OFFICE OF SPECIAL MASTERS

January 31, 2003

JOHN and ELIZABETH SETNES, as parents and natural guardians, on behalf of their minor son, AUSTIN J. SETNES,	*	
Petitioners,	*	No. 02-791V Published
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Sheila A. Bjorklund, Minneapolis, MN, for petitioners.
Vincent J. Matanoski, Washington, DC, for respondent.

Millman, Special Master

DECISION

Petitioners filed a petition dated July 15, 2002, under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-10 et seq., alleging that their son Austin J. Setnes (hereinafter "AJ") suffered autism spectrum disorder as a result of the cumulative administration of vaccines he received during his first two years of life. AJ was born on June 10, 1997.

Petitioners allege they began to notice AJ began to change significantly in development and behavior after his 15-month vaccinations on September 11, 1998.

In support of their allegation that the thimerosal in the multiple vaccinations AJ received from August 1997 through September 1998 caused his autism spectrum disorder, petitioners filed a medical expert report from Dr. Donald H. Marks, M.D., Ph.D., dated July 12, 2002, in which Dr. Marks states:

> By 9-15-98 [sic], he had received 11 vaccines containing mercury and on that date, received DTaP, Hib, which also contained mercury. Within the next three months, the symptoms of autism began to appear.

P. Ex. C, p. 228.

That means according to petitioners' expert Dr. Marks that the onset of AJ's autism spectrum disorder was, at the latest, December 15, 1998. (Since the vaccinations were actually administered on September 11, 1998, this onset interval actually should end on December 11, 1998.) Petitioners, under the Vaccine Act statute of limitations, should have filed their petition no later than December 11, 2001. Instead, they filed their petition on July 15, 2002, seven months too late.

On October 15, 1998, respondent moved to dismiss this case for failure to file within the statute of limitations. Petitioners replied in opposition on November 4, 2002. This case was transferred to the undersigned from another special master on November 7, 2002. Respondent replied to petitioners' response on November 14, 2002.

DISCUSSION

Section 16(a)(2) of the Vaccine Act states:

> In the case of--
>
> > a vaccine set forth in the Vaccine Injury Table which is administered after the effective date of this subpart, if a vaccine-related injury occurred as a result of the administration of such vaccine, no petition may 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....[emphasis added].

Petitioners argue in their opposition to respondent's motion that autism is a subtle disease and, therefore, the first symptom or manifestation of onset should be dated at the time of the diagnosis. Before the diagnosis, symptoms can be confused with normalcy. They append an Affidavit from Eric V. Larsson, a Ph.D., not a medical doctor,[1] stating "[m]anifestations of the disorder are subtle." Larsson Pet. at 2.

However, the Act does not require diagnosis of a condition or disease to start the running of the statute of limitations. It starts the statute running from the date of the occurrence of the vaccinee's first symptom or manifestation of onset of the alleged vaccine injury. The Act also does not require knowledge that the vaccine caused the symptom or manifestation of onset in order for the statute of limitations to start running.

The Federal Circuit in Brice v. Secretary of HHS, 240 F.3d 1367 (Fed. Cir.), cert. denied sub nom. Brice v. Thompson, 122 S. Ct. 614 (2001), stated, at 240 F.3d at 1370:

> [A] "statute of limitations is a condition on the waiver of sovereign immunity by the United States," and courts should be "careful not to interpret [a waiver] in a manner that would extend the waiver beyond that which Congress intended." *Stone Container Corp. v. United States*, 229 F.3d 1345, 1352 (Fed. Cir. 2000) (quoting *Block v. North Dakota*, 461 U.S. 273, 287 ... (1983) (internal quotation omitted)).

