's account and relied solely on the later dated medical records, petitioner's claim was not timely filed. In order for the Petition to be timely filed it needed to be filed by no later than May 16, 2005. See §16(a)(2). Petitioner's filing date of November 13, 2007 is almost two and a half years past that date, and thus untimely.

Regarding petitioner's contention that Setnes "should still be considered good law," petitioner makes no effort to develop this argument or explain how Setnes survives the Circuit's discussion and finding in Markovich. The undersigned's analysis of Setnes post-Markovich is that although not directly stated, the Markovich decision appears to have found that Setnes was incorrectly decided. See Wilkerson ex rel. Wilkerson v. Sec'y of HHS, No. 05-232V, 2008 WL 4636329, at *11-14 (Fed.Cl.Spec.Mstr. Sept. 30, 2008) (on appeal) (detailed discussion of Markovich and the Federal Circuit's consideration of the Setnes analysis). 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. The undersigned's analysis was affirmed in Cloer v. Sec'y of HHS. See Cloer, No. 05-1002V, -- 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,-- Fed. Cl.--, slip. op. at 3 (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 statute of limitations."). Accordingly, the undersigned declines to apply Setnes in analyzing the timeliness of this Petition.

Petitioner also raises a number of constitutional challenges based upon the 5th and 14th Amendments. Noteworthy is the lack of a single legal citation in support of the various challenges. While respondent contends that the Special Master lacks the authority to review these constitutional challenges, the undersigned notes that under Terran v. Sec'y HHS, it appears implicit that the special master has the power to address constitutional arguments. Terran, 195 F.3d 1302, 1310 (Fed. Cir. 1999)("Because jurisdiction is proper, the Court of Federal Claims had the power to address Terran's argument based on the Constitution."(citing Beck v. Sec'y of HHS, 924 F.2d 1029, 1036 (Fed. Cir. 1991)("It is, however, reasonable to infer that the [Vaccine] Act must confer on the Claims Court that power which is necessary to adjudicate the controversy before it."))). However, the undersigned finds it unnecessary to engage in a lengthy constitutional analysis since the criteria for eligibility has been analyzed and found to pass constitutional scrutiny. Black, 93 F.3d 781; see also Leuz v. Sec'y of HHS, 63 Fed. Cl. 602 (2005); Cloer, No. 05-1002V, -- Fed. Cl. --, 2008 WL 5248401 (2008) (Block, J.). In Cloer Judge Block wrote a thorough analysis of various petitioners' equal protection and due process constitutional challenges to the 36 month limitations period under §16(a)(2). Cloer, 2008 WL 5248401, at *6-11. It is clear that the statute of limitation is only subject to a rational basis review. Id. at *10-11. The Vaccine Act does not implicate a fundamental right. Id. at *10 (citing Black v. Sec'y of HHS, 93 F.3d 781, 787 (1996)). Nor do petitioners have a vested right in any claim for damages until there is a final judgment. Id. (citing Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Hammond v. United States, 786 F.2d 8, 12 (1st Cir. 1986)). As Judge Block stated:

> [T]here can be no question that applying the Vaccine Act's limitation period is rationally related to the dual legitimate legislative purposes undergirding the Vaccine Act: (1) the settling of claims quickly and easily, and (2) the protecting of manufacturers from uncertain liability making "production of vaccines economically unattractive, potentially discouraging vaccine manufacturers from remaining in the market." *Brice*, 240 F.3d at 1368. And because petitioner also lacks a vested property interest in her claim, it is difficult to see a Fifth Amendment due process violation.

Cloer, 2008 WL 5248401, at *11 (n.10 omitted). In the instant case, petitioner lacks a vested right in any claim for damages as there is no final judgment. Further, petitioner attempts to argue that the limitations period is unconstitutional due to the difficulty in diagnosis, relying on Setnes. As previously discussed, the Markovich decision appears to have found that Setnes was improperly decided. Supra at 7. Additionally, in Blackmon the court observed that "[t]he Due

Process Clause does not entitle every litigant to a hearing on the merits in every case" and while it is regrettable that certain litigants fail to discover and file their claims before the statute of limitations expires that does not render the statute of limitations unreasonable. Cloer, 2008 WL 5248401, at *11 (citing Blackmon v. American Home Prods., 328 F.Supp.2d 647, 656 (S. D. Tex. 2004)). Thus, it is clear petitioner's constitutional arguments fail.

Lastly, petitioner advances a number of policy complaints regarding the Vaccine Act's statute of limitations. These arguments are not cognizable by the undersigned, but are best directed at Congress, as the judicial body has no authority to amend the statute. Black v. Sec'y HHS, 93 F.3d 781, 789 (Fed. Cir. 1996) ("...the task of refining a statutory scheme such as the Vaccine Act so that it more precisely accords with the purposes for which the Act was designed is the responsibility of Congress, not the courts.") Accordingly, based upon the undersigned's interpretation of the allegations in the Petition considered in light of the medical records and petitioner's averments, it appears clear beyond cavil that this Petition was filed untimely.

