OFFICE OF SPECIAL MASTERS

September 25, 2002

REGINA and SHANNON LEMIRE, parents of DESTINY LEMIRE,	*	
Petitioners,	*	No. 01-647V Published
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

D. Michael Noonan, Dover, NH, for petitioners.
Catherine E. Reeves, Washington, DC, for respondent.

Millman, Special Master

DECISION

Petitioners filed a petition dated November 16, 2001, under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-10 et seq., alleging that their daughter Destiny Lemire (hereinafter "Destiny") suffered developmental delays and autism as a result of the cumulative administration of vaccines she had received since the age of two months. Pet. at ¶ 5.

Petitioners allege they began to notice Destiny regress in speech and language after her July 14, 1998 vaccinations. Pet. at ¶ 4. On July 14, 1998, Destiny was 18 months of age. When Destiny

was brought to see a neurologist on November 17, 1998, Mrs. Lemire told him that before Destiny was 15 months of age (April 1998), she was not concerned about her development, but that at 15 months, Destiny's language seemed to regress. Med. recs. at 351.

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

> In the case of--
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> > 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].

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 date of first occurrence of regression in the instant case, according to the petition, paragraph 4, was after the July 14, 1998 vaccinations. But, according to Mrs. Lemire's history to Destiny's neurologist, the date of first occurrence of regression,, was in April 1998. Petitioners filed their petition in November 2001, past the expiration of 36 months after the date of occurrence (even if one takes the July date) of Destiny's first symptom or manifestation of onset of her language regression.

The undersigned issued an Order to Show Cause why this case should not be dismissed on January 11, 2002. Petitioners responded on April 24, 2002. Respondent filed a Reply to Petitioners'

Response to Order to Show Cause on April 30, 2002. Petitioners filed Additional Response to Respondent's Reply to Petitioners' Response to Order to Show Cause on May 13, 2002.

On May 31, 2002, petitioners filed an amended petition, alleging injury from thimerosol. Petitioners allege in paragraph 4 that after Destiny's vaccinations on July 14, 1998, they began to notice that she began to regress in terms of speech and language development.

On June 4, 2002, the undersigned issued an Order requiring the parties to discuss the meaning of "the date of occurrence of first symptom or manifestation of onset" as stated in 42 U.S.C. § 300aa-16(a)(2) as applied to this case. Petitioners responded on July 19, 2002. Respondent replied on August 14, 2002.

DISCUSSION

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)).

When Congress waives sovereign immunity, as it did in the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10, et seq., it grants jurisdiction to a deliberative body, i.e., the special masters, the judges of the United States Court of Federal Claims, the judges of the Federal Circuit, and ultimately the Justices of the United States Supreme Court, to hear cases arising under the statute. But the statute has certain requirements that petitioners must fulfill in order to file a valid petition.

Section 300aa-16(a)(2) states, for post-Act cases, that "no petition may be filed...after the expiration of 36 months after the date of the ...first symptom...of such injury...." Petitioners in the instant action violated this requirement by filing their petition more than 36 months after the onset of their daughter's alleged injury. The Vaccine Act states they cannot file this petition.

Petitioners assert in their Response to Order to Show Cause that the statute of limitations should not start running until April 12, 1999 when Destiny was diagnosed with autism, although since her first birthday, January 3, 1998, Mrs. Lemire had noted changes in Destiny's development which continued through the following months, resulting in an evaluation at Child Development Services on September 2, 1998, that she had delays in communication development, overall lack of purposeful interaction with others or with her environment, and lack of improvement since her first birthday.[1] P. Response, p. 2.

