

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 12-53V

February 29, 2012

Not to be Published

AMBER CROUSE,

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Petitioner,

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v.

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Petition filed after the statute
of limitations expired.

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SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

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Respondent.

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Amber Crouse, Royal Palm Beach, FL, for petitioner (pro se).

Tara J. Kilfoyle, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION¹

On January 26, 2012, petitioner filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-10–34, alleging that hepatitis B

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

vaccine she received on April 4, 2008 caused “the sudden onset of vision disturbances” which led to the diagnosis of multiple sclerosis (MS) on March 17, 2009.

The Vaccine Act statute of limitations requires that a petitioner file her petition within 36 months of the “first symptom or manifestation of onset” of her alleged vaccine injury. 42 U.S.C. § 300aa-16(a)(2). Since petitioner alleges that hepatitis B vaccine caused the “sudden onset” of vision disturbances which led to the diagnosis of MS almost 11 months later, the undersigned assumes that “sudden onset” occurred close in time to the vaccination. But even if the sudden onset of vision disturbances occurred three months later, i.e., by July 4, 2008, in order for petitioner to have filed her petition within the statute of limitations, she should have filed no later than some time in 2011. However, she filed her petition in 2012, after the passage of 36 months from the onset of her illness that was eventually diagnosed as MS.

DISCUSSION

The United States is sovereign and no one may sue it without the sovereign's waiver of immunity. United States v. Sherwood, 312 U.S. 584, 586 (1941). When Congress waives sovereign immunity, courts strictly construe that waiver. Library of Congress v. Shaw, 478 U.S. 310 (1986); McGowan v. Sec’y of HHS, 31 Fed. Cl. 734, 740 (1994); Patton v. Sec’y of HHS, 28 Fed. Cl. 532, 535 (1993); Edgar v. Sec’y of HHS, 29 Fed. Cl. 339, 345 (1993); Jessup v. Sec’y of HHS, 26 Cl. Ct. 350, 352-53 (1992) (implied expansion of waiver of sovereign immunity was beyond the authority of the court). A court may not expand on the waiver of sovereign immunity explicitly stated in the statute. Broughton Lumber Co. v. Yeutter, 939 F.2d 1547, 1550 (Fed. Cir. 1991).

The statute of limitations in the Vaccine Act requires vaccinees to sue within 36 months of the onset of their alleged vaccine injury. Once the statute of limitations has run, vaccinees have no recourse under the Vaccine Act.

Recently, the Federal Circuit, in an en banc decision, ruled in a case concerning the allegation that hepatitis B had led to petitioner's MS which was diagnosed a year later, although petitioner had transverse myelitis much closer in time to the vaccination. The Federal Circuit in Cloer v. Sec'y of HHS, 654 F.3d 1322 (Fed. Cir. 2011), dismissed the petition of petitioner, a doctor, who untimely filed her petition after she read a medical article relating MS to hepatitis B vaccine. She had filed her petition within three years of the diagnosis of her MS, but not within three years of the onset of her transverse myelitis, which was the first symptom of her MS.

The Federal Circuit stated in Cloer that the discovery rule does not apply to the Vaccine Act, i.e., the statute of limitations does not start to run when a petitioner discovers a causal connection between the vaccination and the injury, but does start to run from the date of the first symptom or manifestation of the injury regardless of when petitioner learns the vaccine might have been the cause of the injury. 654 F.3d at 1337, 1338.

Although there are situations when the statute of limitations may be equitably tolled, the Federal Circuit stated in Cloer those situations are limited, involving governmental fraud, duress, or deception, or a procedurally defective pleading. Id. at 1344-45. The facts in this case do not indicate any instance of governmental fraud, duress, or deception, and petitioner's petition was not procedurally defective.

The Vaccine Act imposes on attorneys an obligation to advise a person who consults with an attorney regarding a vaccine-related injury that the person may seek compensation under the

Vaccine Injury Compensation Program. 42 U.S.C. § 300aa-10(b). Since petitioner in the instant action is pro se, this provision does not have any applicability here.

In addition, the Vaccine Act imposes an obligation on respondent to undertake reasonable efforts to inform the public of the availability of the Vaccine Injury Compensation Program. 42 U.S.C. § 300aa-10(c). Whether or not respondent's efforts to publicize the existence of the Vaccine Injury Compensation Program are and were reasonable is beyond the authority of the special masters in this Program to determine.

On February 2, 2012, the undersigned issued an Order to Show Cause why this case shall not be dismissed. At the end of that Order to Show Cause, the undersigned stated that she would ask petitioner for her response to the Order to Show Cause during the first status conference, which would be set up once respondent's counsel filed a Notice of Appearance.

Respondent filed her notice of appearance on February 7, 2012. Since that date, the undersigned's judicial assistant has telephoned petitioner on four separate occasions during four weeks and left messages for petitioner to return the call, which she has failed to do.

This case is dismissed for petitioner's failure to file within the statute of limitations.

CONCLUSION

This petition is **DISMISSED**. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.