IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

CARTER MICHAEL RUSSELL, a Minor by and through his Next Friend, CARA BESTE RUSSELL,	*	No. 02-747 V Special Master Christian J. Moran
Petitioner,	*	Filed: July10, 2009
v.	*	Autism, statute of limitations, speech delay, reliability of expert's opinion
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Douglas A .Dellacio, Jr., Cory, Watson, Crowder & Degaris, P.C., Birmingham, AL., for petitioner;
Heather L. Pearlman, United States Dep't of Justice, Washington, D.C. for respondent.

PUBLISHED DECISION GRANTING MOTION TO DISMISS[*]

Cara Beste Russell alleges that various vaccines caused her son, Carter, to develop autism. She seeks compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa–10 et seq. (2006). However, Ms. Russell filed her petition after the period of time for filing a petition expired. Therefore, the respondent's motion to dismiss the petition is GRANTED.

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[*] 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. Carter was born on October 14, 1997. Exhibit 1 at 1. He received various vaccinations, starting two days after he was born through July 1, 1999. Exhibit 3 at 15.

On January 18, 1999, when Carter was a 15-months-old baby, he was seen by his pediatrician. Carter was reported to be having a bad cough, pulling at his ears, and also had a runny nose. Additionally, there is a notation – probably made by the pediatrician – that Carter spoke "no words" and "? needs hearing checked." Exhibit 3 at 8.

The pediatrician evaluated Carter as part of a "fifteen month well child visit" on February 4, 1999. In terms of behavior and development, the note indicates that Carter did not speak 3-6 words, he did not identify 1-2 body parts, and he did not point to pictures in a book. However, he did perform other tasks, such as understanding simple commands, indicating wants, stacking two blocks, feeding himself with his fingers, and hugging. Exhibit 3 at 4.

Approximately one year later, Carter's parents reported that they suspected that "something was wrong when [Carter] was 15 months old." Exhibit 2 (diagnostic evaluation made by Rebecca L. Dossett, Ph.D., of the Dossett Clinic for People with Autism) at 2. The parents' account corresponds to the information in the pediatrician's records.

At the request of Carter's doctor, Carter was seen for a speech and language assessment on April 20, 1999. The evaluator, Sue Creekmore, reported that Carter's hearing had been checked and was found "to be adequate for hearing speech." After interacting and observing Carter, Ms. Creekmore concluded that "Carter presents mild to moderate (20 to 33%) delays in the areas of comprehension and verbal expression. [Ms. Creekmore was] uncertain as to the reason for the delay and [was] always hesitant when diagnosing a child under the age of two." Exhibit 4 at 2. Ms. Creekmore recommended that Carter receive speech-language services for six months.

The operative date for determining whether Ms. Russell filed the case within the time provided by the statute of limitations is June 28, 1999. See 42 U.S.C. § 300aa–16(a)(2).

On July 16, 1999, Carter was evaluated. He was found to be eligible for early intervention services from Alabama due to a delay in Carter's ability to communicate. Exhibit 4 at 4-6. He was diagnosed with autism after an evaluation at the Dossett Clinic on March 16, 2000. Exhibit 2 at 1-5. Information about Carter's development after he was diagnosed with autism is not relevant to determining the timeliness of the petition.

Ms. Russell filed her petition on June 28, 2002. She also filed five exhibits, which she labeled as exhibits A through E.[1] 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 filed (Mar. 16, 2009). Eventually, at the request of Ms. Russell, a special master stayed her case in 2003.

Ms. Russell's case resumed in 2008, when a special master ordered Ms. Russell to file medical records. Ms. Russell filed exhibits 1 - 7 on April 10, 2008.

Respondent filed a motion to dismiss, arguing that the statute of limitations barred this action. Specifically, respondent asserted that Carter displayed a symptom or manifestation of autism by January 18, 1999, when he was noted to have "no words." Resp't Mot. to Dismiss, filed May 23, 2008, at 3.

Ms. Russell disagreed. She argued that the "medical profession at large" would not recognize Carter's condition on January 18, 1999, as a manifestation of the onset of autism. Instead, according to Ms. Russell, the statute of limitations was triggered no earlier than "July 16, 1999[,] when the medical profession at large recognized the first symptom or manifestation of the onset of autism." Pet'r Resp., filed June 5, 2008, at 5.

