**OFFICE OF SPECIAL MASTERS**

**No. 97-682V**

**(Filed: May 28, 2004)**

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| DANIEL KEVIN O'CONNELL, | * | |
| Petitioner, | * | **TO BE PUBLISHED** |
| v. | * | |
| SECRETARY OF HEALTH AND HUMAN SERVICES, | * | |
| Respondent. | * | |

***Daniel Kevin O'Connell appeared pro se.***
***Mark Rogers, Department of Justice, Washington, D.C., for respondent.***

**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.[1]). For the reasons stated below, I conclude that the case must be dismissed because the petition was not timely filed.

[1]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.).

## I

## BACKGROUND

### *A. Factual allegations*

On October 8, 1997, the petitioner, Daniel Kevin O'Connell, filed the instant petition, alleging that he was injured by a rubella vaccination that he received on or about October 20, 1993. Petitioner alleges that on or about November 1, 1993, he suffered symptoms initially characterized as "shin splints" and "cramps in his calves." He argues that those initial symptoms marked the onset of chronic arthritis that was caused by the rubella vaccination, and that his arthritic condition is compensable under the Program.

### *B. Applicable statutory provisions*

Under the Program, compensation awards are made to individuals who suffered injuries after receiving certain vaccines listed in the statute. There are two separate means of establishing entitlement to compensation. First, if an injury specified in the "Vaccine Injury Table," originally established by statute at § 300aa-14(a) and since modified administratively (as will be discussed *infra*), occurred within the time period from vaccination prescribed in the Table, then the injury may be *presumed* to qualify for compensation. § 300aa-13(a)(1); § 300aa-11(c)(1)(C)(i); § 300aa-14(a). If a person qualifies under this presumption, he or she is said to have suffered a "Table Injury." Alternatively, compensation may also be awarded for injuries not listed in the Table, but entitlement in such cases is dependent upon proof that the vaccine *actually caused* the injury. § 300aa-13(a)(1); § 300aa-11(c)(1)(C)(ii).

One of the vaccinations covered under the Program is the rubella vaccination. In the original version of the Vaccine Injury Table contained in the statute, "chronic arthritis" was not listed as a Table Injury for any vaccination. However, in subsequent versions of the Vaccine Injury Table issued in 1995 and 1997, "chronic arthritis," if incurred under certain specified circumstances, was established as a "Table Injury" for the rubella vaccination. (See discussion below at pp. 5-8.)

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 alleged to have been vaccine-caused.[2] There is also a "savings provision," at §300aa-16(b), that allows an extension of the filing deadline for two years beyond the effective date

[2]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 my 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.").

of any *revision* to the Vaccine Act that would "significantly increase [a petitioner's] likelihood of obtaining compensation."[3]

**C. *The issue to be decided***

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 or about October 20, 1993, and petitioner alleges that the first symptoms of his injury occurred on or about November 1, 1993. Therefore, the statutory filing period extended 36 months beyond the onset of symptoms, to November 1, 1996. However, petitioner's petition for Program compensation was not filed until October 8, 1997. Thus, under a straightforward application of § 300aa-16(a)(2), this petition would clearly be time-barred.

Petitioner argues, however, that the petition should nevertheless *not* be dismissed for untimely filing, for two reasons. First, petitioner argues, the petition should be deemed to have been timely filed under the "savings provision" of the Vaccine Act's statute of limitation - - i.e., § 300aa-16(b)-- which, as noted above, allows an extension of the filing deadline for two years beyond the effective date of any *revision* to the Vaccine Act that would "significantly increase [a petitioner's] likelihood of obtaining compensation."

Second, petitioner argues that even if his petition is not saved by that "savings provision," he is nevertheless entitled to relief under the doctrine of "equitable tolling."

