OFFICE OF SPECIAL MASTERS
No. 03-346V
Filed: April 15, 2004

WENDY and ALAN TUCKER, parents of Matthew Tucker, a minor, Petitioners, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	**TO BE PUBLISHED**

Mark C. Cavanaugh, Philadelphia, Pennsylvania, for petitioners.
Linda S. Renzi, Department of Justice, Washington, D.C., for respondent.

DECISION[1]

HASTINGS, Special Master

This is an action seeking an award under the National Vaccine Injury Compensation Program (hereinafter "the Program").[2] Respondent has filed a motion contending that this petition was untimely filed, and therefore should be dismissed. For the reason set forth below, I conclude that respondent's contention is correct, and I hereby dismiss this petition.

[1]This document constitutes my final "decision" in this case, pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of this Court shall enter judgment in accord with this decision.

Also, the petitioners are reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Rule 18(b)(2) of the Vaccine Rules of this Court, this decision will be made available to the public unless they file, within fourteen days, an objection to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy."

[2]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 et seq. (2000 ed.). Hereinafter, all " § " references will be to 42 U.S.C. (2000 ed.).

I

BACKGROUND

A. The petitioners' claim

This petition was filed on February 14, 2003, by the petitioners, Wendy and Alan Tucker, on behalf of their son, Matthew Tucker. The petition was filed as a "short form autism petition," pursuant to the *Autism General Order #1*, 2002 WL 31696785 (Fed. Cl. Spec. Mstr., July 3, 2002). As such, the petition did not provide a detailed statement of petitioners' claim, but instead stated that the petitioners "adopt the Master Autism Petition for Vaccine Compensation." As the *Autism General Order #1* provides, by adopting the "Master Autism Petition," the petitioners, in effect, alleged that their son has "developed a neurodevelopmental disorder, consisting of Autism Spectrum Disorder or a similar disorder," and that such disorder "was caused by a measles-mumps-rubella (MMR) vaccination [or] by the thimerosal ingredient in certain other vaccinations." 2002 WL 31696785 at *4, 7-8.[3]

B. Applicable statutory provision

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 were the vaccinations at issue here, § 300aa-16(a)(2) provides that a Program petition must be 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."

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[3]This case is one of approximately 4,000 pending Program petitions involving claims that a condition known as "autism," or a similar condition, was caused by one or more vaccinations. These claims have been linked together in a proceeding known as the Omnibus Autism Proceeding. See the *Autism General Order #1*, 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002). A committee of attorneys, known as the Petitioners' Steering Committee, has been formed to represent the general interests of the autism petitioners in the course of the Omnibus Autism Proceeding. As noted in the *Autism General Order #1*, the Petitioners' Steering Committee is attempting to develop evidence concerning the *general issue* of whether thimerosal-containing vaccines and/or MMR vaccines can cause or aggravate autism. When such evidence is developed, it will be presented to me at a hearing concerning the general causation issue. Any conclusions reached as a result of that hearing will then be applied to the individual autism cases.

C. Procedural history concerning respondent's motion

The petitioners did not file any medical records with their petition. However, their counsel appears to have voluntarily submitted certain medical records to the respondent, who, in turn, filed those documents into the record of the case, along with respondent's motion to dismiss, on May 14, 2003. In that motion, respondent alleged that the medical records show that Matthew was diagnosed with a form of autism on June 22, 1998. Because that date was more than three years before the filing of the petition, which was filed February 14, 2003, respondent argued that the petition must be dismissed pursuant to § 16(a)(2), because it was not timely filed.

Petitioners filed a response to respondent's motion on September 16, 2003. Petitioners did not dispute the facts alleged by respondent, but merely asserted that the motion was "premature," and that I should refrain indefinitely from ruling on the motion. On December 16, 2003, I issued an order containing the following instructions:

> I hereby direct petitioners to supplement their response (filed on September 16, 2003) to respondent's "Motion to Dismiss" this petition. I am willing to stay proceedings on petitioner's *causation allegation* in this case pending the outcome of the Omnibus Autism Proceeding. However, if it becomes clear that the petition was *untimely filed* as to any and all of the petitioners' potential causation theories, then it would seem to be appropriate for me to dismiss the petition for untimeliness without awaiting the outcome of the Omnibus Autism Proceeding.
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> Therefore, by February 20, 2004, petitioners shall file a supplemental response to respondent's Motion to Dismiss. Petitioners should clarify their theory or theories of causation -- *e.g.*, state which vaccinations (specify by date) are alleged to have caused Matthew's autism; state whether there is a "significant aggravation" allegation, and, if so, with respect to which vaccinations(s) (specify by date). In short, petitioners should answer respondent's motion as best they can, setting forth any reason why the petition should not be dismissed for lack of timely filing.

Petitioners, however, have not filed any response to my order of December 16, 2003.

II

DISCUSSION

Two issues are raised by respondent's motion and petitioners' response. The first is whether petitioners are correct in their suggestion that I should refrain indefinitely from ruling on respondent's motion to dismiss. I will address each issue, in turn, below.

