

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 12-16V

Filed: January 29, 2013

*****		TO BE PUBLISHED
JULIE ANDERSON,	*	
	*	Special Master Zane
Petitioner,	*	
	*	Hepatitis B; multiple sclerosis;
v.	*	significant aggravation;
	*	dismissal; untimely petition;
	*	statute of limitations; equitable
SECRETARY OF HEALTH	*	tolling
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
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*Sheila A. Bjorklund*, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, MN, for Petitioner.  
*Gordon Shemin*, United States Dep't of Justice, Washington, DC, for Respondent.

### **DECISION DISMISSING CASE<sup>1</sup>**

This matter is before the undersigned Special Master on Respondent's Motion to Dismiss ("Motion to Dismiss"). Petitioner, Julie Anderson, filed her petition on January 9, 2012, seeking compensation under the National Childhood Vaccine Injury Act ("Vaccine Act"), as amended, 42 U.S.C. §§ 300aa-1, *et seq.*<sup>2</sup> Petitioner claimed that three hepatitis B vaccines she received in

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<sup>1</sup> Because this decision contains a reasoned explanation for the Special Master's action in this case, the Special Master intends to post it on the website of the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, § 205, 44 U.S.C. § 3501 (2006). All decisions of the Special Master 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. As provided by Vaccine Rule 18(b), each party has 14 days to file a motion requesting the redaction from this decision of any such alleged material. If the Special Master, upon review, agrees that the identified material fits within the banned categories listed above, the Special Master shall redact such material from public access. In the absence of a timely request, which includes a proposed redacted decision, the entire document will be made publicly available. 42 U.S.C. § 300aa-12 (d)(4); Vaccine Rule 18(b).

<sup>2</sup> Part 2 of the Vaccine Act established the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 through § 300aa-34 (2006) ("Vaccine Program").

March, May, and September 2008, significantly aggravated her pre-existing multiple sclerosis (“MS”). Petition, ¶ 1.

Respondent moved to dismiss Petitioner’s action as untimely based on the Vaccine Act’s applicable statute of limitations, 42 U.S.C. § 300aa-16(a)(2), her petition having been filed more than 36 months after the date of the onset of any alleged aggravation of Petitioner’s MS. Respondent’s Motion to Dismiss at 1. Petitioner conceded her petition was untimely, with the alleged aggravation of her conditions having occurred within weeks of her May 2008 vaccination, but argued that equitable tolling should be applied and, thus, her action should not be dismissed. Petitioner’s Memorandum in Opposition to Respondent’s Motion to Dismiss (“Petitioner’s Opposition”) at 2. Respondent replied that Petitioner did not exercise due diligence in pursuing her claim and that her personal circumstances do not constitute extraordinary circumstances and, thus, Petitioner should not be excused from failing to file a timely claim. Respondent’s Reply to Petitioner’s Opposition to Respondent’s Motion to Dismiss (“Respondent’s Reply”) at 2-3, *citing Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984).

Based on review of the record as a whole and as explained in detail below, Petitioner’s claim is untimely, and equitable tolling of the statute of limitations is not warranted. As such, Petitioner’s action is hereby DISMISSED.

## I. BACKGROUND

Petitioner’s medical problems began nearly three years prior to her receipt of the subject vaccinations. Petitioner’s Exhibit 10 at 4. In March 2005, Petitioner experienced medical conditions that were later determined to be symptoms of MS. *See* Petitioner’s Exhibit 10 at 4.<sup>3</sup> Over the next two years, Petitioner experienced “numbness, tingling, shoulder pain, and weakness in her arm” for which she sought medical treatment. *See e.g.*, Petitioner’s Exhibit 10 at 25, 30; Petitioner’s Exhibit 4 at 39. In fact, in 2007, the year before she received the hepatitis B vaccines, Petitioner made several visits to doctors with complaints that were indicative of MS, *i.e.*, headaches, joint and muscle pain, weakness and fatigue. Petitioner’s Exhibit 10 at 36, 42-43; Petitioner’s Exhibit 3 at 113, 132, 146, 164-65.<sup>4</sup>

Petitioner received hepatitis B vaccines on March 17, 2008, May, 1, 2008 and September 26, 2008. Petitioner’s Affidavit, Exhibit 11, ¶ 2; Petitioner’s Exhibit 2 at 1. As she acknowledges, the onset of her alleged aggravation due to the vaccination occurred shortly after receipt of her second vaccination in May 2008. Petitioner’s Opposition at 2-3. On May 22,

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<sup>3</sup> Petitioner filed an expert report from Dr. Steven F. Noran on May 15, 2012, in which Dr. Noran opined “that Ms. Anderson’s symptoms of MS in all likelihood began in 2005 with the complaint of left arm symptoms. . . .” Petitioner’s Exhibit 1.

