

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

BARBARA RAMIREZ, Parent of
KATHERINE RAMIREZ, a minor,

Petitioner,

Case No. 02-1538V
Special Master Christian J. Moran

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

Filed: May 21, 2009
Reissued: June 8, 2009

autism, petitioner’s motion to dismiss,
respondent’s motion to dismiss due to
statute of limitations

D. Michael Noonan, Shaheen & Gordon, P.A., Dover, N.H., for petitioner;
Katherine C. Esposito, United States Dep’t of Justice, Washington, D.C. for respondent.

PUBLISHED DECISION DENYING COMPENSATION*

Barbara Ramirez filed a petition pursuant to the National Childhood Vaccine Injury Compensation Act, 42 U.S.C. § 300aa–10 et seq. (2006). She alleged that various vaccines caused her daughter, Katherine Ramirez, to suffer autism.¹

* 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, a party has 14 days to identify and to move to delete such information before 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 delete such material from public access. 42 U.S.C. § 300aa–12(d)(4); Vaccine Rule 18(b).

¹ Ms. Ramirez has filed another action seeking compensation for her son, Aaron Ramirez, which bears docket number 02-1539V.

The information in the record, however, does not show entitlement to an award under the Program. Pursuant to Ms. Ramirez's request, this decision dismisses her case. This decision, however, does not resolve the question of whether Ms. Ramirez filed her petition within the time permitted by the statute of limitations, 42 U.S.C. § 300aa-16(a)(2).

I. Procedural History

Ms. Ramirez's case is one of more than four thousand cases in which petitioners allege that vaccines caused their children autism or a disorder along the autism spectrum. The first decisions in three test cases found that petitioners had failed to meet their burden of proof. Cedillo v. Sec'y of Health & Human Servs., No. 98-916V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Snyder v. Sec'y of Health & Human Servs., No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); Hazlehurst v. Sec'y of Health & Human Servs., No. 03-654V, 2009 WL 332258 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Each petitioner filed a motion for review, which remain pending before judges at the United States Court of Federal Claims. The history of proceedings for the omnibus autism proceeding (OAP) is set forth in Cedillo, Snyder, and Hazlehurst.

The procedural history for this specific case began on November 12, 2002, when Ms. Ramirez filed her petition. This case joined the OAP. Ms. Ramirez wanted to wait to see the result of the test cases being litigated.

In 2008, development of Ms. Ramirez's case began. Ms. Ramirez submitted medical records on June 16, 2008.

Respondent filed a motion to dismiss, arguing that Ms. Ramirez did not file her petition in the time provided by the statute of limitations. Specifically, respondent contended that Katherine's autism was apparent by March 28, 1995, approximately seven years before the petition was filed. Resp't Mot. to Dismiss, filed July 30, 2008, at 3-4.

Ms. Ramirez did not reply to respondent's argument directly. Instead, Ms. Ramirez filed a motion seeking a decision dismissing her petition. Pet'r Mot., filed Feb. 27, 2009, at 1-2. Ms. Ramirez stated that she "will be unable to prove that Katherine Ramirez is entitled to compensation in the Vaccine Program." She, therefore, requested "a decision dismissing the claim."

In response, respondent argued that instead of dismissing the case based on Ms. Ramirez's motion, the case should be dismissed for lack of jurisdiction on the ground that the case was not timely filed. Resp't Resp., filed Mar. 12, 2009.

II. Analysis

The parties agree that Ms. Ramirez is not entitled to receive compensation for Katherine's autism through the Vaccine Program. However, the parties reach this conclusion by slightly

different routes. Ms. Ramirez contends that she cannot introduce persuasive evidence to meet her burden of proof. In contrast, respondent maintains that Ms. Ramirez's case should be dismissed for lack of jurisdiction.

Here, a difference in form may be a difference in substance. A determination that a petitioner failed to file her petition within the time provided by the statute of limitation has one, and possibly two, adverse consequences for that petitioner.

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. ___, 2009 WL 901544 (2009). On this point, the law is clear because it has been stated by a panel of the Federal Circuit, whose decisions are binding on special masters.

The second possible consequence concerns a petitioner's right to seek compensation from the manufacturer of the vaccine or the administrator of the vaccine. After fulfilling certain criteria, a person who was a petitioner in the Vaccine Program may file a lawsuit against vaccine manufacturers or vaccine administrators. One criterion is that the petitioner first obtain a "judgment" from the Court of Federal Claims. 42 U.S.C. § 300aa-21(a). A "judgment" follows a "decision" by a special master. 42 U.S.C. § 300aa-12(d), (e). Currie v. Sec'y of Health & Human Servs., No. 02-838V, 2003 WL 23218074 (Fed. Cl. Spec. Mstr. Nov. 26, 2003), explains this unusual system.²

Respondent has a fair argument that the first task is to determine whether the Court of Federal Claims possesses subject matter jurisdiction to adjudicate Ms. Ramirez's case. See Johns-Manville Corp. v. United States, 893 F.2d 324, 327 (Fed. Cir. 1989). However, under the circumstances of litigation in the Vaccine Program, the timeliness issue can be deferred. Several factors support this reasoning.