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, and reasonably could not have known that the vaccine recipient had suffered an injury compensable under the Vaccine Act, citing Mogensen v. Secretary of HHS, 199 WL 1179612 (Fed. Cl. Spec. Mastr., Nov. 30, 1999). But the Mogensen case

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[1/] At Child Development Services on September 2, 1998, Mrs. Lemire told a speech and language pathologist, "Up to her first birthday, Regina [Mrs. Lemire] reports Destiny seemed like a typically developing child. She was using a few words and was learning new skills. Since her first birthday, she has not developed any new language skills and has stopped using the few words that she had. ... Other changes include decline in eye contact and decline in overall attention to verbal information and her environment." Med. recs. at 202. Although Destiny was 20 months old in September 1998, she was rated at a 6- to 9-month level in language comprehension and in 50 percent of her language expression, and at the 3- to 6-month level in 50 percent of her language expression. Med. recs. at 202-03. An Occupational Therapy Evaluation also dated September 2, 1998 recommended neurological evaluation for her regression of language development, resistance in self-care skills, and avoidance of social skills, eye contact, and interaction. Med. recs. at 204.

does not help petitioners herein. Firstly, the special master in Mogensen evaluated petitioners' claim for equitable tolling, assuming the doctrine applied, before the Federal Circuit issued its Brice decision, supra, saying equitable tolling does not apply in the Vaccine Program. Secondly, the special master dismissed the Mogensen case because he found petitioners had not exercised due diligence.

Petitioners also state in their Response that because they are alleging the cumulative effect of thimerosal contained in numerous vaccines Destiny received, they could not have recognized that a symptom may trigger a claim under the Vaccine Act until she received her last vaccination, MMR #1, on January 26, 1999. Firstly, the medical records show that Destiny's last immunization was her fifth DPT vaccination (DTaP) on July 12, 2001. Med. recs. at 92. Secondly, if the statute permitted petitioners to wait until the last vaccination Destiny received (assuming a cumulative affect from all of them) in order to file suit, then the statute of limitations in this case would not begin running until July 12, 2001, which is three years after the onset of Destiny's symptoms. The statute, however, requires petitioners to institute suit within 36 months of the first, not the last, onset of symptoms.

Petitioners admit in their Response that they knew before her first MMR vaccination on January 26, 1999 that Destiny was developmentally delayed. P. Response, p. 4. The Federal Circuit stated in Brice, supra, at 1373, "we note that the statute of limitations here 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." Therefore, petitioners' argument that they needed to wait until Destiny received her first MMR on January 26, 1999 in order to recognize a symptom that would trigger a claim under the Vaccine Act since "the cumulative effect

of the thimerosal contained in the vaccines ... was incomplete up until that point" is directly contrary to the Vaccine Act and the Federal Circuit's interpretation of the Act in Brice. Moreover, petitioners would undoubtedly be surprised to learn that MMR does not contain thimerosal,[2] lending further incredulity to their argument that only after receiving her first MMR did the cumulative effect of thimerosal give petitioners sufficient facts to know of a potential claim under the Act.

Petitioners cite Goetz v. Secretary of HHS, 45 Fed. Cl. 340, 342 (1999) in support of their arguments. P. Response at 4. But Goetz does not support petitioners' case since it resulted in a dismissal on statute of limitations grounds, which was affirmed on appeal. The Honorable John P. Wiese stated, "[I]t is clear that Congress intended the cause of action in a ... case to accrue upon occurrence of the first symptom of an injury, not upon the first identification of a link between the injury and the vaccination." Id. at 341. Judge Wiese also agreed that equitable tolling did not apply in the case. Id. at 342. (The case was decided before the Federal Circuit's opinion in Brice.) Citing Dion v. United States, 137 Ct. Cl. 166, 167 (1956), Judge Wiese stated that ignorance of one's rights is not enough to toll the statute of limitations.

Destiny's symptoms of delays in language, social skills, and self-care were apparent to petitioners more than 36 months before they filed a petition. That there could be various causes for these developmental deficits does not remove from petitioners the obligation to secure their legal rights by filing a petition in a timely manner.

[2/] "Inactivated polio vaccine (IPV) and live viral vaccines, such as measles-mumps-rubella (MMR), varicella, and oral polio vaccine (OPV) do not contain, and have never contained, thimerosal (AAP, 1999; FDA, 2001)." Immunization Safety Review. Thimerosal-Containing Vaccines and Neurodevelopmental Disorders, Institute of Medicine (2001) at 27.

