

**OFFICE OF SPECIAL MASTERS**

**No. 99-108V**

**(Filed: November 1, 2002)**

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BRADLEY AND ROBIN GOFFE, \*  
Parents of Ty Dean Goffe, \*

Petitioners, \*

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

(To be published)

**DECISION**

**HASTINGS, Special Master**

This is an action seeking an award under the National Vaccine Injury Compensation Program (hereinafter the “Program”--see 42 U.S.C. § 300aa-10 *et seq.*<sup>1</sup>). For the reasons stated below, I conclude that the case must be dismissed because the petition was not timely filed.

**I**

**BACKGROUND**

**A. Factual Allegations**

On March 5, 1999, the petitioners, Bradley and Robin Goffe, filed the instant petition, alleging that their son, Ty Dean Goffe, was injured by an MMR (measles, mumps, rubella)

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<sup>1</sup>The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2000 ed.). Hereinafter, for ease of citation, all “§” references will be to 42 U.S.C. (2000 ed.).

vaccination that he received on January 2, 1996. Petitioners allege that Ty experienced a high fever on the day of that inoculation, and seizures beginning three days later. They argue that those initial symptoms marked the onset of a neurologic disorder that was caused by the MMR vaccination and is compensable under the Program.

**B. *Applicable Statutory Provisions***

Under the Program, compensation awards are made to individuals who have suffered injuries after receiving certain vaccines listed in the statute. The statutory deadlines for filing Program petitions are provided at § 300aa-16. With respect to vaccinations administered after October 1, 1988, as was the vaccination at issue here, § 300aa-16(a)(2) provides that a Program petition must be filed within 36 months of the onset of the first symptom of the injury.<sup>2</sup>

**C. *Procedural History***

Respondent argued in a “Motion to Dismiss” filed on March 31, 1999, that petitioners in this case are time-barred from filing this petition, pursuant to § 300aa-16(a)(2). Petitioners responded to this motion on May 13, 1999, but did not dispute the respondent’s contention that their petition was filed more than three years after the onset of the allegedly vaccine-related injury. Rather, they argued that the doctrine of “equitable tolling” should be applied to their case, and that their failure to timely file should be excused because of their alleged “diligence” in filing their petition. On June 18, 1999, respondent asked that petitioners’ request for equitable relief be denied and that the petition be dismissed.

On August 3, 1999, I determined that consideration of respondent’s motion for dismissal of this action should be deferred. I noted that the case of *Brice v. Secretary of HHS* was pending before a judge of this court, presenting the issue of the application of the “equitable tolling” doctrine to Program cases, in a form that might be definitively resolved upon appeal to a higher court.

On March 28, 2002, respondent filed a “Renewed Motion to Dismiss.” On May 24, 2002, in light of the Chief Special Master’s decision in *Chaconis v. HHS*, No. 98-165V (Fed. Cl. Spec. Mstr. Apr. 8, 2002), I filed an Order indicating that I would consider the timeliness issue again, and invited petitioners to file further briefing on the timeliness issue. Petitioners have declined to submit further briefing. It is appropriate at this time that I make a ruling upon the dismissal motion.

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<sup>2</sup>See § 300aa-16(a)(2) (“In the case of... 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.”)

## II

### DISCUSSION

#### A. *The Issue*

As noted above, § 300aa-16(a)(2) requires that a Program petition with respect to a vaccination that was administered after October 1, 1988, must be filed within 36 months after the occurrence of the first symptom of the alleged injury. In this case, the vaccination in question occurred on January 2, 1996, and petitioners allege that the first symptoms of Ty's injury occurred within the next several days thereafter. Therefore, the statutory 36-month period after the onset of symptoms expired during January 1999. However, petitioners' petition for Program compensation was not filed until March 5, 1999. Thus, under a straightforward application of § 300aa-16(a)(2), this petition is time-barred.

#### B. *Applicability of the "Equitable Tolling" Doctrine*

The decision by the U.S. Court of Appeals for the Federal Circuit in *Brice v. Secretary of HHS*, 240 F.3d 1367 (Fed. Cir. 2001), provides a binding precedent concerning the application of the "equitable tolling" doctrine to Program cases. *Brice* holds that "equitable tolling is inconsistent with the existing statutory scheme." *Id.* at 1374. *Brice* makes clear that the Vaccine Act's three-year limitation on filing petitions is a strict rule, and this court is without power to extend the filing period. On November 26, 2001, the U.S. Supreme Court denied a petition for a writ of *certiorari* in that case, thus making the Federal Circuit holding final. *Cert. denied sub nom. Brice v. Thompson*, \_\_\_ U.S. \_\_\_, 122 S.Ct. 614 (2001). Thus, it is indisputable that the doctrine of equitable tolling may not be applied to extend the filing deadline in this case. Therefore, the petition must be dismissed because it was not timely filed.

## III

### CONCLUSION

The illness suffered by Ty Dean Goffe was obviously a tragic occurrence. Congress, however, was explicit in its language as to when petitions under the Program must be filed. In Ty's

case, the deadline set by Congress was 36 months following the onset of his symptoms. Because this petition was not filed within that time period, this petition must be dismissed as untimely.<sup>3</sup>

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George L. Hastings, Jr.  
Special Master

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<sup>3</sup>In my order in this case filed on August 3, 1999, I noted that on June 14, 1999, the Secretary of Health and Human Services sent to Congress a proposed revision of the applicable statute, which would revise the limitations period under 42 U.S.C. § 300aa-16(a)(2) from *three* years to *six* years. Under that revision, the petition in this case would be timely. But, more than three years later, no such statutory revision has been enacted. For the past three years, I have been reluctant to dismiss this petition when it appeared that statutory relief applicable to this case was likely in the near future. However, I do not find it appropriate for a court to wait indefinitely in anticipation of a statutory change. For whatever reason, Congress enacted the currently-applicable three-year statutory provision; Congress has not revised that provision, and while it may yet do so, it also may not. Thus, while I sympathize with the petitioners' situation, I believe that it is appropriate that I follow the law as it actually exists at this time, rather than wait any longer for potential statutory revisions. Accordingly, while it is unfortunate for the petitioners in this case, I find it appropriate to dismiss this petition at this time.