OFFICE OF SPECIAL MASTERS

(Filed: July 26, 2005)

LORI REED, as next friend of her son, RYAN REED, Petitioner,	)	
v.	)	No. 05-0757V
	)	DO NOT PUBLISH
SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	)	

DECISION[1]

Petitioner, Lori Reed (Ms. Reed), as next friend of her son, Ryan Reed (Ryan), seeks compensation under the National Vaccine Injury Compensation Program (Program).[2] In a petition that she filed on July 15, 2005, Ms. Reed alleges that Ryan received a diagnosis of "Autism and Pervasive Developmental Disorder on or about June 2, 1998." Petition (Pet.) ¶ 3. Ms. Reed attributes Ryan's condition to the administration of a "series of mercury-containing vaccines" beginning in 1994. Pet. at 3. Ms. Reed maintains that her "claims are timely filed." *Id.* In the alternative, Ms. Reed asserts that her "claims are equitably tolled because [she] did not and could not have known of a factual basis upon which her claim could have been based." *Id.*

[1] 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.*

[2] 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.

BACKGROUND

Ms. Reed filed scant medical records with her petition. Ryan was born on July 20, 1994. *See* Petitioner's exhibit (Pet. ex.) 1 at 1. Between 1994 and 1998, Ryan received a full complement of childhood vaccinations, including hepatitis B vaccinations, diphtheria-tetanus-acellular pertussis (DTaP) vaccinations, hemophilus influenzae type-B vaccinations, oral polio vaccine (OPV), measles-mumps-rubella (MMR) immunizations, and a varicella vaccination. *See* Pet. ex. 1 at 2. In May 1998, Thomas Murphy, M.D. (Dr. Murphy), evaluated Ryan. *See* Pet. ex. 2 at 2. Dr. Murphy suspected "atypical autism." *Id.* Dr. Murphy referred Ryan for neuropsychological testing. *Id.* The results indicated "delays across all areas, except for motor skills, which is likely in the average to low-average range." *Id.* at 4. Moreover, Ryan's "score" on the "Childhood Autism Rating Scale" placed Ryan "in the mildly to moderately autistic range of abilities." *Id.*

DISCUSSION

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. Reed'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. Reed admits that Ryan was "first diagnosed" with "Autism and Pervasive Developmental Disorder" on June 2, 1998. Pet. ¶ 3; *see also* Pet. ex. 2 at 1. Therefore, Ryan exhibited certainly "the first symptom or manifestation of onset" of his condition by June 2, 1998. Thus, the statute of limitations governing Ms. Reed's petition lapsed by June 1, 2001. § 300aa-16(a)(2). However, Ms. Reed has filed her petition more than four years *after* the expiration of the statute of limitations that governs her claim. Thus, on its face, Ms. Reed's petition is barred by § 300aa-16(a)(2). Yet, Ms. Reed insists that she filed her petition within the applicable statute of limitations based on the discovery doctrine and on the doctrine of equitable tolling. She states that she "did not and could not know of any event or conduct by the vaccine manufacturers and/or Respondents relating to the

neurotoxicological consequences suffered by [Ryan] because it was inherently unknowable." Pet. at 3.

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 Knis v. U.S.*, 2000 WL 1902255 (Fed. Cl. Nov. 28, 2000). Ms. Reed argues that her "claims are timely filed." Pet. at 3. She alleges that she could not have known "of any event or conduct by the vaccine manufacturers and/or Respondents relating to the neurotoxicological consequences" that Ryan suffered. *See id.* However, the discovery doctrine does not apply to the statute of limitations in the Program. *See Childs v. Secretary of HHS*, 33 Fed. Cl. 556, 558 n.2 (1995); *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. Reed discovered that a vaccine may have caused Ryan'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. Reed had a duty to inquire about the cause of Ryan'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.

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.

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 v. Secretary of HHS*, 33 Fed. Cl. 556, 557 n. 2 (1995). However, according to the judge, initial symptoms of autism are "subtle and can easily be confused with typical child behavior." *Setnes*, 57 Fed. Cl. at 179. Therefore, the judge determined that "the beginning stage of autism cannot be reduced to a single, identifiable symptom." *Id.* Indeed, the judge found that there is "no clear start to" autism. *Id.* Thus, the judge ruled that when the claimant suffers a particularly insidious condition, like autism, "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. *Id.* at 181.

Setnes does not assist Ms. Reed. Ms. Reed knew absolutely by June 1998 that Ryan exhibited autism and Pervasive Developmental Delay.[3] Therefore, at the very latest, the statute of limitations commenced in June 1998. And, at the very latest, the statute of limitations lapsed in June 2001. Yet, Ms. Reed did not file her petition until July 2005.

CONCLUSION

The special master is entirely sympathetic to Ryan'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. Reed's copy of this decision to Ms. Reed by overnight express delivery.

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John F. Edwards
Special Master

[3] Ryan's medical records suggest that Ms. Reed must have been aware by at least May 21, 1998, that Ryan suffered likely autism. Pet. ex. 2 at 2.