

OFFICE OF SPECIAL MASTERS

No. 97-0470V

(Filed: May 6, 1998)

MELODY HARRIS and JOHN HARRIS, *
as parents and legal guardians of *
CHRISTINA HARRIS, *

Petitioners, * TO BE PUBLISHED

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

Michael G. McLaren, Memphis, Tennessee, for petitioners.

Gerard W. Fischer, United States Department of Justice, Washington, D.C., for respondent.

DISMISSAL ORDER

EDWARDS, Special Master.

Petitioners, Melody Harris and John Harris (the Harrises), as legal guardians of their daughter, Christina Harris (Christina), seek compensation under the National Vaccine Injury Compensation Program (Program). (1) In a petition that they filed on July 10, 1997, the Harrises allege that Christina suffered the first symptom or manifestation of onset of an encephalopathy or of a seizure disorder "within forty minutes" after she received a diphtheria-pertussis-tetanus (DPT) vaccination in April 1990. Petition (Pet.) ¶ VI. The Harrises assert apparently now that Christina received the DPT vaccination in February 1990. See Affidavit of John Harris, filed September 19, 1997, ¶ 2; Affidavit of Melody Harris, filed September 19, 1997, ¶ 2. Regardless, Christina's DPT vaccination was "administered after the effective date" of the Act that established the Program. See, e.g., § 300aa-16(a)(2).

Under § 300aa-16(a)(2), "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." However, the Harrises have filed their petition more than four years after the putative expiration of the statute of limitations that governs their claim.

Thus, on its face, the Harrises' petition is barred by § 300aa-16(a)(2). Yet, the Harrises insist that they filed their petition "within the applicable statute of limitations based on the doctrine of equitable tolling." Pet. ¶ IV.

Respondent moves to dismiss. *See* Motion to Dismiss (Motion), filed November 14, 1997. Respondent contends that the Harrises have failed "to offer any recognized ground for equitable tolling." Motion at 5. Moreover, respondent argues that the Harrises did not exercise "due diligence" in pursuing their claim. Motion at 8.

FACTS

The Harrises filed scant medical records with their petition. Thus, the special master gleans substantially his recitation of facts from the affidavits that the Harrises proffered with their petition and on September 19, 1997. *See* Pet. at 4-5; Affidavit of John Harris, filed September 19, 1997; Affidavit of Melody Harris, filed September 19, 1997, ¶ 2.

Christina was born on December 12, 1989, in San Mateo, California. Pet. at 4, ¶ 2. In February 1990, when Christina was two-and-one-half months old, she received her initial DPT vaccination. Pet. at 4, ¶ 3; Affidavit of John Harris, filed September 19, 1997, ¶ 2; Affidavit of Melody Harris, filed September 19, 1997, ¶ 2. According to the Harrises, Christina "started crying in a high-pitched, wailing shriek" on the day that she received the DPT vaccination. Affidavit of John Harris, filed September 19, 1997, ¶ 3; Affidavit of Melody Harris, filed September 19, 1997, ¶ 3. The Harrises describe the cry as "loud" and "intense." *Id.* The Harrises assert that Christina's cry "continued for about 24 hours." *Id.* In addition, Mr. Harris recalls that "immediately after the shot," he "noticed that Christina was extremely lethargic with the exception of an occasional 'twitch' which she would have for no apparent reason." Affidavit of John Harris, filed September 19, 1997, ¶ 4.

The Harrises state that they "called Christina's pediatrician, Dr. Elise Atlas (of San Mateo, California) regarding [Christina's] problems." Affidavit of John Harris, filed September 19, 1997, ¶ 5; Affidavit of Melody Harris, filed September 19, 1997, ¶ 4. The Harrises claim that Dr. Atlas suggested that they "were overreacting" to the situation. *Id.* The Harrises claim also that Dr. Atlas "assured" them that they "should not be worried" about Christina's condition. *Id.*

