OFFICE OF SPECIAL MASTERS
No. 03-2013V
Filed: September 19, 2006
Unpublished

SARAH NATIONS , by Her Mother and Next Friend, AMY NATIONS,	*	
Petitioner,	*	Statute of Limitations; Onset; Manifestation of Symptoms
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Ronald Homer, Boston, MA, for petitioner.
Nathaniel McGovern, Washington DC, for respondent.

DECISION[1]

Vowell, Special Master:

On August 29, 2003, Amy Nations filed a petition for compensation under the National

[1] Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post the decision on the United States Court of Federal Claims's website, in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). Under Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

Childhood Vaccine Injury Act ["Vaccine Act" or "Program"], 42 U.S.C. § 300aa–10, *et seq.,*[2] on behalf of her minor daughter, Sarah Nations ["Sarah"]. The petition alleged that Sarah had received numerous vaccinations[3] on May 10, 2000 and that the vaccinations had caused her to develop diabetes. No medical records, affidavit, or expert medical opinion accompanied the petition.

The case was initially assigned to Special Master E. LaVon French. On January 20, 2004, respondent filed a report under Rule 4, RCFC, Appendix B ["Rule 4 Report"]. The Rule 4 Report noted that, without documentation of onset of Sarah's injury, it was impossible to determine if the petition was timely filed.[4] On February 11, 2004, Special Master French ordered petitioner to file medical records and an affidavit by April 12, 2004. Nine exhibits consisting of medical and school records were filed on April 13, 2004. Three additional exhibits consisting of medical records were filed on June 28, 2004. Special Master French advised petitioner on April 30, 2004, of her option to leave the program and file a civil suit. Petitioner served notice of her intent to remain in the Vaccine Program on May 11, 2004.

The case was reassigned to Special Master Laura Millman on August 11, 2004. On August 31, 2004, at petitioner's request, Special Master Millman stayed further proceedings until the completion of discovery in the Autism Omnibus Proceedings. *See* Order, dated August 31, 2004.

The case was reassigned to me on February 8, 2006. At a recorded status conference on March 24, 2006, I lifted the stay. Based on the theory advanced at that status conference by petitioner's counsel, which concerned the thimerosal component of the vaccines Sarah had received on May 10, 2000, I ordered petitioner to file information regarding the vaccines in question, including lot numbers, and ordered respondent to file information on the vaccines' thimerosal content, utilizing the information filed by the petitioner.

On May 25, 2006, respondent filed Respondent's Motion to Dismiss/Amended Rule 4(c) Report,[5] ["Res. Motion to Dismiss"] noting that Sarah first manifested symptoms of diabetes on

---

[2] Hereinafter, for ease of citation, all "§" references to the Vaccine Injury Compensation Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2000 ed.).

[3] The vaccines identified were diphtheria, tetanus, and acellular pertussis ["DTaP"]; inactivated polio ["IPV"]; and measles, mumps, and rubella ["MMR"]. Petition, p. 1.

[4] *Id*., pp. 2-4. Because the petition itself alleged that the vaccinations were administered on May 10, 2000, more than three years before the petition was filed, the date of onset would be crucial in determining if the petition was timely.

[5] There were no medical records on file in January 2004, when respondent filed his initial Vaccine Rule 4 report. *See* § 300aa-11(c) and RCFC, Appendix B, Rule 2(e), specifying the

May 23, 2000. Respondent argued that this placed onset outside the statute of limitations, thus jurisdictionally barring the claim. *Id*., p. 2. Petitioner filed a Motion for Voluntary Dismissal on June 7, 2006; respondent filed a brief in opposition to the voluntary dismissal motion on June 21, 2006. On June 22, 2006, I ordered petitioner to show cause by July 21, 2006, why the petition should not be dismissed for failure to file within the statute of limitations. Respondent was provided with a deadline for any reply brief. In the order, I encouraged the parties to fully brief the applicability of Judge Futey's reasoning in *Setnes v. U.S.*, 57 Fed. Cl. 175 (2003) to this case. *See* Order, dated June 22, 2006. Petitioner did not respond to the show cause order.