A status conference was held on December 8, 2008. During this status conference, the undersigned special master discussed whether any evidence – as opposed to assertions by counsel – supported the proposition that speaking "no words" at 15 months of age was a manifestation of autism. After some discussion about the sequencing of submissions with the parties, the undersigned ordered respondent to submit an expert report on this issue.

Respondent filed a two-page report from Dr. Roberto Tuchman as exhibit A. Respondent also submitted Dr. Tuchman's curriculum vitae, and two articles on which Dr. Tuchman relied. Exhibits B - D. Dr. Tuchman concluded that "Carter's language disorder, evident by age 15 months, was the first symptom and manifestation of the onset of his present diagnosis of Autistic Disorder." Exhibit A at 2.

Ms. Russell challenged Dr. Tuchman's opinion because it was "not based upon reliable, if any, principles or methods." Ms. Russell noted that Dr. Tuchman had not examined Carter. Ms. Russell argued that Dr. Tuchman's opinion should be excluded based upon, among other authorities, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Pet'r Obj., filed May 4, 2009.

[1] A later filing superseded these exhibits.

Respondent filed a response to Ms. Russell's objection to Dr. Tuchman's opinion. Respondent argued that "Dr. Tuchman's opinion in this case is grounded in the methods and procedures of science." Resp't Resp., filed May 14, 2009, at 3.

Ms. Russell was given an additional opportunity to present evidence regarding when the medical profession would believe that Carter first manifested a sign or symptom of autism. Order, filed May 7, 2009.

Ms. Russell did not submit any evidence on this point by the deadline. Instead, Ms. Russell essentially repeated legal arguments from her May 4, 2009 response. See Pet'r Resp., filed June 12, 2009. With that response, the briefing has concluded and the motion to dismiss is ready for adjudication.

II. Analysis

Preliminarily, it is important to emphasize that the facts in this case are not disputed. For example, Ms. Russell does not dispute the accuracy the pediatrician's record that Carter was not speaking at 15 months of age. The parties dispute the medical and legal significance, if any, to this fact.

From these undisputed facts about Carter's condition, the motion to dismiss essentially encompasses two separate issues. The first issue is whether Dr. Tuchman's opinion should be excluded. The answer to this question is no. Dr. Tuchman's opinion is sufficiently reliable that it may be considered. The second issue is whether the evidence shows that the first symptom or manifestation of Carter's autism occurred before June 28, 1999. The answer to this issue is yes because a speech delay, in this case, is a symptom of autism. Elaboration on these two issues follows.

A. Should Dr. Tuchman's Opinion Be Excluded?

After respondent filed Dr. Tuchman's report, Ms. Carter argued that it should be excluded. To the extent that Ms. Carter's argument is characterized as an objection, her objection is overruled. "Decisions concerning the admissibility of evidence, such as expert testimony, are reviewed for abuse of discretion." Monsanto Co. v. David, 516 F.3d 1009, 1014 (Fed. Cir. 2008). Dr. Tuchman's report is sufficiently reliable to be considered.

As the proponent of Dr. Tuchman's report, respondent bears the burden of establishing the reliability of his opinion. Tiufekchiev v. Sec'y of Health & Human Servs., No. 05-437V, 2008 WL 3522297, at *8 (Fed. Cl. Spec. Mstr. July 24, 2008); Doe/03 v. Sec'y of Health & Human Servs., Fed. Cl. redacted, 2007 WL 2350645 (Fed. Cl. Spec. Mstr. July 31, 2007) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993)); see also Knudsen v. Sec'y of Health & Human Servs., 35 F.3d 543, 548 (Fed. Cir. 1994); Moore v. Ashland Chem. Inc., 151 F.3d 269, 276 (5th Cir. 1998) (en banc) (discussing Daubert); Parker Hannifin Corp. v.

United States, 71 Fed. Cl. 231, 235 (2006) (United States bears the burden of proving when a document was signed when the United States is using the document to support a motion to dismiss).

Preliminarily, the standard for the admission of expert opinion requires some clarification. In her brief, Ms. Russell cites extensively to Federal Rule of Evidence 702, which generally requires an expert's opinion to be reliable. Pet'r Obj., filed May 4, 2009, 1-4. However, the Federal Rules of Evidence do not restrict the admissibility of evidence in the Vaccine Program. 42 U.S.C. § 300aa–12(d)(2)(B); Vaccine Rule 8(c).