<sup>4</sup> During this period, Petitioner’s medical records reflect that at times she mentioned there were problems with her children and adopted sister but also indicated that these problems did not interfere with visits to the doctor to address her medical conditions. *See e.g.*, Petitioner’s Exhibit 10 at 61 and 69.

2008, approximately 20 days following her second vaccination, Petitioner visited her physician complaining of noticeable weakness in her right leg as compared to her left leg. Petitioner's Exhibit 10 at 68-69. She returned to her doctor approximately 14 days later, on June 5, 2008, complaining that her right leg felt "a little numb and tingly." Petitioner's Exhibit 10 at 79. On July 16, 2008, Petitioner visited a neurologist to whom she had been referred. Petitioner's Exhibit 6 at 2. At the time, Petitioner reported that her right leg was weak, particularly after exercise and that her right arm also felt heavy at the time. Petitioner's Exhibit 6 at 2. At that time, her physician suspected Petitioner had multiple sclerosis. Petitioner's Affidavit, Petitioner's Exhibit 11, ¶ 3; Petitioner's Exhibit 6 at 3. Shortly thereafter, on August 12, 2008, prior to receipt of the third hepatitis B vaccination, Petitioner was diagnosed with MS. Petitioner's Exhibit 6 at 11.

After the August 2008 diagnosis, Petitioner began a course of treatment for her MS, which included regular medical appointments and consultations. Over the next few months, including following receipt of the third hepatitis B vaccine in September 2008, her health status was monitored, and her medications adjusted based on reactions she had to specific medications. *See e.g.*, Petitioner's Exhibit 6 at 24-25. The medical records do not indicate any exacerbation of her symptoms following the third vaccination and, other than the need to adjust medications, her condition remained stable. Petitioner's Exhibit 6 at 27. A comparison of an MRI done in November 2008 with one done earlier in July 2008, prior to her third vaccine, showed no definite new areas of enhancement, with white matter unchanged and actual resolution of previously demonstrated areas of enhancement. Petitioner's Exhibit 6 at 26. At her December 9, 2008 consult, it was noted that Petitioner was really doing better and that her weakness and numbness had improved. Petitioner's Exhibit 6 at 27.

Petitioner saw her treating neurologist approximately every six months between December 2008 and January 2011. Petitioner's Exhibit 6 at 27, 30, 32 and 39. In January 2010, Petitioner was able to resume most of her normal activities. By then her vision was fine, and she was able to ski and ice skate. Petitioner's Exhibit 6 at 30.<sup>5</sup> In July 2010, although it was noted that her two children required a lot of care and that she had had some infections, nonetheless, she was working 24 hours a week and continued to attend to her own medical condition. Petitioner's Exhibit 6 at 32.

By January 2011, Petitioner reported she was doing quite well. Petitioner's Exhibit 6 at 39. She reported she had no unexplainable visual changes, no new numbness, tingling or weakness, that she had been able to ski and that she was even contemplating pregnancy. Petitioner's Exhibit 6 at 39. At that time, she sought treatment options. *Id.* She mentioned her children and that there had been stress associated with caring for them but that she had gotten a

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<sup>5</sup> Petitioner was given an H1N1 vaccination in November 2009 by her primary care physician due to her history of MS and the doctor's feeling that as a result, her body could not handle a H1N1 infection well. Petitioner's Exhibit 10 at 97. She did not experience any increased symptoms following receipt of that vaccination, and Petitioner's expert opined that such vaccination did not cause or aggravate her MS. Petitioner's Exhibit 6 at 30, 31; Petitioner's Exhibit 1.

reprieve from that situation recently. *Id.* Her lab results at that time showed stable, non-enhancing lesions with no interval progression. *Id.*

## II. APPLICABLE LEGAL STANDARDS

The Vaccine Act provides in pertinent part that “no petition may be filed for compensation under the Vaccine Program for such injury after the expiration of 36 months after the dates of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of such injury....” 42 U.S.C. § 300aa–16(a)(2). In its *en banc* decision, *Cloer v. Sec’y of Health & Human Servs.*, 654 F.3d 1322 (Fed. Cir. 2011), *cert. denied*, 132 S. Ct. 1908 (2012), the Federal Circuit held that the Vaccine Act’s statute of limitations “begins to run on the date of occurrence of the first symptom or manifestation of onset of the vaccine-related injury for which compensation is sought, and the symptom or manifestation of onset recognized as such by the medical profession at large.” *Cloer*, 654 F.3d at 1340.