A. The petitioners have not suggested any good reason why I should not rule upon the instant motion at this time

1. Background

Discussion of petitioners' argument, which is that I should defer ruling upon the instant motion, requires some background information concerning the "Omnibus Autism Proceeding." As described above, this case is one of almost 4,000 pending Program petitions involving claims that a condition known as "autism," or a similar condition, was caused by one or more vaccinations. These claims have been linked together in a proceeding known as the Omnibus Autism Proceeding. See the *Autism General Order #1*, 2002 WL 31696785 (Fed. Cl. Spec. Mstr. July 3, 2002). A committee of attorneys, known as the Petitioners' Steering Committee, has been formed to represent the general interests of the autism petitioners in the course of the Omnibus Autism Proceeding. As noted in the *Autism General Order #1*, the Petitioners' Steering Committee is attempting to develop evidence concerning the *general issue* of whether thimerosal-containing vaccines and/or MMR vaccines can cause or aggravate autism. When such evidence is developed, it will be presented to me at a hearing concerning the general causation issue. Any conclusions reached as a result of that hearing will then be applied to the individual autism cases.

At present, the record in many autism petitions consists only of a "short-form" autism petition, various papers submitted by respondents in order to preserve certain objections to the proceeding, and notices from the court. Thus, at this point, in many of those cases, the petitioners have filed no documents with the court other than the short-form petition. And, as explained in the *Autism General Order #1*, and in *Stewart v. HHS,* No. 02-819V, 2002 WL 31965743 at *4-*5 (Fed. Cl. Spec. Mstr. Dec. 30, 2002), such a lack of medical records has been deemed to be generally acceptable at this time, pending the conclusion of the Omnibus Autism Proceeding. That is, for purposes of deciding the *causation* issue in each of these autism cases, there is no need for me to look at the individual medical records in a case until *after* the conclusion of the Omnibus Autism Proceeding.

However, in a few of the autism cases in which medical records pertaining to the individual child have been filed with this court, for whatever reason, those filed records have seemed to indicate that the petition was not timely filed. In such instances, in which the respondent has filed a motion to dismiss on timeliness grounds, I have found it sensible to have the petitioner respond to such motion, and then to consider and resolve the issue. In other words, while it seems appropriate to defer resolution of the *causation* issue in an autism case pending the Omnibus Autism Proceeding, there seems to be no strong reason why I should necessarily defer ruling on the separate issue of the *timeliness* of a petition, if that issue is raised before me.

Accordingly, in other cases, I have ruled on such timeliness questions. *See*, *e.g.*, *Kinsala v. HHS*, No. 01289V, 2004 WL ------- (Fed.Cl., Spec. Mstr. March 19, 2004); *Wood v. HHS*, No. 02-1317V, 2003 WL 23218062 (Fed.Cl., Spec. Mstr. Nov 26, 2003).

2. This case

In this case, then, as in *Wood*, *Kinsala,* and other similar cases, the respondent has pointed to medical records concerning the injured autistic child, and argues that the petition was untimely filed. As in those other cases, I find that it is appropriate under the rules of this court that I consider the motion without waiting for the conclusion of the Omnibus Autism Proceeding. That is, RCFC 56(b), referenced in Vaccine Rule 8(d),[4] provides that a party "*** may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part ***" of the matter at issue. The party seeking summary judgment must show that such party is entitled to judgment as a matter of law, and that there are no genuine issues of material fact. *San Carlos Irr. and Drainage Dist. v. U.S.*, 111 F.3d 1557, 1562 (Fed. Cir. 1997). In this case, the motion to dismiss, in effect, constituted a motion for summary judgment. Therefore, in response to the motion, the non-moving party -- in this case -- the petitioners, must show either that the moving party misinterprets the law, or that there is a genuine disputed issue of material fact.[5]

After respondent filed the motion to dismiss, pursuant to Vaccine Rule 8(d) and RCFC 56, I provided the petitioners with two opportunities to respond.[6] After the petitioners filed what I considered to be an inadequate response on September 16, 2003, I directed the petitioners on December 16, 2003, to "clarify their theory or theories of causation--*e.g.*, state which vaccinations (specify by date) are alleged to have caused Matthew's autism; state whether there is a 'significant aggravation' allegation, and, if so, with respect to which vaccination(s) (specify by date)," and also to "answer respondent's motion as best they can, setting forth any reason why the

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[4]In all actions before the Office of Special Masters of the U.S. Court of Federal Claims, special masters follow two sets of rules. The "Vaccine Rules of the United States Court of Federal Claims" (*hereinafter* "Vaccine Rules") are found in Appendix B of the Rules of the Court of Federal Claims (*hereinafter* "RCFC"). At the same time, special masters are bound by the other portions of the RCFC to the extent that such additional parts of the RCFC are referenced in the Vaccine Rules. Vaccine Rule 1; *Patton v. DHHS*, 25 F.3d 1021, 1026 (Fed. Cir. 1994).

