

# OFFICE OF SPECIAL MASTERS

(Filed: August 12, 2005)

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DONNA L. HURD,	)	
parent and natural guardian of her son,	)	
DUSTIN RILEY-MAX HURD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 05-0798V
	)	DO NOT PUBLISH
SECRETARY OF	)	
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
_____	)	

## DECISION<sup>1</sup>

Petitioner, Donna L. Hurd (Ms. Hurd), as parent and natural guardian of her son, Dustin Riley-Max Hurd (Dustin), seeks compensation under the National Vaccine Injury Compensation Program (Program).<sup>2</sup> Ms. Hurd filed her petition on **July 27, 2005**. She appears *pro se*.

Ms. Hurd believes that Dustin “was poisoned by mercury” contained in vaccines that he received as an infant and as a toddler. Petitioner’s exhibits (Pet. ex.) at 888.<sup>3</sup> Ms. Hurd maintains

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<sup>1</sup> As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire decision” will be available to the public. *Id.*

<sup>2</sup> The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

<sup>3</sup> Dustin was born on February 28, 1996. Pet. ex. at 1. It appears that Dustin received a Tetramune vaccination, a Hepatitis B vaccination and oral polio vaccine (OPV) in May 1996. *See* Pet. ex. at 2. Tetramune is a vaccine comprised of diphtheria toxoid, tetanus toxoid, pertussis  
(continued...)

that the mercury poisoning has “caused development delay, and loss of hearing and eye sight due to nerve damage.” Pet. ex. at 888. Ms. Hurd concedes that she “did know that something was not right” with Dustin when he was an infant and a toddler. Pet. ex. at 888. Indeed, Ms. Hurd says that she consulted “32 doctors” or “40 doctors” about Dustin’s condition. Pet. ex. at 888. However, Ms. Hurd states: “For the first 5 years I was told that Dustin was born a mentally retarded child with AD/HD.” Pet. ex. at 888. Thus, Ms. Hurd asserts that she “had no idea” that Dustin’s condition “was related to his vaccine shots.” Pet. ex. at 888. According to Ms. Hurd, she “found out on March 2, 2005 that Dustin might have had an allergic reaction to his” vaccinations. Pet. ex. at 888. Ms. Hurd recounts that she “contacted The National Vaccine Center and got some information off the internet related to allergic reactions to vaccine shots.” Pet. ex. at 888.

Ms. Hurd offers that she contacted several attorneys for assistance in filing a Program petition. See Pet. ex. at 888. Ms. Hurd proclaims that the attorneys “have all refused to help.” Pet. ex. at 888. Ms. Hurd elaborates that the attorneys “explained” that Ms. Hurd’s claim “was past the statute of limitations.” Pet. ex. at 888.

The special master convened a formal status conference on August 11, 2005. He discussed Ms. Hurd’s petition. He informed Ms. Hurd that he is constrained to dismiss the petition.

#### DISCUSSION

Because Ms. Hurd proceeds *pro se*, the special master treats her with leniency. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). Thus, the special master holds Ms. Hurd to a less stringent standard of pleading than litigants represented by attorneys. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Davis v. United States*, 36 Fed. Cl. 556, 558 (1996). Nevertheless, Ms. Hurd’s status as a *pro se* petitioner does relieve Ms. Hurd of the duty “to comply with the applicable rules of procedural and substantive law.” *Walsh v. U.S.*, 3 Cl. Ct. 539, 541 (1983), citing *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975).

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<sup>3</sup>(...continued)

vaccine and haemophilus b conjugate vaccine. For purposes of this decision, the special master will refer to Tetramune as “DPT/Hib.” It appears that Dustin received a DPT/Hib vaccination, a Hepatitis B vaccination and OPV in July 1996. See Pet. ex. at 2. It appears that Dustin received a DPT/Hib vaccination and a Hepatitis B vaccination in September 1996. See Pet. ex. at 2. It appears that Dustin received a varicella vaccination in May 1997. See Pet. ex. at 3. It appears that Dustin received a DPT/Hib vaccination, OPV and a measles-mumps-rubella (MMR) immunization in October 1997. See Pet. ex. at 2. It appears that Dustin received a DPT/Hib vaccination, inactivated polio vaccine (IPV) and an MMR immunization in July 2000. See Pet. ex. at 2.

## I. The Statute of Limitations

The United States is sovereign, and no one may sue the United States without the sovereign's waiver of immunity. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). A statute of limitations is a jurisdictional condition to the waiver of sovereign immunity. *United States v. Mottaz*, 476 U.S. 834, 841 (1986). When Congress waives sovereign immunity, a court must "strictly" observe such limitations and "exceptions are not to be implied." *Soriano v. United States*, 352 U.S. 270, 276 (1957). A statute of limitations "promotes justice" by preventing presentation of claims which have been dormant and are later revived when "evidence has been lost, memories have faded, and witnesses have disappeared." *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944).

The Program represents a waiver of sovereign immunity. *See, e.g., Mass v. Secretary of HHS*, 31 Fed. Cl. 523, 528 (1994). Therefore, the special master must construe strictly Program provisions. *Id.* The statutory limitations period governing Ms. Hurd's petition is contained in § 300aa-16(a)(2). The plain language of § 300aa-16(a)(2) requires a petition for compensation related to an injury associated with a vaccine administered after the effective date of the subpart to be filed before "the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset" of the injury.