In *Cloer*, the Circuit also overruled prior precedent and held that equitable tolling applies to the Vaccine Act. *Id.* at 1340, *overruling Brice v. Sec’y of Health & Human Servs.*, 240 F.3d 1367 (Fed. Cir.), *cert. denied*, 534 U.S. 1040 (2001). At the same time, citing the Supreme Court’s decision in *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990), the Circuit recognized that the doctrine of equitable tolling was to be used “sparingly” and that it would apply only in exceptional circumstances. *Cloer*, 654 F.3d at 1344-45.

A litigant seeking equitable tolling bears the burden of establishing “two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), *citing Irwin v. Dep’t of Veterans Affairs*, 498 U.S. at 96. Indeed, equitable tolling of a federal statute of limitations is “appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his hands.” *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Lockwood v United States*, 90 Fed. Cl. 210, 218 (2008). The Supreme Court has warned that “[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.” *Baldwin County Welcome Ctr*, 466 U.S. at 151. “[T]he principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect.” *Irwin*, 498 U.S. at 96.

Courts have found “extraordinary circumstances” exist where the claimant has actively pursued his judicial remedies but has filed a defective pleading during the statutory period or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. *Irwin*, 498 U.S. at 96; *see also Cloer*, 654 F.3d at 1344-45. Courts are not likely to toll the limitations period when the filing is late and “the claimant failed to exercise due diligence in preserving his legal rights . . . .” *Leonard v. Gober*, 223 F.3d 1374, 1376 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1130 (2001), *quoting Irwin*, 498 U.S. at 95-96. Equitable tolling is not granted where a plaintiff discovers the existence, or could have discovered the existence, of a cause of action prior to the expiration of the statute of limitations and does not pursue the claim. *Roth v. United States*, 73 Fed. Cl. 144, 153 (2006). Mere excusable neglect is not enough to establish a basis for equitable tolling. *Martinez v. United States*, 333 F.3d 1295, 1318 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004).

### III. DISCUSSION

#### A. Petitioner's Filing of Her Claim Was Untimely.

The record demonstrates, and Petitioner concedes, that any aggravation of her MS allegedly caused by the hepatitis B vaccines occurred shortly after receipt of the first or second hepatitis vaccines in March and May 2008. Petitioner's Opposition at 2-3. Petitioner visited her doctor on May 22, 2008, complaining of weakness in her leg. Petitioner's Exhibit 10 at 68-69. And, in July 2008, two months following her second vaccination and prior to receipt of her third vaccination, Petitioner saw a neurologist, Dr. Carol Miles, at which time she reported leg weakness that had begun in May 2008. Petitioner's Exhibit 6 at 2. During that consult, Dr. Miles suspected MS. *Id.* at 3. A month later, in August 2008, Dr. Miles confirmed that Ms. Anderson had MS. *Id.* at 11. In her Opposition, Petitioner acknowledges that she had recognizable symptoms of MS in June-July 2008, more than 36 months prior to the filing of her petition. Petitioner's Opposition at 1.

Based on the foregoing, to be timely, Petitioner's petition had to be filed within thirty-six (36) months of the MS symptoms displayed in the weeks following her May 2008 vaccination, sometime between May and August 2011. *See* 42 U.S.C. § 300aa-16(a)(2). As Petitioner acknowledges, her petition, filed on January 9, 2012, was untimely. Petitioner's Opposition at 2. Absent establishing that equitable tolling applies, Petitioner's action must be dismissed.