In petitioners' Additional Response to Respondent's Reply to Petitioners' Response to Order to Show Cause, petitioners assert that the various cases set out a general rule tolling the statute of limitations in the Vaccine Act if the petitioner did not know the vaccinee had suffered a vaccine injury, but petitioners do not cite any of these alleged cases. Moreover, petitioners state that the statute of limitations really could not have run in this case because medical and scientific evidence has not yet confirmed that thimerosal in pediatric vaccines causes autism. This is a breathtaking statement because it means that the statute of limitations can never run as long as there is a dispute among the medical profession over whether someone indeed has a vaccine injury. We are far from the statutory language now which requires that the statute of limitations starts to run at the time of the first symptom or manifestation of onset.

In answer to the undersigned's Order of June 4, 2002 for the parties to discuss the meaning of "the date of occurrence of first symptom or manifestation of onset" as stated in 42 U.S.C. § 300aa-16(a)(2) as applied to this case, petitioners filed their Response on July 19, 2002, stating that the Federal Circuit's opinion in Brice applies only to Vaccine Table cases, but not to causation in fact cases, such as their case. Petitioners assert that they can therefore avail themselves of the doctrine of equitable tolling. Moreover, petitioners state that a symptom in a causation in fact case cannot be "defined" until the illness or condition is known (presumably diagnosed). Since Destiny's autism was not diagnosed until April 1999, they assert their petition is timely (which would negate their need for relying on equitable tolling). P. Response, pp. 1-2.

The statute, however, does not ask for the definition of a symptom (presumably a diagnosis), but only for the occurrence of it. Mrs. Lemire knew that her daughter lost all her language skills at least by April 1998. She did not need to know that her daughter had an underlying condition in

order to recognize when the first symptom, loss of language, occurred. Having a diagnosis of autism a year after the onset of her symptoms does not merge the timing of the onset of those symptoms into the date of the diagnosis of the condition.

Secondly, 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 "defined" in order for the statute of limitations to start to run in causation in fact cases, as petitioners assert. P. Response, p. 4. The Act requires that a symptom occur. Petitioners' assertion that in causation in fact cases, until a disease is diagnosed, a symptom cannot be "defined" and, therefore, the statute of limitations does not start to run is contrary to the statutory language.

Their further assertion that, while equitable tolling is inapplicable to Table cases, it is applicable in causation in fact cases is also without merit. Petitioners assert that a causation in fact case has the traditional tort burden and is a lengthier proceeding than a Table case. Therefore, since an off-Table case cannot be speedy, equitable tolling should be applicable. They also state that United States v. Brockamp, 519 U.S. 347 (1997), upon which the Federal Circuit in Brice relied in concluding that equitable tolling was inapplicable in Vaccine Act cases, is not persuasive. Petitioners assert that Brockamp's fifth criterion (speedy resolution) is inapplicable to causation in fact cases because they take longer to try than Table cases. They state that only Brockamp's fourth

criterion (specific exceptions to the limitations period) applies herein, but that it, by itself, is insufficient to justify not applying equitable tolling to causation in fact cases. P. Response, pp. 9-11.

But the Federal Circuit in Brice did not distinguish between Table and off-Table cases in holding that equitable tolling is inapplicable in Vaccine Act cases, emphasizing congressional intent for speedy resolution. In addition, applying equitable tolling to causation in fact cases would lengthen their resolution even further in direct opposition to congressional intent. Because the Federal Circuit in Brice held that equitable tolling is inapplicable to Vaccine Act cases, without distinguishing between Table and off-Table cases, and because applying equitable tolling to off-Table cases would protract their resolution even further, the undersigned cannot hold that petitioners may avail themselves of this doctrine. Since the onset of Destiny's 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.

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DATE Laura D. Millman
Special Master