While the above arguments logically focused on Travis's symptoms of autism, the petitioner created some confusion by stating in his Response to respondent's Motion to Dismiss that "The petition is not limited to autism. The primary purpose of the petition is to seek compensation for the diagnosis and treatment of mercury poisoning." P Response at 2 para.6 . Thus, it was not clear from petitioner's argument in petitioner's Response if petitioner was attempting to separate mercury poisoning, and the symptoms of that poisoning, from Travis's autism, and the symptoms of Travis's autism. In an effort to give petitioner every opportunity to establish a timely filing, petitioner was afforded the opportunity to clarify if petitioner was attempting to distinguish between Travis's symptoms of autism and the symptoms of the alleged mercury poisoning. Order filed July 24, 2008. The undersigned noted in that Order that;

> **If the symptoms are the same, the Petition is clearly untimely and will be dismissed.** If petitioner is asserting mercury poisoning as a separate injury with symptoms separate and apart from Travis's autism, it is incumbent upon petitioner to make clear what are those symptoms, when did they begin and where are they referenced in the medical records?
>
> Accordingly, if petitioner intends to pursue a claim for mercury poisoning that is separate and distinct from the claim that the vaccines caused Travis's autism, petitioner **shall file within thirty days, by no later than August 22, 2008**, a response to this Order detailing why petitioner's claim of mercury poisoning should not be dismissed as untimely by specifically laying out the following:
>
> -Detail what petitioner's counsel means by "The petition is not limited to autism. The primary purpose of the petition is to seek compensation for the diagnosis and treatment of mercury poisoning." P Response at 2. Petitioner shall clearly define and distinguish his claim of an injury of mercury poisoning from petitioner's claim of an injury of autism.

> -What are the symptoms of onset of the alleged mercury poisoning, including specific cites to medical records and dates. As stated above, if the symptoms of mercury poisoning are the same as the symptoms of Travis's autism, this case will be dismissed as untimely.
>
> -Address respondent's statement that "After a review of the 2001 Physician's Desk Reference (PDR) shows that none of the three alleged vaccines contained thimerosal." See R Mot. to Dis at fn. 1. Petitioner must show that the vaccines administered contained thimerosal, the mercury-based preservative.

Id. at 7-8 (emphasis added).

Petitioner's response does not adequately address the criteria laid out in the July Order and failed to develop in any meaningful sense petitioner's argument. Response to Special Master's Order of July 24, 2008, filed Sept. 10, 2008. Petitioner's two page Response contains a mere paragraph attempting to address the issues laid out in the July 24, 2008 Order. The paragraph states as follows:

> To date, Petitioner has been unable to obtain additional information regarding the heavy metal poisoning and symptoms suffered by Travis Hoogacker. Although John Hoogacker, the father of Travis, has attempted to schedule additional testing for his son, the testing could not be timely scheduled. See August 19, 2008 report from Dr. Kashi Rai of the For Better Health, LLC, which states: "I initially saw Travis Hoogacker on July 13, 2007 with a previous diagnosis of Autism and Heavy Metal Poisoning. Lab testing by Dr. Angela Duthu on April 27, 2007 demonstrated elevated Heptacarboxylporph and Coproporphyrin in the urine. This signifies an elevation of heavy metals in the body. Based on clinical autistic symptoms, Travis was started on a regimen to reduce heavy metals and improve central nervous symptoms activity."

Id. at 2. Petitioner's only reference to medical records is the brief report from Dr. Kashi Rai, dated August 19, 2008 which simply states: (1) Travis was initially seen on July 13, 2007 with a previous diagnosis of autism and heavy metal poisoning, (2) lab work completed on April 27, 2007 on a urine sample indicated elevation of Heptacarboxylporph and Coproporphyrin in the body, (3) based on Travis's autistic symptoms Travis began a regimen to reduce heavy metals and improve central nervous system activity. Id. (see Dr. Rai's report attached to petitioner's Response). This report does not address or define any symptoms of the alleged heavy metal poisoning. Petitioner's lab work with an elevation of heavy metals in the urine does not demonstrate a symptom of petitioner's alleged heavy metal poisoning. Lacking is any reference to the medical records dating the symptoms of onset of petitioner's alleged heavy metal poisoning. Petitioner does not distinguish any symptoms of petitioner's alleged heavy metal poisoning as distinct from petitioner's alleged injury of developmental delays related to autism. Thus, the undersigned is dealing with the same set of facts. As such, per the medical records, developmental delays presented as early as May 2002. P Ex 7 at 1-2. Petitioner filed his Petition

on November 13, 2007, over five years later, well-beyond the 36 month statute of limitations.

The undersigned also notes that petitioner failed to develop petitioner's argument that the primary purpose of the Petition is to seek compensation for the diagnosis and treatment of mercury poisoning. See P Response at 2. It appears to the undersigned that petitioner added this argument with little thought and even less idea of its meaning or impact on the statute of limitations issue. First, "mercury poisoning and/or heavy metal poisoning" would appear to be an alleged **cause** of an injury, for example "mercury poisoning and/or heavy metal poisoning" is akin to "over vaccination" which in turn may cause an injury such as seizures. The undersigned fails to see "mercury poisoning and/or 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, "mercury poisoning and/or heavy metal poisoning" would appear to have no relevance to the statute of limitations issue. See Bono v. Sec'y of HHS, No. 02-1085V (Fed. Cl. Spec. Mstr. Jan. 16, 2009) (published citation not yet available). Again, the undersigned is uncertain what petitioner is arguing since petitioner made no effort to develop this argument in any meaningful way.

As the undersigned clearly stated in the July 24, 2008 Order if the symptoms of petitioner's autism and symptoms of mercury poisoning are the same the Petition is clearly untimely and will be dismissed. Petitioner has provided no compelling evidence to the contrary. In the absence of such evidence, this case is **dismissed as untimely**. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master