

OFFICE OF SPECIAL MASTERS

No. 02-2059V

(Filed: October 25, 2004)

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CHARLES WEINSTEIN and AMY HOLMES, \*
legal representatives of a minor child, Michael D. \*
Weinstein, \*

Petitioners, \*

v. \*

SECRETARY OF HEALTH AND \*
HUMAN SERVICES, \*

Respondent. \*

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TO BE PUBLISHED

Michael L. Cave, Baton Rouge, Louisiana, appeared for petitioners.

Tracy Patton, U.S. Department of Justice, Washington, D.C., appeared for respondent.

DECISION<sup>1</sup>

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-12 et seq.).<sup>2</sup> Respondent has filed a motion contending that this petition was untimely filed, and therefore should be dismissed. For the reasons set forth below, I conclude that respondent's contention is correct, and I hereby dismiss this petition.

<sup>1</sup>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.

<sup>2</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.).

# I

## BACKGROUND

### *A. The petitioners' claim*

On December 30, 2002, the petitioners, Charles Weinstein and Amy Holmes, filed the above-captioned petition on behalf of their son, Michael Weinstein. The petition alleged that certain vaccinations caused Michael to suffer from “autism and/or other ailments.” (Pet., page. 1.)<sup>3</sup>

### *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.”

### *C. Procedural history concerning respondent's motion*

The petition asserted that Michael “was diagnosed with Autism on December 30, 1996.” (Pet., para. 8.) Accepting that assertion, respondent on April 3, 2003, filed a motion to dismiss the petition because it was not timely filed. Since then the parties have filed several additional memoranda addressing the timely filing issue, the last of which was petitioners’ “Supplemental Response” filed on September 21, 2004.

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<sup>3</sup>This case is one of over 4,200 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.

## II

### DISCUSSION

As noted above, § 300aa-16(a)(2) requires that a Program petition alleging injury by a vaccination administered after October 1, 1988, must 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 the injury. I conclude that the petition in this case was *not* timely filed, and, therefore, must be dismissed at this time.

As I analyze the filings of the parties, essentially four different issues are raised with respect to this timely filing issue, which I will discuss, in turn, below.

#### ***A. It is undisputed that the petition was not filed within 36 months of the first symptom of Michael’s autism***

As noted above, according to petitioners’ own factual allegation Michael was diagnosed with autism on December 30, 1996, and the petition was not filed until December 30, 2002. The petitioners do not dispute, therefore, that the petition was not filed within 36 months of the first symptom of Michael’s autism. However, the petitioners in their two memoranda offer, in essence, three different arguments as to why their petition nevertheless should not be dismissed. I will discuss those three arguments below.

#### ***B. Petitioners’ argument concerning when they first became aware of possible causal link***

Petitioners seem to suggest (Response filed on May 6, 2004, p. 6) that the 36-month statutory period should not begin to run until they *became aware* of the possibility of a causal link between Michael’s autism and his vaccinations. In this regard, however, the case law squarely contradicts petitioners’ argument. The U.S. Court of Appeals for the Federal Circuit has stated unequivocally that the limitations period of §300-16(a)(2)--

begins to run upon the first symptom or manifestation of the onset of injury, even if the petitioner reasonably would not have known at that time that the vaccine had caused an injury.

*Brice v. Secretary of HHS*, 240 F. 3d 1367, 1373 (Fed. Cir. 2001), *cert. denied sub nom. Brice v. Thompson*, 122 S. Ct. 614 (2001). Since the pronouncements of the Federal Circuit concerning legal issues are legally binding on this court, it is clear that I must reject this argument of petitioners.

#### ***C. Issue of “equitable tolling”***

Next, petitioners argue that their petition should be *deemed* to have been timely filed pursuant to the doctrine of “equitable tolling.” However, the U.S. Court of Appeals for the Federal Circuit

has held that the “equitable tolling” doctrine is *not* available for extending the time period relevant here-- *i.e.*, § 300aa-16(a)(2). *Brice*, 240 F. 3d at 1372-73. As previously noted, the precedent of *Brice* is legally binding upon this court.

Petitioners nevertheless contend that *Brice* is not applicable to their case. They argue that *Brice* is only applicable to cases in which a petitioner alleges an injury falling within the “Vaccine Injury Table,” and is *not* applicable to cases such as this one, in which the petitioner raises an “actual causation” claim.<sup>4</sup> This argument, however, is completely unpersuasive. Section 300aa-16(a)(2) simply makes no distinction whatsoever between Table Injury and “actual causation” claims, nor did the Federal Circuit make any such distinction in *Brice*.