The Harrises remember that Dr. Atlas referred eventually Christina to the Stanford Children's Hospital Pediatric Neurology Clinic for evaluation. Affidavit of John Harris, filed September 19, 1997, ¶ 6; Affidavit of Melody Harris, filed September 19, 1997, ¶ 5. The Harrises relate that Christina "was diagnosed with a seizure disorder." Affidavit of John Harris, filed September 19, 1997, ¶ 7; Affidavit of Melody Harris, filed September 19, 1997, ¶ 6. According to the Harrises, Christina's seizures "responded fairly well" to steroid treatment that the pediatric neurology clinic instituted. Affidavit of John Harris, filed September 19, 1997, ¶ 7; Affidavit of Melody Harris, filed September 19, 1997, ¶ 6. However, the Harrises recollect that Christina's seizures recurred "and grew worse with time" at some point after the family relocated from California to Iowa in May 1992. Affidavit of John Harris, filed September 19, 1997, ¶ 8; Affidavit of Melody Harris, filed September 19, 1997, ¶ 7.

The Harrises recall that, in approximately Spring 1995, they learned through various sources about vaccine reactions. *See* Affidavit of John Harris, filed September 19, 1997, ¶ 9-10; Affidavit of Melody Harris, filed September 19, 1997, ¶ 8. The Harrises state that one source--a newsletter from a support group--mentioned "Dr. Mark Thoman, a physician who practiced in Des Moines, Iowa." Affidavit of John Harris, filed September 19, 1997, ¶ 10; Affidavit of Melody Harris, filed September 19, 1997, ¶ 8.

The Harrises maintain that they "immediately took Christina to see Dr. Thoman." *Id.* The Harrises claim that Dr. Thoman said that Christina represented "a classic case of pertussis vaccine reaction." *Id.*; *see also* Pet. at 11 (Letter from Young P. Oliver, M.D., a pediatric neurologist, to Mark E. Thoman, M.D., dated January 9, 1996: "The patient had a probable vaccination reaction around two months of age and this also involved some possible seizure activity."). However, the Harrises assert that "Dr. Thoman never once mentioned the possibility of pursuing legal action, or that a Vaccine Act existed." Affidavit of John Harris, filed September 19, 1997, ¶ 11; Affidavit of Melody Harris, filed September 19, 1997, ¶ 9.

The Harrises declare that during Fall 1995, they sought from at least three attorneys legal advice "concerning litigation." Affidavit of John Harris, filed September 19, 1997, ¶ 12; Affidavit of Melody Harris, filed September 19, 1997, ¶ 10. According to the Harrises, their effort "led to the law firm of Thomason, Hendrix, Harvey, Johnson & Mitchell." Affidavit of John Harris, filed September 19, 1997, ¶ 13; Affidavit of Melody Harris, filed September 19, 1997, ¶ 11. The Harrises assert: "Prior to contacting the law firm of Thomason, Hendrix, in November, 1996, we had no knowledge of the existence of the National Vaccine Injury Compensation Act." *Id.*

The Harrises filed ultimately their Program petition on July 10, 1997.

DISCUSSION

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 (1990), the Supreme Court announced clearly that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. However, the Supreme 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 Supreme Court identified just two "situations" in which the Supreme 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). Moreover, the Supreme Court stressed that the Supreme Court has "generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Id.* Indeed, at least one federal court has admonished that "in the case of equitable tolling[,] the plaintiff must be continuously diligent and sue (if he is beyond the statutory period) as soon as it is practicable for him to do so." *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 853 (7th Cir. 1996).

Relying upon *Catawba Indian Tribe v. United States*, 982 F.2d 1564 (Fed. Cir.), *cert. denied*, 509 U.S. 904 (1993), a judge of the United States Court of Federal Claims expanded apparently the doctrine of equitable tolling in Program cases. *See Brice v. Secretary of HHS*, 36 Fed. Cl. 474 (1996). After reviewing the language of § 300aa-16(a)(2), and after reviewing the legislative intent of the Act, the judge concluded that a special master may toll equitably "for at least some period of time" the statute of limitations, *id.* at 478, if a petitioner shows successfully that petitioner "did not know, and reasonably could not have known, that the vaccine recipient had suffered" a vaccine-related injury. *Id.* at 481. However, the judge distinguishes obviously knowledge of a vaccine-related injury and knowledge "of the underlying law that [gives] rise to [a] cause of action" based upon the injury. *Bouley v. Secretary of HHS*, 37 Fed. Cl. 227, 231 (1997). In *Bouley*, the judge reiterated the well-established rule that "[i]gnorance of the law is not a ground for tolling a statute of limitations." *Id.* at 231, *citing New York and*