Ms. Hurd filed her petition on **July 27, 2005**. Therefore, in order for the special master to deem Ms. Hurd's petition as timely under the plain language of § 300aa-16(a)(2), Dustin cannot have exhibited "the first symptom or manifestation of onset" of his condition *before July 28, 2002*. The special master has reviewed comprehensively the extensive records that Ms. Hurd submitted with her petition. The special master determines that no one can dispute reasonably that Dustin experienced the onset of his current condition many, many years preceding July 28, 2002. Even Ms. Hurd acknowledges that Dustin displayed manifestations of his condition as an infant and as a toddler. *See, e.g., Pet. ex. at 888*. Therefore, the special master must conclude that the statute of limitations bars Ms. Hurd's petition.

## II. The Discovery Doctrine

The "discovery doctrine" tolls the applicable statute of limitations until a petitioner knows or reasonably should know that she has been injured or that her injury has been caused by another party's conduct. *See Childs v. Secretary of HHS*, 33 Fed. Cl. 556, 558 n.2 (1995). Ms. Hurd argues that she was not aware until March 2005 "that Dustin might have had an allergic reaction" to vaccines. *Pet. ex. at 888*. However, the discovery doctrine does not apply to the statute of limitations in the Program. *See Childs*, 33 Fed. Cl. at 558 n.2 ; *Pertnoy v. Secretary of HHS*, 1995 WL 579827, at \*3-4 (Fed. Cl. Spec. Mstr. Sept. 18, 1995). Therefore, the statute of limitations is not tolled until Ms. Hurd discovered that a vaccine may have caused Dustin's injury. *See Childs*, 33 Fed. Cl. at 558 n.2. Moreover, "lack of knowledge" regarding a relationship between the "injury and the vaccination is not" grounds for tolling the statute of limitations period. *See Childs*, 33 Fed.

Cl. at 558 n.2. Rather, Ms. Hurd had a duty to inquire about the cause of Dustin’s injury and “ha[d] a duty to inquire as to whether she ha[d] legal rights which she must exercise.” *Pertnoy*, 1995 WL 579827, at \*4.

### III. Equitable Tolling

The doctrine of equitable tolling “permits a court to forgive a late filing where compelling circumstances indicate that such a result would be equitable.” *Lombardo v. Secretary of HHS*, 34 Fed. Cl. 21, 25 (1995). In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), the Supreme Court announced that “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.” The Court cautioned that “the principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect.” *Id.* at 96. Rather, in noting that “[f]ederal courts have typically extended equitable relief only sparingly,” *id.*, the Court identified just two “situations” in which the Court has “allowed” equitable tolling: “where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period or where the complainant has been induced or tricked by his adversary’s misconduct into allowing the deadline to pass.” *Id.* (citations omitted). However, the United States Court of Appeals for the Federal Circuit held as a matter of law that equitable tolling is not available for claims arising under § 300aa-16(a)(2). See *Brice v. Secretary of HHS*, 240 F.3d 1367, 1370-1375 (Fed. Cir. 2001), *cert. denied sub nom.*, 70 U.S.L.W. 3360 (U.S. Nov. 26, 2001) (No. 01-0341). The special master is bound by the Federal Circuit’s decision.

### IV. Other Program Case Law

In *Setnes v. Secretary of HHS*, 57 Fed. Cl. 175 (2003), a judge of the United States Court of Federal Claims affirmed the binding rule 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.” *Id.* at 181, citing *Brice v. Secretary of HHS*, 240 F.3d at 1373; *Goetz v. Secretary of HHS*, 45 Fed. Cl. 340, 341-42 (1999), *aff’d*, 2001 WL 654708 (Fed. Cir. 2001) (unpublished opinion); *Childs*, 33 Fed. Cl. at 557 n.2 (1995). However, the judge found a distinction between the “first symptom” and the “manifestation of onset” language in § 300aa-16(a)(2). The judge ruled that when the claimant suffers a particularly insidious condition, “the court may rely on [an injured party’s] medical or psychological evaluations for guidance in ascertaining when the ‘manifestation of onset’” of an injury occurred. *Setnes*, 57 Fed. Cl. at 181.

*Setnes* does not assist Ms. Hurd. Although the extensive records that Ms. Hurd submitted with her petition indicate some confusion about an appropriate diagnosis for Dustin’s condition, the extensive records that Ms. Hurd submitted with her petition show certainly that Dustin’s condition commenced well before July 2002. Yet, Ms. Hurd did not file her petition until July 2005.

## CONCLUSION

The special master is entirely sympathetic to Dustin's obviously tragic circumstances. However, the special master possesses no authority to waive the limitation period in § 300aa-16(a)(2). Indeed, the special master "has no power to do anything but strike the case from [the] docket." See *Johns-Manville Corporation v. U.S.*, 893 F.2d 324, 327 (Fed. Cir. 1989) (citation omitted). Therefore, 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.

The clerk of court shall send Ms. Hurd's copy of this decision to Ms. Hurd by overnight express delivery.

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John F. Edwards  
Special Master