[5] To demonstrate the latter, the non-moving party must present *actual evidence*, and not rely on mere allegations. *Crown Operations Intern., Ltd. v. Solutia Inc.*, 289 F.3d 1367 (Fed. Cir. 2002).

[6]RCFC 12 directs judges who are faced with similar motions to treat such a motion to dismiss as "one for summary judgment and disposed of as provided in RCFC 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by RCFC 56."

petition should not be dismissed for lack of timely filing." And, although their response was due on February 20, 2004, petitioners have not responded to my Order of December 16, 2003. Therefore, petitioners' only response to the pending dismissal motion is their brief presentation in their response filed on September 16, 2003.

In that response, filed September 16, 2003, petitioners seem to raise two separate arguments. First, petitioners assert that the respondent's dismissal motion is "wholly premature," and that they seem to imply that the motion is "premature" because the Omnibus Autism Proceeding has not yet concluded.

However, I see no merit to this argument. As noted above, while it makes sense to defer ruling on the *causation* issue in an autism case until the conclusion of the Omnibus Autism Proceeding, that Proceeding is not relevant to the timeliness issue, so I see no strong reason compelling me to defer ruling on the latter issue.

Second, petitioners argue that "the medical records upon which the respondent relies are not part of the record," because such records were not filed by *petitioners* but instead were provided by petitioners' counsel as a "professional courtesy," and then filed by *respondent*. However, again I see no logic to petitioners' argument. The medical records in question, while filed into the proceeding by respondent rather than petitioners, are indeed a part of the record in this case. Petitioners do not dispute the authenticity or accuracy of those records -- indeed, petitioners acknowledge that their own counsel voluntarily provided those records to respondent. Petitioners were under no obligation to provide such records to respondent, but they do not dispute that they, in fact, provided such records voluntarily. Therefore, I see no reason why I should not rely upon those medical records in ruling upon the respondent's motion.

B. The petition was untimely filed

Section 300aa-16(a)(2) requires that a Program petition that alleges injury by a vaccination that was administered after October 1, 1988, be filed within 36 months after the date of the first symptom of the onset of the injury in question, or within 36 months of the first symptom of a "significant aggravation" of an injury. I conclude that the petition in this case was *not* timely filed.

The respondent's motion to dismiss the petition was filed May 14, 2003. The motion asserted that the available medical records showed that Matthew was diagnosed with an autistic disorder on June 22, 1998, more than three years before the filing of the petition, and thus outside the statute of limitations. As explained above, I have given the petitioners a chance to dispute the accuracy of those medical records, or respondent's interpretation of such records, but petitioners have not done so.

Despite this silence from the petitioners, I have reviewed the documents filed by respondent myself to see if the respondent is correct in the assertion that Matthews's autism became apparent more than three years before the filing of this petition. Those records show that on June 22, 1998, personnel of the Children's Seashore House Child Development and Rehabilitation Services evaluated Matthew, and determined that he met the criteria for "Pervasive Developmental Disorder," a form of autism spectrum disorder.[7] (Ex. C, p. 6.[8])

Accordingly, the records available to me indicate that the manifestation of Matthew's autism was apparent by June 22, 1998, if not earlier.[9] The petition, however, was not filed until February 14, 2003. Therefore, I am forced to conclude that respondent is correct: the first symptom of Matthew's autism occurred more than thirty-six months prior to the filing of the petition, so the petition was not timely filed.[10]

III

CONCLUSION

Based upon the records filed in this case, it appears that Matthew Tucker suffers from a terrible disorder. Unfortunately, the records also indicate that this petition was not filed within the deadline specified by Congress. I have no choice but to dismiss this petition because it was

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[7]A "pervasive developmental disorder" is a type of autism spectrum disorder. *See*, *e.g.*, Craig J. Newschaffer and Laura Kresch Curran, *Autism: An Emerging Public Health Problem*, 118 Pub. Health Rep. 393 (2003).

[8]Ex. C was filed by the respondent on September 16, 2003.

[9]In *Setnes v. United States*, 57 Fed. Cl. 175, 181 (2003), the court held that the "first symptom or manifestation of onset" of autism does not occur until the occurrence of a symptom that "clearly or obviously" signals the onset of autism. Respondent takes issue with whether *Setnes* correctly interprets the statutory section in question, but I do not need to reach any conclusion on that question here. Even assuming the correctness of *Setnes*, the petition in this case would still be untimely. That is, as I read the record, by June of 1998 not only were the symptoms of Pervasive Developmental Disorder, a form of autism, clear and obvious, but Matthew was, in fact, diagnosed with autism. Thus, even assuming that the *Setnes* analysis is correct, this petition would still be untimely.

[10]I note also that I found no indication in the records that Matthew's autism was substantially aggravated at any later point in time by any other vaccinations. As stated above, the petitioners were given the opportunity to respond to respondent's motion, but have not done so.

not timely filed, no matter how tragic Matthew's condition. Accordingly, I hereby DISMISS this petition because it was untimely filed.[11]

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George L. Hastings, Jr.
Special Master

[11]In the absence of a timely-filed motion for review of this decision, the Clerk of this Court shall enter judgment accordingly.