Cuba Mail S.S. Co. v. United States, 145 Ct. Cl. 654, 658, 172 F. Supp. 684 (1959).

For purposes of this decision, the special master adopts the rationale expressed in *Brice*.⁽²⁾ Therefore, the special master determines generously that by no later than January 1996, the Harrises knew certainly that Christina had sustained an injury that was related potentially to a DPT vaccination that she received in 1990. Affidavit of John Harris, filed September 19, 1997, ¶ 10; Affidavit of Melody Harris, filed September 19, 1997, ¶ 8; Pet. at 11 (Letter from Young P. Oliver, M.D., a pediatric neurologist, to Mark E. Thoman, M.D., dated January 9, 1996: "The patient had a probable vaccination reaction around two months of age and this also involved some possible seizure activity."). Nevertheless, even if the Harrises are entitled to have the statute of limitations "tolled for at least some period of time," *Brice v. Secretary of HHS*, 36 Fed. Cl. at 478, they must demonstrate still that they pursued their legal rights with due diligence. *See*

Irwin v. Department of Veterans Affairs, 498 U.S. at 96.

The Harrises offer vaguely that in 1995 and in 1996, they consulted attorneys about legal remedies for Christina's injury. Affidavit of John Harris, filed September 19, 1997, ¶¶ 12-13; Affidavit of Melody Harris, filed September 19, 1997, ¶¶ 10-11. Yet, the gravamen of the Harrises' claim is that Christina's doctor and several attorneys did not inform the Harrises of the Program. Affidavit of John Harris, filed September 19, 1997, ¶¶ 11-12; Affidavit of Melody Harris, filed September 19, 1997, ¶¶ 9-10. But, "[i]gnorance of the law is not a ground for tolling a statute of limitations." *Bouley v. Secretary of HHS*, 37 Fed. Cl. at 231. In their affidavits, the Harrises do not present any colorable issue regarding other extraordinary circumstances that may have prevented them from filing their petition before July 1997.

Moreover, the Harrises do not explain the seven-month delay between the time in November 1996, when the Harrises contacted a law firm that is experienced with Program cases, and the time in July 1997, when the Harrises filed their petition. The special master acknowledges that some counsel can advance a good-faith argument that certain late filings should be excused because *Brice* constitutes a shift in the law that favors petitioners with stale claims. However, the Court of Federal Claims published *Brice* before the Harrises retained their current counsel. And, in the special master's view, that same good-faith argument would require an attorney who is faced with a client whose claim is beyond the statute of limitations to file *immediately* at least a skeletal petition to preserve a basis for asserting the doctrine of equitable tolling. *See Wolin v. Smith Barney, Inc.*, 83 F.3d 847 (7th Cir. 1996).

CONCLUSION

The facts of this case compel the special master to the unavoidably harsh conclusion that he cannot toll equitably the statute of limitations to July 10, 1997. Therefore, in the absence of a motion for review filed under RCFC Appendix J, the clerk of court shall enter judgment dismissing the petition.

The special master's secretary shall provide a courtesy copy of this dismissal order to the parties by facsimile.

John F. Edwards

Special Master

- ¹ The statutory provisions governing the Vaccine Program are found in 42 U.S.C.A. §§ 300aa-1 *et seq.* (West Supp. 1998). For convenience, further reference will be to the relevant section of 42 U.S.C.A.
- ² The special master does not need to state now an opinion about the precedential value of *Brice*. The special master notes only that the United States Court of Appeals for the Federal Circuit has not had yet the opportunity to entertain an appeal in *Brice*.