#### B. Equitable Tolling Does Not Apply to Petitioner's Claim.

To avoid dismissal, Petitioner argues that equitable tolling should apply. Petitioner's Opposition at 7-8. To support her argument, Petitioner relies on her affidavit. *Id.* Petitioner argues that there are two reasons that her failure to file a timely petition should be excused. First, Petitioner claims that she was not aware of the Vaccine Program and a potential claim until she conducted some internet research in September 2011 and that once she became aware of her potential claim, she pursued her potential legal remedies diligently. Petitioner's Opposition at 8; Petitioner's Affidavit, Petitioner's Exhibit 11, ¶ 6. Admittedly, this was more than 36 months after the onset of her symptoms following receipt of the hepatitis B vaccinations in March and May 2008 and her diagnoses. *Id.* Second, Petitioner avers that although she was diagnosed in 2008, her family situation was an extraordinary circumstance that prevented her from focusing on her own medical conditions until September 2011. Petitioner's Opposition at 8; Petitioner's Affidavit, Petitioner's Exhibit 11, ¶ 6.

First, with regard to the fact that she did not become aware of her potential claim until after the expiration of the 36-month statute of limitations, that circumstance does not provide a basis for applying equitable tolling. It is well-established that a petitioner's lack of knowledge of the law does not constitute an extraordinary circumstance justifying equitable tolling of the statute of limitations. *See Esso Standard Oil Co. v. United States*, 559 F.3d 1297, 1305 (Fed. Cir. 2009)(holding that "ignorance of the governing statute" reflects a lack of diligence and does not warrant the application of the doctrine of equitable tolling); *see also Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir.), *cert. denied*, 133 S.Ct. 141 (2012) (a litigant's

pro se status and lack of knowledge of the law are not sufficient to demonstrate an extraordinary circumstance to excuse a late filing); *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004) (unfamiliarity with the legal process and lack of representation by counsel do not constitute grounds for equitable tolling); *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000), *cert. denied*, 531 U.S. 1194 (2001) (“[I]t is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing”).

Petitioner’s situation is similar to that of the petitioner in *Cloer*. In *Cloer*, more than three years after her doctor diagnosed her with MS, petitioner, while conducting research, discovered information that suggested a potential claim. The Federal Circuit held that, although its decision might result in the dismissal of her claim, the petitioner’s lack of knowledge of and unfamiliarity with her potential claim did not constitute extraordinary circumstances that would be a basis for equitable tolling. *Cloer*, 654 F.3d at 1344-45.

As in *Cloer*, here, Petitioner’s symptoms were apparent in May 2008 and she was diagnosed with MS in August 2008. But, as in *Cloer*, she was unaware of a potential claim under the Vaccine Act until she conducted internet research more than 36 months later, in September 2011. Petitioner’s Affidavit, Petitioner’s Exhibit 11, ¶ 6. As, in *Cloer*, Petitioner’s lack of knowledge of a potential claim does not justify applying equitable tolling. *Cloer*, 654 F.3d at 1344-45; *see also Salois v. Dime Sav. Bank of New York, FSB*, 128 F.3d 20, 25-26 (1<sup>st</sup> Cir. 1997)(equitable tolling was not appropriate when plaintiff had all information necessary to file and could have made a reasonable inquiry enabling him to discover a potential claim before the statute of limitations elapsed).

Following *Cloer*, this Court has applied the principle set forth in *Cloer* and held that confusion about or ignorance of the Vaccine Act’s provisions does not constitute an extraordinary circumstance and, thus, does not warrant applying equitable tolling of the statute of limitations. *Wax v. Sec’y of Health & Human Servs.*, No. 03-2830, 2012 WL 3867161, at \*11-14 (Fed. Cl. Sp. Mstr. Aug. 7, 2012), *aff’d*, No. 03-2830, 2012 WL 6771576 (Fed. Cl. Dec.18, 2012). In accordance with this well-established, governing legal principle, Petitioner’s lack of knowledge of her potential claim under the Vaccine Act does not warrant application of the doctrine of equitable tolling.

Second, as to Petitioner’s argument that her family circumstances interfered with her ability to file her claim, although very sympathetic and challenging, these circumstances are not such that they would be considered “extraordinary circumstances” for purposes of applying equitable tolling. The circumstances that have been recognized to be “extraordinary” are those where a petitioner has pursued her claims diligently albeit in a defective manner, *e.g.*, by filing a defective pleading, or where she was prevented by fraud or trickery from doing so. *Irwin*, 498 U.S. at 96; *Cloer*, 654 F.3d at 1344-45.