[3]See §300aa-16(b)("*Effect of revised table*. If at any time the Vaccine Injury Table is revised and the effect of such revision is to permit an individual who was not, before such revision, eligible to seek compensation under the Program, or to significantly increase the likelihood of obtaining compensation, such person may, notwithstanding section 300aa-11(b)(2) of this title, file a petition for such compensation not later than 2 years after the effective date of the revision, except that no compensation may be provided under the Program with respect to a vaccine-related injury or death covered under the revision of the table if--(1) the vaccine-related death occurred more than 8 years before the date of the revision of the table, or (2) the vaccine-related injury occurred more than 8 years before the date of the revision of the table.").

I must reject both of petitioner's arguments, for reasons to be set forth below, so that the petition must be dismissed as untimely filed. My reasoning as to each of petitioner's arguments will be set forth in the next two sections of this Decision below.[4]

## II

## THE PETITION WAS NOT TIMELY FILED EVEN UNDER THE "SAVINGS PROVISION"[5]

As noted above, the usually-applicable statutory limitations provision required that this petition be filed prior to the expiration of 36 months after the first symptom of the onset of petitioner's allegedly vaccine-caused injury. §300aa-16(a)(2). Under that provision, the petition would have been due to be filed on or about November 1, 1996. Calculation of the deadline here, however, is complicated by the possible application of the "savings provision" set forth at §300aa-16(b), which states that:

> If at any time the Vaccine Injury Table is revised and the effect of such revision is to permit an individual who was not, before such revision, eligible to seek compensation under the Program, or * * * to significantly increase the likelihood of obtaining compensation, such person may * * * file a petition for such compensation not later than 2 years after the effective date of the revision* * *.

§300aa-16(b). In fact, the Vaccine Injury Table was revised, effective March 10, 1995, to include "chronic arthritis" as a Table Injury for the rubella vaccine. See 60 Fed. Reg. 7678, 7695 (Feb. 8, 1995). Accepting, arguendo, that petitioner's case meets the requirements for the "chronic arthritis" Table Injury added under that 1995 Table revision, then petitioner would be entitled to the two-year extended deadline from March 10, 1995--*i.e.*, a two-year extension to March 10, 1997. It is clear,

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[4]Respondent's motion to dismiss has been pending for some time. However, for much of that time it was unclear whether the doctrine of "equitable tolling" would be applicable to §300aa-16(a)(2). Accordingly, I elected to defer ruling on that issue pending the review of the "equitable tolling" issue by the Federal Circuit in *Brice* v. *Secretary of HHS*, 240 F.3d 1367(Fed. Cir. 2001), *cert. denied sub nom*. *Brice v. Thompson*, 534 U.S. 1040 (2001). In addition, until recently it appeared likely that Congress would revise §300a-16 (a)(2) in a way that might have made this petition timely. It now appears, however, that such a revision does not seem imminent, so it is appropriate that I finally resolve this dismissal motion at this time.

[5]It can be argued that this issue involves an element of "statutory interpretation"--*i.e.*, interpretation of the meaning of § 300aa-16(b)(2). To the extent that that is the case, I note that I would be bound by the "sovereign immunity" principles of statutory construction, which would mean that I must "strictly" and "narrowly" construe the statute, in the way that would produce the narrowest possible waiver of sovereign immunity. For a full discussion of the "sovereign immunity" principles of statutory construction, and their application to Vaccine Act cases, see *Burch v. Secretary of HHS*, 2001 WL 180129 (Fed. Cl. Spec. Mstr. Feb. 8, 2001).

however, that petitioner did not meet this extended deadline either, since his petition was not filed until October 8, 1997.

Petitioner contends that his petition is nonetheless timely because it was filed within two years of a *second* revision of the Vaccine Injury Table, which became effective on March 24, 1997. See 62 Fed. Reg. 7685, 7688 (Feb. 20, 1997). Petitioner argues that the 1997 revision *again* significantly increased his likelihood of obtaining compensation. To evaluate petitioner's argument, I set forth below the full text of the Table's language concerning the "chronic arthritis" Table Injury for the rubella vaccine, from both 1995 Table revision and the 1997 Table revision.

