

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-423V

Filed: June 1, 2012

NOT TO BE PUBLISHED

JOHN KEVIN QUEENAN and ANGELA *
QUEENAN, Parents of JOHN TAYLOR *
QUEENAN, a Minor, *

Petitioners, *

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

Autism; Statute of Limitations;
Untimely Filing; Failure to Prosecute

DECISION

GOLKIEWICZ, Special Master.

Petitioners, John and Angela Queenan, filed a Short-Form Autism Petition for Vaccine Compensation¹ under the National Childhood Vaccine Injury Act² [“Vaccine Act” or the “Act”] on behalf of their son John Taylor (“Taylor”) on June 9, 2008.

¹ By electing to file a Short-Form Autism Petition for Vaccine Compensation, petitioners allege 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.

Respondent's counsel filed a Motion to Dismiss on February 23, 2009 as the petition appeared to be untimely filed, based on the Vaccine Act's statute of limitations, §300aa-16(a)(2). The undersigned ordered petitioners to file a Response to respondent's Motion to Dismiss on April 6, 2009 and again on August 20, 2009. No response was received from petitioners. On June 13, 2011 the undersigned again ordered petitioners to file a response to respondent's Motion to Dismiss or show cause why this claim should not be prosecuted for failure to prosecute. Again, no response was received from petitioners.

I. The Omnibus Autism Proceeding

This case is one of more than 5,400 cases filed under the Program in which petitioners alleged that conditions known as "autism" or "autism spectrum disorders" ["ASD"] were caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the OAP, was set forth in the six entitlement decisions issued by three special masters as "test cases" for two theories of causation litigated in the OAP and will not be repeated here.³

Ultimately, the Petitioners' Steering Committee ["PSC"], an organization formed by attorneys representing petitioners in the OAP, litigated six test cases presenting two different theories on the causation of ASDs. The first theory alleged that the measles portion of the measles, mumps, rubella vaccine could cause ASDs. That theory was presented in three separate Program test cases during several weeks of trial in 2007. The second theory alleged that the mercury contained in thimerosal-containing vaccines could directly affect an infant's brain, thereby substantially contributing to the causation of ASD. That theory was presented in three additional test cases during several weeks of trial in 2008.

Decisions in each of the three test cases pertaining to the PSC's first theory rejected the petitioners' causation theories. *Cedillo*, 2009 WL 331968, *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*,

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

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. (2006).

³ The Theory 1 cases are *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Hazlehurst v. Sec'y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec'y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst*, 2009 WL 332306, *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder*, 2009 WL 332044, *aff'd*, 88 Fed. Cl. 706 (2009).⁴ Decisions in each of the three “test cases” pertaining to the PSC’s second theory also rejected the petitioners’ causation theories, and petitioners in each of the three cases chose not to appeal. *Dwyer*, 2010 WL 892250; *King*, 2010 WL 892296; *Mead*, 2010 WL 892248. Thus, the proceedings in these six test cases are concluded. Petitioners remaining in the OAP must now decide whether to pursue their cases, and submit new evidence on causation, or take other action to exit the Program. The petitioners in this case have failed to respond to the court’s orders and therefore the court does not how petitioners intend to proceed.

II. Facts

Taylor was born on December 16, 1995. Petitioners’ Exhibit [“Pet. Ex.”] 2 at 12. Between December 26, 1995 and March 18, 1997, he received routinely administered childhood vaccinations. Pet. Ex. 3 at 1-2. Petitioners allege that the “cumulative amounts of [t]himerosal contained in his childhood vaccinations,” in addition to a thimerosal containing injection given to his mother while he was in utero, caused Taylor’s autism spectrum disorder. Petitioners’ Statement of Onset of Autism filed September 11, 2008 at 1.

On October 20, 1997, when Taylor was about 22 months old, Mrs. Queenan brought Taylor to Children’s Hospital Oakland for a speech language evaluation at the referral of his pediatrician “due to concerns regarding his language skills.” Pet. Ex. 4 at 1. Taylor’s evaluation indicated he presented “with a severe communication deficit compromising his receptive and expressive language as well as his articulation production” *Id.* at 3.