There are two motions pending before the court: petitioner's motion for voluntary dismissal and respondent's motion to dismiss for lack of jurisdiction. When faced with a challenge to its jurisdiction, a court must first address that challenge. If it lacks jurisdiction, it may not take further action on matters pending before it. *See, e.g., O'Connell v. Sec'y, HHS*, 63 Fed. Cl. 49, 57 n.7 (2004). Because I have determined that I lack jurisdiction over this petition, I do not address petitioner's motion for voluntary dismissal.[6]

BACKGROUND

Sarah was born on April 14, 1995. Petitioner's Exhibit ["Pet. Ex."] 8, p. 13. On May 10, 2000, according to her school vaccination records, Sarah received DTaP, IPV, and MMR vaccinations. Pet. Ex. 7, p. 2. During a physical examination for school conducted on May 23, 2000, Sarah provided a urine specimen that tested positive for extremely high levels of glucose. Pet. Ex. 1, pp. 27, 61. A normal urine specimen contains no glucose;[7] Sarah's specimen revealed a glucose level greater than 1,000 milligrams ["mg"] per milliliter. *Id*. The presence of glucose in urine indicates a likelihood that the individual tested has diabetes or some other form of glucose intolerance. *Mosby's Labs* at 976. Sarah saw Dr. Marilyn Brown that same day. Doctor Brown noted Sarah's extremely high urinary glucose level and a history of thirst, voiding during the middle of the night, and weight loss. Pet. Ex. 1, p. 27. Doctor Brown recorded her concern about "possib [meaning "possible"] IDDM." *Id*., p. 28. The initials "IDDM" are a medical abbreviation for insulin dependent diabetes mellitus. *Medical Abbreviations* at 184 (12th ed. 2005). Thirst, frequent urination, and weight loss are common symptoms of IDDM. *Dorland's Illustrated Medical Dictionary* ["*Dorland's Medical Dictionary*"] at 506 (30th ed. 2003).

---

matters that must accompany a petition for compensation.

[6] I do note, however, that petitioner's motion incorrectly cites Rule 20, RCFC, Appendix B, as the basis for her motion for voluntary dismissal. The correct citation should be to Rule 21.

[7] *Mosby's Manual of Diagnostic and Laboratory Tests* ["*Mosby's Labs*"] at 975-76 (3d ed. 2006).

Doctor Brown ordered additional testing. On June 7, 2000, Sarah's urinary glucose was 500 mg (Pet. Ex. 1, p. 60) and on June 16, 2000, her urinary glucose was again high at 500 mg. *Id.,* p. 59. Her blood glucose levels were normal on both dates. *Id.,* pp. 59, 60. Mrs. Nations contacted the pediatric clinic on July 11, 2000 to inquire about the test results. The note describing the telephone call indicated that the tests had been ordered to rule out diabetes. A note by Dr. Brown indicated that she spoke with Mrs. Nations and told her that a consultation with an endocrinologist would be necessary before a diagnosis could be made. *Id.*, p. 32.

Sarah saw Dr. William Rogers, a pediatric endocrinologist on July 18, 2000. He noted her abnormal urinalyses, but did not see any "prominent" thirst, frequent urination, excessive eating, or weight loss. His assessment was possible idiopathic glucosuria[8] versus early IDDM. He ordered additional tests, the results of which do not appear in the records, and directed followup in three months. *Id.,* p. 33.

On December 4, 2000, Sarah was admitted to Sheppard Air Force Base Hospital with an extremely elevated blood glucose level of 996 mmg/dL. *Id*., p. 35. A level of 110 mg/dL is considered normal. *Mosby's Labs* at 267. Sarah was diagnosed with Type 1 diabetes[9] during that admission, and, on December 8, 2000, she was transferred to Children's Hospital in Oklahoma City. *Id.*, p. 36.

The remainder of Sarah's medical history is not relevant to the statute of limitations issue, and is thus not included in this opinion.

