

OFFICE OF SPECIAL MASTERS

(Filed: April 11, 2006)

DO NOT PUBLISH

CARRIE RUTH BRAKE,)	
mother and natural guardian of her son,)	
PHILLIP BRAKE,)	
)	
Petitioner,)	
)	
v.)	No. 05-1233V
)	Statute of Limitations
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	

DECISION¹

On November 17, 2005, Carrie Ruth Brake (Ms. Brake), submitted a letter to the Clerk of the United States Court of Federal Claims. In the letter, Ms. Brake stated her belief that her 16-year old son, Phillip Brake (Phillip), suffered injury, including “severe attention deficit disorder,” from childhood vaccines. Letter, filed November 17, 2005, at 4. The Clerk of the United States Court of Federal Claims deemed the letter to constitute a petition for compensation under the National Vaccine Injury Compensation Program (Program).² Chief Special Master Gary J. Golkiewicz assigned the petition to this special master for the conduct of further proceedings.

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.

This special master convened a formal status conference on December 12, 2005. Ms. Brake and Traci Patton, Esq. (Ms. Patton), respondent's attorney of record, participated in the conference. Given Ms. Brake's status as a *pro se* petitioner proceeding *in forma pauperis*, this special master requested Ms. Patton to obtain, and to file, Phillip's medical and educational records. Ms. Patton agreed.

On February 1, 2006, respondent filed all medical, educational and therapeutic records that respondent had obtained. On February 6, 2006, this special master directed respondent to file a preliminary Rule 4 report identifying any legal impediments to petitioner's claim. *See Brake v. Secretary of HHS*, No. 05-1233V, Order of the Special Master (Fed. Cl. Spec. Mstr. Feb. 6, 2006). Respondent filed a Rule 4(c) report and a motion to dismiss on March 22, 2006. *See Respondent's Rule 4(c) Report and Motion to Dismiss (Report)*, filed March 22, 2006.

Respondent states that the applicable statute of limitations "required" Ms. Brake to file her petition "prior to the expiration of thirty-six months after the first symptom or manifestation of onset of Phillip's alleged vaccine-injury." Report at 4, citing § 300aa-16(a)(2). Respondent notes that the United States Court of Federal Claims has determined that because a Program action accrues "upon occurrence of the first symptom of an injury, not upon the first identification of a link between the injury and the vaccination," the commencement of the statute of limitations is "not to be delayed until the time the petitioner has actual knowledge that the vaccine recipient suffered an injury compensable under the Vaccine Act." *Id.*, citing *Goetz v. Secretary of HHS*, 45 Fed. Cl. 340, 341 (1999)(citation omitted). In respondent's view, Phillip's medical records establish that Phillip exhibited the first symptom of manifestation of his current condition at least by December 1997, when Phillip's school district recommended testing for attention deficit hyperactivity disorder (ADHD), Report at 4, citing Respondent's exhibit (R. ex.) E at 91, and certainly by no later than June 4, 1999, when Phillip received a diagnosis of attention deficit disorder (ADD). Report at 4, citing R. ex. A at 1. Using the later date of diagnosis as the most favorable circumstance for Ms. Brake, respondent calculates that Ms. Brake's petition is over three years late, far "beyond the relevant statute of limitations." Report at 4. And, respondent contends, the United States Court of Appeals for the Federal Circuit (Federal Circuit) has held that equitable tolling is not available in Program cases. Report at 5, citing *Brice v. Secretary of HHS*, 240 F.3d 1367 (Fed. Cir.), *cert. denied*, 534 U.S. 1040 (2001). Thus, respondent concludes that this special master "must dismiss this case." Report at 2.

This special master convened a formal status conference on April 7, 2006. Ms. Brake and Ms. Patton participated in the conference. This special master reviewed respondent's Report. Ms. Brake expressed that she understands that respondent asserts that she missed the deadline for filing a petition. Ms. Brake argued that the filing deadline is unfair because she did not know that vaccines caused Phillip's condition. In addition, Ms. Brake argued that the filing deadline is unfair because she did not know about the Program. This special master explained that although he is sympathetic to Ms. Brake's situation, he must apply the law. This special master explained that the law does not allow a special master to waive statutory deadlines. This special master explained that as a consequence, he is constrained to dismiss Ms. Brake's petition.

This special master has canvassed the record as a whole. He agrees fundamentally with respondent's presentation of facts and with respondent's legal analysis in the Report. Based upon the Report, this special master rules that the statute of limitations contained in § 300aa-16(a)(2) bars Ms. Brake's petition.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

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

John F. Edwards
Special Master