Nevertheless, although Rule 702 of the Federal Rules of Evidence does not govern the admissibility of an expert opinion in the Vaccine Program, expert opinions are still required to be "reliable." Vaccine Rule 8(c) directs special masters to "consider all relevant and reliable evidence." Furthermore, the Federal Circuit has referred to "reliability" (or a synonym) in several decisions. E.g., Andreu v. Sec'y of Health & Human Servs., ___ F.3d ___, 2009 WL 1688231, at *9-10 (Fed. Cir. 2009) (citing Althen and Knudsen); Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005) (stating that petitioner's evidence must be supported by a "'reputable medical or scientific explanation,'" quoting Grant v. Sec'y of Health & Human Servs., 956 F.2d 1144, 1148 (Fed. Cir. 1992); Knudsen v. Sec'y of Health & Human Servs., 35 F.3d 543, 548 (Fed. Cir. 2004) (stating that a theory must be supported by "sound and reliable medical or scientific evidence"). Additionally, the Federal Circuit affirmed that a special master may use the Daubert standards when evaluating an expert's opinion. Terran v. Sec'y of Health & Human Servs., 195 F.3d 1302, 1316 (Fed. Cir. 1999). Consequently, Ms. Russell has correctly identified the standard for considering expert testimony, although she identified the wrong source for this requirement. Thus, Dr. Tuchman's report will be examined for reliability.

Although respondent bears the burden of establishing the reliability of Dr. Tuchman's opinion, examining the specific challenges made by Ms. Russell is helpful. Ms. Russell appears to make three distinct points: first, Dr. Tuchman did not examine Carter; second, Dr. Tuchman's opinion "is no more than his own assertion based upon his authority as a medical physician, i.e., ipse dixit"; and third, Dr. Tuchman did not use any scientific methodology. On all points, Ms. Russell's arguments are not tenable.

First, Ms. Russell notes that Dr. Tuchman has not examined Carter. Pet'r Obj., filed May 4, 2009, at 3. This assertion appears accurate. Dr. Tuchman did not assert that he examined Carter. See exhibit A. But, this fact is not relevant. Ms. Russell has not cited any cases in which a court excluded the proposed testimony of a doctor, who was anticipated to testify as an expert, on the ground that the doctor failed to examine the plaintiff personally. See Pet'r Obj., filed May 4, 2009.

At least two appellate authorities have rejected the argument that the trial court erred in admitting testimony from a doctor who had failed to examine the plaintiff. See Walker v. Soo Line Railroad Co., 208 F.3d 581, 591 (7th Cir. 2000) (stating "The lack of an examination of Mr.

Walker does not render Dr. Upton's testimony inadmissible."); In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717, 762 (3d Cir. 1994) (stating "we think that evaluation of the patient's medical records, like performance of a physical examination, is a reliable method of concluding that a patient is ill even in the absence of a physical examination."). Although the Federal Circuit, whose decisions constitute binding precedent, has not reviewed this exact question, the Federal Circuit has stated that "an expert need not have obtained the basis for his opinion from personal perception." Monsanto, 516 F.3d at 1015.

In the Vaccine Program, experts who have not examined the petitioner testify on behalf of petitioner and respondent routinely. While the opinions of these testifying doctors have been challenged on various grounds, there almost never is a challenge to the admissibility of their opinion. A party, especially a petitioner who is relying upon a statement made by a treating doctor, may argue that a personal examination is a factor to consider in weighing the opinions. But, an argument about weight is different from an argument about admissibility.

Beyond the holdings of the Seventh Circuit in Walker and the Third Circuit in Paoli, the circumstances of the Vaccine Program provide additional reasons to permit doctors to testify about an injured person's health without examining the person. Congress intended to promote a relatively quick adjudication of cases in the Vaccine Program. See 42 U.S.C. §300aa-12(c)(6)(A).[2] If all experts were required to examine the injured person, then additional time and expense would be needed. Such a rule could prevent petitioners from obtaining an opinion from an expert.

Consequently, Ms. Russell's first challenge to the reliability of Dr. Tuchman's opinion, his failure to examine Carter, is rejected. This factor will be considered in weighing Dr. Tuchman's opinion. See section B, below.