As to the first circumstance, Petitioner does not claim to have filed a defective claim, and there is no indication that she did. Moreover, the cases on which Petitioner relies are distinguishable. Both *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) and *Askew v. Sec’y of Health & Human Servs.*, 2012 WL 2061804 (Fed. Cl. May 17, 2012), involved situations where the plaintiff either filed a claim albeit defective or attempted to file one but failed to follow

proper procedure for filing within the period permitted under the statute of limitations. Unlike those instances, Petitioner did not even prepare much less attempt to file a petition prior to the expiration of the statute of limitations. As to the other case Petitioner cites, *Bills v. Clark*, 628 F.3d 1092 (9<sup>th</sup> Cir. 2010), unlike the plaintiff there who was so mentally impaired he did not understand or appreciate the need to file a claim, here there is no indication that Petitioner has any mental impairments similar to those existing in the *Bills* case that precluded her from pursuing her claim.

As to the second circumstance recognized as extraordinary, Petitioner does not claim nor is there any evidence to indicate that the Respondent or anyone else defrauded her or tricked her into not filing her claim. Petitioner's family circumstances are not the types of circumstances recognized to be extraordinary for purpose of applying equitable tolling.

Moreover, Petitioner's particular family circumstances as described in the contemporaneous medical records indicate that, although her family situation created many challenges, Petitioner was not completely unable to engage in any activities nor was she prevented from engaging in activities and addressing her own needs and medical situation. The records demonstrate that she visited her doctor regularly and consistently received medical care. Petitioner's Exhibit 6 at 27, 29, 30, 32 and 39. She had regularly-scheduled medical consultations approximately every six months between December 2008 and July 2011. *See* Petitioner's Exhibit 6 at 27 (December 2008); Petitioner's Exhibit 6 at 29 (June 2009), Petitioner's Exhibit 6 at 30 (January 2010), Petitioner's Exhibit 6 at 32 (July 2010), Petitioner's Exhibit 6 at 39 (January 2011), and Petitioner's Exhibit 6 at 41 (March 2011), and Petitioner's Exhibit 6 at 45 (June 2011).

Significantly, during that 2008-2011 time prior to the expiration of the statute of limitations, Petitioner's condition was stable, her illness did not progress and she was able to perform daily and recreational activities. By January 2010, as noted in the records, Petitioner was able to resume most of her normal activities, her vision was fine and she had even been able to ski and ice skate. Petitioner's Exhibit 6 at 30. In July 2010 Petitioner acknowledged that while she had two children that required a lot of care and that she had had some infections, nonetheless, she was working 24 hours a week and was addressing her own medical condition. Petitioner's Exhibit 6 at 32. In January 2011 nearly a full year before she filed her claim, Petitioner told her doctor that she had no unexplainable visual changes, no new numbness, tingling or weakness, that she had been able to ski and that she was even contemplating pregnancy. Petitioner's Exhibit 6 at 39. Petitioner mentioned that there had been stress associated with caring for her children, but then noted she had gotten a reprieve from that recently. *Id.*

Although Petitioner no doubt devoted much attention to her family's situation, the record indicates that she certainly was able to and did devote time to her own health condition and her daily as well as recreational activities during the period. Because, as the records indicate, Petitioner was able to devote time to her own condition as well as normal daily and extra, recreational activities, it is reasonable that she could have dedicated some time to researching and pursuing her claims. This is not a situation where Petitioner was prevented from pursuing her claims due to circumstances entirely beyond her control. *See Irwin*, 498 U.S. at 96; *Cloer*,

654 F.3d at 1344-45; *see also Heideman*, 904 F.2d at 1266 (equitable tolling of a federal statute of limitations is “appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his hands.”). The events in Petitioner’s life that occupied her time were not “extraordinary circumstances” that justify applying equitable tolling.

Petitioner has failed to satisfy her burden of demonstrating that the statute of limitations should be equitably tolled. Because her petition was filed after the lapse of the statute of limitations, her petition should be dismissed.

### **CONCLUSION**

Accordingly, this action is hereby **DISMISSED** as untimely filed. In the absence of a motion for review pursuant to RCFC, Appendix B, the clerk is directed to enter judgment accordingly.<sup>6</sup>

**IT IS SO ORDERED.**

/s/ Daria J. Zane  
Daria J. Zane  
Special Master

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<sup>6</sup> This document constitutes a final “decision” in this case pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of the Court shall enter judgment in accordance with this decision. Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.