On July 26-27, 1999, when Taylor was about 43 months old, he received a multidisciplinary evaluation completed by a child psychiatrist and a child psychologist from the Lucile Packard Children’s Health Services at Stanford. Pet. Ex. 6 at 1-8. Taylor was diagnosed at that time with a pervasive developmental disorder – not otherwise specified (PDD-NOS), an autism spectrum disorder. *Id.* at 3.

III. Untimely Filing under the Vaccine Act’s Statute of Limitations

The Vaccine Act provides that:

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...

⁴ Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

§ 300aa-16(a)(2) (emphasis added). The Court of Appeals for the Federal Circuit recently affirmed in an *en banc* decision that the “statute of limitations begins to run on a specific statutory date: the date of occurrence of the first symptom or manifestation of onset of the vaccine-related injury recognized as such by the medical profession at large.” *Cloer v. Secretary of Health & Human Services*, 654 F.3d. 1322, 1340 (Fed. Cir. 2011). The date “does not depend on when a petitioner knew or reasonably should have known” about the injury. *Cloer*, 654 F.3d. at 1339. Neither does it depend upon when petitioner actually becomes aware of the cause of the injury. *Cloer*, 654 F.3d. at 1338.

Taylor’s medical records establish that this claim was not timely filed. Taylor was diagnosed with PDD-NOS on July 27, 1999. Pet. Ex. 6 at 1-8. Utilizing even the date of diagnosis, recognizing the first symptom or manifestation of onset of PDD-NOS necessarily occurred earlier, this claim must have been filed by July 27, 2002. The petition was not filed until June 9, 2008, more than five years too late.⁵

IV. Failure to Prosecute

It is petitioners’ duty to respond to court orders. As I reminded petitioners in my June 13, 2011 order, failure to follow court orders, as well as failure to file medical records or an expert medical opinion, shall result in dismissal of petitioner’s claim. *Tsekouras v. Sec’y, HHS*, 26 Cl. Ct. 439 (1992), *aff’d per curiam*, 991 F.2d 810 (Fed. Cir. 1993); *Sapharas v. Sec’y, HHS*, 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b).

V. Conclusion

Petitioners have the burden to demonstrate the timely filing of their Petition. Petitioners have failed to do so. There is preponderant evidence that this case was not 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” as required by the Vaccine Act. § 300aa-16(a)(2). **This**

⁵ While, the Federal Circuit also held that equitable tolling of the Vaccine Act’s statute of limitations is permissible under very limited circumstances, such as to cure a procedural filing defect or prevent fraud or duress. *Cloer*, 654 F.3d at 1340. Petitioners have not presented any extraordinary circumstances that would permit the equitable tolling of the Vaccine Act’s statute of limitations in this case. In light of the Circuit’s recent holding in *Cloer*, had petitioners responded to the court’s orders, petitioners would have been afforded an additional opportunity to present any circumstances that might merit the tolling of the statute of limitations in this case.

case is dismissed as untimely filed under the Vaccine Act and for failure to prosecute.⁶ The clerk shall enter judgment accordingly.⁷

IT IS SO ORDERED.

Gary J. Golkiewicz
Special Master

⁶ Respondent raised the issue that it appears petitioners may have filed a previous Short-Form Petition related to this same claim in contravention of § 300aa-11(b)(2). Respondent's Motion to Dismiss at fn. 1. Since the instant petition is being dismissed for failure to prosecute and untimely filing it is not necessary to consider that issue.

⁷ This document constitutes my final "Decision" in this case, pursuant to § 12(d)(3)(A). If petitioner wishes to have this case reviewed by a Judge of the United States Court of Federal Claims, a motion for review of this decision must be filed within 30 days. After 30 days the Clerk of this Court shall enter judgment in accord with this decision. If petitioner wishes to preserve whatever right petitioner may have to file a civil suit (that is a law suit in another court) petitioner must file an "election to reject judgment in this case and file a civil action" within 90 days of the filing of the judgment. § 21(a).