DISCUSSION

The Vaccine Act's statute of limitations is found in § 300aa-16(a)(2). It provides in pertinent part that "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...of such injury." As the petition was filed on August 29, 2003, the petition cannot be considered timely filed if the first symptom or the manifestation of onset of Sarah's diabetes occurred before that date in 2000.

Because the Vaccine Act is a waiver of sovereign immunity, its statute of limitations must be strictly construed. *Brice v. Sec'y, HHS*, 240 F.3d 1367, 1370 (Fed. Cir. 2001). Respondent argues that the glucose in Sarah's urine, her thirst, nighttime voiding, and weight loss were all

---

[8] Idiopathic means "of unknown cause or spontaneous origin." *Dorland's Medical Dictionary* at 905. "Glucosuria" is high glucose in urine. *Id.* at 783, 787.

[9] Type 1 diabetes is sometimes called juvenile onset diabetes. In Type 1 diabetes, the pancreas is unable to produce insulin. *Dorland's Medical Dictionary* at 506.

obvious symptoms in May, 2000 of what was conclusively diagnosed as IDDM in December, 2000. Thus, the first symptoms of Sarah's disease occurred some three years and three months before the petition on her behalf was filed. Res. Motion to Dismiss, pp. 7-8. Thus, respondent contends that I have no alternative but to dismiss the petition. *Id*., p. 8. I agree.

Because petitioner did not respond to the show cause order, I do not have the benefit of her counsel's reasoning, research, or argument. One possible argument against a determination that the statute of limitations began to run on May 23, 2000 may be found in Judge Futey's opinion in *Setnes, supra*.[10] Judge Futey's opinion discusses the distinction between "first symptom" and "manifestation of onset." While the Federal Circuit held in *Brice* that "the statute of limitations ...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" (240 F.3d at 1373), Judge Futey distinguished *Brice*, pointing out that some diseases present with obvious symptoms and others with a more insidious onset. He held that the special master had erred in finding that certain symptoms manifested onset of autism in the absence of a medical diagnosis. 57 Fed. Cl. at 180-81.

While autism is a condition manifested by a number of behavioral symptoms that may develop insidiously, IDDM has reasonably clear symptoms and criteria for diagnosis. While a definitive diagnosis of IDDM was not made until December 2000, Sarah displayed classic symptoms of IDDM when she saw Dr. Brown in May 2000: thirst, frequent urination, weight loss, and glycosuria. The possible diagnosis of diabetes for these symptoms was obviously discussed with her mother and was clearly set forth by Dr. Brown in Sarah's medical records on May 23, 2000. Additionally, Sarah was referred to a pediatric endocrinologist who noted "early IDDM" as a part of his assessment of her condition in July 2000. Either of these medical assessments of Sarah's symptoms and possible diagnoses renders her petition untimely filed. According to the plain language of the Vaccine Act, the first symptom of the disease starts the clock on the statute of limitations. That clock ran out before this petition was filed.

CONCLUSION

It is unfortunate for Sarah and her family that the merits of her claim will never be examined here. It is also unfortunate that a petition with a jurisdictional defect has languished in this forum for nearly three years before a ruling on that defect was made. Had the petition in this case been accompanied by the statutorily required documentation, perhaps the jurisdictional issue could have been addressed and resolved far earlier. Be that as it may, I have no authority to do

---

[10] Respondent correctly notes that I am not bound by the *Setnes* decision. Res. Motion to Dismiss at 8, n. 6. However, Judge Futey's reasoning regarding what constitutes the "first symptom" or "manifestation of onset" provides insight regarding the interpretation of these provisions of the Vaccine Act..

anything at this juncture except dismiss the petition.[11] In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition as barred by the statute of limitations.

IT IS SO ORDERED.

s/ Denise K. Vowell
Denise K. Vowell
Special Master

[11] This court may not award fees and costs in cases where it lacks jurisdiction over the claimed injury. *See Martin v. Sec'y, HHS*, 62 F.3d 1403, 1407 (Fed. Cir. 1995) and *Brice v. Sec'y, HHS*, 358 F.3d 865, 868 (Fed. Cir. 2004).