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[2] Given that Ms. Russell filed her petition in 2002, it is clear that this litigation has not resolved expeditiously. This delay is primarily, if not exclusively, due to Ms. Russell's desire to defer the resolution of Carter's case until the general causation question – whether vaccines can cause autism – was resolved. See Pet' Notice, filed Jan. 13, 2003. Furthermore, the special master, twice, informed Ms. Carter of her right to opt out of the Vaccine Program pursuant to 42 U.S.C. § 300aa–12(d)(3)(A)(ii). Order, filed April 3, 2003; order, filed Sept. 8, 2003. Yet, Ms. Carter did not exercise this right.

In February 2009, three special masters resolved the first cases testing whether vaccines can cause autism or related disorders. Cedillo v. Sec'y of Health & Human Servs., No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), mot for review filed (Mar. 16, 2009); Hazlehurst v. Sec'y of Health & Human Servs., No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), mot for review filed (Mar. 16, 2009); Snyder v. Sec'y of Health & Human Servs., No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), mot for review filed (Mar. 16, 2009). All are on appeal to judges at the Court of Federal Claims.

Briefing on the second set of three test cases recently completed.

The second challenge to Dr. Tuchman's opinion is that his opinion is "a classic example of ipse dixit." Pet'r Resp., filed May 5, 2009, at 2; accord, Pet'r Resp., filed June 12, 2009, at 1. Ms. Russell's challenge is not supported.

As a matter of law, Ms. Russell is correct when arguing that a court is not required to accept an expert's opinion merely because an expert said it. "But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1999). This principle has been used to evaluate the testimony of experts in the Vaccine Program as well. Moberly v. Sec'y of Health & Human Servs., 85 Fed. Cl. 571, 596 (2009).

However, Ms. Russell errs in arguing that Dr. Tuchman falls short of this standard. Dr. Tuchman submitted two articles from medical journals that support his opinion that language delay may be an early manifestation of autism. See exhibit C (Rebecca J. Landa, Diagnosis of autism spectrum disorders in the first 3 years of life, 4(3) Nat. Clin. Pract. Neurol. 138 (2008)) and exhibit D (J. Luyster et al., Language assessment and development in toddlers with autism spectrum disorders, 38(8) J Autism Dev. Disord. 1426 (2008). Although these articles are discussed in more detail below, it is sufficient to note that their presence refutes Ms. Russell's challenge that Dr. Tuchman's statements constitute an unsupported ipse dixit.

The third defect asserted by Ms. Russell is that Dr. Tuchman did not "apply any methodology or principles to Carter's case." Pet'r Resp., filed May 5, 2009, at 3. This argument, too, misses its mark.

It is difficult to understand what Ms. Russell believes is missing from Dr. Tuchman's report. Dr. Tuchman reviewed the medical records. Exhibit A at 1. Although his summary is contained in one paragraph, Dr. Tuchman appears to have considered all the facts relevant to the question of when Carter first manifested a sign or symptom of autism. Notably, Ms. Russell has not identified any fact about Carter that Dr. Tuchman could have overlooked. See Pet'r Resp., filed May 5, 2009; and Pet'r Resp., filed June 12, 2009.

From this information, Dr. Tuchman concluded that the first sign or symptom of autism was his delay in developing language. As mentioned, Dr. Tuchman cited two articles to support his conclusion. Exhibit A at 2.

It appears that Ms. Russell may be requesting that Dr. Tuchman describe his implicit mental process, but Ms. Russell has cited no authorities that require experts to explain how they think. Doctors commonly form opinions about a patient's disease from their review of medical records. Doctors' medical training and experience give them the ability to reach conclusions about their patients. Practically, it would be difficult for most doctors to articulate the mental process that inherently underlies their categorization of a particular set of symptoms and signs as

one disease or another. Ultimately, Dr. Tuchman's conclusion can be evaluated. (This evaluation is set forth in section B below.) Therefore, Dr. Tuchman is not required to set forth the reasons for his opinion more explicitly.

Ms. Russell presented three challenges to the consideration of Dr. Tuchman's opinion. However, her challenges fail. Dr. Tuchman's opinion is accepted as sufficiently reliable to be considered as evidence.

B. Did Ms. Russell File Her Petition in the Time Permitted by the Statute of Limitations?

The second question encompassed within respondent's motion to dismiss is whether Ms. Russell filed her petition within the time permitted by the statute of limitations. The evidence, including Dr. Tuchman's report, establishes that she did not.

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. Tuchman's report. Dr. Tuchman's report concludes that "Carter's language disorder, evident by age 15 months, was the first symptom and manifestation of onset of his present diagnosis of Autistic Disorder." Exhibit A at 2.