Finally, petitioners seem to suggest that *Brice* was wrongly decided. They contend that *Brice*’s rationale should be reexamined in light of a decision from the U.S. Court of Appeals for the Ninth Circuit. However, as noted above, I am *legally bound* by the ruling in *Brice*; the rationale of *Brice* can be revisited only by the Federal Circuit itself. In short, I am powerless to apply the doctrine of “equitable tolling” in this case.

#### ***D. Petitioners’ claim of “injustice”***

Finally, petitioners raise an argument that amounts to a plea that I should somehow disregard or set aside the language of § 300aa-16(a)(2) because that statute allegedly works an injustice on petitioners. This argument is quite vaguely articulated, but petitioners seem to argue that the Program’s statute of limitations scheme unfairly, or even unconstitutionally, reduces a vaccinee’s *state law tort suit rights*.

If I am understanding petitioners’ contention correctly, their argument seems to be based on the fact that the Program statute of limitations provision may, in effect, significantly curtail the available period for a vaccinee to file a *tort suit* against a vaccine manufacturer or administrator. This concern stems from the language of § 300aa-11(a)(2), which may be interpreted as indicating that if a person with an allegedly vaccine-related injury fails to file a *Program* claim within the limitations period set forth in § 300aa-16(a), then that person is *also* barred from filing a *tort suit*

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<sup>4</sup>There are two separate means of establishing entitlement to compensation under the Program. First, if an injury specified in the “Vaccine Injury Table,” originally established by statute at § 300aa-14(a) and since modified administratively, 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). The Weinstains proceed under this second method of proving entitlement, alleging that the vaccines “actually caused” Michael’s autism.

against a vaccine manufacturer or administrator on account of that injury.<sup>5</sup> Petitioners seem to argue that this provision, in effect, drastically reduces the time period in which a person, who believes himself to have been injured by a vaccination, may file a tort suit against a vaccine manufacturer or administrator. Petitioners point, for example, to a Louisiana statute (Louisiana Civil Code, article 3492) which appears to provide that the limitations period on such a tort suit does not run at all during the period when the injured person is a minor. That would mean that while prior to the enactment of the Program, a person injured in Louisiana by a vaccination as an infant would have had until adulthood to file a tort suit against the vaccine manufacturer or administrator, the Program limitations provision of § 300aa-16(a)(2), combined with § 300aa-11(a)(2), in effect sets a three-year limitations period which cuts off not only the right to *Program* compensation, but also the right to file a tort suit against a *vaccine manufacturer or administrator*.

If the above-stated interpretation of § 300aa-11(a)(2) is correct, then it is arguable that the petitioners do have a reasonable policy argument that the Program statutory scheme is “unjust” or “unfair” when it, in effect, significantly shortens the time periods otherwise available under state laws for filing tort suits against vaccine manufacturers or administrators.<sup>6</sup> However, it is not my role to determine whether a statutory provision is “unjust” or “unfair.” It is my role, rather, simply to apply the statute as written. Policy arguments concerning the fairness of a statutory provision, of course, must be directed to Congress, not a judicial official. And if the petitioners in this case are arguing that this unfairness amounts to an *unconstitutional* deprivation of their rights, they simply have not made a case. Even assuming that I as a special master of this court have any authority to address a constitutional claim, petitioners have simply not offered a coherent argument. They have not even pointed to any particular clause in the U.S. Constitution that is allegedly violated by the Program scheme. They certainly have not explained in detail how the Program scheme violates any of their constitutional rights.

In short, while petitioners may have a *policy* argument of some appeal, they have failed to offer any meritorious *legal* reason why I should do anything except enforce the statute as written.

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<sup>5</sup>Section 300aa-11(a)(2) provides that no civil action may be filed against a vaccine manufacturer or administrator “unless a petition has been filed, *in accordance with section 300aa-16 of this title*, for compensation under the Program \* \* \*.” Since § 300aa-16 provides the time deadlines for Program petitions, it is arguable that pursuant to the italicized language, if the Program petition was not timely-filed, then a tort suit is also barred.

<sup>6</sup>As far as I can tell, the legislative history of the Program does not make it clear whether Congress actually *intended* to, in effect, significantly shorten the state law limitations periods.

### III

#### CONCLUSION

Based upon the petition, it appears that Michael Weinstein suffers from a significant disorder. Unfortunately, therefore, however, the record also indicates that this petition was not filed within the deadline specified by Congress. I have no choice but to dismiss this petition because it was not timely filed, no matter how tragic Michael's condition. Accordingly, I hereby DISMISS this petition because it was untimely filed.<sup>7</sup>

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George L. Hastings, Jr.  
Special Master

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<sup>7</sup>In the absence of a timely-filed motion for review of this decision, the Clerk of this Court shall enter judgment accordingly.