The *1995 revision* contained the following language concerning the "chronic arthritis" Table Injury:

**§100.3 Vaccine injury table.**

(a) In accordance with section 312 (b) of the National Childhood Vaccine Injury Act of 1986 * * *, the following is a table of vaccines, the injuries, disabilities, illnesses, conditions, and deaths resulting from the administration of such vaccines, and the time period in which the first symptom or manifestation of onset or of the significant aggravation of such injuries, disabilities, illnesses, conditions, and deaths is to occur after vaccine administration for purposes of receiving compensation under the Program:

VACCINE INJURY TABLE

| Illness, disability, injury or condition covered | Time period for first symptom or manifestation of onset or of significant aggravation after vaccine administration |
|---|---|
| * * * | |
| II. (b). In the case of measles, mumps, rubella (MMR), measles, rubella (MR) or rubella vaccine only: | |
| A. Chronic arthritis ..... | 42 days. |
| B. Any sequela (including death) of an illness, disability, injury, or condition referred to above which illness, disability, injury, or condition arose within the time period prescribed. | Not applicable. |
| * * * | |

(b) *Qualifications and aids to interpretation*. The following qualifications and aids to interpretation shall apply to the Vaccine Injury Table in the paragraph (a) of this section:

(6) *Chronic Arthritis*. (i) For purposes of paragraph (a) of this section, chronic arthritis may be found in a person with no prior history of arthropathy (joint disease) on the basis of:

(A) Medical documentation, recorded within 30 days after the onset, of objective signs of acute arthritis (joint swelling) that occurred within 42 days after the rubella vaccination; and

(B) Medical documentation (recorded within 3 years after the onset of acute arthritis) of the persistence of objective signs of intermittent or continuous arthritis for more than 6 months following vaccination.

(ii) For purposes of paragraph (a) of this section, the following shall not be considered as chronic arthritis: Musculoskeletal disorders such as diffuse connective tissue diseases (including but not limited to rheumatoid arthritis, juvenile rheumatoid arthritis, systemic lupus erythematosus, systemic sclerosis, mixed connective tissue disease, polymyositis/dermatomyositis, necrotizing vasculitis and vasculopathies and Sjogren's Syndrome), degenerative joint disease, infectious agents other than rubella (whether by direct invasion or as an immune reaction), metabolic and endocrine diseases, trauma, neoplasms, neuropathic disorders, bone and cartilage disorders and arthritis associated with ankylosing spondylitis, psoriasis, inflammatory bowel disease, Reiter's syndrome, or blood disorders.

(iii) Arthralgia (joint pain) or stiffness without joint swelling shall not be viewed as chronic arthritis for purposes of paragraph (a) of this section.

60 Fed. Reg. 7694-7695.

The *1997 revision* contained the following language concerning the "chronic arthritis" Table Injury:

Section 100.3 is amended by revising the Vaccine Injury Table in paragraph (a); by republishing the introductory text in paragraph (b); * * * [and] by revising paragraph (b)(6) * * *.

§ 100.3 Vaccine Injury table.

(a) * * *

VACCINE INJURY TABLE

| Vaccine | Illness, disability, injury or condition covered | Time period for first symptom or manifestation of onset or significant aggravation after vaccine administration |
|---|---|---|
| IV. Vaccines containing rubella virus (e.g., MMR, MR, R). | A. Chronic arthritis. . . . . | 7-42 days. |
| | B. Any acute complication or sequela (including death) of an illness, disability, injury, or condition referred to above which illness, disability, injury or condition arose within the time period prescribed. | Not applicable. |

* * *

(b) *Qualifications and aids to interpretation*. The following qualifications and aids to interpretation shall apply to the Vaccine Injury Table to paragraph (a) of this section:

(6) *Chronic Arthritis*. (i) For purposes of paragraph (a) of this section, chronic arthritis may be found in a person with no history in the 3 years prior to vaccination of arthropathy (joint disease) on the basis of:

(A) Medical documentation, recorded within 30 days after the onset, of objective signs of acute arthritis (joint swelling) that occurred between 7 and 42 days after a rubella vaccination;

