

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

AUSTIN KILE KEMPTON, by *
MARK KEMPTON and ANGELA *
KEMPTON, as parents and natural *
guardians *

Petitioners, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

No. 02-399V
Special Master Christian J. Moran

Filed: January 26, 2010

autism, statute of limitations

John N. Hamilton, Esq., Nance, Cacciatore, Hamilton, Barger, Nance & Cacciatore, Melbourne, FL., for petitioners;
Katherine Esposito and Lynn E. Ricciardella, United States Dep't of Justice, Washington, D.C. for respondent.

PUBLISHED DECISION DISMISSING PETITION FOR LACK OF TIMELINESS*

Mark and Angela Kempton allege that various vaccines caused their son, Austin Kile Kempton ("Austin") to develop autism. They seek compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq. (2006). However, Mr. and Ms. Kempton filed their petition after the period of time for filing a petition expired. Therefore, the petition is DISMISSED.

* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it 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).

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 clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, the person submitting the information has 14 days to identify and to move to delete such information before the document's disclosure. If the special master agrees that the identified material fits within the categories listed above, the special master shall redact such material from public access. 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

I. Factual and Procedural History

_____ The relevant factual events are not disputed. Austin was born on May 9, 1997. Exhibit 1 at 1. Austin received various vaccinations between July 11, 1997 and May 10, 1999. Exhibit 2 at 3-4, 11-12.

Petitioners filed a number of videos showing Austin from October 1998 through April 2007. Pet'r Notice of Filing, dated Sept. 18, 2009.

When Austin was approximately 18 months old, his parents notified Austin's pediatrician that they were concerned about Austin's behaviors and language delay. Exhibit 1 at 27.

The operative date for determining whether the petitioners filed the case within the time provided by the statute of limitations is April 24, 2002. See 42 U.S.C. § 300aa-16(a)(2).

In June 2000, Austin was diagnosed with "Speech/Language Delay" and "Pervasive Developmental Delay (Autism Spectrum Disorder)" Exhibit 1 at 25-29. Information about Austin's development after he was diagnosed with autism is not relevant to determining the timeliness of the petition.

The petitioners filed their short-form petition on April 24, 2002. They did not file any medical records with their petition. When this petition was filed, the Office of Special Masters was attempting to manage the numerous petitions that were claiming various vaccines caused autism. A history of these efforts is provided in Cedillo v. Sec'y of Health & Human Servs., No. 98-916V, 2009 WL 331968, at *7 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), motion for review denied, 89 Fed. Cl. 158, 182 (2009), appeal docketed, No. 2009-5004 (Fed. Cir. Oct. 7, 2009).

The petitioners' case resumed in 2008, when a special master ordered the petitioners to file medical records. The petitioners filed exhibits 1 and 2 on April 10, 2008. Petitioners later presented additional factual information about Austin. In informal status conferences, the parties discussed whether the petition was filed within the time permitted by the statute of limitations.

Respondent filed a report from Dr. Russell D. Snyder. He stated that Austin first displayed symptoms of autism when he was 17 months old (or October 1998). Resp't Exhibit A at 2. Based upon this report, respondent maintained that the petition was not filed within the time permitted by the statute of limitations.

Petitioners requested and were granted an opportunity to evaluate Dr. Snyder's report. Order, filed Nov. 20, 2009. Eventually, petitioners filed a status report stating that "no responsive expert report will be filed on [petitioners'] behalf and that [petitioners] continue to rely upon all previously filed pleadings in this matter." Pet'r Status Rep't, filed Jan. 22, 2010.

II. Analysis

For cases in the Vaccine Program, the statute of limitations requires a petition to be filed within 36 months “after the date of the occurrence of the first symptom or manifestation of onset . . . of such injury.” 42 U.S.C. § 300aa–16(a)(2).

On this point, the only direct evidence is Dr. Snyder’s report. Dr. Snyder’s report concludes that Austin displayed a symptom of autism by October 1998, when he was 17 months old. Dr. Snyder reviewed various videos of Austin from October 1998 to April 2007. Dr. Snyder opined that by October 24, 1998, (the time of the earliest available video) Austin showed “a total lack of the use of spoken language as a means of communication.” Thus, Dr. Snyder concluded that Austin’s earliest sign of autism was manifest by October 24, 1998. Exhibit A at 2. Dr. Snyder cited two articles in support of his opinion. Resp’t Exhibits C - D.

Here, the petitioners have not presented a report from an expert who disagreed with Dr. Snyder, that is, an expert who believes that Austin’s delay in speaking, which was noticed at 17 months, was not a manifestation of Austin’s autism. Although Dr. Snyder’s un rebutted report is not necessarily probative, Applied Medical Resources Corp. v. United States Surgical Corp., 147 F.3d 1374, 1379 (Fed. Cir. 1998); Dr. Snyder’s report is persuasive.

A preponderance of the evidence supports a finding that Austin’s delay in speaking, which was observed when he was 17 months, constitutes a manifestation of his autism. This finding means that the time for filing a petition began no later than October 24, 1998. Pursuant to 42 U.S.C. § 300aa–16(a)(2), the petitioners were required to file their petition within 36 months, that is, by October 24, 2001. They did not. Therefore, the petition must be dismissed.

III. Conclusion

The evidence demonstrates that Austin experienced the “first symptom or manifestation of onset” of autism more than 36 months before the petitioners filed their petition. Therefore, the petition was not filed within the statute of limitations. Therefore, the statute of limitations bars recovery. The petition is DISMISSED.¹

IT IS SO ORDERED.

Christian J. Moran
Special Master

¹ When a petition is filed outside the time permitted by the statute of limitations, the Court of Federal Claims lacks subject matter jurisdiction to entertain the action. Without subject matter jurisdiction, special masters may not award attorneys’ fees and costs. Brice v. Sec’y of Health & Human Servs., 358 F.3d 865, 868 (Fed. Cir. 2004); Kay v. Sec’y of Health & Human Servs., 80 Fed. Cl. 601, aff’d without decision, ___ F.3d ___, 298 Fed. Appx. 985 (Nov. 10, 2008), cert. denied, ___ U.S. ___, 129 S.Ct. 1933 (2009).