Dr. Tuchman cited two articles that support his opinion that a delay in a child's development of expressive language may be a manifestation of autism. One article stated that "Delays and deficits in language acquisition are among the key diagnostic criteria for autism spectrum disorders (American Psychiatric Association 1994), and the absence of first words and phrases is the foremost reason reported by caregivers of children with ASD [autism spectrum disorders] for their initial concern about their child's development." Exhibit D (Luyster at 1426).

Another article advocated intervention with children suffering from disorders along the autism spectrum before age three. This earlier intervention is possible because "there is mounting evidence that developmental disruption is present before 3 years of age in children who are subsequently diagnosed with ASDs." Exhibit C (Landa at 139). The evidence includes that "[a]pproximately 80% of parents of children with ASDs notice abnormalities in their child by 24 months of age, which usually involve delays in speech and language development." Id. The article also discusses the limitations of trying to detect an autism spectrum disorder at an early age. Id. at 142-43.

Here, Ms. Russell has not presented a report from an expert who disagreed with Dr. Tuchman, that is, an expert who believes that Carter's delay in speaking, which was noticed at 15 months, was not a manifestation of Carter's autism. Although Dr. Tuchman's unrebutted report

is not necessarily probative, Applied Medical Resources Corp. v. United States Surgical Corp., 147 F.3d 1374, 1379 (Fed. Cir. 1998); Dr. Tuchman's report is persuasive.

Several factors contribute to the persuasiveness of Dr. Tuchman's report. First, Dr. Tuchman has worked in the autism field for many years. He currently works as the Director of the Autism Program in the Miami Children's Hospital Dan Marino Center. Exhibit B (curriculum vitae) at 1. He has served on scientific boards investigating autism. Id. at 4. He has lectured about autism at national and international conferences on autism for at least ten years. Id. at 8. He has written many articles that were published in peer-reviewed medical journals and chapters of books. Id. at 12-16.

Second, Dr. Tuchman's opinion is supported by the two articles that he filed. Ms. Russell filed no articles contradicting his testimony.

Third, Dr. Tuchman's opinion is consistent with the findings of the three special masters who heard three weeks of evidence in the autism test cases. Each special master mentioned that a delay in speaking may be a manifestation of autism. Cedillo, 2009 WL 331968, at *96; Hazlehurst, 2009 WL 332306, at *22; Snyder, 2009 WL 332044, at *37.

For all these reasons, a preponderance of the evidence supports a finding that Carter's delay in speaking, which was observed when he was 15 months, constitutes a manifestation of Carter's autism. This finding means that the time for filing a petition began no later than January 18, 1999. Pursuant to 42 U.S.C. § 300aa–16(a)(2), Ms. Russell was required to file her petition within 36 months, that is, by January 18, 2002. She did not. Therefore, her petition must be dismissed.

Ms. Russell argued that the motion to dismiss wrongly forces her "to prove that a diagnosis should have occurred at an earlier age." Pet'r Resp., filed June 12, 2009, at 2. Although this argument is not well developed, this concern should be addressed.

The Federal Circuit has already rejected any argument that a doctor's delay in diagnosing a condition affects the statute of limitations. Consistent with Brice v. Sec'y of Health & Human Servs., 240 F.3d 1367, 1373 (Fed. Cir. 2001), and Weddell v. Sec'y of Health & Human Servs., 100 F.3d 929, 931 (Fed. Cir. 1996), the Federal Circuit stated "Congress intended the limitations period to commence to run prior to the time a petitioner has actual knowledge that the vaccine recipient suffered from an injury that could result in a viable cause of action under the Vaccine Act." Markovich v. Sec'y of Health & Human Servs., 477 F.3d 1353, 1358 (2007). Thus, although a period of approximately 14 months elapsed from when Carter was first noticed to have a delay in his speech (January 18, 1999) to when Carter was first diagnosed with autism (March 16, 2000), this interlude is not relevant.

III. Conclusion

The evidence demonstrates that Carter experienced the "first symptom or manifestation of onset" of autism more than 36 months before Ms. Russell filed her petition. Therefore, the petition was not filed within the statute of limitations. Therefore, the statute of limitations bars recovery. Respondent's motion to dismiss is GRANTED.[3]

IT IS SO ORDERED.

S/ Christian J. Moran
Christian J. Moran
Special Master

[3] 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).