(B) Medical documentation (recorded within 3 years after the onset of acute arthritis) of the persistence of objective signs of intermittent or continuous arthritis for more than 6 months following vaccination; and

> (C) Medical documentation of an antibody response to the rubella virus.
>
> (ii) For purposes of paragraph (a) of this section, the following shall not be considered as chronic arthritis: Musculoskeletal disorders such as diffuse connective tissue diseases (including but not limited to rheumatoid arthritis, juvenile rheumatoid arthritis, systemic lupus erythematosus, systemic sclerosis, mixed connective tissue disease, polymyositis/determatomyositis, fibromyalgia, necrotizing vascultitis and vasculopathies and Sjogren's Syndrome), degenerative joint disease, infectious agents other than rubella (whether by direct invasion or as an immune reaction), metabolic and endocrine diseases, trauma, neoplasms, neuropathic disorders, bone and cartilage disorders and arthritis associated with ankylosing spondylitis, psoriasis, inflammatory bowel disease, Reiter's syndrome, or blood disorders.
>
> (iii) Arthralgia (joint pain) or stiffness without joint swelling shall not be viewed as chronic arthritis for purposes of paragraph (a) of this section.

62 Fed. Reg. 7688-7689.

Comparing the 1997 revision to the 1995 revision, petitioner argues that the 1997 revision, in comparison to the 1995 revision, increased his likelihood of obtaining compensation in four ways. Specifically, petitioner argues that the 1997 revision:

1. "Broadens the category" of vaccines to which the chronic arthritis Table Injury applies, to include "*any* vaccine containing rubella virus." (Petitioner's response filed on Feb 9, 1998, pp. 8-9, para. 1-2.)

2. Requires an onset of symptoms between 7 and 42 days after vaccination, in contrast to the 1995 Table revision which required an onset "within 42 days." (*Id*. at p. 9, para. 3.)

3. Provides compensation for "any acute complication" of chronic arthritis in addition to any "sequela" of chronic arthritis. (*Id*. at p. 9, para. 4.)

4. Requires proof of an antibody response to the rubella virus. (*Id*. at para. 5.)

However, even assuming all of petitioner's factual allegations to be true, petitioner has not demonstrated how any of these four changes made in 1997 to the Table Injury of "chronic arthritis" following rubella vaccine significantly increased *his own* likelihood of obtaining compensation.

As to petitioner's first of his four arguments, the slight change in wording between the 1995 and 1997 revisions regarding covered vaccines does not appear to have any effect at all on petitioner's case. To be sure, the 1995 version seems to have applied to rubella vaccinations given in the form of (1) rubella-only vaccines, (2) combined measles-rubella ("MR") vaccines, or (3) combined measles-mumps-rubella ("MMR") vaccines; whereas the 1997 version covers "*any* vaccine containing rubella virus." Therefore, if petitioner claimed that he received his rubella vaccine in some form other than one of the three forms listed above in the 1995 version, then perhaps he could show that the 1997 version increased his likelihood of obtaining compensation under the Program. However, petitioner has made no such claim. He does not allege that his 1993 rubella vaccination was received in a form not covered by the 1995 Table. Indeed, I have never even heard of a rubella vaccine given in a form other than the three listed in the 1995 Table. In other words, the rubella vaccine, alleged to have been received by petitioner, clearly was listed as a covered vaccine under *both* the 1995 *and* the 1997 versions of the "chronic arthritis" Table Injury. Therefore, the latter revision did *not* increase petitioner's likelihood of obtaining compensation.

As to the petitioner's second argument, concerning the fact that the 1997 revision changed the onset period from "within 42 days of" vaccination to a period of "between and 7 and 42 days after vaccination," this change obviously imposes a *more stringent* standard than that which existed under the 1995 version. Thus, I cannot conclude that this revision "significantly increased" *any* petitioner's likelihood of obtaining compensation. Similarly, with respect to petitioner's fourth argument, the *added requirement* of documentation of a positive antibody response to rubella virus, added by the 1997 revision, obviously did not *improve* petitioner's chance of success, even if he is able to meet this new substantiation requirement.