First, as mentioned above, the underlying result will not change. Ms. Ramirez will not receive compensation even if she filed her petition on a timely basis.

Second, as a practical matter, determining whether the petition was filed in a timely manner is likely to be both complex and costly. The statute of limitations for cases in the Vaccine Program requires that the petition be filed within "36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of [the] injury." 42 U.S.C. § 300aa-16(a)(2). When the injury is autism or another disorder along the spectrum of autism disorders, the "first symptom or manifestation of onset" is difficult to identify. Often, an early manifestation is a child's failure to speak. The omission of a skill is more difficult to identify than an overt act, such as a seizure.

² Currie is sometimes cited as Hamilton.

If a ruling on the timeliness of the petition affected the outcome of the case, then it is likely that both parties would be required to retain experts to opine when Katherine Ramirez manifested the first symptom of autism. These experts would probably testify at a hearing. This retention would be costly. At the present time, there seems to be no reason to force the parties to undergo these costs.

The third factor follows from the second in that any adjudication about timeliness can be deferred. Ms. Ramirez possesses the right to seek an award for her attorneys' fees and costs even after it is found that she is not entitled to compensation. 42 U.S.C. § 300aa-15(e). If Ms. Ramirez exercises this right, she will be required to demonstrate that the Court of Federal Claims possesses subject matter jurisdiction to award her attorneys' fees and costs, that is, that her petition was filed within the statute of limitation. See Brice, 358 F.3d at 868.³ Until Ms. Ramirez places the timeliness of her petition in issue by seeking attorneys' fees and costs, adjudicating the timeliness would seem to be a poor use of scarce judicial resources and limited funds of both parties.

The final factor supporting the ruling to grant Ms. Ramirez's motion for a dismissal and not to decide respondent's motion to dismiss concerns Ms. Ramirez's qualified right to bring a lawsuit in another venue. On this point, too, a ruling regarding the timeliness of Ms. Ramirez's petition seems not to affect the outcome. If respondent's motion to dismiss were granted, a "decision," which results in a "judgment," would be issued. E.g., Hoogcacker v. Sec'y of Health & Human Servs., No. 07-800V, 2009 WL 321264 (Fed. Cl. Spec. Mstr. Jan. 23, 2009). Therefore, Ms. Ramirez is not gaining any advantage in connection with filing a subsequent lawsuit by having the present petition dismissed at her request, rather than dismissed on the ground of lack of timeliness. She will receive a "judgment" either way.

In short, almost nothing is lost by now abstaining from resolving the question of whether Ms. Ramirez filed her petition within the time provided by the statute of limitations. This question can be taken up if and when Ms. Ramirez seeks an award of her attorneys' fees and costs.

After the question about the timeliness of the petition is deferred, the remaining question is whether Ms. Ramirez is entitled to compensation. Ms. Ramirez does not assert that she is entitled to compensation. She has requested that her case be dismissed.

Pursuant to the Vaccine Act, a petitioner may not be given an award in the Vaccine Program based solely on the petitioner's claims alone. Rather, the petition must be supported by either medical records or by the opinion of a competent physician. 42 U.S.C. § 300aa-13(a)(1). In this case, because there are no medical records supporting Ms. Ramirez's claim, a medical opinion must be offered in support. Ms. Ramirez, however, has offered no such opinion.

³ Ms. Ramirez should be aware that her expenditures in trying to establish that she filed her petition within the statute of limitations will only be reimbursed if she is successful in her endeavor.

An examination of the record did not uncover any evidence that Katherine suffered a “Table Injury.” Further, the record does not contain a medical expert’s opinion or any other persuasive evidence indicating that Katherine’s alleged injury was vaccine-caused. **Thus, this case is dismissed for insufficient proof.**⁴

III. Conclusion

The Clerk shall enter judgment in accord with this decision if a motion for review is not filed.

IT IS SO ORDERED.

Christian J. Moran
Special Master

⁴ An unpublished decision, Chou v. Sec’y of Health & Human Servs., No. 01-659V, (Fed. Cl. Spec. Mstr. Sept. 12, 2006), reached the same result. Although not published, Chou is available on the web site for the Court of Federal Claims.