

OFFICE OF SPECIAL MASTERS

No. 04-1080V

(Filed: September 9, 2005)

KATIE M. JAYNES, mother and guardian ad litem for Marcus Cetell, a minor,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

**Unpublished
To be posted on court's
website¹**

ORDER DEFERRING RULING ON TIMELINESS ISSUE

Respondent filed a Respondent's Report on August 4, 2005, arguing that this petition should be dismissed because it allegedly was not timely filed. I hereby defer ruling on that motion, for the reasons set forth below.

I

BACKGROUND

A. The petitioner's claims

The petition alleges that Marcus was *initially neurologically injured* by vaccinations received in January of 2001, and that his condition was later *aggravated* by vaccinations received on

¹Because this document contains a reasoned explanation for my action in this case, I intend to post this order on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Therefore, as provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, this entire document will be available to the public. *Id.*

October 10, 2001. Then, petitioner's filing of March 25, 2005, appears to add an allegation that Marcus suffered *autism* as a result of unspecified vaccinations.

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 of the significant aggravation of such injury."

II

DISCUSSION

As noted above, § 300aa-16(a)(2) requires that a Program petition with respect to 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. In this case, the petitioner, as noted above, seems to raise three separate claims: (1) that Marcus was *initially injured neurologically* by certain vaccinations received on January 2001; (2) that his condition was *significantly aggravated* by certain vaccinations received on October 10, 2001; and (3) that his *autism* was caused or aggravated by unspecified vaccinations.

A. Onset of neurologic injury

As respondent points out, the medical records filed in this case appear to indicate that the first evidence of seizures and/or other neurologic abnormality in Marcus occurred in January and February of 2001, while the Program petition was not filed until June 29, 2004. Accordingly, it appears that, as respondent argues, the petition was not filed within "36 months after the date of the occurrence of the first symptom or manifestation of *onset*" of Marcus' neurologic abnormality. Therefore, it appears that as to petitioner's *first* claim, that Marcus' neurologic abnormality was *initially caused* by his January 2001 vaccinations, the petition, was, in fact, untimely filed.

B. "Aggravation"

As to petitioner's *second* claim, concerning "significant aggravation," however, I conclude that it would *not* be appropriate for me to dismiss the claim on timeliness grounds at this time. If the vaccinations in October 2001 did in fact aggravate Marcus' neurologic abnormality, then obviously the first symptom of that *aggravation* must have occurred in October 2001 or thereafter,

so that the filing of the petition in June of 2004 occurred within 36 months after the first symptom of that aggravation.²

C. Autism claim

As to the additional claim that Marcus' *autism* was vaccine-caused, the available records simply do not make it clear when the first symptom of his autism occurred, so that it is simply unclear whether petitioner's claim as to his autism was timely filed.

III

CONCLUSION

As to petitioner's first claim, the petition apparently was untimely, and under current law I clearly would be barred from affording petitioner any compensation for that alleged injury. However, the petition does not appear to be untimely as to petitioner's *second* claim, that Marcus' neurologic condition was *aggravated* by certain vaccinations administered in October of 2001. Further, it is not clear when the first symptoms of Marcus' *autism* appeared, so it is not clear whether Marcus' claim as to his autism was timely filed. Accordingly, it is appropriate that I do *not* dismiss this petition at this time; instead, it seems appropriate that I afford petitioner the opportunity to offer evidence supporting her factual contentions as to the aggravation and autism claims.

Of course, if and when the petitioner ultimately attempts to prove "causation" in this case, supplying additional medical records and/or expert support for her claims, *at that time* it will likely become clear when the first symptoms of Marcus' autism, and of his neurological aggravation (if any) occurred. We can *at that time* assess whether the petition was timely filed as to those claims. There is no need to do so at this time. (I note, however, that in cases in which the available medical records *do* indicate that the first symptom predated the filing of the petition by more than three years, I will continue to dismiss such cases, as I have in the past. *See, e.g., Weinstein v. HHS*, No. 02-2059V, 2004 WL 3088663 (Oct. 25, 2004), *aff'd sub nom Hebert v. HHS*, 66 Fed. Cl. 43 (2005); *Tucker v. HHS*, No. 03-0346V, 2004 WL 950012 (Fed. Cl. Spec. Mstr. Apr. 15, 2004); *Kinsala v. HHS*, No. 03-1289V, 2004 WL 828459 (Fed. Cl. Spec. Mstr. Mar. 19, 2004).)

Finally, I reiterate to the petitioner that, as set forth in my "Notice" sent to her on April 6, 2005, if she desires to attempt to prove, on her own, that Marcus' autism or any neurologic aggravation was vaccine-caused, she may do so at any time. On the other hand, she may, if she

²Of course, to gain an award, the petitioner will have to supply evidence *proving* that a vaccine-caused aggravation occurred and that the "first symptom or manifestation" of that aggravation occurred less than three years prior to the date on which the petition was filed. Petitioner may choose to either provide the necessary evidence herself at any time, or wait to see whether evidence at least partially supportive of this claim is provided in the Omnibus Autism Proceeding.

wishes, continue to elect to defer any proceedings on this case, while awaiting the outcome of the Omnibus Autism Proceeding. Unless I hear otherwise from petitioner, I will assume that she still wishes to defer proceedings and await the outcome of the Omnibus Autism Proceeding.

George L. Hastings, Jr.
Special Master