Finally, I address petitioner's third argument. This argument is based on the fact that while the 1995 Table version affords compensation to any "sequela" of chronic arthritis, the 1997 Table compensates any "acute complication or sequela" of chronic arthritis. Petitioner argues that the addition of the phrase "acute complication" significantly increased his chances of qualifying for the Table Injury. (*Id*. at p. 9, para 3.) I cannot agree. To be sure, if an "acute complication" were distinguishable from a "sequela," and if petitioner could demonstrate that he suffered the former condition and not the latter, he might reasonably argue that the 1997 revision increased his chances of gaining compensation. However, petitioner has made no such showing, nor has he suggested that he could make such a showing. More importantly, in promulgating the 1997 revision, the Secretary of Health and Human Services provided the following explanation for this particular change in wording from "sequela" to "acute complication or sequela."

Technical Amendments

> In the Notice of Proposed Rulemaking published in the Federal Register on November 8, 1995, items * * * IV.B * * * [and certain other items] of the Table read: "[a]ny sequela (including death) of an illness, disability, injury, or condition referred to above which illness, disability, injury, or condition arose within the time period prescribed." These items are being revised to read: "[a]ny acute complication or sequela * * *." The additional language does not represent a change in the available Table injuries; rather, the language is added to provide internal consistency within the Table.

62 Fed. Reg. 7685, 7686 (Feb. 20, 1997) (emphasis added). This explanation makes it evident that the change in the Vaccine Injury Table language from "sequela" to "acute complication or sequela" was *not* intended to substantively change or broaden the scope of the Table Injury in any way. Nor do I see how the addition of "acute complication" broadens the category. Therefore, this 1997 change in the language of the Table cannot be considered to have significantly improved petitioner's chances of obtaining compensation.

In short, I have analyzed each of petitioner's four arguments for the proposition that the 1997 revision of the Table "significantly increased [petitioner's] likelihood of obtaining compensation." I have found no merit to any of the four arguments. To be sure, if petitioner could prove his factual allegations, then apparently his case *would* qualify for the "chronic arthritis" Table Injury under the 1997 revision thereof. But if that were the case, he would also seem to qualify under the *1995 version* of the "chronic arthritis" Table Injury. I cannot see how the 1997 revision in any way changed the petitioner's chances of showing that he qualifies.

Accordingly, I conclude that petitioner has failed to demonstrate that he is entitled, under the "savings provision" of §300aa-16(b), to a two-year extension of the filing date from March 1997, as a result of that 1997 revision.

## III

## THE DOCTRINE OF "EQUITABLE TOLLING" IS NOT APPLICABLE

Petitioner's alternative argument is that his petition should be *deemed* to have been timely filed pursuant to the doctrine of "equitable tolling." (See the petitioner's Response filed on February 9, 1998, pp 10-12.) However, while the "equitable tolling" doctrine may have appeared to be potentially applicable to petitioner's case at the time in 1998 when petitioner's argument was filed, it is now clear, as a matter of law, that the doctrine can be of no assistance to petitioner in this case. That is because in *Brice* v. *Secretary of HHS*, 240 Fed. 3d 1367 (Fed Cir. 2001), *cert denied sub nom*. *Brice v. Thompson*, 534 U.S. 1040 (2001), the U.S. Court of Appeals for the Federal Circuit held that

the "equitable tolling" doctrine is *not applicable* under any circumstances to the statute of limitations provision applicable here, §300aa-16(a)(2).

## IV

## CONCLUSION

It is, of course, very unfortunate that petitioner suffers from a debilitating chronic condition. He is certainly deserving of sympathy for that condition. As the above discussion indicates, however, I have no choice but to conclude that this petition must be dismissed, because it was not timely filed. Absent a timely motion for review of this Decision, the Clerk of this Court shall enter judgment accordingly.

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George L. Hastings, Jr.
Special Master