Petitioners assert that the 36-month statute of limitations can be tolled for some period of time if the petitioners show that they did not know the actual condition AJ had until a doctor

---

[1] The opinion of a non-medical witness on a medical issue has no relevancy. See Domeny v. Secretary, HHS, No. 94-1086V, 1999 WL 199059 (Fed. Cl. Spec. Mstr. March 15, 1999), aff'd, (Fed. Cl. May 25, 1999) (unpublished), aff'd, No. 99-5130 (Fed. Cir. April 10, 2000) (per curiam) (unpublished) (proffer of dentist's testimony for diagnosis of a neuropathy rejected).

diagnosed it, citing the dissent in Brice, supra, to the effect that equitable tolling should apply under the Vaccine Act. But, the dissent in Brice has no legal authority. Moreover they attempt to distinguish Brice from the instant case because Brice was a Table case and this is a causation-in-fact case. But the majority in Brice did not state it applies only to Table cases.

The Federal Circuit in Brice did not limit its holding that equitable tolling is inapplicable in Vaccine Act cases solely to Table cases. The only distinction it made was in pre-Act and post-Act cases (pre-Act cases concerned statutes of repose for which equitable tolling was never applicable). 240 F.3d at 1371. Turning to post-Act cases, the Federal Circuit held "there is good reason to find that Congress did not want the equitable tolling doctrine to apply in post-Act cases." Id. at 1372. Firstly, the Federal Circuit examined the Act's specific exception from the limitations period for petitions improperly filed in state or federal court. The Act requires dismissal of the petition from that court, but considers the date the action was filed to be the date the later petition was filed if it was filed within one year of the date of dismissal. 42 U.S.C. § 300aa-11(a)(2)(B). The Federal Circuit stated, "When an Act includes specific exceptions to a limitations period, we are not inclined to create other exceptions not specified by Congress." 240 F.3d at 1373.

Secondly, the Federal Circuit refused to apply equitable tolling to Vaccine Act cases because "the limitations period is part of a detailed statutory scheme which includes other strict deadlines," referring to the requirement that decisions be issued within 240 days of the filing of a petition, and the prohibition of suspending proceedings for more than a total of 150 days. 42 U.S.C. §§ 300aa-12(d)(3)(A)(ii) and (C). Id. Moreover, the Act "emphasizes the importance of quick resolution of claims," stating that Congress intended the parties to obtain speedy and reliable judgments under the Act. Id. The Federal Circuit stated:

> To allow equitable tolling would conflict with these principles. While the doctrine of equitable tolling is designed to prevent harsh and unjust results, the difficulty with the doctrine is that it invites prolonged and wasteful collateral litigation concerning the running of the statute of limitations. ... Lengthy collateral litigation is directly inconsistent with Congress's objective in the Vaccine Act to settle claims quickly and easily.

Id.

Even before the Federal Circuit's opinion in Brice, lower courts have held that the discovery rule or doctrine is inapplicable to the Vaccine Act, i.e., the running of the statute of limitations is not delayed until petitioner discovers the vaccine caused the injury. Childs v. Secretary of HHS. 33 Fed. Cl. 556, 558 and n.2 (1995); Pertnoy v. Secretary of HHS, 1995 WL 579827, at *3, *4 (Fed. Cl. Spec. Mstr., Sept. 18, 1995); and Gribble v. Secretary of HHS, 1991 WL 211919, at *2 n.5 (Cl. Ct. Spec. Mstr., Sept. 26, 1991).

The Vaccine Act does not require that a symptom be diagnosed in order for the statute of limitations to start to run in causation in fact cases, as petitioners assert. The Act requires that a symptom occur. Petitioners' assertion that in causation in fact cases, until a disease is diagnosed, the statute of limitations does not start to run is contrary to the statutory language.

The undersigned notes that this case does not concern an allegation that the initial set of vaccinations caused autism spectrum disease, and the statute of limitations starts running from those initial vaccinations. It is always possible in such a case that the later series of vaccinations may have significantly aggravated any prior causation of this disease, should such evidence ever be produced to satisfy the burden of proof. This case concerns the cumulative effect of thimerosal contained after AJ received all his childhood vaccinations and the symptoms arose after his final vaccinations. Since the onset of AJ's alleged vaccine injury precedes 36 months before petitioners filed their

petition, the undersigned has no subject matter jurisdiction over this petition, and the petition must be dismissed.

CONCLUSION

The undersigned ORDERS that this case be dismissed for lack of subject matter jurisdiction. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

_____ _____

DATE Laura D. Millman
Special Master